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# GENDER BIAS, COGNITION, AND POWER IN THE LEGAL ACADEMY\*

*Elizabeth M. Schneider*<sup>†</sup>

Professor Virginia Valian's book *WHY SO SLOW?*<sup>1</sup> has tremendous significance for lawyers and lawmaking generally. However, in this commentary I want to briefly focus on the implications of her work for issues of gender bias in the legal academy. Since I have been active in a number of organizations concerned with problems of gender bias in legal education, and recently chaired a Workshop for Women in Legal Education for the Association of American Law Schools ("AALS") with the title "Getting Unstuck . . . Without Coming Unglued," I have been thinking a lot about the particular problems of gender bias facing women legal academics.<sup>2</sup> The "gender schemas" that Professor Valian discusses—the implicit or unconscious hypotheses about sex differences that play a central role in shaping men's and women's professional lives—and the notion of accumulated disadvantage that she explores, have a deep and complex impact on women's lives in the academy, and in the legal academy particularly. I also raise questions about the role of cognition for lawmaking and proof of discrimination that are suggested by her work.

In March of 1999, the Massachusetts Institute of Technology released its Study on the Status of Women Faculty in Science. This report made the front page of the *New York*

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<sup>†</sup> Professor of Law, Brooklyn Law School. Thanks to members of the Planning Committee for the 1999 AALS Workshop for Women in Legal Education; Kim Dayton, Lisa Ikemoto, Betsy Levin, and Nell Newton for many wonderful conversations on problems of gender bias in the legal academy; and to Susan N. Herman, Stacy Caplow, Minna Kotkin, and Nan Hunter who have discussed these issues with me. Thanks also to Lina Del Plato, Katherine Paszkowska, and Tracy Peterson for helpful research assistance.

<sup>1</sup> VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998).

<sup>2</sup> *Getting Unstuck . . . Without Coming Unglued* (AALS Workshop for Women in Legal Educ., New York, N.Y., Chicago, Ill., and Washington, D.C.), Oct. 1-2, 1999.

*Times* under the heading, "MIT Admits Discrimination Against Female Professors."<sup>3</sup> The conclusions of this study were that there was widespread discrimination—not intentional, perhaps, but the result of unconscious assumptions. Numbers of tenured women in the various departments of Science had remained the same for many years, leadership positions were largely male, resources and "space" for laboratories were disproportionately given to men. The study identified subtle factors and received considerable media attention. An editorial in the *New York Times* noted that the Committee, which wrote this report, concluded that "old-fashioned assumptions and gender stereotyping worked to marginalize the women, undervalue their achievements and exclude them from positions of power, even when there seemed to be no ill intentions."<sup>4</sup> Nancy Hopkins, the MIT Professor of Biology who chaired the report, has gotten faxes and e-mails from women academics around the world confirming her findings.<sup>5</sup>

From the perspective of cognition, one of the most interesting aspects of the report was the women faculty members' own description of how it happened—how the women came to know, and to realize, what was going on. The Introduction to the Study describes it in the following way:

In the summer of 1994, three tenured women faculty in the School of Science began to discuss the quality of their professional lives at MIT. In the course of their careers, these women had come to realize that gender had probably caused their professional lives to differ significantly from that of their male colleagues. Interestingly, they had never discussed the issue with one another and they were even uncertain whether their experiences were unique, their perceptions accurate. This situation was about to change dramatically. It was soon clear to the women that their experiences formed a pattern.<sup>6</sup>

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<sup>3</sup> See *A Study on the Status of Women Faculty in Science at MIT* (Oct. 16, 1999) <<http://web.mit.edu/fnl/women/women.pdf>> [hereinafter *A Study on the Status of Women Faculty*]; Carey Goldberg, *MIT Admits Discrimination Against Female Professors*, N.Y. TIMES, Mar. 23, 1999, at 5.

<sup>4</sup> Editorial, *Gender Bias on the Campus*, N.Y. TIMES, Mar. 28, 1999, at 16.

<sup>5</sup> See Ann Douglas, *Crashing the Top: Women at Elite Universities May Have Broken the Ivory Ceiling, But They're Still Battling Old-Fashioned Discrimination* (Oct. 11, 1999) <<http://www.salon.com/books/it/1999/10/11/douglas/index.html>>.

<sup>6</sup> *A Study on the Status of Women Faculty*, *supra* note 3, at 5.

These women polled other tenured women on the Science faculty, and 16 of the 17 women on the Science faculty sent a proposal to the Dean asking him to establish the Committee. In their request they wrote:

We believe that unequal treatment of women faculty impairs their ability to perform as educators, leaders in research, and models for women students . . . .

. . . Most discrimination at MIT, whether practiced by men or women, is largely unconscious. Often it is difficult to establish discrimination as a factor because any case, no matter how disturbing or aberrant, can usually be ascribed to its special circumstances.<sup>7</sup>

Amazingly, in response to their request, the Dean undertook a quick study of his own and realized that a serious problem existed. He became a strong champion of the women's cause and won the approval of the administration to allow the women to establish their committee.<sup>8</sup>

The process of this Committee described in the Study is fascinating: inclusive, scrupulous in its reliance on women's stories of their experiences, fully participatory, and operating by consensus. The Study documented the women faculty's perceptions of their status that most of the senior women faculty were "invisible," excluded from a voice in their departments and from positions of any real power.<sup>9</sup> This process of "marginalization" had occurred as the women progressed through their careers at MIT, making their jobs increasingly difficult and less satisfying. Junior women felt more included and supported in their departments but were concerned with the extraordinary difficulty of combining family and work. An important finding of the Study was that the difference between the perception of junior and senior women faculty about the impact of gender on their careers repeated itself over generations.<sup>10</sup> Each generation of young women, including those who are currently senior faculty, began by believing that gender discrimination was "solved" in the previous generation and would not touch them. Gradually, though, their eyes were opened by the realization that the playing field is not level

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<sup>7</sup> *A Study on the Status of Women Faculty*, *supra* note 3, at 6 (first omission in original).

<sup>8</sup> *See A Study on the Status of Women Faculty*, *supra* note 3, at 5.

<sup>9</sup> *A Study on the Status of Women Faculty*, *supra* note 3, at 8.

<sup>10</sup> *See A Study on the Status of Women Faculty*, *supra* note 3, at 7.

after all; that the slight disadvantages accumulated over time had created great differences between their careers and those of their male colleagues; and that they had paid a high price both personally and professionally as a result. The Study affirmed the notion that gender schemas and accumulated disadvantage, but not necessarily intentional action, constituted discrimination.

The MIT Study could have been the report of the October 1999 AALS Workshop on Women in Legal Education. Although numbers of women in the legal academy have increased, the Workshop revealed tremendous feelings of marginalization by many women, exclusion from positions of power within their institutions. Many women are in the new "female ghettos" of legal writing and clinical teaching; and so they are in lower status positions and do more labor-intensive work.<sup>11</sup> Many women do institutional "caretaking" work: advising and mentoring students, developing student-focused programs, participating on committees, laboring for love within the institution. Their work is, like caretaking work in the home, frequently invisible.<sup>12</sup> Many senior women spoke about particular forms of marginalization, such as exclusion from membership on, or leadership of, powerful committees and failure of their home institutions to recognize their accomplishments, and the statistics bear them out. Fewer women have chairs or are directors of centers or institutes. Many cannot negotiate higher salaries or positions if they are forced to "leverage" these matters with outside offers, since they are more frequently locked in geographically by family or caretaking needs. Backlash and resistance of other faculty members and students are also significant.

Yet issues of gender are also increasingly less visible in the legal academy. Ann Douglas, Professor of English at Columbia University, recently wrote an article in the online mag-

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<sup>11</sup> See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75 (1997); Robert F. Seibel, *Symposium: Institutional Barriers to Women in the Workplace: Do Deans Discriminate?: An Examination of Lower Salaries Paid to Women Clinical Teachers*, 6 UCLA WOMEN'S L.J. 541 (1996).

<sup>12</sup> See Susan B. Apel, *Gender and Invisible Work: Musings of a Woman Law Professor*, 31 U.S.F. L. REV. 993 (1997).

azine *Salon* on her experiences with gender discrimination in Ivy League academia.<sup>13</sup> She observed that gender parity is no longer seen as a pressing issue in the academy. She quotes Jean E. Howard, an English professor at Columbia University and currently the president of the Shakespeare Association of America, to say, "Feminism is no longer foregrounded in progressive politics in the academy, especially in the elite institutions. The assumption is, we've done that."<sup>14</sup> Howard was quick to add, "We haven't—it's just not being talked about."<sup>15</sup>

These are serious problems of cognition—cognition of what is gender bias, cognition by women ourselves, cognition by a society. Nancy Hopkins recounts that her awakening did not come when she was discussing how much lower her salary was than those of her male peers ("it was my fault," she remembers thinking, "I'd never asked about salaries")—until a male colleague in effect took over a course she had been teaching.<sup>16</sup> Marianne LaFrance identifies this phenomenon as the *modus operandi* of women's subjugation.<sup>17</sup> We look at individual instances and do not (or refuse to) see the accumulated results of so many small, unacknowledged harms that constitute patterns of differential treatment and exclusion. But I want to underscore Marianne LaFrance's point that it is important to see the problems of gender bias as resulting from power differential and male privilege, not just cognition.<sup>18</sup> The story of MIT and the story for women in the legal academy is about the power of denial and the denial of power—about not being willing to see systemic problems but thinking it is "just us."

On the positive side, the MIT study and the AALS Workshop underscore the continuing importance of cognition—shared cognition—that old idea of "consciousness-raising"—the significance of women beginning to talk and share stories—not saying "you're crazy," but "me too!" Without women making these cognitive connections, we would never have had the Women's Movement activism that has led to legal recognition of the

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<sup>13</sup> See Douglas, *supra* note 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Marianne LaFrance, *The Schemas and Schemes in Sex Discrimination*, 65 BROOK. L. REV. 1063 (1999).

<sup>18</sup> See *id.*

harms of sexual harassment and domestic violence, which we now take for granted.<sup>19</sup> Legal recognition resulted from the accumulation of many "me toos," and the re-cognition that small, seemingly trivial acts of private harm were public violations.

Without cognition there is no legal change. But law does not often acknowledge the subtlety of cognition. Thus, it is important to note the contrast between Professor Valian's complex, multi-faceted description of how discrimination happens in real life and the arcane and formalistic notion of discrimination that the Supreme Court has detailed. For example, in *Personnel Administrator of Massachusetts v. Feeney*,<sup>20</sup> Massachusetts had passed legislation to provide an absolute veteran's preference for civil service jobs. Of course, women were not veterans, so women were excluded from these automatic preferences, which meant a lot in terms of their access to good jobs in the real world. The veteran's preference was challenged by a woman on equal protection grounds, and the Supreme Court concluded there was no violation because in order to show there was discrimination one had to prove "discriminatory purpose" and clear intent to discriminate. The Supreme Court explained:

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Yet, nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.<sup>21</sup>

Professor Valian's work, the MIT story, and the AALS Workshop suggest the inappropriateness of the *Feeney* standard, and the importance of integrating more complex insights of cognition into lawmaking.

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<sup>19</sup> For further discussion of these issues in the context of lawmaking on domestic violence, see ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (forthcoming 2000).

<sup>20</sup> 442 U.S. 256 (1979).

<sup>21</sup> *Id.* at 279 (citation omitted).

Now, cognition is the first step, but remedying the simply cognitive dimension is not enough. Professor Valian recognizes this in the last part of her book where she discusses remedies: she observes that sensitivity training is a limited remedy because people do not need to simply disclose and share unconscious biases. Instead, she notes that “[t]hey need only understand that they are likely to have such biases, and that they must work out procedures to protect themselves and others from bad judgments based on them.”<sup>22</sup> But how will people begin to understand that those judgments are “bad”? Recognition of the structural and power imbalances within institutions that reinforce these biases, and the development of procedures to identify bias and to protect against bad judgment, are the next steps. What the MIT Study and the AALS Workshop tell us is that women acting collectively to recognize systemic patterns behind small and trivial exclusions, and thoughtful, open and responsive institutional leadership, are necessary, even if not sufficient, prerequisites for change.

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<sup>22</sup> VALIAN, *supra* note 1, at 315.



