

Identity Politics is Failing Women in Legal Academia

Sahar Aziz

Two universal truths about patriarchy: It's global and it's tenacious. As women in legal academia, we are not shielded from the consequences of this reality.

Starting from this premise, my contribution to this important (yet perennial) discussion on gender (in)equity in legal academia is framed around three points. First, formalistic identity politics grounded in immutable characteristics is failing our generation of women (and women of color in particular) in the legal profession, including in the academy. Second, women who have managed to overcome the hurdles imposed by patriarchy to reach official leadership positions are as subject to institutional capture and conflicts of interest as their male counterparts. Third, the politics of civility in law schools is a patriarchal tool deployed to constrain women's ability and willingness to radically reform existing systems of inequality.

Let's start with the failure of formalistic identity politics. The reasoning that more women and more minorities in power will necessarily produce less sexism and less racism is flawed if the patriarchal systems are left in place. One need only look at formerly colonized countries whose social and political systems continue to perpetuate European white supremacy. Lighter skin color is still represented in media as more beautiful than darker.¹ Western civilizations and religions are still perceived as superior and more sophisticated.² Just as native rulers in the global south and east do not eliminate inferiority complexes

Sahar Aziz, Professor of Law, Chancellor's Social Justice Scholar, Director, Center for Security, Race and Rights (csrr.rutgers.edu), Rutgers Law School. This essay is based on my comments in the Discussion Group on Building Bridges Across Curricular and Status Lines: Gender Inequity throughout the Legal Academy at the American Association of Law School's Annual Meeting in 2019. I am indebted to librarian and Professor Caroline Young for lending her expertise in the research process for this article. I also thank Sabah Abbasi for her able research assistance.

1. Margaret Hunter, *The Persistent Problem of Colorism: Skin Tone, Status, and Inequality*, 1 SOC. COMPASS 237, 238 (2007) ("The maintenance of white supremacy (aesthetic, ideological, and material) is predicated on the notion that dark skin represents savagery, irrationality, ugliness, and inferiority. White skin, and, thus, whiteness itself, is defined by the opposite: civility, rationality, beauty, and superiority. These contrasting definitions are the foundation for colorism.").
2. Edward W. Said, *The Clash of Ignorance*, THE NATION (Oct. 4, 2001), <https://www.thenation.com/article/clash-ignorance/>.

deeply entrenched after centuries of white supremacy and European colonialism, increasing the number of female (or racial minority) leaders does not eliminate patriarchy. Absent purposeful dismantling of these oppressive systems, the change is limited to who implements patriarchy.

When women and racial minorities were either nonexistent or minuscule in numbers at law schools, law firms, and law faculty, identity politics served a utilitarian purpose. In sharing the immutable characteristic of gender and race, members of categorically marginalized groups had a common interest in reforming or even destroying existing systems underpaying, demoting, or outright excluding them. Their shared adverse experiences on account of their status as women, people of color, or women of color galvanized them to unite in pursuit of change in their collective interests.

As direct losers in the male- and white-dominated status quo, they had low tolerance for slow incremental change. These women's daily lived experiences were proof that the patriarchal foundation of the system needed to be challenged head on, not merely tinkered with around the edges. Increasing the number of women (and minorities) in the legal academy was a necessary step toward those ends.

Due to concerted advocacy over decades, the number of women law students, faculty, and administrators gradually increased. In 2018, women comprised fifty-three percent of law students.³ On law faculties, women are estimated to be between thirty-two percent and thirty-nine percent, with women of color comprising less than ten percent.⁴ In 2013 when the latest data were collected, thirty-six percent of tenure-track and tenured professors were women, with the number slowly rising since then. In 2019, approximately thirty-five percent of law deans are women.⁵ However, over seventy percent of legal research and writing professors are women, most of whom do not have tenure-track or tenured positions and are paid significantly less than tenure-track and tenured (male and female) law professors.⁶ Hence simply putting women in high-status positions

3. ASS'N OF AM. LAW SCH., LEGAL EDUC. AT A GLANCE: 2019, <https://www.aals.org/wp-content/uploads/2020/02/2019-Legal-Education-At-a-Glance.pdf> (60175 of a total 112730 law students are women as of 2019).
4. *Id.* (10354 of a total 25940 law school faculty are women as of 2019); MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 4 (2019) ("AALS reports that women of color account for a mere 7.0% of the 10,965 law faculty members" while an additional 25% are white women; the ABA "reports similar figures.").
5. Karen Sloan, *More Minority Women Ascend to Law Dean Jobs*, THE NAT'L L.J. (Jan. 10, 2019), <https://www.law.com/nationallawjournal/2019/01/10/more-minority-women-ascend-to-law-dean-jobs/> [<https://perma.cc/2Y LX-9Y7S>]; Am. Bar Ass'n, *A Current Glance at Women in the Law* 4 (2019), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf.
6. ASS'N OF LEGAL WRITING DIR. & LEGAL WRITING INST., REPORT OF THE 2017-2018 INSTITUTIONAL SURVEY Q.4.II, at 11 & 58 (2019), <https://www.alwd.org/images/resources/ALWD-LWI-2017-18-Institutional-Survey-Report.pdf> (finding twenty-six out of 132 responding law schools offer some or all of their legal writing faculty traditional tenure or tenure track and that seventy-two percent of legal writing appointments are untenured); Yvonne M. Dutton,

is no guarantee the gender inequity in pay, promotion, and pedagogy will disappear.⁷

The rise of women into high-status tenured and tenure-track positions (albeit at a painstakingly slow rate)⁸ thus poses the questions: why are so many women still concentrated in non-tenured, lower-pay legal research and writing jobs?⁹ Why do women law professors earn less on average than male law professors?¹⁰ Why is legal academia experiencing the same phenomena as other industries where positions disproportionately comprised of women become low status and lower paying, including the same jobs previously occupied by men?¹¹

More to the point, has the rise in numbers and status of women within the legal academy produced the systemic changes anticipated by our predecessors whose identity politics strategy for change centered around advocating for more women on law faculty and leadership?

The answer varies depending on two factors—where you stand in the pay and status hierarchy, and your demonstrated ideological commitments. Whether you are a female or male law professor turns out to be less determinative than expected in predicting a faculty member's actions. This is consistent with critical feminism and critical race studies scholars' warnings against the essentialization

Margaret Ryznar & Lea Shaver, *Advancing Faculty Diversity Through Self-Directed Mentoring*, 25 DUKE J. GENDER L. & POL'Y 55, 58 (2017) (citing American Bar Association (ABA) data for tenured and tenure-track female law professors based on 2013 law school reports); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000).

7. Rick Seltzer, *80 Cents on the Dollar*, INSIDE HIGHER ED (Feb. 15, 2017), <https://www.insidehighered.com/news/2017/02/15/gender-pay-gap-persists-higher-education-administrators> (providing data to show that while women's representation has increased among high-level administrative positions, women are still underpaid as compared with their male counterparts).
8. Nick Hazelrigg, *Slow Going on Faculty Diversity*, INSIDE HIGHER ED (July 2, 2019), <https://www.insidehighered.com/news/2019/07/02/little-progress-diversifying-faculty-ranks-study-finds-particularly-research> (citing statistics from the Hispanic Journal of Law and Policy at the South Texas College of Law based on federal data from 2013 to 2017: "The study revealed moderate progress for gender diversity during the 2013 to 2017 period, with a 1.7 percent increase in the amount of women serving in faculty positions at doctoral-status institutions. . . . [W]omen still only make up 32 percent of tenured positions.").
9. Nancy Levit, *Keeping Feminism in its Place: Sex Segregation and the Domestication of Female Academics*, 49 KAN. L. REV. 775, 778 (2001).
10. CHRONICLE DATA, <https://data.chronicle.com/> (last visited Sept. 7, 2019) (average salaries displayed for full-time faculty at thirty-two selected law schools from which data were collected for the year 2017-2018, showing women are paid on average \$11,000 less than men).
11. Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data*, 88 SOCIAL FORCES 865-91 (2009) (arguing that the proportion of women in an occupation negatively affects pay because of the devaluation of women's labor); see also Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html> [<https://perma.cc/4ZQY-BA9Y>] ("Wages declined] when women in large numbers became designers (wages fell 34 percentage points), housekeepers (wages fell 21 percentage points) and biologists (wages fell 18 percentage points).").

of women, minority women, and racial minorities as homogenous in their responses to group-based subordination.¹²

Within the United States, the feminist movement historically excluded women of color in membership and leadership.¹³ White women's experiences shaped the agenda because white women were leading the movement. Due to the leadership's starkly different experiences from minority women's in many aspects of life, the (white) feminist movement failed to address social, political, and economic challenges disproportionately affecting women of color.¹⁴

The same dynamic is true between tenure-track/tenured women and non-tenured women insofar as prioritizing and defining gender equity. Not all women law professors have the same material interests. And material interests affect a woman's (and man's) ideological commitments to gender equity.

In many law schools, women who gain tenure are not prioritizing the unavailability of tenure for their female legal research and clinical faculty colleagues. Likewise, tenured women who are paid more than their non-tenure-track colleagues (because of tenure) are not willing to expend political capital to demand more equitable pay for other female professors, even though they are paid less on average than their tenured male counterparts. Female tenured faculty's individual material self-interests do not converge with those of their lower-status and lower-paid female colleagues, despite their shared gender identities. The failure of identity politics reinforces the dangers of essentializing women as axiomatically supportive of structural changes that would produce more gender equity in pay and status on a collective level.

Although more women are entering higher-status and higher-paid tenured positions, including deanships, that does not necessarily translate into their going beyond the standard lip service to gender equity. The collective is no longer most women law professors but multiple collectives of women experiencing different degrees of exclusion, pay disparity, and underrepresentation as compared with male counterparts.

One caveat is the combination of ideological commitment and life experiences. Having experienced the limitations caused by poverty makes

12. Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014) (discussing different ways in which members of subordinated groups respond to oppression); see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 78-81 (2003).

13. See, e.g., Brent Staples, *How the Suffrage Movement Betrayed Black Women*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/opinion/sunday/suffrage-movement-racism-black-women.html> [<https://perma.cc/2F4X-42PP>] (highlighting the white supremacy of prominent white suffragists such as Elizabeth Cady Stanton).

14. *Id.* (quoting Frederick Douglass) ("When women, because they are women, are hunted down through the cities of New York and New Orleans; when they are dragged from their houses and hung upon lampposts; when their children are torn from their arms and their brains dashed out upon the pavement; when they are objects of insult and outrage at every turn; when they are in danger of having their homes burnt down over their heads; when their children are not allowed to enter schools; then they will have an urgency to obtain the ballot equal to our own.").

one more sympathetic to economic inequality. Being denied opportunities and resources on account of your gender or race sensitizes you to the harms of racism and sexism. Having family members and close friends whose lives are adversely affected by low-income jobs, microaggressions, or explicit racial and gender bias colors your perception of society.

So, yes, there are certainly women tenured professors and deans who expend political capital necessary for structural change that upsets the status quo—and its predominantly male winners. Just as there are, and have always been, men who do the same. But to mistakenly assume these women do so merely because they are women explains in part why legal research and clinical faculty continue to be “pink collar” jobs despite the gradual increase in the number of tenured women professors and slower increase in the number of female law deans.

This leads me to my second point—institutional capture impedes structural change within law schools.

The legal academy is rife with tradition, aversion to change, and aversion to the conflict usually necessary for systemic change. When coupled with the long-term, repeat-player interactions among faculty, the outcome is internal stagnation. Faculty calling for changes that threaten the pay and status of their colleagues, whether individually or as a group, will face stiff opposition and even social stigma. As repeat players with long memories, faculty prioritize personal relationships more than the law school’s overall institutional interests or those of their lower-status colleagues. They also prioritize individual interests over collective interests, especially if they do not belong to the lowest-paid and least-appreciated collective of female law professors.

If equalizing pay translates into less pay for all unless the total pool of money increases, the (female or male) proponent will be hard-pressed to find allies. If making promotions more transparent and resources more accessible such that promotion for women and minorities increases, those at the top of the status echelon will feel threatened. For their status to be high, someone else’s must be lower. Hence the frequent failure to connect recruitment with retention in so-called diversity initiatives.¹⁵

The very people tasked with governing the law school are sometimes the least likely to reform the institution because of the special interests of its most powerful faculty—including the women and racial minorities in those ranks.

The women and men who are willing to expend political capital to improve gender equity in legal academia, therefore, should identify allies based not on a common gender or race, but on ideological commitments shaped largely by their own life experiences. To be sure, being a woman, a person of color, or a

15. Paula A. Monopoli, *The Status Gap: Female Faculty in the Legal Academy* 1 (2014), https://digitalcommons.law.umaryland.edu/fac_pubs/1624/ (describing how the low retention of women in the legal academy is frequently caused by inequity in pay or promotion and unfair treatment. Three reasons are offered for the status gap between male and female faculty that contribute to disparate retention rates: “1) the ancient association of ‘scholar’ with the masculine; 2) disproportionate institutional service by women faculty; and 3) gender schemas that distort student expectations about how women faculty should serve them.”).

woman of color affects how you are treated in public, work, school, and other forums—especially in the United States. But where you are positioned in the hierarchies within these forums determines your perceptions of the legitimacy of such hierarchies.

As a result, whatever major change occurs may more likely come from outside the law faculty and administration. Systematic changes may come from higher-level university administrators themselves pressured by outside sources, collectives of students with purchasing power, the American Bar Association, state bar associations, alumni, and high-profile negative publicity. Or change may be ordered by courts.¹⁶

My final point is that the most potent disciplining tool in legal academia is the unspoken civility codes infected by patriarchy. Patriarchy across the world operates on the trope of the “good woman” that serves the political, social, and economic interests of men.¹⁷ While acknowledging the manifestation of patriarchy is culturally specific, I proffer the four prongs of the “good woman” trope are acceptance, obedience, accommodation, and sacrifice for men and male-dominated structures. As a result, “good women” are pleasers of men emotionally, sexually, and financially.

The “good woman professor” trope is operationalized in unspoken civility codes of conduct between members of a particular law faculty. Women risk social censure and retaliation should their behavior challenge existing patriarchal systems. Regardless of whether women or men are in charge of the patriarchal system, as deans, associate deans or committee chairs, female faculty are expected to adhere to the four prongs of patriarchy.

When told the policy does not allow for (predominantly female) clinical or legal writing faculty to be on the tenure track even if they produce legal scholarship, the female professor should accept the policy. When told the stark underrepresentation of women with chairs or as distinguished professors is attributable to a lack of interest or ability, the female professor should accept the status quo and sacrifice her professional ambitions. When asked to serve as chair of labor-intensive committees, which takes away from her production of scholarship, the female law professor should accommodate and sacrifice her time so that her male colleagues can focus on their research. And when the dean or senior colleague warns the female professor that she is pushing too hard for radical reform, she should obey and stop complaining.

16. Stephanie Francis Ward, *After Previously Defending Lower Pay for Female Profs, DU Law School enters EEOC Consent Decree*, ABA JOURNAL (May 17, 2018), http://www.abajournal.com/news/article/after_defending_lower_pay_for_female_law_professors_university_of_denver_en [<https://perma.cc/XWZ8-8FZK>] (describing how as part of a settlement with seven female professors, “the [University of Denver] law school agreed to significantly increase the women’s pay . . . and it will submit to having oversight from an [sic] monitor for the next five years. Additionally, the university will hire an [sic] labor economist to provide the monitor with annual pay equity studies at the law school, based on compensation data and criteria.”).
17. See e.g., KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2017) (exploring the history and causes of misogyny that construct “good women” tropes as giving, caring, loving, and attentive and vilifies women who defy such gender stereotypes).

Failure to accept, obey, accommodate, and sacrifice for the patriarchy is a violation of a gendered civility code weaponized to impede radical change led by female law professors. Compliance, meanwhile, earns a female professor social acceptance and individualized material rewards. Special requests for research support or convenient teaching schedules are more likely to be granted to the “good woman” professor as defined by her patriarchy-compliant behavior.

Women who are tenured professors and deans are not immune from the patriarchal civility codes, which also disincentivizes them from upending a status quo that produces gender inequity. Whether dealing with imposter syndrome as the first female dean at the law school or unequal pay compared with male tenured professors, the high-status women on the faculty are institutionally captured. They face individualized penalties for upending the system. As such, they perceive their individual interests as diverging from those of the larger number of women among the underpaid and undervalued legal research and clinical faculty.

Apropos to my argument, my comments are influenced by my life experiences as an American Muslim Arab woman, an immigrant, and a comparative scholar of the Middle East. Having experienced the various forms of subordination produced by an intersectional identity in the United States, I perceive the gender inequities in U.S. legal academia as clear as day.¹⁸ Also clear are the multiple ways in which American female legal academics accept, obey, accommodate, and sacrifice for men and male-dominated structures. Patriarchy is in the air of American law schools.

Thus, I cannot help but notice the irony in Americans’ presumptions that Muslim and Arab women need saving from patriarchy by American feminism.¹⁹ To be sure, the Middle East is rife with patriarchy—because patriarchy is global, not because Arabs or Muslims are misogynists by nature. All too often, however, American feminists’ preoccupation with gender equity in exotic foreign lands (usually Muslim majority) distracts them from their own gender oppression at home.²⁰

When I read about the radical actions taken by American women (white and racial minorities) in the feminist movements of the twentieth century, I cannot help but ask “where have all the American feminists gone?” When I talk with my Arab and Muslim female colleagues abroad who are taking great risks today to their reputations, livelihoods, and sometimes lives to challenge patriarchy in their home countries, I cannot help but ask “what happened to American feminism?” When I personally experience more liberty in performing my gender identity as a strong, confident professional woman during my long stays in

18. Sahar F. Aziz, *The Alpha Female and the Sinister Seven*, in *PRESUMED INCOMPETENT II: INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (Carmen Gonzales et al. eds., forthcoming 2020).

19. LILA ABU-LUGHOD, *DO MUSLIM WOMEN NEED SAVING?* (2013).

20. SUSAN MOLLER OKIN, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 9-24 (1999).

Middle East countries, I cannot help but dread returning to the gendered cultural straitjacket imposed by American law schools' civility codes.²¹

While a change in gender demographics on law faculties has certainly made law schools less hostile toward women, it is not producing the structural changes anticipated by our predecessors. New strategies not reliant solely on identity politics are necessary to overcome the tenaciousness of patriarchy. More women, minority women, or male minority law deans are not a panacea for fixing gender and racial inequity. More tenured female professors alone will not change a system that values certain professional skills over others, leading to a lower-paid, lower-status legal research and clinical professor class comprising largely of women.²²

The overarching challenge facing U.S. legal academia is whether we are truly committed to gender and racial equity on our (not just others') faculties as demonstrated by our actions, not merely our rhetoric. Are we willing to make the changes at our home institutions, or will we limit our efforts to abstract discussions at conferences? Will we have the courage to confront colleagues on our own faculty as well as recognize how our silence contributes to gender inequity in our workplaces? For the sake of our daughters and granddaughters, I certainly hope so.

21. Aziz, *supra* note 18.

22. ROBERT R. KUEHN & DAVID A. SANTACROCE WITH MARGARET REUTER & SUE SCHECHTER, THE 2016-2017 SURVEY OF APPLIED LEGAL EDUC. 40 (2017), http://www.csale.org/files/Report_on_2016-17_CSALe_Survey.pdf (showing that approximately sixty-five percent of full-time clinical faculty are women); ASS'N OF LEGAL WRITING DIR. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 2015, at 69 (2015), [https://www.alwd.org/images/resources/2015%20Survey%20Report%20\(AY%202014-2015\).pdf](https://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf) (reporting that seventy-two percent of full-time legal writing faculty are women).