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### Comments In Reply

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## Comments in Reply

Richard K. Neumann Jr.

In his response to my article, Dan Subotnik makes five claims:

1. Discrimination can never be inferred from statistics.
2. "The story of women in legal education may well be the greatest story of group professional success ever told."
3. Women sabotage themselves in academic employment because they have children and quit teaching to follow husbands when their husbands switch jobs.
4. Women naturally predominate in off-tenure-track legal writing jobs because legal writing teachers "work[] substantially fewer hours . . . than tenure-track teachers."
5. Men naturally predominate as law school deans and on law school faculties because they have testosterone and don't worry about relationship issues as much as women do.

Let's consider each of these in turn.

### *1. Discrimination can never be inferred from statistics.*

Subotnik's only evidence for this is a quotation from Thomas Sowell. Sowell's only evidence is a list of statistical disparities—virtually all of them irrelevant, such as the Cambodian donut shops—that plainly are not caused by discrimination.<sup>1</sup> If one is looking for non sequiturs, Sowell's own train of reasoning is a giant one. The fact that some or even many statistical disparities are not caused by discrimination does not prove that discrimination can never be inferred from statistics, or even that it usually can't. All it proves is that discrimination cannot be inferred from statistics 100 percent of the time, which is obviously true anyway.

To open any book by Sowell is to find him using statistics in support of almost any proposition he likes, usually without providing details that would allow us to evaluate statistical reliability or validity. Among other things, he uses statistics to argue that discrimination does *not* exist or exists much less frequently than is commonly believed.<sup>2</sup> Sowell thinks that inequalities are

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1. Thomas Sowell, *The Quest for Cosmic Justice* 34–39, 60–68 (New York, 1999) [hereinafter *Quest*]; Thomas Sowell, *Preferential Policies: An International Perspective* 128–43 (New York, 1990).
2. Sowell, *Quest*, *supra* note 1, at 36–39; Thomas Sowell, *Civil Rights: Rhetoric or Reality* 77, 82, 84, 87–89, 92–102 (New York, 1984).

caused by “performance differences” or “differences in luck [or] other factors.”<sup>3</sup> The claim that discrimination can *never* be inferred from statistics is a slogan, not a conclusion derived from dispassionate and comprehensive empirical research and reflection.

The truth is that discrimination or bias is usually not inferable from a *single* statistic standing alone. A single statistic is a snapshot, showing one view of a situation from one angle. To show causation for an inequality, something more is needed. That can come from a comprehensive battery of statistics, showing the situation from many different views and many different angles. (My article provided that.) Or it can come from nonstatistical evidence such as narratives of discrimination. (My article cited several of those.) A multilayered examination like this is considered probative not only among social scientists and statisticians, but also in law.<sup>4</sup>

Statistics dominate social science research for very good reasons. In complex situations statistical evidence is often the most reliable method of figuring out what is really going on beneath the surface of everyday appearances. And statistical evidence is often the best evidence of motives that remain hidden because they are unexpressed or not understood even by the actors themselves. Accordingly, courts rely extensively on statistics to resolve, among other things, environmental impact questions, jury composition disputes, and disparate impact discrimination cases. In my article, the sheer weight of the statistics—no matter what measure is used, no matter how you look at the question—shows similar patterns of disadvantage to women throughout legal education.

2. “*The story of women in legal education may well be the greatest story of group professional success ever told*” (141).

To support this claim, Subotnik notes that although women once were almost entirely absent from law school faculties, they are now 22 percent of full professors, 46 percent of associate professors, and 48 percent of assistant professors. (Like Sowell, Subotnik believes that statistics can prove an absence of discrimination.)

Subotnik ignores, among other things, the following. The associate and assistant professor numbers are misleading because nearly three-quarters of the teaching professoriat are full professors (page 325 in my article). Men disproportionately receive associate professor appointments while women disproportionately become assistant professors (341). Salary data, where available, show women earning less than men, even when controlled for job status and experience (337–39). In the clinical and legal writing fields, where some jobs are tenure-tracked and others are not, men are disproportionately on tenure track and women are disproportionately off (329). Off-tenure-track jobs in general and assistant deanships are overwhelmingly female (324–29).

3. Sowell, Quest, *supra* note 1, at 62.

4. See *Bazemore v. Friday*, 478 U.S. 385, 398–401 (1986); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977); *Int'l Brotherhood of Teamsters*, 431 U.S. 324, 339–41 (1977).

Schools with no off-tenure-track jobs have, on average, higher female percentages of tenure-track faculty (335). Female students earn higher grades than men in college but lower grades in law school (320–22). And a significant number of women believe discrimination occurs (348–51).

Subotnik does not ignore the statistics showing that women apply for tenure-track teaching jobs less frequently than one would expect, and that they receive tenure at lower rates than men. He misinterprets them, as I explain below.

3. *Women sabotage themselves in academic employment because they have children and quit teaching to follow husbands when their husbands switch jobs.*

Subotnik's primary support for this is quotations from two books, Joan Williams's *Unbending Gender*<sup>5</sup> and Susan Estrich's *Sex and Power*.<sup>6</sup> In each case Subotnik takes quotations out of context and misrepresents the source.

Subotnik quotes the following sentence from Williams's book: "It is time to admit that women as a group do not perform the same as men as a group when jobs are designed around an ideal worker with men [having] access to a flow of family work most women do not enjoy" (144). Subotnik then attributes to Williams the belief that (in his words) "women cannot be competitive [and] cannot normally become the 'ideal workers' who earn their promotions." Williams says no such thing, and her position is exactly the opposite.

Williams unambiguously uses the word "ideal" in an *ironic* sense. She does not use the word to describe the best possible worker. She instead analyzes an assumption that employees should not take time off for childbearing or childcare and should be able to work much more than full time and relocate whenever needed for career reasons. She cites evidence showing that this "ideal" kind of worker is *not* more productive than other types, and that employers who are not fixated on the "ideal" have advantages in retention, recruitment, and employee relations in general.<sup>7</sup> Although many women do satisfy the "ideal," it is based on "masculine norms" rather than on true measures of effectiveness. Williams argues that designing a job around masculine privileges in family life constitutes sex discrimination in the same way as "[d]esigning jobs around men's bodies" and thus is a significant factor in "the economic marginalization of women."<sup>8</sup> She also argues that expecting this "ideal" from women violates existing antidiscrimination statutes.<sup>9</sup> And she pointedly quotes Judith Vladek: "Having a baby is used as an excuse not to give women opportunities."<sup>10</sup>

Subotnik similarly misrepresents the Estrich book (146). Nowhere does Estrich "rebuke" young women for refusing to make sacrifices. She talks

5. *Unbending Gender: Why Family and Work Conflict and What to Do About It* 69 (New York, 2000).

6. New York, 2000.

7. Williams, *supra* note 5, at 84–100.

8. *Id.* at 65.

9. *Id.* at 101–10.

10. *Id.* at 69.

instead of women who are discouraged by forms of discrimination that are subtle, often unconscious, and therefore harder to recognize and challenge than the more overt forms of the past.<sup>11</sup> The “drop out in much higher numbers” quotation actually appears in a discussion of sex discrimination and is preceded by “Women are promoted to partner or president less often than men in corporate America.”<sup>12</sup> The “simply don’t want to get to the top” quotation does not reflect a lack of willpower on the part of women. It appears in a discussion of legitimate dissatisfaction with the Dilbertization of many corporate jobs. These distortions misrepresent a book in which the following appears early and prominently: “Every society, Margaret Mead observed, divides tasks between men and women, and while the divisions vary with the society, the rankings don’t. What the men do, whatever it is, is considered more valuable, which makes men more powerful.”<sup>13</sup>

Subotnik also attributes to me positions that I never took. I did not say that “women are not welcome in the dean’s office” (146). I said that although the female percentage of professorial associate deans seems to be about the same as the female percentage of faculty from whom professorial deans are drawn, women are underrepresented among law school deans and overrepresented among nonprofessorial associate deans and assistant deans (323–25 of my article).

I also did not say that “women’s application rate in the Faculty Appointments Register is enough to tell the whole story” of law school faculty hiring (143). Subotnik claims—inaccurately—that “the job success rate for female *tenure-track* FAR applicants is marginally higher than that of men” (143, emphasis added). As I pointed out in my article, the AALS statistics do not include a tenure-track “success” rate (342). Because FAR “success” statistics do not separate tenure-track FAR hiring from non-tenure-track hiring, and because women are the overwhelming majority of non-tenure-track hires (some of which happen through the FAR), we do not know whether those off-tenure-track hires account for the small extra “success” rate shown in Table 23 of my article. Moreover, the FAR “success” rate is an unreliable picture of law school hiring because only about half of faculty hiring occurs through the FAR (342). And the “success” rate hides the fact that men are hired disproportionately at associate professor ranks (341).

Moreover, the numbers on tenuring rates in the first full sentence on page 144 are not from my article. I know of no reliable source of statistics for men and women who “move to another law school,” and the percentages given by

11. For example: “The worst of it, these days, is that you can almost never be sure. Would they treat a man this way, I ask myself all the time. . . . Unconscious discrimination is harder to recognize and more difficult to prove, which makes it a more insidious problem for women.” Estrich, *supra* note 6, at 9–10.
12. The quotation appears on page 10 of the Estrich book, not on page 12 as cited by Subotnik. And other words in Subotnik’s sentence are really Estrich’s, not his, even though they do not have quotation marks around them.
13. Estrich, *supra* note 6, at 5.

Subotnik are not computable from any source cited by me or by him. (The AALS statistics in Tables 17 and 18 in my article show percentages of faculty who failed to receive tenure, were no longer listed at an AALS school, or resigned before decision.)

4. *Women naturally predominate in off-tenure-track legal writing jobs because legal writing teachers “work[] substantially fewer hours . . . than tenure-track teachers” (145).*<sup>14</sup>

Here, and elsewhere in his piece, Subotnik introduces ideas with the word *if*, as though they are possibilities, and then almost immediately treats them as proven facts—even though he hasn’t provided proof. He cites no evidence to support the idea that legal writing teachers work less than tenure-track teachers do. He can’t because both the empirical evidence<sup>15</sup> and the anecdotal evidence<sup>16</sup> emphatically show the opposite. Moreover, Subotnik ignores the other half of the off-tenure-track population: clinicians, who are nearly as disproportionately female as the off-tenure-track legal writing teachers (328–29 in my article). And the truth is that *all* teaching—on tenure track or off, and regardless of subject matter—offers a huge advantage to a parent over law practice: more flexible working hours. A teacher has far more control than a lawyer does over *when* the work gets done.

Here, too, Subotnik misrepresents a source. He cites an article by Maureen J. Arrigo for the proposition that legal writing teachers “may not have the same elite school and law review pedigrees as tenure-track faculty” (145). Here is what Arrigo actually said, beginning on the page Subotnik cites to:

In fact, . . . when viewed as a “total package,” required credentials for LRW’s [legal writing teachers] are often the same as and sometimes higher than those for a non-LRW teaching position. To the extent that the required credentials are “lower,” this typically translates to one being able to get a LRW teaching position even if one did not attend one of the top twenty “professor feeder schools.”<sup>17</sup>

5. *Men naturally predominate as law school deans and on law school faculties because they have testosterone and don’t worry about relationship issues as much as women do.* According to Subotnik, women “lack the psychological makeup for success” because they “seek to establish and deepen relationships with those

14. Subotnik calls legal writing “legal methods.”

15. Jo Anne Durako, A Snapshot of Legal Writing Programs at the Millennium, 6 Legal Writing 95, 108–09 (2000).

16. Along with many others, I might be able to testify on this subject. I am tenured and publish regularly, both articles and books. The hardest work I’ve ever done, by far, was teaching legal writing—even though during that time I wrote nothing for publication. Teaching legal writing consumes enormous amounts of time and effort. Every person I know who has taught legal writing as well as doctrinal courses says pretty much the same thing. And every faculty committee that I have observed examining a legal writing program has come away with new respect for what legal writing teachers do and for how hard the work is.

17. Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs, 70 Temple L. Rev. 117, 155–56 (1977).

around them” while men “attempt to dominate their environments” (147). “[T]estosterone and estrogen are directly implicated in the inability of women as a group to match the success of men in the corporate world”—and this has something to do with lust (148). “The male is programmed to project himself onto life’s stage and take the consequences” while women, because they “must be more cautious . . . in [their] sexual dealings,” look for safe jobs (149).

Merely to repeat this nonsense is to discredit it.

While researching *Women in Legal Education: What the Statistics Show*, I learned that women’s progress in our field has slowed down and in some ways stopped, something that I and perhaps most other people had not realized. I think I had expected to find only pockets of discrimination. The only credible explanation I was able to discover both for the statistics and for my surprise at them is embodied in a quotation that appears on page 351 of my article and which I repeat here because it completes a refutation of Subotnik’s response. We no longer live in an era in which most discrimination occurs openly and loudly; instead it persists

underground . . . in a plethora of work practices and cultural norms that only appear unbiased. They are common and mundane—and woven into the fabric of an organization’s status quo—which is why most people don’t notice them, let alone question them. But they create a subtle pattern of *systemic* disadvantage . . .<sup>18</sup>

Let’s solve this problem. My article mentioned that the ABA Commission on Women in the Profession has urged each school to conduct a gender self-study and has provided a methodology for doing so. That sounds like a good way to start (352).

18. Debra E. Meyerson & Joyce K. Fletcher, A Modest Manifesto for Shattering the Glass Ceiling, *Harv. Bus. Rev.*, Jan.-Feb. 2000, at 127, 128.