

# A Noteworthy Absence

Nancy Leong

## Introduction

In recent years, female law students at top-fifteen-ranked law schools have authored only 36 percent of all student notes published in their schools' general-interest law reviews.<sup>1</sup> The remaining notes have been authored by men. Although the magnitude of the sex-based publishing disparity varies considerably from school to school, a disparity of some sort exists at every school. Scholars have previously demonstrated that male legal scholars publish a disproportionate number of articles, and that the journals viewed as most prestigious are disproportionately dominated by the work of men. But no research has previously examined the fact that this discrepancy in fact begins in law school.

My goal in this Article, therefore, is to start a discussion about the publishing disparity between male and female law students. I will present quantitative data that demonstrate the disparity. I also will also present the results of an open-ended survey I conducted with law review editors at the top-fifteen-ranked schools. While I conclude, based on the information I have gathered, that the causal story underlying the discrepancy is complex and multifaceted, I wish to highlight and examine one element of that story here: women's alienation from their schools' general-interest law reviews. Finally, I wish to point out some implications of this discrepancy for women, for law reviews, for law schools, and for scholarly legal discourse.

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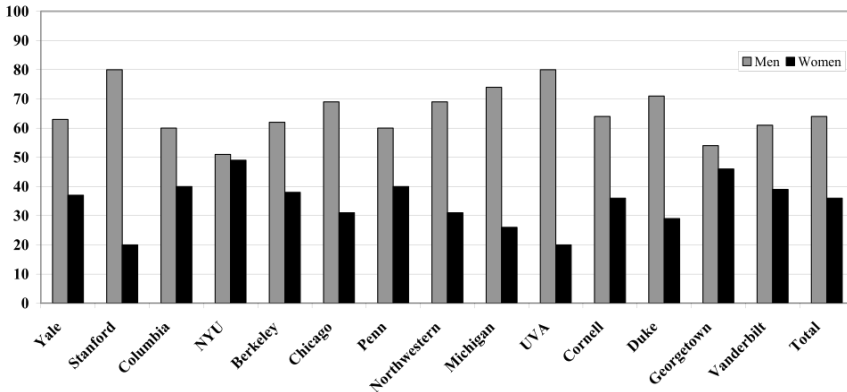
1. Throughout this Article, I use the term "note" to refer to any student writing published in a law review, including notes, comments, book reviews, and essays.

## I. Data

At *U.S. News & World Report's* top-fifteen-ranked law schools,<sup>2</sup> men have out-published women in the three most recent volumes of those schools' general-interest law reviews.<sup>3</sup> Figure 1 shows that the disparity in publication rates varied considerably from school to school. At no school did women publish more notes than men. Only one school—New York University—published an essentially equal number of notes by men and women. At five other schools—Georgetown, Cornell, Vanderbilt, Columbia, and the University of Pennsylvania—women authored at least 40 percent of notes.

At all other schools, women authored less than 40 percent of student notes during the three-year period for which I gathered data. The greatest disparities occurred at the University of Virginia and Stanford, where men authored 80 percent of published student notes. In Volume 58 of the *Stanford Law Review*, published in 2006–2007, no student notes were authored by women. Several other schools also had a substantial disparity for the time period in question: at the University of Michigan, 74 percent of student notes were authored by men; at Duke, 71 percent; at Northwestern, 70 percent; and at the University of Chicago, 69 percent of notes were authored by men.

**Figure 1: Percentage of Student Publications by Sex 2005-2008**



**Figure 1:** To ascertain the percentage of notes authored by each sex, I examined notes published in the three most recent volumes of the law review and determined whether a student was male or female based on that student's name. Most reviews included

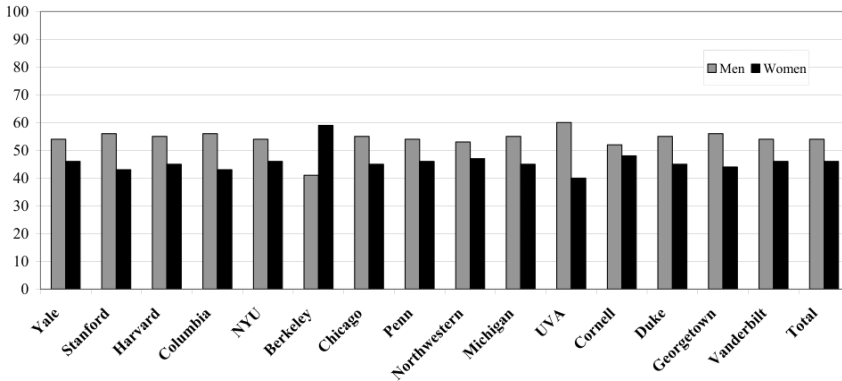
2. I use the U.S. News rankings not because I think they denote which law schools are "best" (I don't) but because they are probably the best proxy for perceived prestige, and one goal of my Article is to discuss note publication as one benefit offered by attendance at a prestigious institution. The selection of fifteen schools on which to focus, rather than any other number, is largely a reflection of my own time constraints.
3. For the majority of schools, this consisted of the volumes for academic years 2005–2006, 2006–2007, and 2007–2008. I did not include information for 2008–2009 because some schools did not have that information when I wrote this Article. Columbia, NYU, Berkeley, Chicago, Northwestern, and Vanderbilt define their volumes by the calendar year rather than the academic year. For those schools, the three most recent complete volumes were for the years 2005, 2006, and 2007.

a few notes for which I could not determine the author's sex based on his or her name ("Robin"; "Jamie"; "Jesse"). A few schools offered to identify the sex of these authors, and in those instances I used the information provided by the schools. For the remaining authors, I was able to determine the sex of the students through inquiries to their school's registrar's office. The exact numbers I obtained are reproduced in the Appendix to this Article. Harvard did not provide information on the sex of student note authors, so it is not included in this Figure.

I emphasize that the data represented in Figure 1 are no more and no less than a snapshot of a three-year time period.<sup>4</sup> Any conclusions drawn from these numbers should be made cautiously, and with the understanding that publication data can vary widely from year to year. In response to my survey,<sup>5</sup> several schools indicated that they had modified their note selection process during or after the three-year period represented in Figure 1, while others suggested that the sex disparity in publication in certain years did not reflect an ongoing or current disparity. For example, the *Duke Law Journal* implemented a new and more stringent selection process before selecting notes for the 2008–2009 volume; of the seventeen notes selected for publication that year, eight were authored by men and nine by women. Figure 1, therefore, does not represent the result of the current process.<sup>6</sup> Figure 1 is therefore simply one source of information, and the trends in schools' publication practices and the presence of year-to-year variation also deserve consideration.

The disparity in publication occurred against the backdrop of a slightly greater male law student population, presented in Table 2. Men outnumber women approximately 53 percent to 47 percent at the top-fifteen-ranked law schools. The greatest difference was at UVA, where men outnumber women about 60 percent to 40 percent. The only school at which women were a numerical majority was Berkeley, where they represented 59 percent of the total enrollment.

4. I chose the time period in question as a compromise: a shorter time period would yield too little data to draw any conclusions at all, while a longer time period would sweep in volumes for which note selection practices may have been quite different. (Indeed, many schools objected to even three years as too lengthy a time period on the ground that their selection process had changed dramatically within the past few years.) Three years represents a "generation" of law students, and is therefore an appropriate frame of reference for recent publishing statistics. It would be useful for future researchers to examine a longer time period to assess the overall trends in publication.
5. The survey is discussed in the text accompanying notes 6–18.
6. The rate of publication in Figure 1 also does not reflect the most recent issues of the *Virginia Law Review* and the *Stanford Law Review*. The *Virginia Law Review* selected seven notes authored by men and four by women for academic year 2007–2008, and in academic year 2008–2009, it selected four notes by men and six by women. Likewise, the *Stanford Law Review* accepted four notes authored by men and three authored by women during academic year 2008–2009. Women therefore published 43 percent of notes during that year.

**Figure 2: School Enrollment by Sex 2005-2007**

**Figure 2:** I drew the data in this figure from the Official Guide to ABA-Approved Law Schools for 2007 and for 2008. The 2007 edition provides the school's total enrollment for the 2005-2006 academic year, while the 2008 edition provides the school's total enrollment for the 2006-2007 school year. I chose to present the data in the aggregate to forestall potentially misleading comparisons. For example, different law reviews have different timelines for selecting student notes for publication: Some select notes only during students' 2L years; others allow note submission for a full year after a student has graduated. So it would not necessarily be meaningful to say, for instance: "The enrollment at X school was 45 percent female for the 2006-2007 academic year, but the note publishers that year were only 30 percent female." I therefore intend the information in this figure to serve only as a general estimate of the enrollment of men and women at individual top-fifteen-ranked schools with which publication data may be contrasted.

I also emailed a questionnaire to an editor of each law review seeking information about their journal's membership and student note publication practices. The questionnaire is as follows:

1. For the academic years 2005-2006, 2006-2007, and 2007-2008, what percentage of your law review's staff was male and what percentage was female?
2. Is student note publication limited to members of the law review?
3. What percentage of papers considered for publication as student notes is authored by women?
4. How are submissions selected for publication?
5. Is the selection process blind/anonymous?
6. Are there any formal criteria for selection? If so, what are they?
7. Who is involved in selection of student notes for publication? (For instance, does your law review have a specific committee, etc.?)

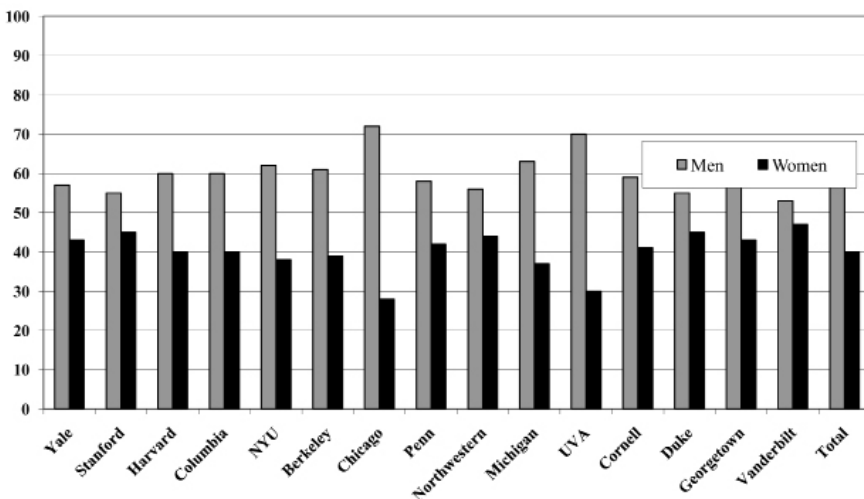
8. Are faculty members involved at any stage of the selection process? If so, how?

9. Has the note selection process changed between 2005 and the present? If so, how?

All fifteen law reviews responded to my questionnaire. Their responses were thoughtful and, in many instances, provided more information than I had requested. Many editors suggested other avenues for inquiry. These responses helped to improve my understanding of the note selection process. I summarize these responses in the remainder of this section.<sup>7</sup>

Question 1: Figure 3 presents the membership of each school's law review by sex. At all fifteen law schools, there were more men than women on the law review. Generally speaking, a school's law review tended to have a higher percentage of men than the law school as a whole. But the overall sex disparity in law review membership was less pronounced than the sex disparity in note publication.

**Figure 3: Law Review Membership by Sex (2005-2008)**



**Figure 3:** Most schools provided me with data about the percentage of male and female members on their law review in response to Question 1 of my survey. When a school provided this information, I used its self-reported percentages to create this Figure. Some schools suggested that I look at their mastheads to obtain the membership

7. I circulated a draft of this Article to editors of all fifteen law reviews after receiving their questionnaire responses to give them an opportunity to verify that the information in the Article was accurate. Some schools suggested corrections or clarifications, which I incorporated. If I changed the Article substantively after a school's initial comments, I re-circulated the draft to that school until I received a final confirmation of accuracy. I received a final confirmation of accuracy from thirteen of the fifteen schools. The two schools that did not respond were Penn and Harvard.

information or simply stated that they did not have the information. For those schools, I estimated the percentage of male and female law review members based on the names listed on the masthead. Each masthead included a few names for which I was unable to determine a student's gender; I assumed half these students were male and half were female, and calculated percentages accordingly.<sup>8</sup> Several schools who self-reported percentages also cautioned me that their numbers were approximations. This chart should therefore be viewed only as an estimate of the composition of each school's law review, not as an exact census.

Question 2: Some schools limited publication to law review members, while others allowed any student to submit a note for consideration.<sup>9</sup> Michigan, Chicago, Yale, Duke, and Stanford allow students to "write on" or "note on" to law review if they submitted a note that was selected for publication.<sup>10</sup> Vanderbilt also allows students to "note on," although its process has several stages and does not automatically result in the publication of the member's note.<sup>11</sup> Harvard permits any 3L member who wants to publish a note to do so, but provided no data on how many students avail themselves of this option.

Question 3: Stanford, NYU, Duke, and Georgetown responded to this question on the percentage of female-authored submissions. Stanford did not provide data for the time period reflected in Figure 1, but reported that, for the 2008–2009 submission cycle, 59 percent of submission authors were male and 41

8. The schools for which I collected data in this manner were Yale, Harvard, Michigan, Cornell, and Georgetown. Georgetown reported law review membership statistics for the 2007–2008 academic year only, so for the sake of consistency I collected data from its masthead for all three years in the manner described in the caption to Figure 3. The editor who responded to the questionnaire indicated that the journal was about 60 percent male and 40 percent female for the 2007–2008 academic year and also indicated that the percentage of female staffers was somewhat lower than usual that year. Both the reported statistic and the observation are consistent with my masthead-based estimates.
9. Northwestern, Harvard, Penn, Chicago, NYU, and Vanderbilt limit note publication to law review members. Berkeley does not limit publication to law review members, but it does give them tie-breaker preference; an editor reports that this has not happened during the 2008–2009 academic year. Virginia, Stanford, Columbia, Cornell, Georgetown, Duke, Michigan, and Yale do not limit note submission to law review members.
10. Yale does not keep an annual record of how many students "note on." One editor stated that she could think of four non-Yale Law Journal members who had successfully "noted on" during the 2008–2009 volume, but added that getting a note accepted was "pretty tough" and was not the easiest route to journal membership. Duke reported that one rising 3L—a woman—had been invited to join the Duke Law Journal through its "note-on" competition. Stanford implemented a "note on" program for the 2008–2009 volume in which non-member 2Ls can become members if a note they wrote is accepted before their 3L year. During the 2008–2009 submission cycle, one student—a man—was admitted to the law review through the program.
11. A Vanderbilt editor explained that all 2L students at Vanderbilt who are not members of the Vanderbilt Law Review have the option of submitting a note to the note selection committee. If the committee selects a student's note, the note's author will be offered membership on the law review. But her note will not be published the following year—rather, "noting on" allows the student to become a member of the law review, which then provides her with the opportunity to seek the publication of either that note or a different one during her 3L year.

percent were female.<sup>12</sup> Duke estimated that roughly 50 percent of submissions were by women for the 2008–2009 volume; prior to that year, the percentage of submissions by women was identical to the percentage of notes published by women because any member who wished to publish a note was able to do so. NYU reported that, for the 2007–2008 class, 32 percent of submissions (11 out of 34) were authored by women, and 30 percent of acceptances (7 out of 23) were authored by women. Georgetown reported that for its current volume (2008–2009) about 40 percent of submissions had been by women,<sup>13</sup> but did not have statistics for submissions for past years. At Vanderbilt and Penn,<sup>14</sup> all law review members are required to submit notes and only those notes may be published in the law review, so the percentage of submissions by women necessarily reflects the composition of that year’s law review class. (Over the past three volumes, Vanderbilt’s law review membership averaged 53 percent male and Penn’s averaged 58 percent male.)

Questions 4–7: Some schools reported that their selection process was blind,<sup>15</sup> while others stated that identity of students was known to committee members.<sup>16</sup> Most schools reported that there were no formal criteria for note selection; rather, they selected notes based on a holistic evaluation. But there were a few exceptions to this general rule.<sup>17</sup> At fourteen of the fifteen schools surveyed, a committee of law review members made publication decisions, although the committee might be either an autonomous “Notes Committee” or a panel composed of both specialized notes editors and managing editors or editors-in-chief. As mentioned previously, Harvard allows any 3L student to publish a note, so it has no designated selection committee.

Question 8: Schools took a variety of approaches to faculty involvement in the selection process. Some law reviews reported no faculty involvement.<sup>18</sup> Stanford typically requests input from a professor with expertise in a field related to the topic of the note before extending an offer of publication. Several

12. In deriving this percentage, Stanford noted that if a student submitted multiple papers, each submission was counted separately. If a submission had multiple authors, it was counted as a separate submission by each author.
13. At the time that Georgetown completed the questionnaire, one out of six note submission opportunities for the current volume had yet to occur.
14. Penn has a procedure for allowing students to opt-out of the writing requirement, but reports that the procedure has not been utilized for the past two years.
15. Duke, Stanford, Virginia, Berkeley, Yale, Georgetown, and Vanderbilt stated that their selection processes were blind.
16. Columbia, Chicago, Northwestern, and NYU stated that their processes were not blind.
17. While ultimately employing a holistic approach, Columbia uses four “guiding factors”: (1) structure; (2) roadmapping; (3) authority and sourcing; and (4) clarity. Similar to Columbia’s “guiding factors,” Duke employs a “global ready” standard which all notes must meet in order to be slated for publication. Georgetown and Chicago both have more detailed statements of standards regarding note selection.
18. Schools reporting no faculty involvement included NYU, Columbia, Virginia, Vanderbilt, Northwestern, Duke, Georgetown, and Michigan.

schools also reported that faculty members might be consulted on an ad hoc basis, particularly when the selection committee members were unfamiliar with a note's topic.<sup>19</sup> As explained previously, Harvard allows any member to publish a note during his or her 3L year; as part of that process, the student must work with a faculty advisor. No school substituted faculty review for student editorial discretion.

Question 9: Many respondents did not know whether the note selection process was different before they joined the law review. Duke reported that it extensively revamped its note selection process for the 2008–2009 academic year. An editor at Chicago reasonably suggested that from year to year different committees might value slightly different things, even if the formal procedures remain the same—this insight likely holds true at all schools, regardless whether the selection process has been modified.

## II. Explanations

The numerical disparity in note publication is undeniable. During the three-year period I examined, *every school* published more notes authored by men than by women, and in some cases several times as many notes were authored by men. The numerical disparity in publication by men and by women undoubtedly has multiple interwoven causes. I think it likely that the explanatory narrative differs from one school to the next and from year to year at the same school.

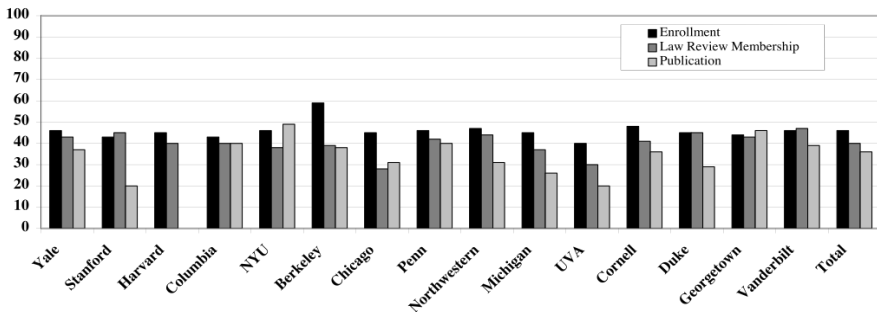
Some possible explanations include: fewer women than men are enrolled at the schools in question; fewer women than men are law review members at schools where law review membership is a prerequisite to publication; fewer women than men submit notes for consideration; and fewer notes authored by women are selected for publication. Figure 4 provides a visual comparison of enrollment, law review membership, and publication statistics, and I believe that each of these explanations contributes to the publication disparity to some degree. Unfortunately, the schools I surveyed either did not have or did not make available information regarding women's submission rates across the time period in question, so the Figure does not provide that information.<sup>20</sup> Likewise, without information about the percentage of notes submitted by women, it is not possible to determine whether women's written work is selected for publication at a lower rate than the work of men.

19. Yale, Berkeley, and Penn all stated that such consultation occurred from time to time.

20. See *infra* text accompanying notes 33–34.



**Figure 4: Female Enrollment, Law Review Membership, and Publication**



**Figure 4:** The Figure compares female law school enrollment, law review membership, and law review note publication by aggregating the data from Figures 1–3. At Columbia and Georgetown, student note publication closely tracks female enrollment and membership on law review; at NYU, the female publication rate is actually slightly greater than we might expect given the overall enrollment and law review membership. At all other schools, the percentage of women who published student notes was slightly to substantially less than the percentage of female enrollment at the school and, where relevant, the percentage of law review members who were female.<sup>21</sup>

So while I acknowledge the complexity of the overall causal story and the probable role of the factors mentioned above, I wish to highlight a different aspect of that story in this section: women’s alienation from their schools’ general-interest law reviews. As I define the term, “alienation” comprises both literal lack of involvement with law review as well as feelings of psychological distance from law review. I believe that such alienation is rooted in women’s experiences during the first year of law school, and continues to affect women’s relationship with their schools’ general-interest law review—including their desire to publish—throughout their law school careers. While my emphasis on alienation as a causal factor is tentative and based to some degree on anecdotal evidence, these qualities do not render the discussion inconsistent with my overall goal of starting a conversation about the sex-based publication disparity.

21. I did not perform a statistical analysis of the various numerical variables at play in order to derive an estimate of how much of a law review’s sex disparity in publication is likely to be attributable to factors beyond the school’s overall enrollment rate (and beyond the male and female law review membership at schools where law review membership is a prerequisite to publication). I chose to forego this line of analysis due to the potential for misleading results. Selection of notes for publication is an inherently dynamic phenomenon; the criteria may change from year to year, and the relevant sample size is quite small. Statistical analysis risks implying a degree of accuracy that the data I have accumulated do not necessarily support. My goal of engendering a frank and collegial conversation about the disparate rate of note publication by men and women does not require a statistical analysis, and I am skeptical whether we need yet another metric for ranking law schools. Some individual law reviews may well find such analysis useful in evaluating their sex-based publishing disparities, but I prefer to leave the decision to undertake statistical analysis to members of the individual law reviews.

My focus on women's alienation from law reviews as an explanation for their lower publication rate flows from an extensive literature documenting women's feelings of disenfranchisement resulting from their experiences during their first year of law school.<sup>22</sup> Researchers have found that a significantly greater percentage of women than men suffer a loss of confidence and damage to their self-esteem as a result of their classroom experiences during the first year of law school.<sup>23</sup> Women are less likely to participate in the classroom than men, and research indicates that their relative silence is caused by the classroom environment.<sup>24</sup> The feeling of being a bystander in turn results in greater disengagement from both the classroom environment and law school itself. The point is not that women's discomfort results from any one specific experience, but rather that the "day-to-day ordinary operation of the law school process alienates and silences" women.<sup>25</sup> The first year of law school then concludes with an invitation to audition for the law review—a paradigmatic symbol of an educational institution which has disproportionately depressed and discouraged women during their first year of law school. The current membership of law review represents an "in-group" whom alienated students may view as successful, fulfilled, and well-adapted to the challenges presented by law school, and alienated students may view themselves as outsiders to that group.

Both quantitative and qualitative data support my proposal of alienation as an explanation. Most obviously, women are a numerical minority on law reviews at all fifteen law reviews I examined. The law schools I surveyed either did not have or did not make available the percentage of women who applied for law review membership during the years in question, so it is difficult to say whether this minority status results from women's failure to apply to law

22. See, e.g., Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* 3-55 (Beacon Press 1997); Harvard Law School Working Group on Student Experiences, *Study on Women's Experiences at Harvard Law School 18-19* (2004), available at <http://www.law.harvard.edu/students/experiences/FullReport.pdf>. (Cited by permission of the authors).
23. See Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 *Yale J. L. & Feminism* 389, 417 (2006) (collecting citations); Harvard Law School Working Group on Student Experiences, *supra* note 22, at 22-23 (2004).
24. See, e.g., Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy, and Discourse*, 5 *Mich. J. of Race & L.*, 847, 879-85 (2000) (describing women's experiences with classroom silencing); Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 *U. Pa. L. Rev.* 1, 45-47 (1994) (finding that women felt more alienated by the Socratic method than did men and were consequently less likely to speak in class than men; also finding that this silence contributed to women's alienation from the law school experience); Rita Sethi, *Speaking Up! Speaking Out! The Power of Student Speech in Law School Classrooms*, 16 *Women's Rts. L. Rep.* 61 (1994) (describing the alienation the author felt as a result of remaining silent in the law school classroom); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 *Stan. L. Rev.* 1299, 1300-02 (1988) (discussing law school silencing of women).
25. Kathryn M. Stanchi, *Dealing with Hate in the Feminist Classroom: Rethinking the Balance*, 11 *Mich. J. of Gender & L.* 173, 204 (2005).

review or women's failure to apply *successfully* to law review. I propose, however, that in either case, the ultimate situation of women as a law review minority results from similar feelings of alienation.

I believe it more likely that women are affirmatively choosing not to try out for law review. Given the perception of law review as an elite institutional symbol, alienated women may choose simply not to try out for a number of reasons. For instance, the first year of law school may have damaged their self-confidence, and they may consequently wish to avoid investing time in a grueling application process they believe will likely result in failure. As one woman colleague told me, "My first semester grades weren't so good, and I was completely exhausted at the end of my first year. I just couldn't bring myself to do the writing competition after that." Alternatively, women may make an affirmative decision to reject law review as a form of rebellion against an institution that has alienated them—the decision not to apply for membership is a means of expressing scorn for the institution itself. Another colleague stated: "I was so fed up with the whole law school culture by the end of first year, and law review seemed like just an extension of that." In either case, the result is that a smaller number of women will apply for law review.

The existence of specialty journals, clinics, and other student organizations implicitly encourage alienated women not to apply for law review by providing alternative outlets for their efforts. Several women expressed the sentiment that, as one woman put it, "[t]here were so many more interesting ways to get involved at the law school—I didn't want to spend my life Bluebooking other people's articles." This same thinking—that their time would be better spent doing something besides law review—was reflected in the remarks of many other women. For those whose confidence suffered as a result of their first-year experiences, involvement with a specialty journal or a clinic provided a supportive community that acknowledges the value of their contribution. As one woman explained, "working in [one of the volunteer clinics her school offered] was the first time since I started law school that I felt like I was doing something that people appreciated." And for women who disdained law review as symbolic of an institution whose practices they disliked, these alternative avenues allow them to expend effort on a project they view as more worthwhile.<sup>26</sup> One woman who—despite excellent grades—decided not

26. I hope that readers will not construe this paragraph as a criticism either of alternatives to law review such as specialty journals and other student organizations or of women who choose to participate in those organizations. My point is simply that the presence of these avenues provides a ready alternative for alienated women who are already inclined to distance themselves from their school's general-interest law review. Many women also devote time to non-law-related pursuits during law school. For example, women tend to spend more time on household responsibilities than their male partners; a sense of alienation from law school may lead to a greater willingness to accept this division of labor. Bureau of Labor Statistics, U.S. Dep't of Labor, *American Time Use Survey—2007 Results* (2008), available at <http://www.bls.gov/news.release/pdf/atus.pdf> (last visited Feb. 27, 2009) (noting that women devote more time to housework than men, even when both partners work the same amount of time outside the home); Lynn M. Casper & Suzanne M. Bianchi, *Continuity and Change in the American Family* 298, 307 (Sage Publications 2002) (citing research finding

to apply for law review stated bluntly that the law review application process “seemed like just more ridiculous hazing to me, and I never willingly sign up for hazing.”

The alternative explanation for women’s numerical underrepresentation is that women audition for law review at the same rate as men, but with a lower rate of success.<sup>27</sup> But even if this is the case, I believe it may be traced to the same mechanisms of alienation that lead women to decide not to try out for law review. Most law reviews incorporate grades as part of the application process or allocate a certain number of slots for members based on grades. Several researchers have found that at many schools men earn better grades than do women, particularly during the first year of law school when grades matter for law review qualification.<sup>28</sup> This phenomenon has been traced to women’s alienation from the classroom experience and from their professors—leading to less substantive engagement with the material—as well as to weaker exam performance. Even when women achieve equivalent grades, a sense of alienation might still prevent women from succeeding on the Bluebooking or essay exercises that many law reviews employ to determine membership. Disengagement from the law school experience may dissuade women from seeking advice from professors or current law review members about how best to approach these tasks, while the stereotype threat may also prevent them from maximizing performance on the law review application tasks.<sup>29</sup>

Ultimately, then, either a failure to apply or a failure to apply successfully for law review membership may be traced to alienation from the law school experience. The resulting numerical underrepresentation of women on law reviews provides a compelling explanation for the sex-based publication disparity at schools where law review membership is a prerequisite to publication. Six schools use law review membership as such a prerequisite: Northwestern, Harvard, Penn, Chicago, NYU, and Vanderbilt. Berkeley

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that women spend three times as much time caring for children and perform four times as much of the routine housework as men).

27. This may be the case to a greater extent at some schools than at others. At Harvard, for example, researchers found that gender was not a significant factor in students’ decision to apply to law review. See Harvard Law School Working Group on Student Experiences, *supra* note 22, at 21 (2004).
28. See Bashi & Iskander, *supra* note 23, at 401 & n.46-47 (collecting sources); Harvard Law School Working Group on Student Experiences, *supra* note 22, at 27 (2004).
29. “Stereotype threat” refers to the idea that members of a negatively-stereotyped group perform worse on measures of aptitude or achievement because their awareness of the negative stereotype distracts them from optimizing their performance. See, e.g., Gregory Walton & Steven J. Spencer, Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students, *Psychol. Science* (forthcoming 2009); Steven J. Spencer, Claude M. Steele & Diane M. Quinn, Stereotype Threat and Women’s Math Performance, 35 *J. of Experimental and Soc. Psych.* 4 (1999); Claude Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 *J. Pers. Soc. Psychol.* 797 (1995).

does not limit note publication to law review members but gives members tie-breaker preference in selecting pieces for publication.

Moreover, data indicate that women's numerical underrepresentation on law reviews may be relevant to their lower rate of publication, even at schools where law review membership is not an automatic prerequisite to publication. At two of the schools with the greatest publication disparities—Michigan and UVA—students may submit notes for publication regardless of whether they are members of law review, yet every note published during the time period I examined was in fact authored by a law review member. At Stanford, which also had a sizeable publication disparity, all five women who published notes during the relevant time period were members of the law review, but only half of the men who published notes—ten out of twenty—were members of the law review. While the sample size is small and any conclusions necessarily tentative, one possible explanation is that non-membership on law review poses an obstacle (either logistical or psychological) to publication, and that in some instances that obstacle proves to be more of a deterrent for women than for men.<sup>30</sup>

Another indication of alienation is the rate at which women submit notes to be considered for publication, both at schools where law review membership is a prerequisite to publication and at schools where anyone may publish a note. Unfortunately, little previous research has examined submission rates. A study commissioned by the *Yale Law Journal*,<sup>31</sup> which does not limit submissions to law review members, found that 39 percent of submissions were by women (as compared to 42 percent of women in the 2L and 3L classes that year), yet their acceptance rate was only 8 percent compared with 35 percent for men.<sup>32</sup> But this disparity was due in large part to the fact that 63 percent of notes eventually published were initially rejected and accepted only following resubmission and women were far less likely than men to resubmit their notes after an initial rejection.<sup>33</sup> Women's inclination to disengage from the submission process after an initial rejection, therefore, engendered a lower rate of publication.

My own research added only modestly to this information because the fifteen schools I surveyed either did not have or did not make available the

30. With the exception of Stanford, at the nine schools that allowed note submission by students who were not members of law review, no more than 10 percent of law review notes were authored by non-members.

31. The study covers only academic year 1994-1995 at a single law school, and its significance is limited accordingly. As Bashi & Iskander observe, however, its results are "consistent with comments by faculty members that they believe women exhibit less 'tenacity' in pursuing academia-related goals." Bashi & Iskander, *supra* note 23, at 426. This lack of tenacity is logically traceable to confidence-eroding experiences that women undergo as part of a broader pattern of alienation during law school.

32. Bashi & Iskander, *supra* note 23, at 425.

33. Thirty-seven percent of initially-rejected male-authored notes were resubmitted, while only 12 percent of initially-rejected female-authored notes were resubmitted. *Id.*

sex breakdown of submission rates for the time period I examined.<sup>34</sup> But my data is consistent with the notion that women are less likely to submit notes for publication. During the 2008–2009 submission cycle at Stanford, 41 percent of submission authors were female even though the relevant pool of authors—the entire student body—was close to half female. The same was true at Georgetown; about 40 percent<sup>35</sup> of submissions to its 2008–2009 volume were authored by women although the author pool—the student body—was nearly half women. And for NYU’s 2007–2008 class, only 32 percent of submissions (11 out of 34) were authored by women. Because law review membership is a prerequisite to publication at NYU, this figure is particularly notable, demonstrating that even women whose selection for law review represents a measure of conventional success may remain alienated from the law school culture that attaches importance to note submission.

Women’s non-membership creates psychological distance between them and the law review, further hindering publication. Concretely, non-members may be less likely to hear about submission deadlines or less attuned to the predispositions and idiosyncrasies of a given year’s note selection committee. More subtly, non-membership on law review may create a cognitive disincentive to submit work for publication: If a woman has applied and been rejected for law review membership, she is likely hesitant to risk further rejection. And if she rejects the law review as an institution, she is unlikely to want to entrust that institution with her written work.

Mentors can help combat the alienation that contributes to women’s lower submission rates. Women who hesitate to speak in the classroom or are intimidated by their professors are unlikely to develop strong mentoring relationships. But supportive professors can help students generate compelling note topics, guide them during the researching and writing process, encourage them to submit the completed piece, and advise them on how best to present the piece for submission.<sup>36</sup> Indeed, faculty guidance may encourage students to write in the first instance. Thus, if women disproportionately experience a mentorship deficit, it helps to explain their disparately depressed submission rates.<sup>37</sup>

34. *See supra* text accompanying notes 11–13. As I discuss in more detail later, I believe that law schools should record and make publicly available the data on the percentage of notes submitted by men and by women. *See infra* Part IV.

35. At the time that Georgetown completed the questionnaire, one out of six note submission opportunities for the current volume had yet to take place.

36. Bashi & Iskander, *supra* note 23, at 424 (explaining the importance of mentorship to publication).

37. *Id.* at 420–22 (suggesting that law faculties—particularly those that are predominantly male—provide better mentorship in the aggregate for men than for women). The publication practices at Columbia also provide some anecdotal support for the importance of mentorship in forestalling alienation. At Columbia, 3L students guide 2L students in writing their notes. The rate of publication by women at Columbia closely mirrors the rate of female membership on the law review as a whole for the time period I examined.



Finally, women may be alienated from law review—and hence less likely to submit scholarship for publication—even if they *are* members of law review. Indeed, the fact that women experience disenfranchisement from their law schools without actually dropping out demonstrates that membership in an institution is not inconsistent with alienation from that institution. One potential indication of such alienation is the lower likelihood that women will assume leadership positions on law review. For example, in the years I sampled, 76 percent (44 out of 58) of the identified editors-in-chief were male.<sup>38</sup> If this significant disparity results from women’s disinclination to campaign for leadership positions on law review, one might interpret this reluctance as cynicism about law review borne of first-hand experience. Such disengagement might represent a decision to do as little as possible to retain the membership credential, further dampening the desire to publish. The numerical underrepresentation of women on law review, then, may understate the extent of women’s alienation from law review.

I acknowledge that the causal story underlying women’s decision to publish is complicated. Nonetheless, available evidence indicates that alienation from law review as an institution is a critical element that has thus far failed to garner attention in scholarly discourse. But if the publication disparity exists and may be traced to alienation as a root cause, why should we care? In the next section, I hope to convince readers that the imbalance has negative consequences that we should work to ameliorate.

### III. Implications

The underrepresentation of women among student note authors has tangible consequences for women’s legal careers. A published note can serve as an impressive offering to any legal employer who requests a sample of an applicant’s written work. If the employer reads the note carefully, its substance may provide fodder for a rich and substantive interview. Anecdotal evidence also suggests that student note publication is particularly important to the clerkship application process. Some judges view the publication of a note as self-sufficient evidence of writing ability. Some view it as evidence of ambition and a strong work ethic. Others simply consider a polished and published piece a more impressive sample of writing than a legal research memo or moot court brief. Still others may see the academic character of a published note as representative of an applicant’s ability to address legal topics from a scholarly perspective rather than that of an advocate. And some judges accept

38. I have been unable to confirm the gender of two editors-in-chief, but regardless of the result, men still held a majority of editor-in-chief positions on law review. I would have liked to have further interrogated the leadership structure of the various law reviews, but found that differences among law reviews’ internal structures precluded such examination. For example, at some law reviews “Managing Editor” is a prestigious position; other schools do not have managing editors and divide the functions associated with that job among other offices. Some have one lead articles editor; others have five editors of equal status. And different schools define the membership of their executive boards differently, making meaningful comparison among schools virtually impossible.

candidates in part based on their perceived potential as academics, viewing the ability to feed clerks into academic positions both desirable for its own sake and strategically useful as a means to procure well-qualified clerks from the former clerk's law school in the future.<sup>39</sup>

Moreover, the gender disparity in note publication also has grave implications for women's success at attaining academic teaching jobs. Publishing a student note can launch an academic teaching career. In some instances, a strong student note may provide the basis for an academic hiring decision. But at a minimum, the experience of writing and publishing a note confers familiarity with the publication process and provides a foundation for later scholarly efforts. Unquestionably, would-be scholars can begin writing and publishing successfully after graduation, but the law school environment is an ideal context for a first effort at creating and publishing a work of legal scholarship. Students have the unique opportunity to produce written work as part of the paper requirement for a small seminar, which both grounds them in the relevant seminal literature and provides a valuable forum for mentoring and feedback from their professor.

A wealth of data, which I need not recount exhaustively here, demonstrates the sex disparity in legal academia.<sup>40</sup> This disparity may be traced even to the schools that are most successful at placing students in legal academic positions. For example, Yale Law School is one of the highest "producers" of law teachers.<sup>41</sup> Yet between 1996 and 2002, women constituted 44 percent of its graduating J.D. classes, but only 29 percent of its candidates entering the teaching job market.<sup>42</sup> The causal story for this disparity is doubtless complicated. But men's disproportionately high rate of student note publication perhaps leads to their greater success at that endeavor.<sup>43</sup>

The disparity in student note publication rates represents an absence of women's voices and perspectives, one that has remained—until now—

39. A note published in a specialty journal—rather than the general-interest law review—may accomplish some of the same goals described in this paragraph. Practically, however, employers and judges tend to view notes published in general-interest law reviews as more rigorous and value them more highly.

40. The most recent available data reveal that 36.9 percent of all law faculty are women, 2007–2008 Association of American Law Schools Statistical Report on Law School Faculty: Gender and Age, <http://www.aals.org/statistics/2008dlt/gender.html>, while 30.4 percent of tenured or tenure-track law faculty are women, 2007–2008 Association of American Law Schools Statistical Report on Law School Faculty: Job Security, <http://www.aals.org/statistics/2008dlt/security.html>.

41. Bashi & Iskander, *supra* note 23, at 426 & n.132.

42. *Id.* at 447 App. C.

43. Bashi and Iskander's work does not provide data regarding success rates for the women who went on the teaching market. Given Yale's aforementioned success at placing legal teachers, however, it is reasonable to infer that most market applicants had success. *See supra* note 26. Moreover, the overall greater success rate for men at procuring tenure track teaching positions likewise indicates that women's lower application rates are not fully counterbalanced by a greater success rate on the market itself.



unacknowledged in the legal academy. Just as women are likely to feel alienated from the classroom experience when they feel uncomfortable with speaking,<sup>44</sup> they are also likely to feel excluded or marginalized from scholarly discourse when their work is ignored or underrepresented in their school's general-interest law review. As I discussed in Part II, the explanation for the sex disparity in student note publication is complex and multifaceted. But the underrepresentation of female law students has symbolic significance, despite the lack of explicit acknowledgment in the scholarly legal discourse. When women see their school's general-interest law review dominated by the written work of their male peers, that law review becomes yet another forum in which women's voices are absent.

Conversely, success at writing and publishing may have consequences beyond publication itself. Publication provides a form of external validation that may encourage a newly-minted author to speak more often in class, to apply for competitive jobs, and to feel entitled to request and receive attention from professors. Such validation may even clear the path to better grades by stifling the voices of self-doubt that prove so distracting during studying and taking exams. Psychologists have uncovered many circumstances in which expectations shape achievement.<sup>45</sup> If legitimization of one's ideas leads to increased expectations for oneself, such increased expectations may become a self-fulfilling prophecy. And if this is so, we should ask why the benefits of publication are conferred disproportionately upon men.

Finally, my view is that the sex disparity in publication is a detriment not only to women, but to legal scholarship. I don't subscribe to the view that there is such a thing as a distinct, unified, "female voice."<sup>46</sup> But our social reality is such that women are treated differently from men, with the result that women's lived experience is qualitatively different from that of their male peers. The perspectives that come of that different lived experience—whatever they may be—are surely equally worthy of expression in a law review. And the systematic underrepresentation of women's perspectives, however unintentional, impoverishes the scholarly discourse. I believe this is a loss for the entire legal community.

#### **IV. Looking Forward**

While acknowledging that the gender disparity in publishing has multiple causes, I have here discussed the alienation of women from law review as one prominent explanation. And I have also demonstrated the negative implications of the sex-based publication disparity for women and for the legal profession.

44. *See supra* note 42.

45. *See supra* note 29.

46. *See generally* Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993).

So what can we do about this undesirable disparity? Many of my recommendations for remedying the alienating consequences of law school classroom experiences echo those of scholars who have addressed the issue previously.<sup>47</sup> To those general recommendations I add a few others specific to student note publication. Schools should strive to ensure that all students—both male and female—understand the benefits of publishing a student note. In particular, schools should make sure that students interested in pursuing a career in academia are informed of the desirability of publishing a note while still in school. A school can accomplish these goals by having regular informational sessions about the benefits of publishing as well as making literature about these benefits available to students. To specifically encourage publication from women, organizations for women law students—aided by their faculty liaisons—can organize and sponsor such events and encourage their members to attend. Finally, law reviews themselves can facilitate better understanding of the sex disparity in publication by re-examining their submission policies and collecting and publicizing data on the number of men and women who submit notes—the issue for which the greatest information void currently exists.

At a more individual level, law professors—male and female alike—should consider it their job to encourage law students to publish. Professors should identify students in their classes who have written excellent seminar papers and encourage them to undertake the additional effort to make those papers publishable. Professors should also make themselves available to guide those students, giving particular attention to encouraging students who are less confident than their abilities warrant. At many law schools, contact between faculty and students is relatively minimal; given that environment, a relatively small investment of time and resources in mentorship and encouragement would go quite a long way.<sup>48</sup>

These relatively modest recommendations would have a discernible impact on the sex disparity in publication. But more importantly, I hope this Article will catalyze a collegial and productive conversation about this disparity that ultimately leads to its elimination.

47. See, e.g. Guinier et al., *supra* note 22, at 77–90.

48. I hope this paragraph makes clear that I believe that both men *and* women should receive additional mentoring and encouragement to publish. I am not proposing that faculty members should “favor” women, or should single out women for additional attention. Such activity would stigmatize individual women, and, indeed, would be unfair to men. My point is simply that many law students who produce high-quality written work may lack the confidence to submit that work for publication, and if some of the scholarship I discussed in Part II is correct, these “underconfident” students may be disproportionately female. Thus, by encouraging all students who produce high-quality written work to seek publication, faculty members will provide much-needed mentorship to those students—perhaps more women than men—for whom additional encouragement may tip the scales in favor of revising and submitting their work for publication.

## Appendix

School	Percent female enrollment during academic years 2005-2006 and 2006-2007	Percent female law review membership	Number of student notes published by men	Number of student notes published by women	Percent student notes published by women
Yale	46	43	49	27	36
Stanford	43	45	20	5	20
Harvard	45	40	n/a	n/a	n/a
Columbia*	43	40	27	18	40
NYU*	46	38	35	34	49
Berkeley*	59	39	26	16	38
Chicago*	45	28	35	16	31
Penn	46	42	18	13	42
Northwestern*	47	44	21	9	30
Michigan	45	37	28	10	26
UVA	40	30	24	6	20
Cornell	48	41	17	12	41
Duke	45	45	39	16	29
Georgetown	44	43	21	17	45
Vanderbilt*	46	47	30	22	42
Overall	46	40	390	221	36

Unless otherwise noted, the time period in question is academic years 2005-2006, 2006-2007, and 2007-2008. For schools labeled with an asterisk (\*), the numbers are drawn from the three most recent complete volumes of the journal, published in calendar years 2005, 2006, and 2007.