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Engendering Law Faculties

Carl Tobias

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Engendering Law Faculties

CARL TOBIAS*

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I. INTRODUCTION

"It begins in law school."¹ Patricia McGowan Wald, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, observed that many of the problems confronting women in the legal profession, such as alienation, begin in the classroom. She admonished that "law schools have much introspection and outreaching to do—quickly," if the "profession is serious about bringing women into the mainstream with full rights and benefits."² Situated at the portal to the legal profession, law schools are a promising focal point for attacking gender bias in the profession.³ Women

* Professor of Law at the University of Montana. I wish to thank Marina Angel, Jane Baron, Bari Burke, Marc Feldman, and Peggy Sanner for their valuable suggestions and the Harris Trust for its generous, continuing support. Errors that remain are mine alone.

1. Wald, *Women in the Law*, 24 TRIAL 75, 75 (1988).

2. See *id.* at 77.

3. Of course, law schools are not the only locus in which gender bias occurs or could be attacked. See Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 119-22 (1988) (describing how conditions in big law firms have improved for women since large numbers of women first entered practice in the 1970's, but emphasizing that firms have much more to accomplish); cf. Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988) (adjudicating recent Securities and Exchange Commission scandal in which male supervisors allegedly sought sexual favors from female attorneys in exchange for job advancement and engaged in other forms of sexual harassment); Wald, *supra* note 1, at 75 (noting that President Carter appointed 41 women to the federal judiciary during the four years of his administration, but President Reagan named only 31 women during his eight years

professors act as role models for female students⁴ and make law faculties more representative of the profession and of society.⁵

Nonetheless, numerous women have experienced great difficulty securing tenure at many institutions during the 1980's, even though significant numbers of women entered law teaching in that period. There currently is only an imperfect understanding of the reasons why women have encountered problems in attaining tenure. It is imperative that an enhanced appreciation of these difficulties be developed. If the problems are allowed to persist, the career and the personal well-being of every woman who considers seeking tenure are jeopardized, legal education's commitment to fairness is threatened, and the prospects for improving the treatment of women in the legal profession are reduced.⁶

The first section of this piece examines data pertinent to the tenuring of women faculty in law schools. The analysis reveals that although women have achieved some progress, many problems remain. The second part assesses possible reasons for the difficulties witnessed and potential solutions to them. The concluding section offers suggestions for the future.⁷

in office, despite a dramatic increase in the number of women attorneys between 1981 and 1989).

4. Forty-one percent of first-year law classes were women in 1986. See OFFICE OF CONSULTANT ON LEGAL EDUCATION, A.B.A. ENROLLMENT STATISTICS AT ABA APPROVED LAW SCHOOLS, 1947-86 (1987).

5. See Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMPLE L. REV. 799, 806 (1988); Czapskiy & Singer, *Women in the Law School: It's Time for More Change*, 7 LAW & INEQUALITY 135, 136 (1988); Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226, 245 (1979); Zenoff & Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869, 870, 901 (1983).

6. It is crucial to keep at the center of analysis and thought the individual women denied tenure. The costs to them have been enormous. Moreover, law schools and especially law students have been deprived of the substantial abilities and the unique perspectives women faculty can bring. See Angel, *supra* note 5, at 806.

7. I rely most in this essay on the work of Angel, *supra* note 5; Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); and Zenoff & Lorio, *supra* note 5. For a valuable collection of articles addressing topics important to women in law schools, see *Women in Legal Education—Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. 1-193 (1988). Two helpful books which include historical accounts of women as students, faculty, and practitioners are C. EPSTEIN, *WOMEN IN LAW* (1981), and K. MORELLO, *THE INVISIBLE BAR* (1986).

Many people are treated as second class citizens in law schools, and much more attention must be devoted to the issues affecting them. That work, however, is beyond the scope of this piece, although some ideas offered here will be applicable. For representative work on minority law faculty, see Chused, *supra*, and *The 1985 Minority Law Teachers' Conference*, 20 U.S.F. L. REV. 383 (1986). For representative work on women law students, see Weiss & Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988), and Project,

II. PROGRESS AND PROBLEMS

The dearth of tenured female faculty is the most acute problem affecting women in legal education.⁸ In the period encompassing the 1980-81 and 1986-87 academic years, the number of full-time women faculty increased from 13.7% to 20% with tenured classroom women faculty increasing from 5.8% to 11%; women holding tenure track classroom positions rose from 23.5% to 33.8% and contract status legal writing women faculty increased from 48% to 68.4%.⁹ These figures do represent some progress; the number of women in tenure track classroom faculty positions approximates the relevant number of women graduates.¹⁰

Nonetheless, certain problems remain. One-fifth of the law schools have made significantly less progress than others,¹¹ with the so-called "elite institutions" comprising over one-quarter of this laggard group.¹² Although the national tenure rates for female and male junior faculty are nearly identical, the similarity masks certain inherent difficulties.¹³ Even those schools that appoint women in significant numbers may ultimately deny them tenure.¹⁴

Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates, 40 STAN. L. REV. 1209 (1988).

8. See, e.g., Angel, *supra* note 5; Czapanskiy & Singer, *supra* note 5, at 135, 146; Wald, *supra* note 1. I rely in this section on the thorough and recent data contained in Professor Chused's work. See Chused, *supra* note 7; cf. Angel, *supra* note 5 (recent scrutiny of five northeastern schools). For earlier data on and analysis of women faculty, see Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RES. J. 903 (1970's data); Weisberg, *supra* note 5 (1970's data); and Zenoff & Lorio, *supra* note 5 (early 1980's data).

9. See Chused, *supra* note 7, at 557. For a discussion of the difficulties entailed in compiling such data, see Angel, *supra* note 5, at 803; and Zenoff & Lorio, *supra* note 5, at 871-74.

10. See Zenoff & Lorio, *supra* note 5, at 871-74 (noting that the percentage of women in tenure-track positions in the 1986-87 academic year should have been 35% according to a sex-equity formula premised on the number of women graduates in 1981-82).

11. In 1986-87, these schools had proportionally less women than the 1981-82 national average of 12%. See Chused, *supra* note 7, at 548-52.

12. Everyone's list of elite schools varies. Because I rely substantially on Professor Chused's data, I also rely on his list of these schools. See Chused, *supra* note 7, at 549 n.65. Professor Chused found that "[o]ver thirty-five percent of the 'high prestige' law schools have less than thirteen percent of their teaching slots occupied by women, [while] [o]nly about eighteen percent of all other schools may claim that dubious distinction." *Id.* at 549.

13. See Chused, *supra* note 7, at 550-52; cf. Angel, *supra* note 5, at 805 (reporting that between 1970 and 1987, five northeastern schools tenured 31% of eligible women candidates and 60.5% of males).

14. See Chused, *supra* note 7, at 551; Czapanskiy & Singer, *supra* note 5, at 144. Recent, controversial tenure disputes involving women at several elite institutions appear symptomatic of the problem. See Tobias, *Respect for Diversity: The Case of Feminist Legal Thought*, 58 U. CIN. L. REV. 175 (1989) (discussing disputes at Harvard, Pennsylvania, and Yale); cf. Chused, *supra* note 7, at 552 (suggesting that limited progress made by elite schools indicates that tenure may be a problem for many women).

Women now occupy two-thirds of the legal writing positions, a growing area of legal education.¹⁵ These jobs, however, pay less, afford minimal job security, and are accorded lower status. Moreover, three-quarters of the occupants ultimately leave teaching.¹⁶ Many schools appear to "track" women into these positions, paying the writing instructors little and then releasing them.¹⁷

Law schools should do more to welcome women. An academic career, especially in contrast to one in large firms, affords numerous professional rewards and personal advantages. Law school endeavors can be more satisfying than private practice, particularly as law firms increasingly resemble big businesses. Members of law faculties have greater freedom to select the projects on which they labor. Professors work with individuals who will lead the profession, and they are not obligated to amass thousands of billable hours. Legal education also offers the flexibility to schedule classroom teaching or office hours in ways that free blocks of time for scholarship and for working at home. This flexibility should appeal to lawyers with significant familial responsibilities.¹⁸

III. REASONS AND SOLUTIONS

A. *Appointments*

Although the problems attending appointment appear less compelling than those pertinent to advancement and tenure, at least twenty percent of law schools must significantly increase the number of women on their faculties.¹⁹ This lack of progress in appointing women to law faculties is surprising because many women graduates have credentials that law schools traditionally have valued: degrees from prestigious schools, law review participation, high grades and other academic honors, and judicial clerkships.²⁰

15. See Chused, *supra* note 7, at 552-55.

16. *Id.* at 553. Professor Chused observes that these data do not necessarily mean that the jobs are undesirable. Legal writing positions attract many capable applicants who may prefer short term employment and many who do not envision an academic career and, thus, could be expected to leave teaching. *Id.* at 553-54.

17. *Id.* Professor Chused could not test this hypothesis completely but urged schools to scrutinize appointment processes for gender stereotyping which may be moving women to assume these jobs. *Id.* at 554-55.

18. I am saying neither that women ought to enter law teaching for these reasons nor that the flexibility for women with familial obligations approaches what is needed. For a helpful analysis of these issues, see Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care*, 35 J. LEGAL EDUC. 568 (1985).

19. See *supra* note 14 (suggesting that the problems are less compelling in part because most elite schools appoint women at the same rate as others).

20. There is some disagreement over this. Compare Angel, *supra* note 5, at 808 (studies

One possible explanation is that many appointment committees are predominantly male.²¹ Excuses frequently offered are the lack of qualified women or the dearth of openings.²² These reasons, however, are contradicted because numerous faculties have attained gender diversity, many women graduates have made significant achievements, and there is substantial turnover in legal education.²³ All law schools must continue recruiting and hiring additional women, experimenting with creative recruitment techniques, expressly designating more openings for women, and stating publicly that appointing women faculty is crucial.²⁴

B. Tenure

Comprehension of the difficulties facing women who seek tenure is complicated by many factors, such as the complex, subtle nature of gender relations in a profession women only recently entered in large numbers²⁵ and the lack of thorough, current, and accurate data. It is possible, however, to identify and provide explanations for the most pressing difficulties and to suggest solutions.

1. THE SETTING

The milieu in which women attempt to secure tenure warrants description. The time commitment female faculty must make to attain tenure can create substantial pressure, although female faculty probably labor under less intense pressure than women seeking part-

show women's academic standing as high as men's) with Zenoff & Lorio, *supra* note 5, at 896 (women underrepresented in hiring criteria).

21. For examples of blatant gender bias, such as premising decisions on candidates' physical appearance, and subtler forms of discrimination, including the myth of the perfect candidate, see C. EPSTEIN, *supra* note 7, at 230-33; and Weisberg, *supra* note 5, at 242. Other reasons are examined in Zenoff & Lorio, *supra* note 5, at 875-78, 890-96, and in Weisberg, *supra* note 5, at 237-44. Weisberg concludes that the greatest problem may be faculties' failure to see the appointment of women as a problem. *Id.* at 244.

22. For a discussion of the excuses, see Angel, *supra* note 5, at 827-28; Chused, *supra* note 7, at 555; and Zenoff & Lorio, *supra* note 5, at 874-78, 890-96.

23. See Chused, *supra* note 7, at 555 (discussing contentions regarding gender diversity and faculty turnover); *supra* note 20 and accompanying text.

24. For discussion of these and other proposals, see Chused, *supra* note 7, at 555; Czapskiy & Singer, *supra* note 5, at 143-44; and Kay, *The Need for Self-Imposed Quotas in Academic Employment*, 1979 WASH. U.L.Q. 137, 138. Cf. Weisberg, *supra* note 5, at 241 (suggesting that schools should seek graduates of non-elite schools and use non-traditional criteria).

25. For example, when the Modern Language Association adopted an anonymity rule for submissions, the acceptance rates of papers written by women increased enormously. See Zenoff & Lorio, *supra* note 5, at 884; cf. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1188 (1988) (noting that identical scholarly articles are evaluated less favorably when the author is thought to be a woman).

nership in large firms.²⁶

The stated requirements of scholarship, teaching, and public service constitute the criteria of the formal tenure process,²⁷ while the unarticulated criterion of collegiality is the informal component.²⁸ The requirements are difficult to articulate and apply. Commentators have asked "whether scholarship 'entails publication and if so what successful publication requires. Does teaching refer to breadth of fields covered or popularity with students or student achievement; or some combination? Does collegueship mean fitting in? Is conformity a measure of success?'"²⁹

Women are comparative newcomers to male-dominated legal institutions. Many senior faculty may have different substantive interests, methods of legal analysis and teaching, political views, and ways of interacting than junior women. Thus, they may scrutinize and fail to appreciate a woman's scholarship, teaching, political activities, and behavior.³⁰ The women find themselves in numerous double binds: their efforts may be considered too feminist or too feminine.³¹ Unfortunately, relatively few senior professors serve as mentors, offer-

26. See Kaye, *supra* note 3; see also C. EPSTEIN, *supra* note 7, at 175-218, 265-302, 315-26; K. MORELLO, *supra* note 7, at 194-217.

27. A panel of tenured faculty assesses the service, teaching, and scholarship of a junior professor at discrete junctures in her career, usually by observing teaching, reading publications, and reviewing written evaluations of students and colleagues. See Angel, *supra* note 5, at 830-34; Biernat, *Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment*, 20 U.C. DAVIS L. REV. 501, 509-11 (1987). For additional examination of tenure criteria and decision making, see Angel, *supra* note 5, at 830-34; and Biernat, *supra*, at 509-11, 517.

28. The informal process begins with initial appointment and includes informal observations that lead tenured professors to form opinions of junior faculty. See Angel, *supra* note 5, at 830-32; Biernat, *supra* note 27, at 509-11; Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223 (1984).

29. Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J. L. & EDUC. 429, 436 (1976); see also Angel, *supra* note 5, at 832 n.202. There also are difficulties of consistent application, of the value assigned to each criterion, and the activities satisfying them. Moreover, there are difficulties with candidate evaluations which can vary based on institutional expectations. Thus, tenure decision making can exhibit certain characteristics of a shell game.

30. This is at once obvious and subtle. Many aspects of gender relations in professional contexts are not yet fully understood. See Angel, *supra* note 5, at 830; Rhode, *supra* note 25, at 1178-92. For example, recent social science research indicates that individuals in working environments generally are more comfortable with persons of the same gender; untenured women who are being evaluated could be disadvantaged. See B. SANDLER, *THE CAMPUS CLIMATE REVISITED: CHILLY FOR WOMEN FACULTY, ADMINISTRATORS, AND GRADUATE STUDENTS* 8 (1986); Rhode, *supra* note 25, at 1178-92.

31. "[Y]ou are tough or you are a wimp [so that a] woman prosecutor is described in the press as 'ferocious'; her male supervisor is called 'fearless.'" Wald, *supra* note 1, at 77; see also Zirkel, *supra* note 28, at 236-37; cf. Rhode, *supra* note 25, at 1189 (analyzing double binds).

ing guidance on matters ranging from scholarship to faculty politics.³² Law students, particularly males, have challenged women faculty's substantive interests, teaching techniques, and credentials; incidents of harassment, hanging obscene posters or defacing legitimate ones, reportedly are increasing, and law school administrations have ignored or even condoned the activities.³³

Junior women faculty appear to have relatively little time for scholarship, perhaps the crucial tenure criterion. Many women have onerous administrative responsibilities or committee assignments.³⁴ Others may have commitments to such resource-intensive activities as clinical programs, moot court, or student counselling.³⁵ Accordingly, the setting in which junior women faculty are expected to advance may not facilitate professional development.

2. PROBLEMS WITH TENURE CRITERIA AND THEIR APPLICATION

a. Collegiality

Collegiality, the unstated fourth criterion, may be more important than the three articulated requirements.³⁶ Collegiality is an amorphous concept, but in the context of evaluating female faculty, it essentially means whether tenured faculty are comfortable with junior women professors—whether they “fit in”—an informal evaluation process that begins on the first day of employment.³⁷ This criterion is problematic because most tenured faculty are men, and because male cultural norms, modes of interaction, and role definitions generally set the standards junior women must satisfy. Even when notions of collegiality do not exhibit blatant gender bias³⁸ or demand that a woman

32. Junior women often lack a “guru of impeccable credentials to defend their ‘scholarship’ against attack, push their virtues, and deflect their opponents.” Wald, *supra* note 1, at 77; see also Angel, *supra* note 5, at 830-36; Czapanskiy & Singer, *supra* note 5, at 145.

33. See, e.g., Angel, *supra* note 5, at 832-33; Wald, *supra* note 1, at 77; Zenoff & Lorio, *supra* note 5, at 879-80.

34. See C. EPSTEIN, *supra* note 7, at 233; Czapanskiy & Singer, *supra* note 5, at 144; Zenoff & Lorio, *supra* note 5, at 884. A junior woman may be the lone woman on important committees, such as appointments.

35. See Angel, *supra* note 5, at 833-34; Wald, *supra* note 1, at 77. These temporal constraints are exacerbated when there are few professors or practicing attorneys working pro bono on issues important to women. See Czapanskiy & Singer, *supra* note 5, at 144. Women also devote more time than men to class preparation. See E. ASHBURN & E. COHEN, *THE INTEGRATION OF WOMEN INTO LAW FACULTIES* 160 (1980). Moreover, women may have heavier course loads, teach more unrelated courses, or be asked more often to vary their course offerings. See Zenoff & Lorio, *supra* note 5, at 884; see also Angel, *supra* note 5, at 823.

36. See Angel, *supra* note 5, at 830-32; Zirkel, *supra* note 28.

37. See Angel, *supra* note 5, at 830-32 (analysis of “fitting in”); *supra* note 28 and accompanying text (discussion of collegiality).

38. For examples that do, see C. EPSTEIN, *supra* note 7, at 232-33; and Angel, *supra* note 5, at 823-24.

act like one of the boys,³⁹ these concepts remain male-oriented. They range across a broad spectrum. Some may be as apparently innocuous as not knowing the latest sports scores, or that when someone refers to Tribe, he means the Cleveland Indians, not the Harvard law professor. Collegiality can also involve matters of faculty politics as basic as counting votes on a specific issue or as important as the question whether the faculty should exercise most of the power over the institution. An important, recurring difficulty is how a junior faculty member can avoid offending senior colleagues without compromising her principles. Some of this involves knowing the ropes or how best to satisfy the three other stated criteria. Because the evaluators overwhelmingly are men, junior women, who may have different substantive and political interests and different patterns of behavior, can be disadvantaged.⁴⁰

b. Scholarship

Scholarship is the most significant enunciated criterion at many schools, but it can be ambiguous. Is good scholarship research and writing or actual published work, and if so, how much of what type?⁴¹ The criterion also can be applied subjectively or technically.⁴² Many faculties disparage practical or doctrinal writing, while they only value work in certain substantive fields or within a restricted band on the theoretical spectrum.⁴³ These factors have disadvantaged some female faculty who have made outstanding contributions in areas important to women, such as wife battering and sexual harassment.⁴⁴ Even though these faculty members created new substantive fields or

39. For examples, see B. SANDLER, *supra* note 30, at 7-9; Angel, *supra* note 5, at 830-32; and Wald, *supra* note 1, at 77.

40. For example, one woman who "[a]ll parties seem to agree . . . [had] impeccable credentials" recently was denied tenure. She claimed that "they don't want women who threaten the status quo too much." See *Down and Out in Cambridge*, NEWSWEEK, Apr. 4, 1988, at 66.

41. See *supra* note 29 and accompanying text. Quantity and quality are implicated. Are three articles better than two? Is a 50-page article worth more than a 30-page one? How much does the journal's reputation count?

42. One faculty member's quality scholarship can be another's political polemic. See Tobias, *supra* note 14, at 179. The criteria can be facially so demanding or applied so rigidly that they cannot be satisfied. *Id.* at 178.

43. See Angel, *supra* note 5, at 833 (writing on "women's subjects" disparaged); Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 66 (1987) (stating that to count as theory in established academic institutions, women's work must satisfy criteria of coherence, value neutrality, and abstraction that may embody the false universalism feminists criticize); Tobias, *supra* note 14, at 178 (noting that prized theory must fit within narrow band).

44. See Tobias, *supra* note 14, at 177 n.8 (citing C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) as a classic example).

recast the terms of discourse, their efforts proved too little and too much; they were considered unconventional and overly theoretical.⁴⁵ Ironically, this is the type of cutting edge scholarship that has long been prized; some of the writing in feminist legal thought has received praise as the most interesting in recent legal scholarship.⁴⁶

Women who write in more traditional substantive areas also find themselves in double binds. Work in family law may be criticized as too conventional or deemed "soft,"⁴⁷ although it has long been a very dynamic field.⁴⁸ Some women have even been advised not to write in areas of interest to them and significant to women and society, out of concern that the work's substance may jeopardize their tenure prospects.⁴⁹ Other women, found not to have satisfied the scholarship criterion, may have been thwarted by a lack of uninterrupted time that quality scholarship invariably demands.⁵⁰

c. Teaching

At numerous schools, teaching may be less important for tenure purposes than collegiality or scholarship.⁵¹ The requirements governing teaching also can be unclear. Is good teaching measured by the depth of coverage, command of the substantive material, clarity of its conveyance, or the amount students learn?⁵²

The teaching criterion can be applied subjectively, so that good teaching is in the eye of the beholder.⁵³ Tenured faculty who employ traditional teaching techniques, such as the Socratic Method, or have

45. See *id.* at 177. Debate over candidates focused on whether their substantive work and their analytical methods were proper in law schools and whether their efforts constituted legal scholarship. *Id.* at 179.

46. See, e.g., Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1987).

47. See Angel, *supra* note 5, at 833.

48. See *id.*; Kaye, *supra* note 3, at 117-18. Women who work in this or related fields, such as gender discrimination, or who employ traditional methodologies may be found too conventional by those of divergent political views.

49. See Carter, *Women Face Hurdles as Professors*, NAT'L L. J., Oct. 24, 1988, § 1, at 31, col. 2; see also Wald, *supra* note 1, at 77.

50. These temporal restraints may have been imposed by teaching, administrative, counselling, and other institutional responsibilities, and by family obligations, all of which typically fall more onerously on women. See Angel, *supra* note 5, at 837-39; *supra* notes 34-35 and accompanying text (institutional obligations).

51. Teaching does not always advance the prospects of those seeking tenure. For a general discussion, see Angel, *supra* note 5, at 832-33. For discussion from an explicitly feminist perspective, see Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155 (1988).

52. See Zenoff & Lorio, *supra* note 5, at 879 n.41; *supra* note 29 and accompanying text.

53. A tenure panel at one school actually stated that "[t]o many, acceptable teaching is in the eyes of the beholder, and to some extent that is true. This panel, by happenstance, is the beholder." Angel, *supra* note 5, at 832.

rather conventional views of substantive law or of what students should learn, may not appreciate the innovative teaching methods of junior women faculty. They may unfairly penalize women professors who experiment with less confrontational methods, who choose to explore less traditional subject matter, or who emphasize non-legal concepts or analysis.⁵⁴

Student evaluations of faculty teaching may be used to affirm preconceived assessments by tenured faculty.⁵⁵ If the junior faculty member or her teaching does not favorably impress senior professors but she receives positive student evaluations, the assessments will be discounted, either because students are unable to evaluate the quality of teaching or because the junior professor was easy on them.⁵⁶ Conversely, if the senior faculty members favorably view the untenured professor or her teaching and student assessments are strong, the evaluations will be given more weight.⁵⁷ Because students, especially males, have challenged the teaching methods and substantive interests of junior women faculty, they may well assign these tenure candidates lower ratings for reasons unrelated to the actual quality of their teaching.⁵⁸

d. Service

Work with the bench and bar, with federal, state, and local legislative entities, with community organizations, and with the broader university can benefit law schools.⁵⁹ Nevertheless, many schools consider public service to be the least important tenure criterion. Even when schools accord service greater significance, it is not always clear

54. There is widespread agreement that women faculty are more willing to experiment with new teaching techniques. See, e.g., Angel, *supra* note 5, at 832. For cogent examples of such experimentation, see Hantzis, *supra* note 51, at 162-63; and Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. LEGAL EDUC. 249 (1986).

55. This is one variation on the shell game idea. For a classic description of this process, see Angel, *supra* note 5, at 832.

56. See *id.* (describing students as being spoon-fed, not intellectually stimulated).

57. See *id.* at 833 (If evaluations are good, faculty give them validity.). Perhaps the whole teaching evaluation process should be considered a wash. The relative infrequency of faculty visits and the skewed nature of the educational process that often attends such visits may warrant a rethinking of the evaluation process.

58. See Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 145 (1988); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 43 n.6 (1989); cf. Rhode, *supra* note 25, at 1188 (College students evaluate male professors more favorably than females.).

59. These can range across a broad spectrum from the relatively "selfish," such as securing employment for law faculty or law students, to the comparatively altruistic, such as providing legal services to those who cannot afford them.

what activities count or how they are valued.⁶⁰ For example, those junior women faculty who devote substantial time to public service of a non-traditional nature, such as working with battered women or rape victims, may not be rewarded in tenure decisions.⁶¹

3. SOLUTIONS

There should be attempts to maximize clarity and objectivity in the tenure decision making process. Law schools must provide supportive, collegial environments for all who work there, especially women, and must act promptly to condemn harassment of any kind.⁶²

Legal education must implement positive measures to welcome women as full participants in the law school intellectual community. One important step would be having more tenured faculty serve as mentors for junior women professors. Mentors can advise untenured faculty on the substance of their scholarship, review and criticize draft efforts, and work with them to improve the quality of their writing.⁶³ Senior colleagues can offer helpful guidance on classroom teaching by inviting junior faculty to attend their classes or by visiting untenured professors' classes to give constructive suggestions. Mentors can provide advice on avoiding the pitfalls that come under the collegiality rubric, particularly "faculty politics."⁶⁴ For now, male professors may have to assume the responsibility of serving as mentors at numerous institutions, but the preferable solution, and a goal which all law faculties should strive to meet, is assembling a critical mass of tenured women faculty.⁶⁵

More women must be appointed to tenure committees and to important administrative posts in law schools, especially as deans and

60. See Angel, *supra* note 5, at 833-35 (providing background discussion of issues relevant to women faculty and service); *supra* note 29 and accompanying text.

61. The women may be disadvantaged both in the sense that their efforts will count for little toward tenure and take time away from endeavors, such as scholarship, that are deemed more worthy. See Czapanskiy & Singer, *supra* note 5, at 144. For additional examples of how women faculty may be disadvantaged, see Angel, *supra* note 5, at 833-34.

62. See *supra* note 33 and accompanying text. In numerous situations, not to sanction is to condone. See Wald, *supra* note 1, at 77; see also Czapanskiy & Singer, *supra* note 5, at 136-37 (discussing sexual harassment in law schools and suggesting amelioration and prevention).

63. The advice can be on relatively lofty matters, such as substantive topic selection. Moreover, mentors can provide moral support and assistance in determining which draft is the final draft. Their advice also can be mundane, such as the number of law journals to which a manuscript should be submitted. For advice on intramural draft circulation, see Angel, *supra* note 5, at 833.

64. For helpful treatment of "playing the game," see *id.* at 827-35.

65. For discussion of the critical mass concept, see Chused, *supra* note 7, at 552; and Zenoff & Lorio, *supra* note 5, at 881-82. Cf. Angel, *supra* note 5, at 829-31, 835 (noting the problems of securing critical mass and having tenured male faculty serve as mentors).

associate deans. Occupants of these positions can influence significantly the appointment and tenuring of women faculty and create more supportive environments.⁶⁶

Senior male faculty should be more tolerant of the perceived or actual differences in substantive or political interests of untenured women colleagues and of differences in the ways junior women professors think, teach, or behave. They also should recognize the value of, and be receptive to, women's experimentation in scholarship, teaching, and public service.

Measures should be instituted to ameliorate or remedy temporal restraints that jeopardize junior women's bids for tenure. This is a call for fair treatment, not special pleading. To the extent that law schools, families, and society impose special demands on women's time, women are entitled to reclaim that time or to be evaluated in light of the time available. Law schools should provide direct support in the form of generous pregnancy and parental leave policies or free child care, or should adjust teaching obligations, committee assignments, and administrative responsibilities to reflect women's actual contributions.⁶⁷ Law schools should acknowledge that there are multiple, equally valid career paths to tenure by flexibly tailoring the period in which women can attain tenure.⁶⁸

There should be efforts to make the four tenure criteria clearer and to make their application more objective and consistent.⁶⁹ If significant improvements cannot be achieved, perhaps some of the criteria should be eliminated and new requirements created. For example, respect for women's differences and the value of experimentation

66. For data on women law school deans, see Angel, *supra* note 5, at 802-03; and Zenoff & Lorio, *supra* note 5, at 889. For a telling description of how discretion can be exercised over junior faculty, see Chused, *supra* note 18, at 584 n.32. For discussion of the "glass ceiling" at the top of the legal profession that women have experienced difficulty piercing, see Czapanaskiy & Singer, *supra* note 5, at 135-36; and Wald, *supra* note 1.

67. For helpful suggestions along these lines, see Chused, *supra* note 18; Kay, *supra* note 24, at 138; and Rhode, *supra* note 25, at 1206. Cf. Czapanaskiy & Singer, *supra* note 5, at 142 (Efforts by law schools to accommodate child care responsibilities serve as models for the legal profession.).

68. For a discussion of proposals for the suspension or extension of pretenure probationary periods, see Chused, *supra* note 18, at 585-86; and Weisberg, *supra* note 5, at 238 n.22. There also are creative ways that administrators or faculties can distribute summer grant money, or fashion teaching schedules, to produce large blocks of writing time. For a helpful analysis of these types of proposals, including the idea of part-time tenure positions and actions which recognize both parents' responsibilities, such as creating day care centers, as being preferable to solutions that reduce women's professional obligations, see Zenoff & Lorio, *supra* note 5, at 896-901. For a helpful example of how pregnancy leave and tenure postponement can work in practice, see Carter, *supra* note 49, at 31, col. 1.

69. For helpful suggestions regarding the tenure criteria, see Biernat, *supra* note 27, at 542-48.

might translate into recognition of the validity of junior female professors' work in areas important to women, whether it be scholarship in the field of feminist legal thought or litigation on behalf of a battered women's shelter.⁷⁰

IV. A GLANCE INTO THE FUTURE

Some research performed on the appointment and tenuring of women law school faculty has been anecdotal, impressionistic, speculative, or subjective. This has been necessitated partly by the amorphous character of the processes being evaluated and by the complex, dynamic nature of gender relations in a profession and an institution large numbers of women entered only recently. There is now substantial need for comprehensive, reliable, and refined research on questions significant to women professors.⁷¹

Future efforts should focus on the tenure decision making process. There must be a searching analysis of the four tenure criteria and their application to junior women faculty to ascertain more precisely the ways in which these standards disadvantage women. An important starting point will be an improved understanding of exactly how law school faculty members spend their time.⁷² There is widespread agreement that junior women professors spend substantial time fulfilling law school obligations other than scholarship.⁷³ It would be helpful to know how much time they accord these activities, especially in contrast to male junior faculty and to tenured professors. Moreover, such analysis would yield a better sense of the institutional value placed on these activities and what the time expended means for women's scholarship. If the studies reveal that junior women faculty devote disproportionate amounts of time to law school activities unrelated to scholarship, benefiting the institutions but disadvantaging women by reducing the scholarship they can produce, adjustments of faculty responsibilities or other changes would be indicated.

A 1983 study stated that untenured women faculty wrote fewer

70. These suggestions apply as well to collegiality and classroom teaching.

71. Nothing in this paragraph is intended to be critical of the very valuable work undertaken to date. Even those who have done the work, however, have clearly acknowledged the pressing need for additional work. See, e.g., Zenoff & Lorio, *supra* note 5, at 878, 888 & 894.

72. I do not suggest timesheets or that faculty punch a timeclock. I also recognize that this suggestion could implicate questions of professional and personal privacy and of academic freedom. These are counterbalanced by concerns of equity in fairly distributing responsibilities among faculty members.

73. See *supra* notes 34-35 and accompanying text.

articles and books than junior male professors.⁷⁴ Its authors acknowledged, however, that expert evaluators had cautioned that it is only fair to draw such comparisons after institutions have secured a critical mass of twenty percent women faculty, a figure very few law schools had then attained.⁷⁵ It would be valuable to have a current assessment of junior women's scholarly productivity that considers, for example, quality of scholarship, insofar as it can be measured objectively, particularly in light of the time available.⁷⁶ Similar efforts to evaluate the relative quality of junior women professors' teaching, service, and collegiality should be undertaken.⁷⁷

There is a need for more work to supplement the excellent preliminary research on the critical mass concept.⁷⁸ Additional efforts might consider precisely what numbers constitute such a mass and the importance of having that critical mass, especially in terms of creating congenial working environments.⁷⁹ Securing and maintaining a critical mass must be a priority for law schools, particularly as they experience decreasing flexibility to appoint and tenure women professors, created by the increasingly senior composition of their faculties and resource constraints.⁸⁰

In applying the four tenure criteria, law schools must consider the comparatively recent influx of women attorneys into a profession and institutions previously dominated by males. For instance, the collegiality concept should be reevaluated in light of this development and the consequences of male-female interactions in the professional

74. See Zenoff & Lorio, *supra* note 5, at 881-85. The study only measured publication rates and had no qualitative dimension.

75. See Zenoff & Lorio, *supra* note 5, at 881-82. See generally NATIONAL RESEARCH COUNCIL, CLIMBING THE ACADEMIC LADDER: DOCTORAL WOMEN SCIENTISTS IN ACADEMIA 39 (1979); Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 HARV. WOMEN'S L.J. 1, 10 (1978).

76. I do not underestimate the difficulty of performing such an assessment. For a sense of the difficulties entailed, see *supra* notes 41-50 and accompanying text. For suggestions on evaluation, see Zenoff & Lorio, *supra* note 5, at 881-85.

77. These may be as difficult to evaluate as scholarship. For suggestions as to teaching, see Zenoff & Lorio, *supra* note 5, at 879-81; as to service, see Angel, *supra* note 5, at 833-34; as to collegiality, see Zirkel, *supra* note 28. For suggestions that more work also is needed on women law faculty's formal credentials, promotion rates, and the controversial questions of how women law students' academic accomplishments compare with males and why women are failing to make more progress in the legal profession, see Zenoff & Lorio, *supra* note 5, at 878.

78. See sources cited *supra* note 65.

79. For recent work that gives a sense of what is needed, see Rhode, *supra* note 25.

80. Many have recognized the import of these problems for the future. See, e.g., Angel, *supra* note 5, at 835; Chused, *supra* note 7, at 548 n.53; Fossum, *supra* note 8, at 913-14; Kay, *supra* note 24, at 140-42.

working context.⁸¹ Similarly, the teaching requirement should be reassessed in view of women faculty's experimentation with a broad range of new teaching techniques and their questioning of the validity of confrontational measures, such as the Socratic Method.⁸²

Law schools should study the tenure implications of familial obligations, especially child care responsibilities, for junior women faculty.⁸³ The institutions ought to develop formal policies governing parental leave, child care, part-time employment, and the suspension of time to satisfy tenure requirements.⁸⁴ Given the relative flexibility of the legal academy, law schools should be in the vanguard of thinking and acting to remedy the difficulties that familial duties can create.⁸⁵ Every law school should promptly implement written policies that address the peculiar obstacles that women may confront in areas such as hiring and retention, tenure track positions, teaching responsibilities, administrative obligations, scholarship standards, and maternity leave.

The writers upon whose work I have relied and the Society of American Law Teachers (SALT) have spearheaded work on issues involving women law professors. The Association of American Law Schools (AALS) also has supported some efforts.⁸⁶ Now that the Executive Director of the AALS is a woman, and women comprise a majority of its executive committee, issues of importance to women law faculty have been receiving increased attention.⁸⁷ Indeed, Professor Herma Hill Kay, the Association's President during 1989,

81. See *supra* notes 29-31, 39-40 and accompanying text.

82. See *supra* note 54 and accompanying text.

83. The most comprehensive work to date has been performed by Professor Chused. See Chused, *supra* note 18.

84. See sources cited *supra* note 67. Much of the work done to date on all of the issues relating to women faculty needs updating. Even quite recent work may require future research to have statistical validity. See, e.g., Chused, *supra* note 7, at 552, 554 (calling for more work to confirm tenuring trends and tracking hypothesis for legal writing instruction).

85. I mean that law schools should be in the vanguard relative to other segments of the legal profession. For examples of flexibility and a warning of the risks entailed in employing certain mechanisms, see *supra* note 77 and sources cited therein.

86. For examples as to SALT, see Chused, *supra* note 7 at 537; and Chused, *supra* note 18, at 568. For examples as to AALS, see Angel, *supra* note 5, at 839-41; and Weisberg, *supra* note 5, at 226.

87. For example, President Herma Hill Kay, in each of her President's Messages in the first three AALS Newsletters issued last year, urged law schools and faculties to respond to issues of significance to women law professors raised in this essay. See Kay, *An Agenda for a Shared Future*, AALS NEWSL., Feb. 1989, at 1, 1-3; Kay, *Beyond Diversity: Accepting Difference*, AALS NEWSL., Apr. 1989, at 1, 1-3; Kay, *Thoughts at Graduation*, AALS NEWSL., May 1989, at 1, 1-3. Former Dean Betsy Levin is Executive Director, Professor Herma Hill Kay is immediate past president, and Professors Mary Louise Fellows, Emma Coleman Jordan, M. Kathleen Price, and Dean Kristine Strachan comprise a majority of AALS' executive committee.

appointed a Special Committee on Tenure and the Tenuring Process. That Committee, which has been studying certain issues, namely law faculty diversity, discussed in this piece, is scheduled to publish its final report in November 1990.⁸⁸ The American Bar Association, as the legal education accrediting authority, should support and promote more projects like its commission on women in the legal profession, which has sparked considerable interest in women as law professors, law students, and members of the profession.⁸⁹

V. CONCLUSION

The tenuring of additional women law faculty is integral to the meaningful participation of women in the legal profession. Yet law schools have made halting progress in tenuring women candidates, while current comprehension of gender bias and access to the profession remains only nascent. If the schools implement the suggestions above, they should be able to enrich intellectual life in the legal academy and to expand women attorneys' access to, and mobility in, the legal profession.

88. Telephone conversation with Professor Carl Monk, AALS Deputy Director (Apr. 3, 1990).

89. *See* REPORT OF THE ABA COMMISSION ON THE STATUS OF WOMEN IN THE PROFESSION (1988).