

## Essays

# The Intersectional Race and Gender Effects of the Pandemic in Legal Academia

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*Just as the COVID-19 pandemic helped to expose the inequities that already existed between students at every level of education based on race and socioeconomic class status, it has exposed existing inequities among faculty based on gender and the intersection of gender and race. The legal academy has been no exception to this reality. The widespread loss of childcare and the closing of both public and private primary and secondary schools have disproportionately harmed women law faculty, who are more likely than their male peers to work a “second shift” in terms of childcare and household responsibilities. Similarly, women law faculty were more likely to feel the effects of the financial exigencies that universities and law schools faced during the pandemic because of their disproportionate representation in non-secure, meaning non-tenure-stream, faculty positions. Furthermore, the rapid switch to remote teaching and learning, particularly during spring 2020, had a more detrimental effect on women in part because of the persistent gender bias that women law faculty, who teach a larger percentage of required and survey courses, encounter in student teaching evaluations and in part because women tend to be more engaged in the mental health and emotional caretaking of students, which significantly increased during the pandemic. Even the actions that law schools took during the pandemic to provide relief to faculty, such as automatic extensions to the tenure clock for all faculty, place women more at risk than men for harmful impacts on factors like pay equity. In all, this Essay briefly analyzes how factors such as limited childcare, remote learning, the greater caretaking needs of students, plus other pandemic-related effects, have worked to exacerbate previously existing gender and intersectional gender and race inequities between men and all women in legal academia and between white men and women of color.*

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## INTRODUCTION

Just as the COVID-19 pandemic helped to expose the inequities that already existed between students at every level of education based on race and socioeconomic class status,<sup>1</sup> it has exposed existing inequities among faculty based on gender and the intersection of gender and race.<sup>2</sup> Indeed, scholars have highlighted widening inequities among men and women<sup>3</sup> faculty scholars in the STEM fields, where women faculty are already severely underrepresented.<sup>4</sup> Like in STEM, the pandemic has placed women law professors, particularly women of color law professors, at a severe disadvantage.<sup>5</sup> The widespread loss of childcare and the closing of both public and private primary and secondary schools have disproportionately harmed women law faculty, who are more likely than their male peers to work a “second shift” in terms of childcare and

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1. See, e.g., Nicholas Casey, *College Made Them Feel Equal. The Virus Exposed How Unequal Their Lives Are*, N.Y. TIMES, (Apr. 4, 2020, updated May 5, 2020), <https://www.nytimes.com/2020/04/04/us/politics/coronavirus-zoom-college-classes.html>.

2. See Nancy D. Spector & Barbara Overholser, *COVID-19 and the Slide Backward for Women in Academic Medicine*, 3(9) JAMA NETWORK OPEN 1, 1 (2020) (arguing that “women now run the serious risk of sliding backward” due to the pandemic and noting that the impacts on Black women academics in medicine will be greater); see also Brooke Petersen Gabster, Kim van Daalen, Roopa Dhatt & Michele Barry, *Challenges for the Female Academic During the COVID-19 Pandemic*, 395 LANCET 1968, 1969 (2020) (making the case that “COVID-19 is threatening progress [in academic medicine] by amplifying existing gender disparities”); see generally Bettina J. Casad, Jillian E. Franks, Christina E. Garasky, Melinda M. Kittleman, Alanna C. Roesler, Deidre Y. Hall & Zachary W. Petzel, *Gender Inequality in Academia: Problems and Solutions for Women Faculty in STEM*, 99 J. NEUROSCI. RES. 13 (2021).

3. A number of faculty identify as non-binary, gender fluid, genderqueer, and several other ways apart from man and woman, but because the research on gender inequality in academia examines the issue in terms of men and women and refers only to men and women, I use the language that aligns with that research. Although I suspect there are disparities between men faculty and non-binary faculty, for example, the research does not speak to such specific disparities and inequities.

4. See, e.g., Mackenzie R. Wehner, Yao Li & Kevin T. Nead, *Comparison of the Proportions of Female and Male Corresponding Authors in Preprint Research Repositories Before and During the COVID-19 Pandemic*, 3(9) JAMA NETWORK OPEN 1, 1 (2020) (noting the disparity between male and female faculty in medicine and observing “a statistically significant increase in the corresponding author gender gap in medRxiv”); Texas Tech University, *COVID-19 Shines Spotlight on Gender Inequity in Academia*, LAB MANAGER (July 7, 2020), <https://www.labmanager.com/news/covid-19-shines-spotlight-on-gender-inequity-in-academia-23216> (“In addition to more student demands in the classroom, many women are experiencing increased demands at home—either for care and homeschooling of children or of elderly family members, or for running the household. Given the increased demand of teaching and home responsibilities, women have less time to devote to research and grant writing.”).

5. See Karen Sloan, *The Pandemic Could Set Women Law Professors Back Years. These Academics Want to Find Solutions*, LAW.COM (Jan. 13, 2021, 12:56 P.M. EST), <https://www.law.com/2021/01/13/the-pandemic-could-set-women-law-professors-back-years-these-academics-want-to-find-solutions/> (highlighting a law school symposium that Professors Cyra Choudhury, Meera Deo, and Shruiti Rana organized about the pandemic and its effects on women law professors and referring to a letter that the three women wrote asking law journals to reconsider and ultimately change their submission and acceptance practices and policies to account for the drop in article submissions from women that was certain to result during the pandemic); see also Cynthia L. Cooper, *Work-Life Imbalance: Pandemic Disruption Places New Stresses on Women Lawyers*, A.B.A. (Dec. 18, 2020), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/december/worklife-imbalance-pandemic-disruption-places-new-stresses-women-lawyers/> (quoting Beth Wilensky, a clinical professor of law at the University of Michigan Law School, who proclaimed, “For anyone who is raising kids, the ability to get work done has shifted markedly.”).

household responsibilities, which has left women law faculty with very little of the most precious commodity needed to produce legal scholarship: time.<sup>6</sup>

Because academic scholarship is the coin of the realm in the legal academy and is needed to obtain tenure and other accolades and honors, women law faculty with young children are less likely than their male counterparts to advance as quickly through the tenure and promotion ranks, and some might end up not advancing at all.<sup>7</sup> Similarly, the rapid switch to remote teaching and learning, particularly during spring 2020, has had a more detrimental effect on women, who already face gender bias in student teaching evaluations,<sup>8</sup> because women not only tend to teach a greater number of large, required and survey courses than men, but also tend to be more engaged in the mental health and emotional caretaking of students, an issue that has significantly increased for students during the pandemic.<sup>9</sup> Additionally, the pandemic has placed a greater strain on the relationships of women with children in partnerships and marriages, and the emotional toll is greater on women than men because women frequently blame themselves for the conflict.<sup>10</sup> Even the actions that law schools have taken to provide relief during the pandemic, such as automatic extensions to the tenure clock for all faculty during the pandemic,<sup>11</sup> are likely to result in

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6. See Rose Casey, *The Pandemic's Sexist Consequences: Academe's Stark Gender Disparities Are Exacerbated by Covid-19*, CHRON. HIGHER EDUC. (Mar. 16, 2021), <https://www.chronicle.com/article/the-pandemics-sexist-consequences>. The “second shift” refers to “the disproportionate child and home care working women still do” on top of their paid work outside of the home. Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, 1760 (2012); see also Marlena Studer, *Negotiating the “Labor of Love”*: How Resources, Time, and Gender Shape Parenting Arrangements, 34 PEPP. L. REV. 417, 430 (2007) (discussing the “‘second shift’ of being a primary parent in addition to an income earner”).

7. See MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 88 (2019) (noting that “the litmus test” for tenure “for most schools is scholarship,” explaining how teaching and service demands on women of color law faculty “leave little time for scholarship,” and explicating that a junior professor “who does not publish will likely not be promoted”).

8. See Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities? The Perils of “Doing” Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164, 173–82 (Gabiella Gutiérrez y Muhs et al., eds., 2012) (discussing intersectional race and gender bias in student teaching evaluations).

9. See Texas Tech University, *supra* note 4 (quoting Professor Breonna Harris as stating: “Women tend to teach more and larger classes, students depend on female faculty for emotional support and expect more leniency from women vs[.] male faculty, and students evaluate women more harshly in teaching evaluations. With the rapid shift to online learning, more students and/or courses means more work, and having more students during a crisis means students will expect more emotional and academic support.”).

10. Jessica McCrory Calarco, Emily Meanwell, Elizabeth Anderson & Amelia Knopf, “*My Husband Thinks I’m Crazy*”: COVID-19-Related Conflict in Couples with Young Children 28–30 (Sept. 23, 2020), <https://osf.io/preprints/socarxiv/cpkj6/>; see also Jessica McCrory Calarco, Emily Meanwell, Elizabeth Anderson & Amelia Knopf, “*Let’s Not Pretend It’s Fun*”: How Disruptions to Families’ School and Childcare Arrangements Impact Mothers’ Well-Being 22 (Nov. 1, 2020), <https://osf.io/preprints/socarxiv/jyvk4/> (finding that mothers who have greatly increased the time they spend caring for their children during the pandemic have disproportionately reported “increased stress, anxiety, and frustrations with their children”).

11. See Noam Scheiber, *Pandemic Imperils Promotions for Women in Academia*, N.Y. TIMES (Sept. 29, 2020, updated Oct. 6, 2020), <https://www.nytimes.com/2020/09/29/business/economy/pandemic-women-tenure.html> (noting that universities “initially responded to the pandemic by pausing the so-called tenure

disproportionately negative, gendered impacts on factors like salary, retirement accounts, and “merit badges”<sup>12</sup> like chairs and professorships.

This Essay briefly analyzes how factors such as limited childcare, remote learning, the greater caretaking needs of students, plus other pandemic-related effects, have worked to exacerbate previously existing gender and intersectional gender and race inequities between men and all women in legal academia and between white men and women of color.<sup>13</sup> Part I details how the pandemic disproportionately burdens women law professors due to status because women tend to be overrepresented in the most precarious faculty jobs within law schools, such as legal writing, academic services, and clinical faculty positions, a good portion of which are not on the tenure stream. Part II examines the impact of the movement of many women’s “second shift” responsibilities in home care, childcare, and elder care responsibilities into their “first shift” responsibilities of scholarly production, teaching, and service and, correspondingly, on their promotion, tenure, and/or awards and honors prospects. It also explores how women law faculty’s overall greater engagement in the caretaking of students, academically, professionally, and emotionally, further impinges on their ability to produce scholarship, all of which ends up diminishing women law faculty’s chances for successful advancement in their scholarly careers. Part III analyzes how seemingly neutral and benevolent policy adoptions and enactments like automatic extensions on tenure clocks due to COVID are more likely to negatively affect women faculty and faculty of color, particularly women faculty of color.

### I. FEARS OF THE SHE-CSSION IN LEGAL ACADEMIA

In December 2019, women workers achieved a key milestone in the labor market when they exceeded men in the number of payroll jobs for the first time

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clocks of junior faculty members, giving them an extra year to publish academic work that would help them earn the promotion”).

12. In his article “Reflections on Academic Merit Badges and Becoming an Eagle Scout,” Professor Michael Olivas discusses the operation of bias in the awarding of “merit badges,” such as professorships and chairs, among law faculty. He contends that “the most exclusionary practices occur in the distribution of the highest level of prestige resources, those of the various merit badges earned or handed out in the daily business of academia.” Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 84 (2006).

13. See Jessica L. Malisch, Breanna N. Harris, Shanen M. Sherrer, Kristy A. Lewis, Stephanie L. Shepherd, Pumiwiitt C. McCarthy, Jessica L. Spott, Elizabeth P. Karam, Naima Moustaid-Moussa, Jessica McCrory Calarco, Latha Ramalingam, Amelia E. Talley, Jaclyn E. Cañas-Carrell, Karin Ardon-Dryer, Dana A. Weiser, Ximena E. Bernal & Jennifer Deitloff, Opinion, *In the Wake of COVID-19, Academia Needs New Solutions to Ensure Gender Equity*, 117 PROC. NAT’L ACAD. SCI. U.S. 15378, 15379 (July 7, 2020) (noting that a pandemic “amplifies the mental, physical, social, and economic impacts attributable to preexisting inequities in academia”); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1242, 1242–45 (1991) (defining intersectionality); Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 238 (2009) (“Intersectionality recognizes that power, privilege, disadvantage, and discrimination are influenced by interlocking spectrums of identity.”).

in more than ten years.<sup>14</sup> Less than half a year later, and after the COVID-19 pandemic hit, women workers found themselves exceeding men in a different, more devastating way: the rate at which they were losing their jobs.<sup>15</sup> By April 2020, women accounted for 55% of the millions of jobs that had been lost during the pandemic.<sup>16</sup> By that time, women's unemployment had risen to 15% compared to men's 13% unemployment rate, and Black women and Latinas fared the worst with unemployment at a rate of 16.4% and 20.2%, respectively.<sup>17</sup> Indeed, the unemployment rates for women in the workforce had gotten so bad that C. Nicole Mason, the president and chief executive of the Institute for Women's Policy Research, proclaimed, "I think we should go ahead and call this a 'shecession.'"<sup>18</sup>

Although no studies have demonstrated the gendered effects of job loss in higher education or in the legal academy, particularly among faculty, others have revealed that women law faculty are overrepresented in the least secure of all faculty roles at law schools in the United States: non-tenure stream faculty roles. As Professor Paula Monopoli explained in her article *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, in 2012, "women represent[ed] [a whopping] 61.3% of lecturers and 65.4% of instructors while men represented "the vast majority of high-paying and high-prestige positions, 80.2% of deans, 70.7% of full professors, but a minority of low-paying and low-prestige positions, 38.7% of lecturers and 34.6% of instructors."<sup>19</sup> As a result, during the pandemic, when many institutions of higher education had to make cuts due to financial exigencies,<sup>20</sup> faculty in non-tenure stream positions, the overwhelming majority of whom are women, found themselves in extreme fear and panic about losing their jobs and their income or actually losing their livelihood.<sup>21</sup> And, the stresses that came with the potential loss of employment

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14. See Alisha Haridasani Gupta, *Why Some Women Call This Recession a 'Shecession,'* N.Y. TIMES (May 9, 2020, updated May 13, 2020), <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html>.

15. See Mary Wood, *Law Professor: Pandemic's Impact on Women Highlights Opportunities for Change*, UVATODAY (Oct. 21, 2020), <https://news.virginia.edu/content/law-professor-pandemics-impact-women-highlights-opportunities-change> (quoting Professor Naomi Cahn who cited a recent McKinsey report that indicated that "while women made up 46% of the labor force before COVID-19," they account "for 54% of job losses" during the pandemic, primarily because of their "responsibility for child care").

16. See Gupta, *supra* note 14.

17. See *id.*

18. See *id.*

19. See Monopoli, *supra* note 6, at 1747.

20. See Shawn Hubler, *Colleges Slash Budgets in the Pandemic, With 'Nothing Off-Limits,'* N.Y. TIMES (Oct. 26, 2020, updated Nov. 2, 2020), <https://www.nytimes.com/2020/10/26/us/colleges-coronavirus-budget-cuts.html> ("Though many colleges imposed stopgap measures such as hiring freezes and early retirements to save money in the spring, the persistence of the economic downturn is taking a devastating financial toll, pushing many to lay off or furlough employees, delay graduate admissions and even cut or consolidate core programs like liberal arts departments.").

21. See Laura Krantz, *In Higher Education, The Pandemic Has Been Especially Cruel to Adjunct Professors*, BOS. GLOBE (Sept. 20, 2020, 5:09 PM), <https://www.bostonglobe.com/2020/09/20/metro/pandemic-deepens-great-divide-academia> (noting that "[w]hile many tenure-track professors received pandemic-related

were even greater for women faculty who are single mothers or the primary economic caretakers for their parents or women faculty who are single and have no back-up income or person to rely on.<sup>22</sup>

## II. DISADVANTAGES CAUSED BY WOMEN'S "SECOND SHIFT" MOVING INTO THE "FIRST SHIFT" AND BEYOND

The most harmful effects of the pandemic to women law faculty's careers came from the closing of daycare centers and schools for children, along with the corresponding loss of childcare and education, during the crisis.<sup>23</sup> As daycares and schools closed during the pandemic, women faculty found themselves disadvantaged by the realities of their home lives and responsibilities. Despite our more egalitarian aspirations in society, women faculty remain much more likely than their male colleagues to have partners who also work for pay outside the home and, more importantly, are much more likely than their male counterparts to work a second shift at home after their paid work, meaning they are more likely to take on household responsibilities for cooking, cleaning, paying bills, and more.<sup>24</sup> Indeed, as Marlena Studer explained, although one study showed that the "average housework hours spent by married women have declined from 30 to 17.5 hours per week, while hours spent

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extensions for their research, many adjuncts simply watched their jobs evaporate" and that many adjuncts "are also more likely to be women and people of color"); see also Kaiser Health News, *COVID Crisis Endangers Adjunct Professors*, USNEWS.COM (July 21, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-07-21/adjunct-professors-face-high-coronavirus-risk-with-jobs-low-on-pay-health-benefits> (discussing the precarious situation that part-time or adjunct faculty find themselves in during the pandemic).

22. See Casey, *supra* note 6 (referring to the special burdens that COVID-19 has placed on single mothers and others who do not fit the family structure that society defines as the normative ideal). Single mothers have borne some of the harshest consequences of the pandemic. As one journalist explained:

In a pandemic, single mothers must shoulder all the responsibilities at home — educating schoolchildren, caring for aging parents, cooking, cleaning and household management.

Now single moms have been hit particularly hard by the unemployment crisis, losing jobs at a far higher rate than other families with children, according to a *Stateline* analysis of census microdata provided by the University of Minnesota.

In April, the number of single mothers with jobs was 22% lower than it was a year ago, compared with a 9% employment decline for other families with children, according to the analysis.

The hit was even harder for low-wage single moms: Eighty-three percent working as waitresses lost their jobs by mid-April, along with 72% of those working as cleaners, 58% of cooks, a third of personal care aides and 14% of customer service representatives, according to the analysis.

Tim Henderson, *Single Moms Hit Hard by Job Losses*, PEW STATELINE (May 26, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/05/26/single-mothers-hit-hard-by-job-losses>. Melissa Yamauchi, a single mother in Mississippi, vividly described one of the greatest fears of single mothers for their children, "If something happens to me, there's nobody to raise them . . . Nothing, and I mean nothing, is more important than being here for them. There are thousands out there just like me." *Id.*

23. See Sloan, *supra* note 5 (quoting Professor Choudhury as stating that "the child care burden"—meaning "having to juggle work from home and 24/7 child care at home when schools started shutting down" and "taking Zoom calls while trying to supervise . . . kids at their learning, in the same physical and temporal space"—"was the most obvious stressor for most people, and . . . continues to be").

24. See Monopoli, *supra* note 6, at 1760–62.

by men have increased from 4.9 to 10.9,” it also revealed that “a gender gap still remains.”<sup>25</sup> As Studer detailed, “[w]omen still do the majority of household work, including preparing meals, washing dishes, cleaning up after meals, cleaning the house, laundry, ironing, mending, outdoor/other household maintenance, paying bills, keeping financial records, and car maintenance and repair.”<sup>26</sup> Such massive, gender differences in household duties existed despite the fact that childcare was not included in the study.<sup>27</sup> For women faculty who have children, the disadvantages from being more likely to have a second shift and being less likely to have a spouse who works only in the home and thus can provide support for their professional work have been compounded by the fact that schools and daycares have closed or have reduced their hours during the pandemic, leaving them with no time to research and write and publish law review articles.<sup>28</sup> Research already shows that the productivity of male faculty tends to increase during parental leave while the productivity of women faculty tends to decrease during such leaves. For example, economics researchers found in one study that, while male scholars in their field were able to use their parental leaves to increase their productivity with publications, there was no parallel productivity for female economics scholars during their parental leaves. In summary, while parental leaves helped male economics scholars advance towards tenure, they did not provide their female counterparts with any such boost.<sup>29</sup> And, as noted previously, in journals for other fields and disciplines, a widening gap in article submissions received by men and women faculty has occurred.<sup>30</sup>

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25. Studer, *supra* note 6, at 419.

26. *Id.*

27. *Id.*

28. See Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 FORDHAM L. REV. 2467, 2469 (2021) (“Parallel drops in publications by women faculty are certainly occurring in legal academia, and institutions have begun discussing possible mitigating efforts.”); see also Caitlyn Collins, Liana Christin Landivar, Leah Ruppanner & William J. Scarborough, *COVID-19 and the Gender Gap in Work Hours*, 28 GENDER WORK ORG. 101, 102 (2021) (finding, in dual-earner, heterosexual couple families, that the mothers’ paid work hours decreased five times more than the fathers’ work hours between March 2020 and April 2020 of the pandemic); Casey, *supra* note 6 (“One study in the United States found that, in heterosexual partnerships with both parents working virtually, mothers with children under 12 have reduced their work hours four to five times as much as fathers have.”).

29. See Heather Antecol, Kelly Bedard & Jenna Stearns, *Equal but Inequitable: Who Benefits from Gender-Neutral Tenure Clock Stopping Policies?*, 108 AM. ECON. REV. 2420, 2435 (2018) (“We report results at several points in time because there is no obvious single year at which to evaluate publications. By year five, men exposed to a gender-neutral policy have 0.36 more top-5 publications than men at the same university without a policy. This grows to 0.56 by year seven. In contrast, there is no increase in the number of top-5 publications for women.”); Justin Wolfers, *A Family-Friendly Policy that’s Friendliest to Male Professors*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/26/business/tenure-extension-policies-that-put-women-at-a-disadvantage.html> (“They found that men who took parental leave used the extra year to publish their research, amassing impressive publication records. But there was no parallel rise in the output of female economists.”).

30. See Michelle L. Bell & Kelvin C. Fong, *Gender Differences in First and Corresponding Authorship in Public Health Research Submissions During the COVID-19 Pandemic*, 111 AM. J. PUB. HEALTH 159, 161 (2021) (“Overall, more manuscripts per day were submitted during the pandemic period than previously, with an increase of 25.1%. However, the pattern of manuscript submissions differed by gender. For men, the rate of

On top of the gaps in publishing between men and women faculty during the pandemic were the additional stresses like the pressures of family conflicts caused factors like closed schools and daycares, particularly for women with children in partnered relationships. For instance, researchers in one study found that 39% of the mothers they examined reported increased frustration in their relationships during the pandemic due to lack of support from their partners in childcare and household responsibilities.<sup>31</sup> More so, the researchers found that many of the women blamed themselves for even feeling frustrated with their partners to begin with.<sup>32</sup>

Adding to these burdens are the challenges that women law faculty, particularly women of color law faculty, already face in academia in terms of service work.<sup>33</sup> Even before the pandemic, women faculty, especially women of color, served on more committees, including the most onerous committees, and performed more administrative tasks for the school than their male counterparts.<sup>34</sup> This additional work is not only limited to committee service and administrative tasks; it also extends to emotional and mental caretaking for students.<sup>35</sup> Students not only find women law faculty to be more approachable and empathetic to their concerns as a general matter, but they also tend to expect women law faculty to be more approachable, lenient, and empathetic than their male colleagues.<sup>36</sup> The isolation, loneliness, and uncertainty that students have faced throughout the COVID-19 pandemic has increased their need for emotional and mental health support, which has tended to result in even greater work for women faculty than men faculty.<sup>37</sup> For women of color, these impacts have been even larger in part because of the invisible mentoring and caretaking work that they frequently perform to help students of color, who were and are, along with their family members, more likely to die from COVID-19, face hate crimes as a result of stereotypes concerning the “China virus,” and lose than

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submissions (manuscripts/day) for corresponding authors went up 41.9%, whereas for women they increased 10.9%, indicating an almost 4-times-higher increase in productivity for men compared with women ( $P < .05$ ). Among manuscripts from the United States, when we compared the pandemic with the [pre-pandemic] period, submissions by corresponding author increased 23.8% for men but only 7.9% for women.”).

31. Calarco et al., *supra* note 10, at 12–18.

32. *Id.* at 18.

33. See Deo, *Investigating Pandemic Effects*, *supra* note 28, at 2475–77, 2485–87.

34. See DEO, *supra* note 7, at 87–88; Monopoli, *supra* note 6, at 1762–63 (noting that women faculty do most of the caregiving in the workplace, meaning women “in the academy play domestic, supportive roles,” which “includes service on hard-working, low-status committees in the law schools,” while “men tend to do the outside work—more scholarship, more travel, more self-promotion, more blog entries and other ‘scholarly’ career work”).

35. See Monopoli, *supra* note 6, at 1763; Scheiber, *supra* note 11 (noting that “advising students struggling with emotional stress” also “fall[s] disproportionately on women”).

36. See Monopoli, *supra* note 6, at 1763 (asserting that students react “poorly to women faculty who do not respond to” the expectation that they spend more time with students).

37. See Laura Pineault & Siara Rouzer, *Even Ivory Towers Can’t Protect Women from “Bearing the Brunt” of the COVID-19 Pandemic*, AM. PSYCH. ASS’N. (Oct. 1, 2020), <https://www.apa.org/science/leadership/students/gender-equity-academia> (discussing impacts of the extra service commitments of women faculty).

their jobs during the pandemic than majority students and their family members.<sup>38</sup> Additionally, women of color faculty themselves are more likely to suffer the effects of these stresses and harms themselves than their majority colleagues.<sup>39</sup>

In summary, although prior inequities between men and women law faculty persisted in part because of the burdens of the “second shift” on women law faculty, the pandemic has blurred the lines between the “first shift” of paid work outside the home and the “second shift” of unpaid household care, childcare, and elder care inside the home for many women.<sup>40</sup> In many ways, one could argue that the “second shift” invaded and conquered the “first shift,” resulting in a widening of the male-female divide in the production of scholarship, which itself can lead to a widening of the tenure gap between men and women.<sup>41</sup>

On top of causing a gap in tenure rates between men and women, pandemic-related inequities in responsibility and time between men and women are also certain to result in pay inequities due to merit decisions that tend to weigh scholarship much more heavily than either teaching or service. Furthermore, these inequities in raises and pay for women faculty are and will be compounded by the effects that they will have on other benefits, such as matches in retirement contributions from their universities, which is often a percentage of an employee’s salary. Relatedly, any and all cuts in retirement contributions at universities have had a disproportionately negative impact on women, given their already lower pay compared to men. And, in times of stress like during the pandemic, biased decisionmaking processes are frequently used because decisions are made more quickly, which means implicit biases are more likely to creep into decisions concerning issues like merit raises, the awarding of chairs and professorships, and even hiring.<sup>42</sup>

### III. DISADVANTAGES FROM BENEVOLENT POLICIES MOTIVATED BY THE COVID-19 PANDEMIC THAT SHOULD BE STUDIED AND EXAMINED TO MINIMIZE THE WIDENING OF GENDER GAPS IN PAY, AWARDS, AND OTHER BENEFITS

Even in instances where law schools have granted a form of relief to faculty as a result of the challenges presented by the pandemic, women faculty remain vulnerable to a deepening of inequities between them and their male peers. For example, although law schools across the nation responded to pandemic-related challenges by not requiring the use of evaluations from the spring 2020 semester

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38. See Deo, *Investigating Pandemic Effects*, *supra* note 28, at 2469–70, 2475–80, 2489–90.

39. *Id.*

40. Gus Wezerek & Kristen R. Ghodsee, *Women’s Unpaid Labor is Worth \$10,900,000,000,000*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html> (discussing the value of the unpaid household labor that women perform).

41. See Casey, *supra* note 6.

42. See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom* 126 YALE L. J. 862, 877 (2017) (reviewing NICOLE VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT (2016)) (noting that “implicit biases flourish in situations where individuals make decisions quickly and on the basis of limited information”).

in tenure or promotion evaluation processes, as well as by granting an automatic extension to the tenure clock, such policies are likely to result in meaningfully disparate results for men and women faculty because they take a gender-neutral approach to a process that is already marred by gender biases within academia and society.<sup>43</sup>

To begin with, without a conscious accounting of how women faculty, especially women of color, are differently affected by the student teaching evaluation process, law schools are certain to reify, rather than minimize, the existing inequities that women, especially women of color, face with regard to teaching evaluations. With respect to teaching evaluations, women, particularly women of color, already face nonconscious and conscious bias in student evaluations, which could mean that their first or even second sets of evaluations might not be stellar.<sup>44</sup> As Professor Meera Deo and many authors in *Presumed Incompetent* and *Presumed Incompetent II* have made clear, women faculty of color face innumerable obstacles and barriers in how students perceive them and their teaching.<sup>45</sup> Having one less semester of evaluations means junior women faculty of color have one less semester of evaluations to prove themselves or make up for a slow start to a biased process. Law schools should ensure that their tenure and promotion committees take note of this reality to avoid unnecessarily penalizing women of color law faculty during the tenure and promotion evaluation process. Additionally, law schools should avoid leaving the decision of whether to use spring 2020 evaluations up to the individual junior faculty. After all, if male law faculty have had more time as a general matter to prepare for class and adjust to remote forms of teaching and learning, they might more frequently choose to have their evaluations included as part of their review during the tenure and promotion process. As senior faculty are likely to assume that the teaching evaluations of faculty who choose not to employ evaluations from the pandemic period are negative or otherwise bad, then women faculty are more likely than male faculty to be perceived in negative ways by the very colleagues who will vote on their futures.

Additionally, research reveals that tenure clock stopping policies, while generous, can work to widen tenure gaps between men and women faculty rather than reduce them.<sup>46</sup> For example, while examining a data set on assistant professor hires at top-fifty economics departments from 1980-2005, economists Heather Antecol, Kelly Bedard, and Jenna Stearns found that that universities' "adoption of gender-neutral tenure clock stopping policies substantially reduced

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43. See Scheiber, *supra* note 11 (noting that universities "initially responded to the pandemic by pausing the so-called tenure clocks of junior faculty members, giving them an extra year to publish academic work that would help them earn the promotion").

44. See Lazos, *supra* note 8, at 173-82.

45. See DEO, *supra* note 7, at 55-80, 85-87; see generally Lazos, *supra* note 8, at 164-185; PRESUMED INCOMPETENT II: RACE, CLASS, POWER, AND RESISTANCE OF WOMEN IN ACADEMIA 13-73 (Gabriella Gutiérrez y Muhs et al. eds., 2020).

46. See generally Antecol et al., *supra* note 29.

female tenure rates while substantially increasing male tenure rates.”<sup>47</sup> Furthermore, in the same way that tenure clock extensions increased men’s tenure rates while reducing women’s tenure rates, they are certain to result in pay inequities between men and women law faculty if law schools do not think creatively about the impacts of built-in advantages for many male law faculty.<sup>48</sup> After all, both tenure and promotion to full professor often come with a big pay raise. To the extent that women might be using the year added on to their tenure clock while their male peers may not be, women faculty will find themselves making less in salary than the very male counterparts they came in with, and for no reason other than societal gender inequities in their housekeeping responsibilities, both at home and in school service, and in childcare.

Moreover, disproportionate delays in tenure for women are likely to have impacts beyond gender pay disparities. Delayed tenure also means delayed consideration for the “merit badges” of law schools, such as chairs, professorships, and other positions that can come with financial or reputational rewards. Law deans need to be conscious of all of these realities as they are making not only individual annual merit raise decisions on pay, but also decisions about which faculty have earned major honors such as Deans’ Awards, chairs, or professorships. And, delayed tenure also means delay in having one’s voice in faculty meetings and in debates concerning curriculum, hiring, and student policies, which is particularly crucial for those on the margins. If women, particularly women of color, are less likely to speak on contentious faculty governance issues because they have not yet received tenure, many insights, key to gender and racial equity, could go unspoken for and might not be considered as faculties work to develop their curriculums, hires, and policies. Such absences will have detrimental effects on student experience and learning, particularly for women students and students of color, many of whom already feel marginalized within their institutions.

#### CONCLUSION

In all, the COVID-19 pandemic has had a devastating impact on women worldwide. Women law faculty in the United States are no exception, and women of color law faculty face multiplicative burdens in terms of the impact of the COVID-19 pandemic on their advancement within legal academia.

To ensure that the legal academy is not living with the most severe consequences of the pandemic for decades to come, law schools must be proactive in working toward solutions that minimize the perpetuation and, more so, the widening of gender gaps and intersectional race and gender gaps in pay,

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47. *Id.* at 2420.

48. These pay disparities resulting out of differences in the timing of tenure would be on top of existing gender pay disparities. See generally Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 870 (2016); Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENV. U. L. REV. 873, 879 (2014).

tenure, award and honors, and other benefits and factors. The steps that law schools must take should be gender- and race-conscious, accounting for the real challenges,<sup>49</sup> including the many imbalances, that men and women faculty are facing during the pandemic.

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49. A group of women researchers have suggested that higher education institutions should “form Pandemic Faculty Merit Committees to deal with equity issues” instead of adopting gender neutral policies. Texas Tech University, *supra* note 9. The researchers further contended, “Such committees should be proactive, diverse, transparent, informed, and trained in both bias and the institution’s history.” *Id.*

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