Gender and the legal academy in the UK: a product of proxies and hiring and promotion practices

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Gender and the legal academy in the UK: a product of proxies and hiring and promotion practices

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Abstract

In this chapter we examine the differential numbers of men and women in each of the seniority levels of the legal academy with reference to qualitative studies on gender and the legal academy in the literature, and our initial analysis of the UK Higher Education Statistical Agency's systematically collected data derived from all higher education institutions in the United Kingdom. We then apply the human resource management research literature to these data to seek to understand how decision-making in the academy may explain ongoing inequalities. Our research suggests that the continued disparity in male-female promotion trajectories is, at least in part, a function of the way in which talent, merit, or excellence is understood and operationalised in the academy more widely. We posit that the disparity in the numbers of men and women at the higher levels of the legal academy will only be successfully countered once we adopt a more sophisticated approach to analysing what makes an excellent law teacher/researcher/administrator and then develop and promote people on that basis.

INTRODUCTION

The academy has a long tradition of critical discourse about sex, race and other forms of discrimination and how unconscious and not so unconscious biases lead to negative outcomes for those who are not within traditional dominant groups in their society. Indeed, the academy has been one of the key sites of struggle to uncover discriminatory thinking and to posit new ways of being, so as to limit oppressive practices.

In the UK, University College London allowed women to participate in some evening classes from the 1860s and in some mixed classes from the 1872-73 academic year, including some law courses; the women's hall of residence opened in 1882 (UoL Constituent Colleges, 345-59; and see Auchmuty, in this book). Meanwhile, women's colleges had been set up at Cambridge in 1869 (Girton and Newnham) and at Oxford in 1879 (Somerville and Lady Margaret Hall), with small numbers of women entering law almost from the start (Auchmuty 2008). In 1878 University College became the first university in England to allow women to take the same exams and get degrees on equal terms with men (UoL Constituent Colleges, 345-59), and in 1888 Eliza Orme was the first woman in England and Laetitia Walkington in Ireland to gain law degrees (First 100 Years). Yet although women could study law at university, they could not actually become lawyers, as the professional associations excluded them from their own

qualifying examinations. Women had been campaigning for admission to the legal profession from the 1870s and in 1912 Gwyneth Bebb, effectively a first-class honours law graduate from Oxford (which allowed women to take the examinations, but not to get degrees), was chosen as a test case to take the Law Society to court for their refusal to admit women (Auchmuty 2011; Rackley and Auchmuty 2019). She lost, but the case won valuable support for the cause, and after the first world war it was clear that women had proved themselves capable of succeeding in the most demanding university courses and could no longer be denied a public role in law on the grounds of lack of intelligence or expertise. The Sex Disqualification (Removal) Act 1919[1] paved the way for a whole series of 'firsts' for women entering professional, including legal, life: it enabled them to become solicitors (Cruickshank, 2019; Cruickshank, 2019b)), barristers (Bourne, 2019; Goldthorpe, 2019; Lindsay, 2019;) and magistrates (Logan, 2019;) and to sit on juries, and encouraged Oxford to grant degrees to women; Cambridge held out until 1949.

In the academic world, Edith Morley became the first woman appointed as a university professor in Britain in 1908 (in English Language), at University College, Reading, now the University of Reading (Fort, 2016). The first woman to teach law was Ivy Williams, who had also been the first woman to qualify as a barrister, but forswore legal practice in favour of a post as law tutor at Oxford in 1920 (Auchmuty 2008). Frances Moran was appointed professor of law at Trinity College, Dublin (Ireland), in 1925 (Hutchinson 2019), but the numbers of women teaching in university law schools could be counted on the fingers of one hand until well after the second world war, and the first woman law professor in the UK, Claire Palley, was not appointed until 1970, at Queen's University, Belfast (Cownie 2015; Cownie, 2019; and see Cownie, in this book).

This very clear male dominance at the higher reaches of the legal academy persists, in marked contrast to the outcomes that would have been anticipated had the trickle-up theory of equality lived up to its promise. That theory is founded on the principle that once sufficient numbers of women had attended university and earned the qualifications deemed necessary to enter professional life, women would advance at proportionately the same rate as men and be proportionately dispersed at all levels of professional life. By implication, trickle-up theory does not concede any inequality of opportunity once formal barriers to career development are removed, it does not recognise informal structural or cultural barriers. Instead, one would have to infer that women are responsible for their lack of progression in the legal academy given any disproportionate outcomes.

The theory has been largely debunked by academics (Sommerlad 1994 at p. 34; McGlynn 2003 at p. 139; Malleson 2003, pp. 175-190) and in legal professional circles, at least in those sections of the profession that are concerned about diversity, equality and inclusion. Instead, an economic rationalist model is advanced that seeks to uncover unconscious biases or informal structural and cultural barriers within the workplace so as to unlock the economic potential of female talent with the aim of improving firms' profitability (Sommerlad 1998). Workplace

[1] Sex Disqualification (Removal) Act 1919, see section 1: "section 1, which stated that:
A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise), [and a person shall not be exempted by sex or marriage from the liability to serve as a juror]…" The Act removed women's disqualification from the civil service, the university sector and the courts. See Takayanagi 2019)

stratification has subsequently been recognised and viewed through this lens (Ashley and Empson 2013) because this business case for equality and diversity is replete with flaws, not least it is avowedly neo-liberal rather than emancipatory and places equality as a servant of the economy (McGlynn 2000, 2003b; Webley and Duff 2007; Ashley and Empson 2013; Ackroyd and Muzio 2007; Sommerlad 2012, 2002, 1994, Wilkins 2004). Evidence of a causal relationship between gender (in)equality and profitability is also somewhat scant. The best evidence on this appears to be available from the 30% Club, which seeks to ensure that women make up at least 30% of board representation (McKinsey and Company 2007), although this has been disputed (see Buchanan, 2012). But business case and talent management research has injected some new thinking into the relatively intractable structure versus agency debate as regards female attrition from the workplace (e.g. Chullion, Collings and Claigiuri 2010; Howe, Davidson and Sloboda 1998 at pp.399-400), as discussed later in the chapter. And that provides access to innovative ways of thinking about *how* decision-making biases may impede women's progress and promotion, even if it does not offer a particularly useful model through which to understand *why* decision-making biases persist.

STUDY AND METHODS

In this chapter we examine the differential numbers of men and women in each of the seniority levels of the legal academy with reference to others' qualitative studies on gender and the legal academy and our initial analysis of the UK Higher Education Statistical Agency's systematically collected data (HESA data) derived from all higher education institutions in the United Kingdom. We then apply the talent management or human resource management research literature to these data to seek to understand how decision-making in the academy may explain ongoing inequalities. Our research suggests that the continued disparity in male-female promotion trajectories is, at least in part, a function of the way in which talent, merit, or excellence is understood in the academy. We posit that the disparity in the numbers of men and women (and minority groups) at the higher levels of the legal academy will only be successfully countered once we adopt a more sophisticated approach to analysing what makes an excellent law teacher/researcher/administrator and then develop and promote people on that basis.

In this phase of our study we have not considered the individual agency of academics, having not interviewed legal academics about their experience in the workplace or on promotion panels, nor considered individual biographies that may explain how particular people have navigated their career pathways. We note this omission, although consider that in the light of our examination of data derived from the population of 5,335 full-time and part-time legal academics[2], the influence of individual agency would have a lesser influence on macro level outcomes than would informal structural and cultural factors operating within the legal academic community. The human resource management literature interrogates notions of excellence and approaches to developing excellence and how they can be harnessed to support fair recruitment, development and promotion processes in the workplace from a largely structural and in some instances cultural perspective. However, we have sought to reduce the lack of focus on agency by applying insights from the literature in this respect.

[2] This figure is drawn from the 2014-15 data set and may include some senior technical and administrative staff who are considered to be on law school staff in the UK, rather than part of university centrally managed staff numbers.

Our chapter begins with a discussion of the literature on women in the legal academy. It then considers the HESA data on this point, before examining what the literature on 'talent management' may do to assist our ways of thinking about staff development and promotions in higher education. It explores how this may affect women, and what could be done to limit discriminatory thinking and practices.

PREVIOUS STUDIES ON WOMEN IN THE LEGAL ACADEMY

This enquiry developed from our research aimed at understanding some of the problems women and minorities have encountered in the practising legal profession. Much has been written on women lawyers, on inequality of opportunities and the reasons for persistent differences in their status and seniority, as references above indicate. Less research has been undertaken on gender and the legal academy although notable studies by Collier (2002, 1998), Cownie (1998, 2004, 2015), McGlynn (1998, 1999, 2003), Thornton (2013, 2004, 2001, 1998), Vaughan (2016) and Wells (2003, 2001), among others, provide insight into how working practices and trends in higher education, particularly in the common law English-speaking world, have shaped the experience of women law academics and may have led to differential promotion opportunities and career trajectories.

McGlynn (1998) provided one of the earliest studies from England and Wales of women not only in academia, but also in legal practice, and included information detailing the law courses that taught feminist legal studies. McGlynn's data were collected in 1997 directly from Law Schools and, whilst a handful of law schools did not respond, with a 93% response rate the data are robust and reliable. This survey found that in 1997 4 per cent of law professors were women, when in the university sector as a whole, women represented 9 per cent of all professors. McGlynn commented positively that the number of women improved lower down the hierarchy where 'over one third of staff in law schools are women' (1998, p. 41). The implication, at least for some, was that greater numbers of women would become professors with the passage of time there would be an inevitable trickle-up effect.

There was nonetheless a formal and substantive equality gap in UK law schools, given that there were relatively few women in senior positions (Collier 2002, p. 8). Whilst the obvious poor practices associated with recruitment and promotion were acknowledged, Collier's study found that the masculine culture of the law school played a significant role in the lack of female advancement, with routine 'disassociation of women from authority to a persistent benchmarking and assessment of women against a normative 'ideal' employee' (2002, p. 9). This is something we shall return to in later sections, as assessment against the normative ideal is often perceived as good rather than poor practice, and yet is so often a product of unconscious biases leading to unequal treatment. Cownie suggested that the majority of legal academics appeared to 'lack awareness' about gender inequality and 'that awareness of gender issues is not very deeply embedded into the culture of academic law' (2004, p. 91). In the Australian context, Thornton observed that a university senior management heavily dominated by men created an environment in which women felt marginalised yet without management acknowledgement of this as a problem (2004). Collier concluded that 'There is no reason to believe, in short, that the dominance of men has shifted simply because a new intellectual terrain has evolved or because lip service is now paid to gender equity' (2002, p. 28). Without any real appetite to tackle gender inequality, it appeared unlikely that the culture would change.

Previous studies consequently indicated that promotion within the legal academy rested on a favourable assessment against the ideal legal academic, a template drawn up in a masculine culture. And that promotion was in part a function of one's performance being judged highly in the context of tasks deemed hierarchically more elite within that culture. Cownie's (2004) respondents identified progression and promotion requiring research, Collier explained '...the performance and research productivity of all academic staff has become crucial to the status, financial health and, perhaps, the very future of the law school itself.' (2002, p. 15). Interestingly Cownie's informants perceived that being a good academic lawyer involved primarily two skills, first, analysis and 'the need for curiosity' and, second, communication skills (2004, 81), with academics in "old" universities valuing organisational skills and persistence (often through a research lens) alongside these as well. Yet when the respondents were asked about what qualities were required to become a professor, the majority, across both genders and both old and new university sectors, identified significant amounts of research as the key. There is also reference to the need for 'informal contacts' and the ability to network (at p. 87), both of which are more easily achievable when one is part of a dominant group rather than a marginalised one. Cownie (2004) found that the respondents in this study identified the colleagues who were promoted to chairs as 'not good citizens' and considered them ruthless and ambitious, stereotypically masculine qualities (2004, p. 88). Thus, some tasks are not only valued less, they appeared to be valued not at all and should, where possible, be actively avoided if one wants to court promotion.

Since the majority of these studies were undertaken, there have been a number of significant changes in the higher education sector in the UK, a sector now perceived and configured to be a market. These included: the introduction of student fees, which changed the relationship between student and academic; the drive for greater efficiency; and the introduction of new public management systems of governance and surveillance that in time gave way to even more aggressive neo-liberal oversight, all of which led to the removal of 'collegiate self governance' and the imposition of 'top down' management. Ostensibly these changes appear to impact equally on women and men, both experiencing the same demands. Referring to academics using Thornton's term of 'new knowledge worker' (2001b), all academics are now in competition, whether it is with academics from other law schools or from within one's own school (2004). Competition is powered by prestige and, given that that resides in research outputs, grants and awards, the invisible work (pastoral care, good citizenship, mentoring and in some instances teaching) gets pushed to the margins when assessments of merit are being made. Further, to enhance their career both men and women need to be able to demonstrate commitment by working long hours and being available to travel to international research conferences. Collier (2002) concluded that there were physical and psychological costs to academic life and that these are not gender neutral but gendered. The studies point to a culture in which assessments of merit are driven by the value hierarchy placed on different types of task, where measures of performativity are firmly entrenched across the higher education sector and there is little if any understanding of the gendered nature of the inputs or the outputs of these measures.

In this study, we were interested to see whether there had been an increase in female representation within the legal academy, and whether there was anything that we could learn from human resource management literature that would assist in improving the approaches to promotion set out above.

DATA ON GENDER AND THE LEGAL ACADEMY IN ENGLAND AND WALES

To date the discussion of women in the legal academy has tended to focus on the micro level experiences of women and men, their choices and the barriers that they have faced. Much of this research has been biographical, providing detailed data on critical career points and how people make decisions to pursue particular opportunities or to challenge or to recover from decisions that went against them (see Cownie, 2015 and further Archer, 2003). We have sought instead to consider the experience of men and women at a macro level, drawing upon the United Kingdom legal academic population data collected by the UK's Higher Education Statistical Agency (HESA). HESA has statutory responsibility for annually collecting demographic and other data on all staff and students in the UK higher education sector. The annual exercise is mandatory and systematic and provides an aggregated dataset that academics and others may pay to access for research purposes, subject to ethical approval. We requested and analysed both the 2014-15 and 2015-16 law data sets and compared this against the publicly available all-discipline HESA data over the same period. We have also considered our findings in light of the other national study on law academics, by McGlynn, from the late 1990s, to examine whether differences have emerged over just under 20 years.

The table below sets out the most recent data on legal academics coded as having their main discipline as 'Law' working as academics in universities in the United Kingdom. We have displayed the data by gender and ethnicity (according to the HESA groups). There is some overlap between the figures contained in the Heads/Senior Function Leads column and the Professors column, as many Heads of Law Faculty/School/Department will also be Professors. There are also some challenges in terminology use as the two main university sectors, the pre-1992 sector (often referred to as old universities) and the post-1992 sector (often referred to as new universities) use the lecturer titles differently.[3] Both sectors benchmark these roles against a national pay scale of Academic 2-4, and so we have used these in the column headings to minimise confusion. But that does mean that law lecturers in old universities may sometimes fall into the AC2 column and others into the AC3 column.

It may be helpful to put the law-specific data into some context. Across all disciplines in the 2015-16 session there were some 201,380 academics and 208,750 non-academic staff in the UK.[4] Just over 45% of all academics in the UK were women, with relatively more women at junior and mid-levels (92.4% women compared with 82.6% men) and relatively fewer in the higher levels of the academy (5.2% women are professors compared to 13.8% of men; 2.4% of women hold other senior academic posts vs. 3.6% of men).[5] The table below sets out the law specific data, across the main role descriptors that have been nationally agreed across the academy. There are 5,335 law academics in the UK, of which 93% are on the types of contract displayed in this table.

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[3] Old universities have senior lecturers and a very wide band of lecturers, new universities have principal lecturers equivalent to the old university senior lecturers, and divide the old university lectureship into two: senior lecturer and lecturer.

[4] 79% of the academic staff are white, and 84% of the non-academic staff. 69% of academic staff are from the UK compared to 89% of the non-academic staff. Women make up 45.4% of the academic staff population and 54.7%.

[5] HESA Table B Academic Staff (excluding atypical) by source of basic salary, academic employment function, salary range, contract level. Terms of employment, mode of employment and sex 2015-16 available at: https://www.hesa.ac.uk/data-and-analysis/staff/overviews?breakdown%5B%5D=583&year=620&=Apply

Table 1: Higher Education Statistical Agency Data 2015-6 for Law Academics

	Law School Heads	**Professors**	**Readers/ Principal Lecturers Ac4**	**Senior Lecturers/ Ac 3**	**Lecturers /Ac2**	**Totals**
Men	3.4% n84 *61.7%*	20.3% n502 *68.7%*	20.9% n516 *52.0%*	29.6% n731 *44.8%*	25.8% n639 *42.7%*	2,472 *49.6%*
Women	2.1% n52 *38.2%*	9.1% n229 *31.3%*	18.7% n470 *47.7%*	35.9% n902 *55.2%*	34.1% n857 *57.3%*	2,510 *50.4%*
Overall 100%	136 2.7% academics	731 14.7% academics	986 19.8% academics	1,633 32.8% academics	1,496 30% academics	4,982 100%

The percentages displayed in italics are those that indicate the male to female proportions within the specified role, the percentages in roman (standard) text indicate the proportions of men or women within each of the specified roles, but do not compare the two against each other. They provide an indication of the steepness of the pyramid, for example only 2.7% of all law academics within the table are Heads of Law Schools, while 14.7% are professors.

There are additional groups (some managerial contracts n19 and some hybrid administrative roles n34) that are not included here, nor are research and teachings assistants who are not on full academic contracts (n412). This accounts for the disparity in figures at various points of our analysis.

The table shows that there are marginally more women than men in the discipline of law (51%), which is perhaps unsurprising given that the UK law graduate population is also tipped in favour of women (c. 64% of law graduates are female).[6] But even given the similar number of men and women in the legal academy, the senior ranks are dominated by men (62% of all law school heads, 69% of all professors). The legal academy follows a similar pattern to the wider academic population, in that men are concentrated in greater numbers at the senior levels and women at the mid and more junior ones. Given that women are noted to undertake more teaching and more pastoral support, the invisible roles, and that research is valorised above all, this is perhaps to be expected. Women are slightly more likely to hold a management role (head of school) than to hold a research leadership role (professorship), and as discussed below this may be associated with promotion for teaching and academic citizenship rather than the more prestigious promotion route via research excellence.

On analysis of their distribution by contract type (teaching only, teaching and research and research only) too, we note that women make up 55% of those on teaching-only contracts (n 937 of N 1690) and 69% of research-only contracts (n 179 of N 258) although we also note that the research-only contracts tend to be temporary rather than permanent contracts. Teaching and research contracts are relatively evenly split between women and men (48:52). Men and women have relatively similar patterns of full-time and part-time work although women are

[6] For a detailed breakdown of the graduating cohort and subsequent entry and progression in the legal profession see Webley, 2018.

more likely to be part-time than are men: 60% of women being in full-time employment compared with 69% of men. Claims that women are not being promoted due to part-time working practices are unlikely to be substantiated on this reading of the data. Academic institutions have a much better record of permitting flexible working and part-time working than does the practising legal profession; it may be that part-time working leads to a longer promotion track than for full-time academics, as has been noted in private practice, but that is not likely to account for the difference in promotion, given that the data have not been displayed by age or experience.

Female representation within law schools has been strong for many decades and as such women should be at least equal in number to men at all levels of promotion unless one were to conclude that men were naturally more talented than women or that other factors beyond merit are implicated in promotion decisions. When we compare the current data with McGlynn's data from 1997 we note that the proportion of female professors has increased significantly (14% women in 1997; 31% in 2015-16) and the proportion of women at AC4 level including Reader and Principal Lecturer has increased from 40% to 48%. We would suggest, however, that in the context of the AC4 classification, that is likely to be due to an increase in the number of teaching- and student-focused Principal Lecturer roles rather than because more women have been promoted to Reader on the basis of research. We do not, however, have any data to test this hypothesis. And further, promotion on grounds of teaching excellence may be more apparent within 'new universities' that are more teaching-focused than in 'old universities' that are more research-focused and the data do not allow us to differentiate between these two sectors. In short, the masculine culture that the legal education studies revealed above, may have weakened, but there appear to be ongoing inequalities within pathways to promotion and/or promotion processes that have differential impacts on men and women. In the next section we consider whether the literature on human resource management provides access to new ways of measuring merit such that the normative ideal employee is not a masculine embodiment.

IDENTIFYING AND MANAGING EXCELLENCE

A rich research literature has developed within the discipline of human resource management and informed by the psychology of decision-making, which provides a useful foundation for understanding how excellent potential and excellent performance may be identified, measured and developed, but equally how all too often it is misread and wrongly valorised. Most institutions would argue that they seek to attract the best people, but the literature suggests that they have a relatively poor understanding of what excellence means in terms of the skills, attributes and qualities needed across their various strands of activity (Collings and Mellahi 2009 at p. 313). Further, the way in which notions of talent or excellence are conceptualised also play an important role in the way in which candidates are selected, developed and promoted. For example, Tansley's commentary on Gagne's work suggests that talent, or excellence, is often viewed in binary terms. In a western world view it is all too often considered to be the product of a gift or natural aptitude that one has from a very young age (Tansley 2001 at pp. 267-268). This is in stark contrast to Eastern notions of excellence, which are considered to be a function of a high degree of practice and striving, linked to character rather than a gift (Tansley 2001 at p. 267; Gagné 2001; Ashton and Morton 2005 at p. 30;

Heller, Mönks, Sternberg, and Subotnik 2001 at p. 67). Both conceptions have their limitations, and of course they are presented in an essentialist and simplified format here, but the Western conception is more likely to lead to individuals being misidentified as talented or not talented on the basis of proxies for excellence (early awards for academic or sporting prowess at a young age, school grades in unrelated disciplines and which may in reality be more a product of social background and school attended rather than ability and yet are often perceived to be the product of innate ability) (Webley and Duff 2017). These proxies for excellence are more likely to privilege socially dominant groups and disadvantage others (Webley *et al.* 2016). Consequently, our attempts to measure people against criteria for excellence in an effort to reach merit-based results can in fact have the effect of embedding inequality rather than reducing it, unless we treat our use of proxies with a degree of scepticism.

Universities with their public-sector heritage are more likely than private sector employers in the UK to have detailed job descriptions and person specifications, as well as published promotion processes with promotion criteria, against which to recruit and promote. There is a nationally agreed set of role profiles at each of the Ac2-4 levels of seniority in higher education institutions and also a national pay spine benchmarked against these. Universities also have a relatively stable set of proxies that are deemed to be markers of excellence with reference to national metrics such as the Research Excellence Framework (REF)[7], the Teaching Excellence Framework (TEF)[8] and the proposed Knowledge Exchange Framework (KEF). The challenge in the context of the practising profession is to draw up nuanced definitions of excellence so as to be able to develop and evaluate how workplace structures and cultures may be supporting or impeding excellence among their staff (Tansley at 266). In contrast, in the academy the proxies include detailed breakdowns of qualifications by level, awards associated with academic or publication excellence, research grant income (with a hierarchy of prestige for funders, as well as the amount awarded), and esteem factors (such as visiting positions), teaching experience (less clearly defined), whether one has run or convened a course/module (again, less clearly defined), management experience (also defined in somewhat vague terms). The proxies are precise in the context of research but somewhat less well articulated in respect of teaching, which may be linked to the established nature of the REF exercise and the relatively recent introduction of the TEF. It may also, perhaps, be that markers of excellence have coalesced around the high-status work (research) and the low status work (teaching and university administration) has been added as something of an afterthought. Although university rhetoric is now that teaching and research are of equal merit and that promotion on those bases are identical in stature, this is not borne out by the findings of the qualitative studies above. The old hierarchies still persist across all disciplines and HR practices are centrally managed through university policies that apply to all disciplines

In university law schools the challenge may be more to find a means to integrate approaches to developing staff while also holding on to excellence in teaching and research that may not be

[7] This is a national assessment conducted at discipline level (in this case law) to assess the quality of the publications, research impact and research environment at an individual law school level. Law school research quality may then be benchmarked and compared. This REF exercise takes place every 6-8 years, the last one was published in 2014 and the next will be 2021.

[8] This is an assessment of the teaching quality in universities with reference to a range of metrics including the national student survey of student satisfaction with their university experiences. Universities in the TEF pilot have been given one of three teaching award levels: gold, silver or bronze. The TEF pilot has now developed from institution level to discipline level assessment and Law (along with Management) is included within the pilot disciplines.

captured by the metrics of REF, TEF, the National Student Survey (NSS)[9], and DLHE and its successor. And further, to be able to promote academic service both in the academic community (research and teaching mentoring, peer reviewing of research publications and of research grants) and the wider civic community too (in the local community through, for example, public legal education or lending academic expertise to local projects). Law academics are prey to the same unconscious biases as are others, including confirmation bias by which our brains are primed to find evidence to confirm what we believe to be true and to gloss over evidence that is contrary to our view. Unconscious bias is associated with a way of thinking that has been termed system one thinking (Kahnemann, 2011), which makes heavy use of heuristics or proxies designed so as to facilitate rapid decision-making in uncertain contexts. The resulting decisions are not necessarily nuanced or based on solid evidence, but they lead to certainty and action. That is useful in situations where quick thinking is of the essence and where a pause to reflect may lead to negative consequences (think of situations where a person could be in personal danger unless they decide on a swift course of action). But system one thinking is less useful in complex situations that require data to be weighed. System one decision-making draws upon past precedent and so is inherently conservative and derivative. If used for hiring and promotion decisions it is likely to lead to homogenous workforces drawn from dominant groups. Yet it masquerades as objective as it draws on apparently objextive standards (even if these are, really, blunt proxies). This makes it facially appealing. In a law school context, publication prizes and high-status research grants are often taken as markers of academic excellence, although consideration of how access to a high-profile mentor may have assisted a candidate to achieve these awards, or how a period of research leave or a lighter administrative load may have contributed to them is often not part of the assessment process. And teaching prizes and excellent student feedback may count for significantly less.

If we are to challenge inbuilt inequalities the literature suggests that we need to establish system two thinking within out law schools. System two decision-making requires the weighing of a range of data to give rise to a decision, with reflection on how that data is only an indirect measure of excellence and one that hides the social and cultural capital of candidates being considered for the role. It looks at each situation on its merits and is thus both more innovative and more likely to give rise to concerns of risk. It also "feels" more subjective given the weighing of different proxies against each other, and the ensuing debate that follows. It may lead outsiders to question the outcomes that flow from it, as they are not necessarily privy to all the data that was considered and may not be able to "see" how the decision was reached. It would require us to consider how some colleagues benefit from lighter teaching and administrative loads, and thus have more time to be successful at research; and to note that research grant success tends to breed further success, and that initial success can be about who you are working with rather than how strong you are as a sole researcher. It would also necessitate a more nuanced appreciation of the interplay between different facets of academic life, and how these may contribute to the good of the law school in ways that do not always appear as obvious as those that provide individual glory. In short, it is time-consuming, more challenging and requires a degree of honesty about the ways in which some roles and responsibilities are deemed more worthy than others, and the benefits that some colleagues get

[9] This is a national survey of all students in their final undergraduate year, which seeks their views on their satisfaction with their teaching, assessment, course of study, university facilities etc, details of which are published nationally.

at the expense of others, given that some people (usually women) are assigned academic citizenship roles that allow others (often men) to follow more glamorous pathways.

CONCLUSIONS

Senior academic appointments have tended to be grounded in the Western tradition with a focus on the search for apparently innately talented individuals who have had a smooth and swift trajectory through the career ranks from evidence of undergraduate excellence and beyond, with a wealth of individual publications, research grants, and research related esteem factors. Substantial attention has been placed on attracting, hiring and retaining this group of academics, less to developing and nurturing more junior colleagues unless they too have early signs of these markers of excellence (for details of good practice see Fried-Fiori, Manch and Paldziewicz in Mottershead 2003). Colleagues have often historically been expected to self-manage their careers, and junior colleagues to seek out sponsors or mentors who may provide them with research opportunities, rather than teaching opportunities, in which they may shine (see Collings and Mellahi). Were we to consider talent to be a product of years of striving and environment, we may be more inclined to focus on ensuring that the conditions within our law schools were optimal for excellence to flourish and to be developed. We may also be less concerned with seeking out exceptional people, but rather those people with a desire to strive to develop themselves and others. And in doing this, markers of cultural and social capital may have less influence, diminishing the privilege that comes with membership of a dominant group. It would also send a powerful message to our students, that hard work rather than privilege is likely to be the means by which one succeeds.

But how to achieve this? The literature on the psychology of decision-making suggests that we are only likely to challenge our unconscious biases (if that is what they are) by slowing down our decision-making processes, by building in deliberative, reflective decision-making. To do this we would need to recognise that the measures of excellence are "proxies" that we fall back on when we struggle to be able to find ways of measuring excellence in direct terms. And we would treat them as indirect rather than direct measures of excellence which are influenced by social background and thus are not neutral measures. We would also need to have challenging conversations about what we prize and why, what that means for our environment and the behaviour and the people that it privileges. The legal academy would need to be willing to give proper weight for the unseen work, often undertaken by women, that allows others to be able to pursue their own goals knowing that the law school continues to run without them. And that is a much wider conversation to be had within the academy, but one which is must have if it is to stay true to its mission to hold power to account and to challenge orthodoxy.

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