

WHAT WE KNOW, WHAT WE THINK WE KNOW, AND WHAT WE DON'T KNOW ABOUT WOMEN LAW PROFESSORS*

Elyce H. Zenoff**
Kathryn V. Lorio***

An invasion of armies can be resisted but not an idea whose time has come.¹

I. INTRODUCTION

More than a decade ago, equality of opportunity for women in the legal profession seemed to be an idea whose time had come. More than abandonment of discriminatory practices was envisioned by federal executive orders² and by American Bar Association (ABA³) and the Association of American Law Schools (AALS⁴) policy statements. In addition, women were to be *encouraged* to study, practice, and teach law.

The first task for the schools and the law firms in the seventies was recruitment. It was too early to think about such questions as, how many women will accept the profession's invitation? How enthusiastically will

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** Professor of Law, George Washington University National Law Center. B.A. University of Wisconsin; J.D., Northwestern University.

*** Professor of Law, Loyola University of New Orleans. B.A., Tulane University; J.D., Loyola University of New Orleans.

1. V. HUGO, *HISTOIRE D'UN CRIME* (1852).

2. Exec. Order No. 11,246 as amended by Exec. Order No. 11,375 3 C.F.R. 684 (1967).

3. The text of the resolutions adopted by the American Bar Association (ABA) in 1972 can be found in Bysiewicz, 1972 *AALS Questionnaire on Women in Legal Education*, 25 J. LEGAL EDUC. 503 n.1 (1973).

4. The Association of American Law Schools (AALS) adopted "Equality of Opportunity" provisions at its December 1970 meeting. *Id.* at 503.

the bar and the law schools respond to their leaders' call to welcome women? How long will it take to erase the effects of prior discrimination? Will women prove to be as capable, industrious, and dependable as men? Similarly, it was premature to consider whether reasons existed other than the unacceptability of employment discrimination, for encouraging women to become attorneys.

Women responded promptly and enthusiastically to the invitation to become law students. Although they comprised only 7.8% of the first year law students in 1970, six years later their number had almost quadrupled to 28.4%.⁵ The most recent data show another increase. Thirty-eight percent of first year law students in 1982-83 were women.⁶

The impact of women on the profession as a whole also has been substantial. After decades of comprising an unchanging 2 to 3% of all attorneys, their numbers increased dramatically during the seventies.⁷ In 1983, women accounted for 16% of all attorneys⁸ and more than one-third of the youngest cohort.⁹

The number of women law professors increased also, according to the Review of Legal Education (RLE) figures, to 14.7% of all full-time law teachers.¹⁰ For several reasons, they are the focus of this Article. First, many questions asked about the progress and performance of women law teachers are also relevant to students and practitioners. Has discrimination in hiring stopped? Do women teachers stay or drop out of the education profession? Do they advance or remain in entry level positions? Does their performance match that of their male colleagues? Do women teachers present special problems? The second reason for using women law teachers as the subject of this Article is that information about them is more accessible than it is for women law students and practitioners. Third, previous research about women law professors provides a base for measuring their progress and suggests some topics which need study.¹¹ But the most important reason for studying women law teachers is that they serve as role models for students. Consequently, the status and achievements of these teachers affect their students' aspirations, career choices, and contributions to the legal system.

5. Weisberg, *Women in Law School Teaching*, 30 J. LEGAL EDUC. 226 (1979).

6. ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, Fall, 1982 at 40. [hereinafter referred to as RLE].

7. Variations in the number and percentage of women lawyers depend on whether one uses Bureau of the Census or Martindale-Hubbell data. The census count includes anyone claiming to be a lawyer or judge, while Martindale-Hubbell includes only those employed in the legal profession. D. Fossum, *Women in the Legal Profession: A Study of Social Change* 8 n.12, (Summer 1981) (doctoral dissertation available at The State University of New York at Buffalo).

8. Lauter, *Gender Gap Gets Wider on National Law Faculties*, Nat'l L.J., January 9, 1984 at 1, 9, col. 1. This is a two percent growth in the percentage of women lawyers in two years. BUREAU OF LABOR STATISTICS, DEPT OF LABOR, NEWS (Nov. 2, 1982).

9. B. Curran, *Lawyer Demographics* 16, (August 8, 1981) (presentation to ABA Annual Meeting).

10. RLE, *supra* note 6, at 39.

11. In addition to the Bysiewicz article, *supra* note 3 and the Weisberg article, *supra* note 5, the Fossum dissertation, *supra* note 6, the literature on women law professors includes Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RESEARCH J. 903; E. ASHBURN & E. COHEN, *THE INTEGRATION OF WOMEN INTO LAW FACULTIES* (1980); and C.F. EPSTEIN, *WOMEN IN LAW*, ch. 12 (1981).

II. ESTIMATING THE NUMBER OF WOMEN LAW PROFESSORS—TODAY AND TOMORROW

A. *How Many Women Professors are There?*

If the percentage of women who were law students and practitioners was considered small before the seventies, the proportion who were law teachers can best be described as miniscule. When President Johnson issued Executive Order 11,375 in 1967, 39 women were described as tenure-track faculty, 1.7% of the total.¹² In 1972, the ABA said that "all law schools should . . . make substantial efforts to recruit, hire, and promote women professors."¹³ At that time, 5.2% of all lawyers were women, but they accounted for only 3.2% of the law professors.¹⁴ The only topic about women in legal academia on which there is a consensus is that the number and percentage of women faculty have increased steadily since that time. However, no one knows how many women law professors exist or their percentage of the law teacher population because ABA and AALS, the only sources for statistics on the law teaching profession, define law professor quite differently.

Consequently, the number of women law professors varies depending on whether AALS or ABA statistic are used, as well as on which definition researchers use to correct what seem to them to be inaccurate estimates.¹⁵ For example, a comparison of AALS and ABA estimates of the number of law professors for three years shows that each year AALS reported a higher percentage of women than the ABA,¹⁶ while an American Bar Foundation study of professors with tenure-track titles found a smaller percentage of women than either AALS or ABA.¹⁷ Determining the number and percentage of women law professors is thus not a simple matter.

Whether a professor is on the tenure track usually affects eligibility to vote at faculty meetings and ultimately determines employment security.¹⁸ ABA accreditation standards require faculty participation in such matters as faculty selection and tenure, admission, and academic standards.¹⁹ Since only tenure-track faculty vote on these matters at the typical law school, tenure-track status is an important criterion in determining law school citizenship. For this reason, we followed Fossum's approach in her study of law teachers and counted only women who have tenure opportu-

12. Fossum, *supra* note 11, at 906. Fewer than ten black law professors were at white law schools at that time. G.R. SEGAL, *BLACKS IN THE LAW* 235 (1983).

13. Bysiewicz, *supra* note 3, at 503 n.1.

14. Fossum, *supra* note 11, at 906.

15. See Zenoff & Barron, *So You Want to Be a Law Professor?*, 12 J.L. & EDUC. 395 n.65, 397 (1983) for a list of the various definitions and a glossary of law teachers and administrative personnel.

16. E. ASHBURN & E. COHEN, *supra* note 11, at 7-8.

17. *Id.* at 8.

18. Tenure means that a faculty member's position can be terminated "only for adequate cause." AM. ASSOC. OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES OF ACADEMIC FREEDOM AND TENURE.

19. ABA, STANDARDS AND RULES OF PROCEDURES FOR THE APPROVAL OF LAW SCHOOLS, Standard 205 (1979). These standards were adopted by AALS in 1946. 1946 AALS PROCEEDINGS, 66-68 (1946).

nity titles,²⁰ although we define the term somewhat differently than Fossum does.²¹

Only persons listed in the AALS directory as professor, associate professor, or assistant professor, unmodified by any other term such as adjunct, clinical, visiting, or emeritus were defined as tenure-track faculty. Deans, associate deans, and assistant deans were included only if they also held one of the three professorial titles.²² Librarians, although usually tenure-track, were excluded because they constitute a distinct career line. As a rule, they spend their whole career in that role, while deans normally start their law school careers as a faculty member and often return to that position.

Table 1 shows that the number of women with tenure-track titles is consistently smaller than the total number of women listed in the AALS directory, whether the comparison is made with complete directories or "new-hires" supplements.

TABLE 1
WOMEN LAW PROFESSORS—AALS DIRECTORY AND TENURE
TRACK

	Number of Women in AALS Directory Listing	Number of Tenure-Track Women	Percent of Tenure-Track Women
Full Directory:			
1976-77	543	305	56%
1979-80	673	468	70%
1982-83	767	553	72%
New Hires Supplement:			
1975-76	116	54	47%
1981-82	106	49	46%

Although the number of women increases when nontenure-track members of the law school community are counted, of course, the number

20. E. ASHBURN & E. COHEN, *supra* note 11, at 9. A cautionary note is in order. The relationship between titles and tenure has not been studied. Thus, some teachers with opportunity titles may not be on the tenure track.

21. Fossum included the same titles we did but in addition included the following titles we excluded: associate deans without a tenure-track teaching title, professors emeriti, visiting professors who did not have a home school, and professors whose titles were preceded by the designation "clinical." Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RESEARCH J. 501, 503-04. Fossum later further explained her definitions. See E. ASHBURN & E. COHEN, *supra* note 11, at 8.

22. All of the positions we excluded are clearly nontenure-track except for librarians and clinicians. Although clinicians are eligible for tenure in some law schools, they are not in the vast majority. AALS/ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, CLINICAL LEGAL EDUCATION 114 n.147 (1980). At least four types of clinician positions have been identified. "There are clinicians on 'regular' tenure tracks, others on tenure tracks that recognize the different work and contributions of clinical education, still others on renewable or nonrenewable short- or long-term contracts; and finally, a group who continue teaching from year to year with no formal job security." Rivkin, *Faculty Status for Clinical Teaching? Yes*. 23 SYLLABUS 1, 9 (1982).

of men does too. Thus, the important question is whether the percentage of women professors varies with tenure-track status. Table 2 shows that invariably the percentage of women declines when only tenure-track positions are considered. This finding is not solely a result of pre-1972 employment practices. Women still are significantly overrepresented in nontenure-track hiring. A comparison of men and women "new hires" for 1981-82 shows that 54% of the women but only 28% of the men were hired in nontenure-track positions.²³

TABLE 2²⁴
PERCENTAGE OF WOMEN PROFESSORS
TENURE AND NONTENURE TRACK

Year	% Women Faculty	% Women Tenure Track Faculty
1975-76	8.9	6.9
1976-77	9.1	7.5
1977-78	10.6	8.6
1978-79	10.8	9.5
1979-80	12.0	10.5

What, then, can be said about the representation of women law professors? Both their number and their percentage of the law teaching population increases each year, but neither figure is as high as AALS and RLE data indicate. Clearly, their proportion, between 11% and 13%,²⁵ of the teaching population, is too small if the number of available women is measured by either the percentage of women lawyers (16%) or the percentage of current women graduates, a surprising 33% in 1982.²⁶ But should either of these bases be used to determine the appropriate number of women professors?

B. *How Many Women Law Professors Should There Be?*

Ideally, of course, there should be no "appropriate" number of women professors. However, the memory of law schools' previous inhospitality to women has not faded, so each year the number of women faculty is scrutinized in an effort to find out if discrimination has ceased. When the population of women attorneys stabilizes, that question will be easier to

23. We counted the total number of new hires (meaning teachers new at a school as well as first time teachers) listed in the AALS 1981-82 Directory and the number of men and women hired in each track. Colleges and universities are also said to be hiring women in nontenure-track positions in disproportionate numbers, a practice one critic characterized as a "new and refined technique for discrimination." Chron. of Higher Educ., Jan. 18, 1984, at 20, col. 5.

24. The percentages in column one were derived from the RLE for the years in question. Those in column two come from Fossum, *supra* note 11, at 906.

25. The RLE percentage for 1981-82 is 13.6%, ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—1981-1982 at 54, and 14.7% for 1982-83, RLE, *supra* note 6 at 39. Since Table 2 shows that the percentage of tenure-track women was 1½ to 2% lower for the years 1975 through 1979 than the RLE percentage, the assumption was made that this difference also existed in 1981-82. The contrast between Lauter's finding of 13% with RLE's estimate of 14.7% indicates that our assumption is correct. Lauter, *supra* note 8 at 9.

26. RLE, *supra* note 6 at 39. In 1982, 34,844 J.D.s were awarded, 11,493 to women.

answer. For example, if the 33% women figure for J.D. graduates in 1982 continues, eventually that will be the percentage of women in the profession. Then, if women are as interested in and as capable of being law teachers as men, 33% of tenure-track teachers should be women.

In the meantime, however, the percentage of women graduates, the percentage of women in practice for five years, and the percentage of women in the profession bear little relationship to each other because the rate of women entering the bar has increased substantially each year. Consequently, a decision must be made about the percentage appropriate to use for sex-equity purposes until the population stabilizes. Since the average law professor begins tenure-track teaching approximately five years after becoming a lawyer,²⁷ the estimated pool of women should be the percentage who graduated five years earlier. But the progress of women should be measured by their percentage of new teachers,²⁸ not by their percentage of total faculty because law school faculties change only slightly each year. The number of teachers hired at each school is not available now, but it could be collected and reported as part of the annual RLE survey. If the proposed formula for determining sex-equity is adopted, the percentage of women hired in tenure-track positions should be as follows: 1983-84, 25.9%; 1984-85, 28.2%; 1985-86, 30.7%; and 1986-87, 35%.²⁹

Whether these estimated percentages will be realized depends on the accuracy of the following assumptions:

- (1) women are as willing to become and remain law professors as men;
- (2) women perform as competently as male law professors;
- (3) women are perceived by legal academicians as being as competent as men.

The extent to which existing data support or refute these assumptions is explored in the following sections of this Article.

III. RECRUITMENT AND RETENTION

A. *They Won't Come*

One reason advanced for the relatively few women in law teaching is that women prefer private practice or government service. However, no data have been compiled about the number and sex of applicants for law teaching positions and, consequently, the assumption that women are less interested in law teaching than men cannot be verified. Undoubtedly,

27. Fossum, *supra* note 21, at 511-12; *Developments*, 32 J. LEGAL EDUC. 424, 425 (1982).

28. The expression "new hires" is frequently erroneously used as a synonym for "new teachers." The AALS Directory lists people who are new at a particular school. However, many of the "new hires" have been teaching for many years. A school's percentage of women "new hires" should be based on the number of positions it filled in a particular year. However, AALS or ABA should publish annually both the number of new tenure-track teachers and the number and percentage of these new teachers who are women.

29. The targeted percentages were arrived at by finding the percentage of women who received their degree five years before the academic year in question. For example, almost 26% of the persons receiving J.D. degrees in 1978 were women. The percentages of women receiving degrees in 1978, 1979, and 1980 were obtained from E. ASHBURN & E. COHEN, *supra* note 11, at Table 1.14. The statistics for 1980 and 1981 were obtained from the RLEs for 1980-81 and 1981-82, *supra* note 5, at 52.

some women have turned down unsolicited offers from law schools. In fact, after telling a school's hiring committee they were not interested in law teaching, some women received and refused subsequent offers from the same institution in succeeding years.³⁰ However, there is no evidence that the percentage of women refusing unsolicited offers is greater than the percentage of men who do so.

Many women are thought to be interested in a teaching career, only if it can be achieved without relocation. Undoubtedly, some women are not willing to move to enter or to take a new position in law teaching. A single woman may fear social isolation in a small community and a married woman may be reluctant to move because of lack of employment opportunities for her husband or because he is unwilling to move. But whether a mobility sex differential persists today, and, if so, how extensive it is, are unknown. Nor do any data reveal the marital status of men or women law professors or the number of either sex who are members of two career-families. However, two studies of women Ph.D's concluded that the problems of women in academia arise not from marriage, family responsibilities, or limited geographical mobility—the traditional explanations for women's less satisfactory career progress—but from the hiring and promotion practices of educational institutions.³¹

The complaint "they won't come," however, is not limited to geographically isolated law schools. One school, under a consent decree because of its lack of women faculty, insisted for years that it was unable to hire a woman although it is considered an outstanding school and is located in one of the largest cities in the country.

At least for schools in the same city, the problems of obtaining women should be similar since such factors as the population of women lawyers, social isolation, and employment opportunities for spouses are identical. Yet, Table 3 shows that the variation within cities is considerable. Geography, then, is not the barrier; nor, apparently, is low prestige of the school. Three of the seven schools with less than ten percent women faculty are "producer schools."³²

30. Weisberg, *supra* note 5, at 243. Weisberg also questions whether annually contracting people who have expressed their lack of interest constitutes "good faith" affirmative action. *Id.* at 244 n.35.

31. J. AHERN & B. SCOTT, CAREER OUTCOMES IN A MATCHED SAMPLE OF MEN AND WOMEN PH.D's, vi (1981).

32. "Producer schools" are the twenty law schools producing the most law teachers. They are: University of California at Berkeley, University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, George Washington University, Harvard University, University of Illinois, University of Iowa, University of Michigan, University of Minnesota, New York University, Northwestern University, University of Pennsylvania, Stanford University, University of Texas, University of Virginia, University of Wisconsin, and Yale University.

TABLE 3
THE NUMBER AND PERCENTAGE OF WOMEN FACULTY
AT SCHOOLS IN SEVEN CITIES³³

	<u>Total Faculty</u>	<u>No. of Women</u>	<u>% of Women</u>
<i>Boston</i>			
Boston College	27	5	18.5
Boston University	49	7	14.2
Harvard	55	5	9.0
New England	26	4	15.3
Northeastern	13	2	15.3
Suffolk	45	6	13.3
<i>Chicago</i>			
De Paul	33	7	21.3
Illinois Institute of Technology	28	5	12.0
John Marshall	41	4	9.8
Loyola	21	5	23.8
Northwestern	32	4	12.5
University of Chicago	23	1	6.9
<i>Cleveland</i>			
Case-Western	24	5	25.3
Cleveland State	34	4	11.7
<i>Los Angeles</i>			
Loyola	23	2	8.6
Southwestern	25	3	12.0
University of California at Los Angeles	36	3	8.3
University of Southern California	31	2	6.4
<i>New York</i>			
Columbia	35	2	5.7
Fordham	33	4	12.1
New York Law School	30	3	10.0
New York University	51	11	21.5
Yeshiva	32	6	18.7
<i>San Francisco</i>			
Golden Gate	25	7	20.8
University of California at Berkley	43	5	11.6
Hastings	49	7	14.8
University of San Francisco	24	6	25.0
<i>St. Louis</i>			
St. Louis University	23	2	8.0
Washington University	25	4	16.0

33. The total faculty and number of women faculty were taken from RLE 1981-82. Since RLE figures are based on full time teachers, not tenure-track, both the number and percentage of women professors are probably inflated.

B. *They Won't Stay*

Another explanation offered for the small women law teacher population is that they leave the profession because they are offered judgeships or other prestigious positions, because they discover they do not like law teaching, or because their husbands move or child care responsibilities become too demanding. In other instances, the cause for departure seems to be unknown. For example, one law school administrator complained that he could not understand why his school was unable to retain women teachers for more than one or, at most, two years.³⁴ Since the school is one of the most prestigious in the country and is located in an urban area, the problem was puzzling, to say the least. Yet, this problem completely disappeared when the school stopped its practice of hiring one woman at a time in a nontenure-track position and hired three women on tenure-track the same year.

No study has reported the retention rate of legal academics of either sex³⁵ or the extent to which their attrition is voluntary or involuntary. Until this information is obtained, a task beyond the scope of this Article, the questions about the difference in male and female attrition rates and the extent to which lucrative offers induce women to leave academia will remain unanswered.

We did collect and analyze some information about female attrition and concluded that there are substantial differences in the retention rate of tenure-track and nontenure-track women. The retention rate for women who were teaching in 1976 and in 1979 was determined by counting the number in each group who were still teaching in 1982-83. The retention rate for tenure-track women was 50% in the 1976 group and 65% in the 1979 group. The retention rate for nontenure-track women, however, was low. Only 13% of the 1976 group and 30% of the 1979 group were still teaching in 1982. Similar differences between tenure-track and nontenure-track were visible when the retention rate of new hires was calculated. One hundred and sixteen women, 58 tenure-track and 58 nontenure-track, taught for the first time in 1975-1976. Forty-seven percent (27) of the tenure-track but only four percent (8) of the nontenure-track group were still teaching in 1982.

These results show that combining tenure-track and nontenure-track positions for purposes of analysis is misleading. When they are combined, the retention rate appears to be only 31% for the 1975, 35% for the 1976 and 56% for the 1979 cohorts. The data also indicate that a substantial share of female attrition may be attributed to involuntary causes rather than individual preferences for public or private practice, a possibility which is masked if the attrition rate of the two groups is combined. In addition, the data suggest women should be cautious in assessing their

34. Conversation between administrator of a producer school and the first author, June 1978.

35. Fossum estimated that 83% of professors holding tenure-track positions in 1976 had been teaching in 1970. However, this was not a retention study. Nor were these data reported by sex undoubtedly because the number of women tenure-track teachers in 1970 was minute. See Fossum, *supra* note 21 at 503-04.

chances of moving from a nontenure-track to a tenure-track position. Only 7 out of 58 did so between 1975 and 1982.

No evidence exists to support the claim that women are less willing than men to become or to remain law teachers. Next, we turn our attention to the evaluation of the competence of women law teachers to see if lack of ability explains their disproportionately small share of faculty positions.

IV. EVALUATING WOMEN FACULTY

If the extent of the literature concerning faculty competence is an appropriate measure of interest, law teachers are indifferent to the aftermath of their hiring decisions.³⁶ Although the literature contains some information about the paper qualifications of legal academics, the number of hours they work, and their promotion rates, research about teaching ability, publication rates, or the quality of committee work is virtually nonexistent.

We summarized and updated the information on those topics which are discussed in the literature. In addition, we compared the publication record of matched pairs of women and men law professors. Eventually, perhaps, enough information will be available to evaluate law professors' performance and law schools' predictive efforts.

A. *Formal Credentials*

In 1976, women tenure-track teachers were as likely as men to have graduated from prestigious schools, to have attained academic honors, and to have had judicial clerkship experience.³⁷ More than half of them received their first law degree from a producer school and either served on their school's principal law review or were elected to the Order of the Coif. The percentage who had academic honors increased each academic year from 1976-77 to 1982-83³⁸ but the percentage of those with degrees from producer schools declined in each of these years.³⁹ Although the decrease probably was due to the efforts of law schools to increase the number of women faculty, it also may be true that a producer school degree is becoming a less important credential for law teaching.⁴⁰ At present, women law professors, like their male colleagues, are highly credentialed; whether

36. Zenoff & Barron, *So you Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 493 (1983).

37. Fossum, *supra* note 21, at 533.

38. Based on information found in the AALS directories, in 1976-77, 52%, 158 of the 305 women tenure-track teachers were members of their university's law review or awarded Order of the Coif. The percentage rose to 56%, 309 out of 553, for 1982-83. The percentages for nontenure-track were very different. Only 10.5%, 25 out of 238, of the nontenure-track women in 1976-77 had one of these honors. However, the percentage increased to 23%, 45 out of 214, by 1982-83.

39. Based on a count from the AALS 1980 recruitment conference, the percentage of tenure-track teachers with degrees from producer schools declined to 47%, 144 out of 305, in 1976-77 and then declined again to 43%, 240 out of 553 in 1982-83.

40. A survey of people attending the AALS 1980 Recruitment Conference showed that 56.4% of the respondents came from producer schools. Their "offer rate" was less than 51.3%, appreciably lower than the rate of offers made to attendees from non-producer schools, 70.3%. E.J. MILLER, LAW SCHOOL RECRUITMENT CONFERENCE, SURVIVAL MANUAL 20, 47 (1982). Although offer rates to nonrespondents and people not attending the conference are probably different, the

they will continue to possess equal credentials when their percentage of teaching positions increases is uncertain. This issue will be explored in a later section of this Article.

B. *But Can They Teach?*

No consentient criterion accurately measures good university or law school teaching, and no data exist on the number of professors, men or women, who would meet such a criterion.⁴¹ For example, after visiting 703 classes, Professor Kelso identified several teaching styles and suggested that a professor's views on the importance of theoretical as opposed to practical knowledge influenced choice of teaching style.⁴² Kelso did not rate teaching methods or the teachers he observed, nor has any other study evaluated teachers. AALS and ABA inspection teams do visit classes but their purpose is to assess the quality of instruction offered at a school, not to evaluate or rank individual teachers. However, anecdotal data suggest that at some law schools women are perceived as less competent by students, at least at the beginning of their careers.⁴³ To what extent this is a pervasive reaction to all women teachers or solely to women law teachers is unknown, but evidence reveals that some university students consider women teachers in general less able than men.⁴⁴ Information about the basis for these opinions is negligible.

One plausible explanation offered is that students expect a "real" law professor to be a man and are angry when a woman appears instead.⁴⁵ Another suggestion is that some students believe that hiring standards are lower for women than for men; thus, they perceive women as less competent.⁴⁶ Still another possibility is that schools tend to hire "nice" women,

data still suggest that less emphasis may be being placed on the credential of a "producer school" in hiring than in the past.

41. Good teaching may refer to breadth of coverage, popularity with students, student achievement, or some combination of these. Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J.L. & EDUC. 429, 436-37 (1976). Van Alstyne, *Ranking the Law Schools: The Reality of Illusion*, AM. B. FOUND. RESEARCH J. 649, 661-62 (1982) asserts that quantifying or judging teaching skill is impossible.

42. Kelso divided teaching styles into four main groups, which he identified as: (1) rules and principles (lecture); (2) cases as sources of rule and precedent; (3) situation and sense and reason cases; and (4) problems, law development, and lawyer roles. High resource schools had a lower percentage of lecture style professors and a high percentage of situation and problem approaches while the reverse was true in low resource schools. C.D. KELSO, THE AALS STUDY OF PART-TIME LEGAL EDUCATION FINAL REPORT, 179-87 (1972).

43. Fossum reported that at N.Y.U. women scored noticeably lower than men on student evaluations for at least their first few years of teaching. However, a discrepancy existed between student evaluations and faculty observations of classroom performance of women teachers. A similar discrepancy between peer and student evaluations of male teachers was not found except when the men were not white. Fossum, *supra* note 7, at 121. Comments made by some women professors at the 1981 AALS Conference on Women Law Teachers indicated they believed students considered them less capable than their male colleagues.

44. Some social science research on this topic shows a preference for male teachers, especially in large classes. Ferber & Huber, *Sex of Student and Instructor: A Study of Student Bias*, 80 AM. J. SOC. 949 (1975). See also Brant, *Attitudes Toward Female Professors: A Scale with Some Data on Its Reliability and Validity*, 43 PSYCHOLOGY REP. 211 (1978). Brant found that students who were dogmatic or closed-minded tend to hold unfavorable attitudes toward women professors.

45. Fossum, *supra* note 7, at 121.

46. Ashburn & Cohen found that students at the producer schools in their sample thought hiring standards for women at their schools were lower than for men and that women were less

who then are considered not sufficiently forceful or entertaining in large classes.⁴⁷ Last, of course, is the possibility expressed in the story in which the psychiatrist says to the patient, "Unfortunately, you really *are* inferior."

The correlation, if any, between what women teach and how they are perceived as teachers and scholars also is unclear. Initially, women taught a disproportionate number of courses in family law, trusts and estates, and legal research and writing, the classroom counterparts of the so-called women's specialties in law practice. By 1976, they were teaching all substantive areas in the curriculum, including the standard first-year courses, although they still were overrepresented in legal writing, 20% women to 10% men, and family law, 17% women to 10% men. Conversely, they were underrepresented in the prestigious business fields.⁴⁸

Seven years later, the percentage of women teaching legal writing⁴⁹ had increased to 24%. Moreover, in 1982-83, when women constituted at most 13 to 14 percent of all teachers, they represented 34% of the legal writing teachers.⁵⁰ (137 women out of 474 legal writing teachers.) Although much can be said for the view that legal writing courses should be considered among the most important law school offerings and that the resources devoted to it, the credit given, and the skill of the instructors should reflect this belief, in many schools the opposite is true. Frequently, the curriculum contains only one legal writing course, which is awarded few credit hours, is ungraded, receives a small portion of the law school budget, and is not taught by a "real" law professor. Instead, it is often taught by second and third year law students, outside writing consultants who may or may not be lawyers, or teaching fellows.⁵¹ When taught by regular faculty, a disproportionate number of those perceived to have the lowest prestige, the women faculty, are the teachers.

Overrepresentation of women as teachers of other subjects considered nonprestigious, casts further doubt on their status as law professors. For example, a comparison of men and women who have taught the subjects listed below for less than five years yielded the following results:⁵²

competent, while students at non-producer schools had opposite perceptions. E. ASHBURN & E. COHEN, *supra* note 11, at 174. They also reported that over half of the men and women interviewed indicated that students treated men and women teachers differently. "Women undergo torture in the classroom," commented a man who had observed a woman colleague's classes. He reported challenging comments and inattentiveness which did not occur in his classes. *Id.* at 134-37.

47. E. ASHBURN & E. COHEN, *supra* note 11, at 141.

48. Fossum, *supra* note 11, at 912.

49. All women listed as teaching legal research and/or legal writing, legal bibliography, or legal writing and process were considered legal writing teachers.

50. Based on the information found in the AALS directories eighty-four of the 214 (30%) nontenure-track women, were also teaching legal writing. If tenure and nontenure-track teachers are combined, 24% of all women professors were teaching legal writing in 1982-1983.

51. All these sources of legal writing instructors are listed in Graham, *Weaknesses In Legal Writing Create Need for Consultants*, Legal Times, May 30, 1983, at 7. For a student's complaint that faculty do not reward legal writing, see *A Look at Legal Writing*, 14 SYLLABUS 1 (1983).

52. The number of men and women listed in the 1982-83 AALS Director as teaching these courses one to five years and currently teaching them was:

Administrative Law	13%
Antitrust	13%
Domestic Relations	45%
Juvenile Law	44%
Securities	6%
Women and the Law	83% ⁵³

The reasons prestige subjects are so rated, the propriety of these ratings, and their effect on the development of the law are discussed in the last section of this Article—"Do Women Professors Make a Difference?"

C. *And Do They Write?*

The quality of academic writing is even more difficult to evaluate than teaching,⁵⁴ but publication rates at least are measurable. The obligation of law teachers to advance as well as transmit ordered knowledge is mandated by the American Bar Association, the Association of American Law Schools, and university tenure rules.⁵⁵ The number of law professors who respond to this mandate, enthusiastically or otherwise, beyond the obligatory tenure article or articles has received little attention except for Kelso's 1965-66 survey of full-time teachers.⁵⁶ He found that teachers in "high resource" schools had published at least five articles—or a book—and had spent eleven or more hours a week on research while those at "low resource" schools had published less than five articles, and no books, and had spent less than six hours a week in research activities.⁵⁷ He did not report the number of years his respondents had spent in academia, nor did he report publication rates by sex, undoubtedly because few women were teaching at that time.

Some studies of the relative research productivity of men and women in universities exist, but they yield variable and contradictory results. After reviewing evidence that token status in a department may depress productivity, a National Research Council report concluded in 1979 that "until an occasional major research department can assemble at least a critical mass of women faculty . . . we do not believe studies of compara-

Subject	Total	Men	Women
Administrative Law	199	173	26
Antitrust	106	92	14
Family Law	148	82	66
Juvenile Law	70	39	31
Securities	82	77	5
Women and the Law	30	5	25

53. The small number of tenure-track teachers listed for Women and the Law probably indicates that most of these courses are now taught by part-time faculty.

54. The number of times an article or book is cited is considered an index of quality in the sciences, but no citation counts exist for legal literature. Shepard's Law Review Citations may become a resource for citation counts of articles. At present, however, it does not cover all law reviews nor does it identify articles by author. Therefore, how frequently a particular author is cited cannot be determined.

55. ABA STANDARDS, *supra* note 19, at 401. AALS, ASSOCIATION INFORMATION 11 (1982).

56. C.D. KELSO, *supra* note 42, at 110. See Tables 50-52 for publications of deans and Tables 90-94 for publications and hours spent in research by professors. *Id.*

57. *Id.* at 352-53, 380-82.

tive performance will have much validity."⁵⁸ Despite the fact that the typical law faculty lacks this "critical mass," usually defined as 20%,⁵⁹ it is important to begin compiling data on this area of law teacher performance. Therefore, the publication rates of a matched sample of men and women who started tenure-track teaching in 1975-1976 were compared. Because the sample was small, sixteen men and sixteen women, similar comparisons were made for professors who began teaching in 1976-1977 and 1977-1978.⁶⁰

Law professors are not prolific writers if the 118 in our sample are representative of the law teaching population.⁶¹ In fact, as Table 4 shows, 20% of them did not even write the presumably obligatory tenure piece. A preference for book publication is not the reason for the small number of articles because three-fourths of the professors in the sample have not published any books.⁶²

Table 4 also shows that the men in the sample wrote both more articles and more books than the women. However, women are no longer overrepresented in either the zero article or one article group.⁶³ The publication gap between men and women is closing, but women still are not publishing as many articles as men.⁶⁴

58. NAT'L RESEARCH COUNCIL, CLIMBING THE ACADEMIC LADDER: DOCTORAL WOMEN SCIENTISTS IN ACADEMIA 39 (1979), cited in J. AHERN & B. SCOTT, *supra* note 30, at iv.

59. Whenever people of any social type are proportionately scarce (less than 20% of the total) the dynamics of tokenism are set in motion. Tokens are more visible which may lead to pressures to hide . . . achievements . . . or overachieve. They are more likely to be excluded from informal peer networks and to be constantly reminded of their difference. They are also more likely to be trapped in stereotyped roles.

Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 HARV. WOMEN'S L.J. 1, 10 (1978).

60. In a prior study comparing rates of 31 pairs of tenure-track law teachers, men were found to write more. However, information not provided by four men could have changed the results because in each writing category the difference between men and women was 4 or less. E. ASHBURN & E. COHEN, *supra* note 11, at 156.

61. The sample consisted of all women hired in tenure-track positions in 1975, 1976 and 1977 still teaching in 1983. Men were matched for the year they were hired, the year they started school, and whether they were still teaching in 1983. Women who could not be paired were dropped from the sample, which left 118 teachers, 59 pairs. Sixteen pairs were hired in 1975, 19 in 1976 and 24 in 1977.

62. Book publication information came from biographical sketches in the Directory of Law Teachers (1982-83), articles from the Index to Legal Periodicals (1976-1980), and Legal Resource Index (January 1980-May 1983). Although some law professors undoubtedly publish in periodicals not covered by these indexes, most legal scholarship is included in them, and there is no reason to suspect any sexual bias is created by their use.

63. Women's proportion of the "zero articles" group declined from 80% in the 1975 cohort to 50% in the 1977 cohort. Also, women represented 60% of the "one article" group in the 1975 cohort and only 47% in the 1977 cohort.

64. Thirty-seven teachers, 23 men and 14 women, wrote 3 or more articles. Fifteen of them, 5 men and 10 women, wrote only 3 articles, while the other 22, 18 men and 4 women, wrote more. A study of college professors also found that the gap between the percentage of men and women who reported that they did not published anything narrowed, but that among highly productive faculty men continue to exceed women. Astin & Snyder, *Affirmative Action 1972-1982—A Decade of Response*, 14 CHANGE 26, 29 (1982).

TABLE 4
PUBLICATIONS 1976-1983
BY MATCHED PAIRS OF MALE AND FEMALE
TENURE-TRACK TEACHERS

<u>Publications</u>	<u>Male and Female</u>		<u>Male</u>		<u>Female</u>	
	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>
Articles						
0	24	20.3	11	18.6	13	22.0
1	31	26.3	17	28.8	14	23.7
2	26	22.0	8	13.6	18	30.5
3 or more	37	31.4	23	39.0	14	23.7
Totals	118	100	59	100	59	100
Books						
0	88	75	42	71	46	78
1	18	15	11	19	7	12
2 or more	12	10	6	10	6	10
Totals	118	100	59	100	59	100

Why don't women professors publish as frequently as their male colleagues? Many explanations, some of them contradictory, have been advanced. Women, it is said, have less time for writing because of family, especially child care, responsibilities,⁶⁵ or they may be less ambitious because of the belief that they are only the "second career" in the family. Another possibility is that women work as many hours as men but allocate less time to research and writing because they are overburdened with counseling women students or performing committee work.⁶⁶ It may be argued that so few women are on the typical law school faculty that they must choose between leaving important committees, such as faculty appointments, without female representation or devoting more time to committee work than their male colleagues.

Reports also show that women allocate more time to class preparation and, consequently, less time to research than men.⁶⁷ The difference reported between men and women in this respect may be due to the women's belief that they must make extra efforts to convince students that they are authorities. On the other hand, some women believe they have to spend more time in class preparation because they carry heavier course loads, teach a larger number of unrelated courses, or are more frequently asked to vary their subjects to fill curriculum needs. Women subscribing to this opinion are not necessarily complaining of deliberate discrimination in teaching assignments. Instead, some belatedly recognize that they have been either less adept than their male colleagues at negotiations with the dean or, perhaps, have been too interested in being regarded as "nice."

Other explanations of women's lower productivity are not related to the number of hours they work or their time allocations. The possible discouraging effect of token status already has been mentioned. Some evidence reveals that mere identification as a female leads to low evaluations of ability.⁶⁸ For example, The Modern Language Association (MLA) discovered an enormous increase in the submission/acceptance ratios of papers authored by women for presentation at the annual meeting when it adopted an anonymity rule. The increase in the acceptance ratio to a value proportionate to women's representation in the relevant fields was

65. Criteria for tenure, such as publishing, may be more difficult for women full-time professors because they are also employed simultaneously as mothers. Weisberg, *supra* note 4, at 237. See also E. ASHBURN & E. COHEN, *supra* note 11, at 137. Suggestions have been made that the probationary period be extended so that women with child care responsibilities could have additional time to meet tenure requirements. Presumably one of the purposes of this extension is to give them additional time to satisfy publication demands. See Fossum, *supra* note 7, at 124. Also see Weisberg, *supra* note 4, at 238 n.22 for a proposal at Hastings to extend the probationary period "to take into account the problems of women professors." Other women teachers also report problems meeting writing and child care responsibilities. See Neuman, *Wife, Mother, Teacher, Scholar, and Sex Object: Role Conflicts of a Female Academic*, 1979 INTELLECT 302; Mann, *Jugglers*, Washington Post, Dec. 31, 1982, at B1.

66. C.F. EPSTEIN, *supra* note 11, at 233.

67. E. ASHBURN & E. COHEN, *supra* note 10, at 160. Table 4.14, *id.*, shows that men spent five more hours a week on research; however, five fewer men than women responded to the question.

68. Simply being female is undesirable. Researchers have said that when parents are able to choose their children's sex, as many as 140 boys will be born for every 100 girls in the United States. *Study of Sex Selection Gains*, N.Y. Times, May 28, 1983, at 6.

considered such clear evidence of prior sex discrimination that the anonymity rule was extended to all MLA Journals.⁶⁹ This is not the first report of the damaging effect of sex identification on the evaluation of women's abilities. When resumes, identical except for name and sex, were given to chairmen of psychology departments, more men were considered suitable for tenure-track positions than women. Male candidates also were offered the hypothetical positions at higher ranks!!!⁷⁰

The presence or absence of a role model of the same sex also may affect productivity. Seventy-nine percent of the articles written by a randomly selected sample of psychology Ph.D's were produced by the scholars who had dissertation advisors of the same sex, although the number of people in the sample with same-sex and cross-sex advisors was approximately the same.⁷¹

Another variable which may influence women's publication rates is the willingness of men to work with them. The publication lists of four leading law book publishers show that the vast majority of their books are co-authored, frequently by professors who are, or have been, colleagues.⁷² Even when men know women in the same field, it is questionable whether they are as likely to choose a female co-author.⁷³

The law publishers' lists also show a disproportionate number of producer school authors.⁷⁴ This finding may indicate only that the faculty at these schools are more interested in writing or that lighter teaching loads and more research support allow them to be more productive. It is also possible that publishers are more disposed to solicit and accept books from producer school authors. Since few women teach at these schools they would be disproportionately damaged by such policies.⁷⁵ There is some evidence that the sexual composition of an editorial board affects publication decisions. Accordingly, it is worth mentioning that three of the four publishers have no women on their editorial boards and the fourth has only one.⁷⁶

69. J. AHERN & B. SCOTT, *supra* note 31, at iv.

70. Bienen, Ostriker & Ostriker, *Sex Discrimination in the Universities: Faculty Problems and No Solution*, 2 WOMEN'S RTS. L. REP. 3, 6 (1975). A similar study of science chairmen yielded substantially the same results, *Id.* at 6.

71. Goldstein, *Effect of the Same-Sex and Cross-Sex Role Models on the Subsequent Academic Productivity of Scholars*, 35 AMERICAN PSYCHOLOGIST 407 (1979).

72. LITTLE, BROWN AND CO., 1982 LAW SCHOOL BOOKS SUBJECT AND TITLE INDEX (1982); MICHIE CO., 1983 CATALOG OF LAW SCHOOL PUBLICATIONS (1983); and WEST PUB. CO. AND FOUND. PRESS, INC., DECEMBER 1982 DIRECTORY OF LAW SCHOOL TEACHING MATERIALS (1982).

73. See Goldstein, *supra* note 71, at 407-408 and Menkel-Meadow, *Women as Law Teachers: toward the "Feminization" of Legal Education*, in ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING 16, 24-28 (1981) for a discussion of the problems of male-female collaboration.

74. West Publishing Co. and Found. Press, Inc. shows 59% of their law professor authors teaching at producer schools; Little, Brown and Co., 75%; and Michie Co., 42%.

75. According to the 1982-83 AALS Directory, that year only 78 tenure-track women were at the producer schools.

76. See, e.g., Exum, *Affirmative Action and University Presses*, 14 SCHOLARLY PUBLISHING 123, 125-128 (1983). Professor Herma Hill Kay is on the editorial board of Foundation Press.

D. *Evaluation by Promotion and Salary*

Theoretically, promotion and tenure decisions measure faculty competence; however, the only comprehensive study of these decisions found the rejection rate "surprisingly small," considering the fact that these decisions are made when the appointees are relatively new members of the faculty.⁷⁷ Despite the fact that this study is more than twenty-five years old, no current data dispute its conclusion that the likelihood of remaining on a faculty after obtaining an initial tenure-track appointment is very high and in most schools is virtually certain.⁷⁸

The only articles, also quite dated, dealing with rate of tenure and promotion have found that most law schools agree that tenure should be granted within three to five years from the time of appointment⁷⁹ and that the average law teacher spends three years at the rank of assistant professor and two and a half years as an associate professor.⁸⁰ All of this literature pre-dates the existence of substantial numbers of women professors.

The first studies concerned with the status of women faculty found that they had low ranks and usually lacked tenure;⁸¹ however, this finding was attributed to their recent entry into law teaching. At least one author found that when the length of time spent in tenure-track teaching was controlled, no significant disparity was found between the academic rank of men and women or in the number of years they spent as assistant and associate professors before promotion to a higher rank.⁸²

By the 1982-83 academic year, women teachers were quite evenly distributed among the ranks of assistant (35.1%), associate (33.6%), and full professor (31.3%), which seems to confirm the finding that their formerly high percentage of the lower ranks reflected their lack of experience.⁸³ However, Table 5 shows that when the ranks of the 118 professors in our sample are compared, the percentage of women who were not promoted at all is larger than the percentage of men, while a larger percentage of men were promoted to the rank of full professor.

77. AALS, *ANATOMY OF MODERN LEGAL EDUCATION* 217 (1961). The study did not disclose the number of people who were promoted at each school. *Id.* at 171.

78. *Id.* at 21. Anecdotal reports suggest that the writing requirement is taken more seriously, the pre-tenure period is longer and the tenure decision is less automatic but a comprehensive study is needed to test these assumptions. AALS surveyed the law schools on tenure and promotion practices in 1978 and analyzed the data. Unfortunately, a large number of schools did not respond to the survey.

79. Richard, *Faculty Regulations of American Law Schools (A Survey)*, 13 CLEV.-MAR. L. REV. 581 (1964).

80. Ryman, *A Pilot Study on Law School Promotion*, 24 J. LEGAL EDUC. 364 (1972).

81. Bysiewicz, *supra* note 3, at 508.

82. Fossum, *supra* note 21, at 535.

83. Of a total of 553 tenure-track women law teachers listed in the AALS directory, 198 were assistant professors, 186 were associate professors, and 173 were full professors.

TABLE 5
COMPARISON OF PROMOTIONS OF MEN AND WOMEN
FACULTY HIRED IN 1975, 1976, AND 1977

<u>Hiring Rank</u>	<u>Men & Women</u>	<u>Men</u>		<u>Women</u>	
		<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>
<u>Assistant</u>					
Not Promoted	8	2	5.1	6	13.5
Promoted to Associate	43	20	51.4	23	51.1
Promoted to Professor	33	17	43.5	16	35.4
Totals	84	39	100	45	100
<u>Associate</u>					
Not Promoted	10	3	15	7	50
Promoted	24	17	85	7	50
Totals	34	20	100	14	100

The publication rates of the nineteen pairs in which men outranked women were compared to determine whether this factor explained the disparity in rank. Certainly, it is not a complete explanation because the woman was the more productive person in seven of the pairs and in another pair the number of publications was equal. The factors responsible for the lower rank of these women are unknown.

On the other hand, women achieved the higher rank in seven pairs, but a greater number of publications would explain only four of them. Discrimination could be the reason for a woman's lack of promotion when she is more productive than a male colleague and affirmative discrimination may be responsible for a promotion when she is not. Unfortunately, it is possible that sex-based promotion decisions are not infrequent.⁸⁴

The best law professors theoretically earn the highest salaries, so comparisons of salaries of faculty who have taught for equivalent periods of time also could be used to measure competence. However, basic information on the compensation of law professors is not available to members of the profession.⁸⁵ Although this information is a matter of public record in state law schools, individual salaries are not collected and published. The ABA Section on Legal Education obtains salary information from approved schools, but it is distributed only to deans.

Whether women law teachers receive salaries comparable to their male peers and, if not, whether the difference is related to ability is, therefore, very difficult to determine. If they do receive equal compensation, they have the distinction of being virtually the only group of women who are not victims of wage discrimination. Studies of women in colleges and universities indicate that women teachers still are paid substantially less than men; a comparison of men and women lawyers showed that at every age bracket women earned considerably less than men. The average woman worker in the United States earns less than sixty cents for every dollar earned by a male worker and there was more wage discrimination against young white women entering the labor force in 1980 than in 1970.⁸⁶

84. Examples of both types of discrimination have been reported to the authors. The type of discrimination reported, positive or negative, varies with the sex of the reporter. The "reverse" discrimination is not necessarily a desire to increase the number of women faculty per se. Frequently, it stems from fear of bad consequences to the school if tenure or promotion is denied.

85. The Anatomy of Modern Legal Education survey gave salary information for the 1940-1941 and 1956-1957 academic years. AALS, *supra* note 77, at 263-64.

86. J. AHERN & B. SCOTT, *supra* note 31, at 83-84 and Table 7.1. In 1982-83, the average salary of female professors was lower than that of male professors (Professors 15%, Assoc. 8%, Asst. 7%, 3 ranks combined 19%), Chron. of Higher Educ., Jan. 18, 1984, at 20, col. 4. The more recent entry of women into teaching could partially explain the discrepancy between the sexes at the full professor level but not at the lower ranks. Women lawyers aged 21-35 earned \$9,000 less than men. Smith, *A Profile of Lawyer Lifestyles*, 70 A.B.A.J. 50, 51 (1984). In 1980, women still earned only 77% of men's salaries. This discrepancy was identical to that found back in 1972. Astin & Snyder, *supra* note 64, at 29. Affirmative action notwithstanding, from 1975 through 1981, women still earned only \$.60 for every dollar earned by men. Association of American Colleges, *Project on the Status & Education of Women*, 12 ON CAMPUS WITH WOMEN 3 (1983) (quoting United States Bureau of the Census figures on salary differentials between men and women). See also *Women's Pay Lags Further Behind Men's*, N.Y. Times, Jan. 16, 1984 at 1, col. 1 (Chicago Edition).

E. *Invisible Women*

Women hold few positions of power and prestige in the law school world and their absence from these circles cannot be explained solely by their numbers or the length of time they have been teaching. In 1972, 8% of all deans were women.⁸⁷ Their percentage increased to 10% in 1976⁸⁸ and, at least in the area of tenure-track deanships, no further gains have been made.⁸⁹ In fact, the number and percentage of women who are deans of a law school has decreased from five (3.2%) to three despite the substantial increase in the number of women full professors.⁹⁰

A comparison of black deans and women deans is further evidence that the failure of women to achieve this position is related to some factor other than the number of women in academia. In 1981-82, 173 blacks were full-time law teachers, three of whom were deans of predominately white law schools.⁹¹ At approximately the same time, more than four times as many women were full-time professors,⁹² yet they held only the equivalent number of deanships.

Nor are women substantially represented in power positions in the three organizations which most affect law schools, the Law School Admission Council (LSAC), the ABA's Section on Legal Education, and the Association of American Law Schools. Three women serve on the sixteen person LSAC Board of Trustees, but the positions of president, secretary, and all of the committee chairmanships are held by men.⁹³ No woman has ever chaired the Section on Legal Education and no woman serves as an officer, but three women are members of the Section's Council.⁹⁴

Women have achieved somewhat higher representation in AALS. Although only one woman, Soia Mentchikoff, has served as president of the organization, three women are now members of the Executive Committee. Even in AALS, however, women are sometimes almost invisible. Only eighteen women (7%) represent their schools in the House of Delegates.⁹⁵ Women rarely chair standing committees and they are not represented at

87. Bysiewicz, *supra* note 3, at 507-09.

88. Weisberg, *supra* note 5, at 236-37.

89. In the 1982-83 AALS Directory, 27 tenure-track women were deans, of whom 15 were associate deans and 9 were assistant deans.

90. None of the 5 women deans Weisberg listed are still deans. Weisberg, *supra* note 5, at 236-37. The three women deans are Betsy Levin at the University of Colorado, Barbara Lewis at the University of Louisville, and Susan Westerberg Prager at the University of California at Los Angeles. At the 1984 AALS meeting, seven women were reported to be deans of law schools, 8% of the total. Women appear to have a much more significant role in law school administration if nontenure-track positions are included. They then hold 19.5% of all deanships. The reason is that women hold 41.3% of assistant deanships. These positions are not only nontenure-track, but they also may be held by nonlawyers. Professor Rhonda Rivera of Ohio State reported the statistics from her forthcoming article on women in law school administration at the Women in Legal Education Meeting in 1984.

91. G.R. SEGAL, *supra* note 12, at 237.

92. According to the 1982-83 AALS Directory, 767 women were full-time law professors.

93. LAW SCHOOL ADMISSION COUNSEL, LAW SCHOOL ADMISSION BULLETIN DIRECTORY 5-6 (Oct. 1982).

94. RLE, *supra* note 6, at iv-v.

95. Of the 114 schools that listed their delegate to the 1983 Annual Meeting, only 8 were represented by women. AALS, AMERICAN LEGAL SCHOLARSHIP: DIRECTIONS AND DILEMMAS—1983 ANNUAL MEETING 75-77 (1983).

all on one-third of them, including the Committee on Professional Development.⁹⁶ Nor are they seen with any frequency on the podium at the plenary session.⁹⁷

Another committee lacking female representation is the newly formed AALS Advisory Project Committee, whose function is to assist clinical professors seeking tenure-track appointments. The absence of women members on this committee seems particularly unfortunate since they are overrepresented in nontenure-track positions.⁹⁸

No matter which group of women lawyers is considered the appropriate selection pool, new admittees to the bar, practitioners with five years experience or all attorneys, clearly, women are underrepresented in law school faculties. Of those who are hired, few have achieved power or prestige in legal education. Little thought was given to this problem in the past because it was expected to disappear when more women entered the legal profession. It did not.

V. SHOULD THERE BE SPECIAL CRITERIA FOR WOMEN FACULTY?

A. *Traditional Criteria*

The question of whether schools need to change their hiring and tenure criteria to increase the number of women faculty was, and still is, a troubling one. Law schools use the following criteria to predict success as a law teacher, although the emphasis given to any one criterion varies from school to school.

1. Law school attended
2. Class rank
3. Law Review experience
4. Advanced law degrees
5. Judicial clerkships
6. Practice experience with a law firm⁹⁹

Most women who received J.D. degrees before 1970 lacked some of these indicia of success, at least in part because of sex discrimination.¹⁰⁰ Accordingly, during the next decade, law schools had to either change their criteria or postpone adding substantial numbers of women faculty until new attorneys appeared who possessed these qualifications.

Since both our study and Fossum's study show that men and women professors possess substantially the same credentials¹⁰¹ and the number of women faculty is relatively small, it is evident that most schools chose the postponement route. They equated changing criteria with lowering stan-

96. *Id.* at 93-97.

97. No woman has participated in a plenary session for more than five years. AALS Annual Meetings 1979-1984.

98. AALS, NEWSLETTER OF THE SECTION ON CRIMINAL JUSTICE 4-5 (May 1983).

99. Zenoff & Barron, *supra* note 15, at 407. *But see* Zenoff & Barron, *supra* note 36, at 501-08 (criticisms of the way law schools evaluate credentials).

100. "The 'even hand' of discrimination had been raised against women in all sectors of the legal profession." C.F. EPSTEIN, *supra* note 11, at 84. For a detailed description of discrimination against women law students and attorneys, *see id.* at chs. 3, 4, & 5. *See also* Miller, *An Evolving Role in Law Obscurity to Prominence*, 188 N.Y.L.J. 17 (1982).

101. *See supra* notes 35-37 and accompanying text.

dards and feared that the result would be the addition of faculty with inferior teaching and scholarship skills. Women, at least at first, did not advocate lower standards. Instead, they contended that relying solely on credentials which discrimination had denied them was unfair because it perpetuated the discrimination.

Regardless of whether this dispute about hiring criteria was resolved correctly, it would be relatively unimportant today if law schools no longer claimed a shortage of qualified women. However, many schools still report this difficulty,¹⁰² despite the rapid growth in the number of women attorneys, most of whom presumably have been spared the discriminatory practices suffered by their predecessors. Whether these new attorneys meet the law schools' hiring criteria, and if not, why they are failing to do so merits investigation.

1. *Law School Attended*

The percentage of women recipients of J.D. degrees from producer schools increased steadily during the last several years¹⁰³ and is now virtually identical to the percentage of women receiving J.D.s from all schools.¹⁰⁴ Women, therefore, meet the hiring criterion "school attended."

2. *Class Rank*

Apparently, women are less successful in meeting another important criterion, academic honors, at least at the producer schools. During the five-year period, 1976-1980, women constituted 27.2% of the J.D. graduates at those schools but only 23.2% of them ranked in the top ten percent of the class.¹⁰⁵ Although women's underrepresentation was only 3% in the first three years of this period, it increased to 5% in 1979.¹⁰⁶ More alarming yet, the decline was steeper in 1980, when only 21.7% of the women made top ten percent, although they represented 31.4% of the graduating class.¹⁰⁷

Why are women underrepresented in the highest law school ranks at these schools? It is not that they lack entrance qualifications. For example, a dean said to Betty Friedan, "We take in the most brilliant women, of course. Their record of achievement is breathtaking, as are their scores on the admission tests. But for some reason, they don't do as well as they should when they get here. Can you explain it?"¹⁰⁸ This school is not unusual in having well credentialed women students. Nationally, women's LSAT scores and GPA are as high as men's.¹⁰⁹ Although it is possible that

102. *Education Without Representation*, 9 STUDENT LAWYER 11 (May, 1981).

103. The percentage of J.D. graduates from producer schools in the years 1976-1979 was 21%, 25%, 28%, and 30% respectively. E. ASHBURN & E. COHEN, *supra* note 11, at 60.

104. The percentage of women graduates ranged from 24% to 46%. RLE, *supra* note 6, at 52.

105. *Developments*, *supra* note 27, at 424-25.

106. *Id.* at 426.

107. *Id.*

108. Friedan, *Twenty Years After—The Feminine Mystique*, N.Y. Times Magazine, Feb. 27, 1983, at 56. Although Friedan identified the questioner only as a male dean of a Harvard graduate school, it is not unlikely that he was a dean from the law school.

109. LSAS 1980-81 National Descriptive Statistics show men with a slightly higher LSAT

the schools studied accept less qualified women students, nothing indicates that they are doing so. In fact, the only data available, a 1972 survey of eight elite law schools, showed that more women (53%) than men (38%) ranked in the top 10% as undergraduates.¹¹⁰

It is equally doubtful that conscious grade discrimination is the answer. The literature is devoid of charges of grade discrimination in colleges, universities, and law schools. In fact, grading is largely anonymous¹¹¹ at many law schools. Do women place less emphasis on their studies because they consider theirs will be only the "second career" in the family? Do they study less because of child care responsibilities? Or does something in the law school environment depress their performance?

A nationwide survey conducted ten years ago found that "the typical law professor harbors doubts with respect to women law students which extend from concern for lack of equal opportunities in the profession to beliefs that women are either not needed or are unsuited for certain areas of the law."¹¹² If these views still persist, it would be difficult for them not to be communicated in some way to the students. More than coincidentally, women students complain that they suffer from a lack of women teachers to serve as role models, that they are called on less frequently than men, that their class contributions are not taken as seriously, and that every aspect of the law school world, from assigned readings to classroom hypotheticals, is male dominated.¹¹³ Not only are the clients, the lawyers, and the judges almost always referred to as "he," but the law itself sometimes excludes women. For example, torts texts and cases refer not to the actions of a "reasonable person" but to those of a "reasonable man."¹¹⁴ The psychological damage from this pervasive male domination may well result in depressed performance. Nor is the damage limited to students.

score, 545.68 to 540.22, and women with slightly higher GPA score, 3.17 to 3.05. In 1973-74, the mean LSAT score for both men and women was identical, 527, while in 1974-75, women held a slight edge, with 524 to 522. C.F. EPSTEIN, *supra* note 11, at 56. Although a 1972 study commissioned by the LSAS disavowed a sex bias in the test, *id.* at 56, some claim there is one. See White & Roth, *The Law School Admission Test and the Continuing Minority Status of Women in Law Schools*, 2 HARV. WOMEN'S L.J. 103, 106 (1979).

110. Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 572 (1973). In addition, admissions statistics for The George Washington University National Law Center for the past three years showed that men and women were equally qualified. Information supplied by Assistant Dean for Admissions, Robert Stanek.

111. Defining anonymity, however, is a problem. Some schools use anonymous grading only in required courses and/or only in large ones. Although written examinations may be graded anonymously, it is the practice in many in many institutions to allow for alterations based on class participation.

112. Jason, Moody & Schuerger, *The Woman Law Student: The View From the Front of the Classroom*, 24 CLEV. ST. L. REV. 223, 241 (1975).

113. Recently, editors of law school outlines have begun to use devices such as the use of "she" in half of the text to acknowledge the existence of women; others however, like the Journal of Legal Education, take the position that the use of "he" is grammatically correct and therefore should not be changed.

114. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* ch. 5, 3 (1971) is entitled "The Reasonable Man." "In all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman." *Id.* at 150 n.21 (citing A. HERBERT, *MISLEADING CASES IN THE COMMON LAW* (1930)).

Even in criminal cases, with one exception,¹¹⁵ there is little recognition that persistent use of the masculine gender in self-defense instructions gives jurors the impression that they are to measure the reasonableness of a woman's use of weapons to repel an assault by deciding if a man would have been justified in doing so.¹¹⁶ Whether women's apparent underrepresentation in achieving academic honors¹¹⁷ is a result of this "masculinism" or some defect in women's performance, it signifies a serious problem.

3. Law Review

The question of underrepresentation of women on law review staffs attracted considerable attention in 1981 when it was reported that only 12.4% of the Harvard Law Review staff were women although they constituted 30% of the student body.¹¹⁸ Recommendations that quotas or special criteria¹¹⁹ be used to increase women's representation suggest that the underrepresentation was not caused by overt discrimination.

All producer school law reviews were surveyed for this Article to determine if underrepresentation was widespread.¹²⁰ The reviews were asked about the anonymity of the selection process, the criteria used for membership selection,¹²¹ and the number of men and women elected in 1982-83. Women were overrepresented at four schools, equally represented at one, slightly underrepresented at four, and substantially underrepresented¹²² at ten.¹²³ Although only four editors-in-chief were women, this is a significant improvement over a 1979 article reporting that women rarely attain this honor.¹²⁴

The survey revealed that the selection process for law review membership is anonymous. No correlation was found between the method used to

115. *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977), *reh'g denial aff'd*, 91 Wash. 2d 301, 588 P.2d 1320 (1979).

116. *Id.* at 559.

117. No data exists on the performance of women in non-producer schools, a subject which should be investigated, particularly in view of the fact that the percentage of women teachers from such schools is increasing. See *supra* note 38.

118. Law Review Acts to Admit Minority Group Members, Harvard Law Record, Feb. 13, 1981, at 1, 16.

119. *Developments*, *supra* note 27, at 424.

120. The editor-in-chief or another editor had to be contacted by telephone for this information because the list of staff appearing in the typical law review does not indicate the year of selection. The representation of women was determined by comparing the percentage of women accepted to law review for 1982-83 with the percentage of first-year women in 1981-82 at nineteen of the producer schools. The University of Iowa was not included in this part of the survey because students can join the law review during their third year.

121. The criteria used to determine election to law review staff varied considerably. Generally, members were chosen according to one of the following systems: 1) solely on the basis of grades, 2) solely a writing competition, 3) combination of grades and writing competition, 4) publishable note, or 5) the use of one method for the first group selected and another method for a later group. For example, some schools use only grades for spring selection while their fall selection is based on a combination of grades and writing.

122. Underrepresentation by 4% or more was defined as substantial.

123. At none of the schools, however, was the underrepresentation as high in 1983 as the 17.6% found at Harvard in 1981. The highest underrepresentation in 1982-83, 13%, was found at two state university law schools.

124. Weisberg, *supra* note 5, at 240.

select members and the extent of women's representation. It is obviously difficult to reach any valid conclusions from a one-year study showing extreme variations in representation from school to school. A longer study, perhaps of a five-year period, is needed before the question of whether women are consistently underrepresented on law school reviews can be answered.¹²⁵ A study of this type also should investigate criteria used to select editors and the Editor-in-Chief, as well as the proportion of women selected for these positions.

4. *LL.M. Degrees*

Disagreement is considerable about the value of an LL.M. degree as a credential for law teaching.¹²⁶ The percentage of law teachers possessing this degree is not large, but the percentage of men with this credential is much higher than the percentage of women.¹²⁷ This is not surprising when one realizes that only 17% of the LL.M. degrees awarded in 1980 and only 16% in 1981 went to women.¹²⁸ Women interested in law teaching, at least those who lack some of the other qualifications discussed, may be well advised to consider seeking an LL.M. degree from a prestigious school in spite of the fact that it is not a required credential.¹²⁹

5. *Judicial Clerkships*

Our efforts to determine women's representation in judicial clerkships was largely unsuccessful because data about clerks have not been compiled. The little information available indicates that women are still underrepresented as clerks. For example, the number of women clerks at the United States Supreme Court has not increased during the last few years. In fact, their proportion of clerkships has decreased from seven out of 33 clerks (21%) in 1977 to six out of 34 clerks (18%) in 1982.¹³⁰ The number of women law clerks in other courts seems to vary according to the view of individual judges. For example, the Court of Appeals for the District of Columbia Circuit had 11% women in 1982,¹³¹ while the Fifth Circuit

125. Our intention had been to compile data on each journal at the twenty schools, but this proved to be too time-consuming because so many schools had several reviews. In addition, frequently each review had a different selection procedure. If a study of the law review selection process is undertaken, a comparison with the selection process of the schools' other reviews would be useful.

126. Zenoff & Barron, *supra* note 15, at 409.

127. Fossum's study revealed that 25% of the men had LL.M. degrees and only 12% of the women. Fossum, *supra* note 21, at 534. In 1982-83, we found that the number of tenure-track women with LL.M. degrees had increased to 17%.

128. RLE, 1981-1982, *supra* note 6, at 52, RLE, 1980-81 at 52.

129. Increasingly, women who enroll in LL.M. programs are attending producer schools. Based on information found in the AALS directories, in 1977, approximately half of the women with such degrees, 24 out of 48, obtained them from producer schools. By 1983, the number had increased to 93 out of 97. Women received 20% of the LL.M.'s conferred in 1982. RLE, *supra* note 6 at 39. This may reflect their perception that the degree is of value in the academic marketplace.

130. Figures were provided by the National Law Journal. The 1980-81 figure was even lower, with 3 women out of 32 clerks. Marcus, *Few Women to Clerk at High Court*, NAT'L L.J., Aug. 4, 1981, at 3, col. 1.

131. Perotta, *Clerks to D.C. Federal District, Circuit Judges*, Legal Times of Wash., July 27, 1981, at 8, col. 2.

Court of Appeals had 26%.¹³²

Some effort should be made to encourage the federal courts and state supreme courts to make their proportion of women clerks known. The experience is so highly regarded by both law schools and law firms that it is unfair to refuse to employ women clerks and at the same time deny them the data which demonstrates their inability to meet this criterion. The proportion of women faculty who have experience as judicial clerks has remained substantially the same since Fossum's study. She found that only 22% of the women had served as clerks, whereas in 1982-83, 25% had served in this capacity.¹³³

6. *Prestige Firm Experience*

Women appear to be better represented at the large law firms than on law school faculties. A National Law Journal survey reported that the percentage of women at responding firms was 17% in 1982, an increase of almost 2% over 1981¹³⁴ but far short of the overall percentage of women law graduates. Two caveats are in order, however. First, almost a quarter of the firms solicited did not respond.¹³⁵ If these firms employ fewer women than the responding firms, a likely possibility, the percentage of women employed by the largest firms may be substantially less than the survey results indicate. Second, some firms allegedly combine the number of female summer associates with those of full-time women attorneys when reporting, which of course would inflate the number of women attorneys in the same way that the law schools' inclusion of nontenure-track women inflates the number of women professors.¹³⁶

Reporting firms varied considerably in the number and percentage of their "new hires" who were women. Some firms evidently hired all women in 1982, others hired half or one-third, while still others not only did not hire any women but decreased their number of women associates.¹³⁷ Determining whether women are being hired by the large firms in proportion to their percentage of new J.D.s is, therefore, exceedingly difficult. If future surveys of women in law firms would ask for the percentage of female "new hires" in addition to the total number of women attorneys employed, the figures could then be compared to women's percentage of new J.D.s. Then the task of assessing their progress would be both simpler and more meaningful.

Although the National Law Journal data show that an increasing

132. The second author obtained this information by telephoning the judges of the Fifth Circuit Court of Appeals.

133. Fossum, *supra* note 21, at 534. Fossum did not categorize clerkships by court. The 1982-83 AALS Directory count revealed that 141 of the tenure-track women had clerked. They served as follows: 10 for the United States Supreme Court; 44 at the United States courts of appeals; 39 at the United States district courts; 1 at the United States Court of Claims; 21 at state supreme courts; and 31 at lower state courts. Several of the women had more than one clerkship experience.

134. Flaherty, *Women and Minorities: The Gains*, Nat'l. L.J. Dec. 20, 1982, at 1, col. 2.

135. *Id.* at 8. 151 out of 200 of the largest firms in the country responded.

136. C.F. EPSTEIN, *supra* note 11, at 197.

137. Flaherty, *supra* note 134, at 10. The survey gives the total number of associates and the number of women associates for 1981 and 1982.

number of women are meeting the criterion of experience in a prestigious law firm, deficiencies in the data prevent the conclusion that women's representation is proportionate to their percentage of new graduates.

7. *The "Old Boy" Network*

Recruitment by way of informal referral is not an articulated criterion for being hired as a law professor. Yet, there is little doubt that the "old boy" system exists and plays an important role in faculty hiring and that women are not as "plugged in" to it as men.¹³⁸ This problem has been noted by others in the past and there is little reason to believe it has dissipated.¹³⁹ No doubt this phenomenon impedes both women's lateral movement and initial entry into law teaching, as well as the extent to which they are offered committee positions and chairmanships in legal education organizations.

8. *A Summary*

Although women who are tenure track teachers meet conventional hiring criteria, the preceding portions of this section show that it is not possible to specify the percentage of future candidates who will do so. Women are equally represented in filling the one credential which has been termed the most influential in faculty hiring, possession of a J.D. degree from a producer school. They seem to be underrepresented, at least to some extent, in meeting all of the other criteria but the reason for this state of affairs is unclear. There is no evidence that overt discrimination plays a significant role in failure to achieve a high class rank or to be selected for law review or to obtain an LL.M., although "masculinism" probably does. Discrimination certainly cannot be ruled out as a factor influencing underrepresentation of women in satisfying two other important hiring criteria, judicial clerkships and positions in prestigious law firms. Another factor adversely affecting the number and prestige of women is the "old boy" network. Although not consciously discriminatory, it perpetuates female invisibility and the perception that women are less capable than men.

Since women students start their legal education with credentials equal to their male counterparts, it is not reasonable to expect them to fall behind as they pursue their legal careers. Whatever the reason for their apparent failure to receive a statistically appropriate share of honors, it is a situation which deserves serious study by the law schools, not the benign neglect it has received to date.

B. *Should There Be Special Rules for Women?*

Remedying the effects of discriminatory practices is no longer the only reason offered to justify special treatment for women law students and teachers. Reducing the problems inherent in balancing academic, spousal, and parental responsibilities is the goal of several proposals. Suggestions

138. E. ASHBURN & E. COHEN, *supra* note 11, at 200.

139. Weisberg, *supra* note 5, at 241. See also C.F. EPSTEIN, *supra* note 11, at 233.

include creating part-time day education opportunities, adopting different hiring criteria, lengthening the tenure-eligibility period, and establishing part-time tenure positions. Little attention has been given to the assumptions implicit in these proposals or the effect their adoption might have on student learning, faculty productivity, law school administration, or the status of women practitioners and academics.

The recommendation that law schools add part-time day programs was the first attempt to aid women who were trying to combine a legal career and motherhood.¹⁴⁰ Their proponents believed that mothers would not benefit from law schools opening their doors to women unless they could have a reduced course load.¹⁴¹ Parental obligations, it was assumed, would make full-time study too difficult, while part-time evening study was rejected on the grounds that it requires student absence from home at a time other family members are apt to be there.¹⁴²

This effort to expand part-time legal education was unsuccessful, and little support exists for the idea at present.¹⁴³ A number of possibilities could explain this lack of interest. Women now may be completing their education before assuming family responsibilities, the balancing problem may be less difficult than anticipated, or schools may be allowing such programs on an informal basis. It is also possible that many law schools believe part-time programs are either academically unsound or administratively burdensome and are, therefore, ill-advised, in the absence of demonstrated need.¹⁴⁴ The already large number of women students may have convinced some that special programs are not needed. However, the accuracy of this assumption is difficult to evaluate in the absence of information on the number of mothers in full-time programs and their performance in those programs.

A rationale for establishing special criteria for women faculty is the belief that men attend the best schools available to them and accept employment on the same basis, while women make choices on the basis of proximity to a loved one's place of education or employment. Women may limit summer employment experiences or fail to apply for prestigious clerkships for the same reason. At least one author recommends that hiring committees should recognize this alleged characteristic of women by

140. Gottlieb, *The Feasibility of Part Time Day Legal Education*, 30 J. OF LEGAL EDUC. 291 (1979). In fact, only a year after the AALS resolution encouraging women to apply to law school, the Section on Women in Legal Education appointed a special committee to study the feasibility of part-time programs. *Id.* at 297.

141. Wallach, *A View From the Law School*, in WOMEN AND THE POWER TO CHANGE 81, 111 (F. Howe ed. 1975).

142. Gottlieb, *supra* note 140, at 296.

143. *But see* ABA Section on Legal Education and Admissions to the Bar, *Midday Classes for Homemakers at Southwestern*, 14 SYLLABUS 8 (1983) (reporting a new part-time day program at Southwestern University School of Law for students with child care responsibilities).

144. The majority of law schools has always resisted part-time programs. C.D. KELSO, *supra* note 42, at 285. *See generally* Gottlieb, *supra* note 140 (for a discussion of a number of other studies of part-time legal education). The preference for full-time education is not limited to law schools. Medical and dental schools require full time of their students, as do some business schools. "We enrolled in a two-year, full-time program which allowed . . . no time for part-time anything." F.W. HENRY, *TOUGHING IT OUT AT HARVARD* 21 (1983).

using other criteria to predict success as a teacher and scholar.¹⁴⁵

No doubt anecdotal evidence can be found to support these statements, but incidents of men who choose schools or employment to accommodate their spouses' careers are available also as are stories of couples who "take turns" when making decisions which benefit the career of one but not the other. The number of women who make career choices on a different basis than men is unknown, but the large number who now attend prestigious schools¹⁴⁶ suggests that they are selecting law schools for the same reasons that men do.

Suggestions for flexibility in the length of the pre-tenure period and for part-time tenure positions are other examples of the view that women with child care responsibilities cannot be expected to devote as much time to their profession as men and women who do not have similar demands on their time.¹⁴⁷ In 1982, the Society of American Law Teachers, perhaps as a first step towards urging adoption of such policies, surveyed law school deans about their practices and views on such measures. Preliminary findings show that few schools have made formal concessions to the parenting problem.¹⁴⁸

The equal opportunity offered women law students, practitioners, and teachers when the profession first welcomed them was equal opportunity to adapt to conditions designed for men.¹⁴⁹ Few complained at first, particularly because it was a period when many young people deferred marriage and parenthood.¹⁵⁰ Recently, however, these young professionals now in their thirties have contributed to the "baby boom,"¹⁵¹ and are facing for the first time conflicting professional and family pressures.¹⁵² Does this mean equal opportunity for women is illusory unless the profession becomes more responsive to their needs? Can women who are dividing their time and energies between two careers be as capable and productive as men who are pursuing only one? Should both parents work three-

145. Weisberg, *supra* note 5, at 238-41.

146. RLE, *supra* note 104 and accompanying text.

147. E. ASHBURN & E. COHEN, *supra* note 11, at 33. See also C.F. EPSTEIN, *supra* note 11, at 236.

148. In 1983, at the meeting of the Section on Women in Legal Education during the annual AALS convention, Professor Wendy Williams discussed a study of part-time teaching in law schools which revealed that only two law school deans had made adjustments to the tenure track to include part-time teaching positions with childbearing and childrearing leaves. ABA SECTION ON WOMEN IN LEGAL EDUCATION NEWSLETTER 4 (March 1983).

149. Jason, Moody & Schuerger, *supra* note 112, at 241.

150. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2158, CHILDREN OF WORKING MOTHERS 1 (1983).

151. In the past eight years, first births to women over 30 have almost doubled, and this rate is greater among highly educated women, indicating that women professionals are postponing childbirth to pursue a career. Gottschalk, *Maternity Leave: Firms Are Disrupted by Wave of Pregnancy at the Manager Level*, Wall St. J., July 20, 1981, at 1, col. 6. See also Fialka, *Baby Boom Seems Near But Experts Disagree on Its Size*, Wall St. J., March 4, 1982, at 31, col. 4. According to data found in the AALS directories, the number of women law teachers under 40 has increased dramatically from 34% in 1976-77 to 58% in 1982-83.

152. For a perceptive discussion of this problem in the law firm setting, see Brill, *The Woman Problem*, The Am. Law., Feb. 1983, at 1, col. 1. See also C.F. EPSTEIN, *supra* note 11, at ch. 19 (for a description of how women attorneys are coping with and managing child care responsibilities).

fourths time? Will special rules for women promote equality or perpetuate their second-class status?

It is not surprising that no answers to these new and complex questions now exist. A number of years of experience dealing with these issues is needed and, even then, individual attorneys, firms, agencies, and schools may well disagree about appropriate solutions. It is not too early, however, to start defining terms, a prerequisite to meaningful dialogue on any issue. For example, the claim that mothers cannot be full-time law students or teachers assumes that there is some consensus on the meaning of "full-time," when in fact there is not. Some believe that a full-time student is one who takes the normal course load and spends more than fifty hours a week attending classes and studying.¹⁵³ Others contend that students, after the first year, spend no more than two days a week on law study; thus, full-time student status no longer means full-time effort.¹⁵⁴ A student-parent may be incapable of being a full-time student under the first definition, but not under the second.

Definitions of "full-time" professor vary also. Some schools define a full-time teacher as one who devotes substantially all of his or her working time exclusively to teaching and related law school activities.¹⁵⁵ Another group of schools define full-time teachers in terms of the number of hours taught per week; still other schools have stated policies as to the amount of time full-time teachers can spend on outside activities.¹⁵⁶

Before trying to resolve the difficult issue of whether part-time tenure positions are feasible for law schools or desirable for women faculty, the number of hours full-time faculty allocate to law school related activities should be examined. Periodically, the complaint is made that a large number of nominally full-time professors spend 20, 30 or even 40% of their time in outside practice.¹⁵⁷ Some consensus on the definition of full-time teacher must be reached before estimates can be made about the number of women who have difficulty fulfilling this obligation.

However, if the tasks of legal educators continue to include teaching, research, law school governance, and student counseling, a full-time commitment of at least forty hours a week is necessary. This time allotment assumes that teaching includes a reexamination of basic premises, research encompasses publications which advance as well as transmit ordered knowledge, governance grapples with such issues as a school's institutional purpose, and counseling is "listening with a third ear." Deficiencies in legal education seem more likely to be exacerbated than remedied by en-

153. It has been suggested that the student should spend an average of approximately three hours per credit hour studying. Gottlieb, *supra* note 140, at 291.

154. Stevens, *supra* note 110, at 653. C.D. KELSO, *supra* note 42, at 2. See also Walwer, *Lower LSATs, More Part-Time Students*, 14 SYLLABUS 7 (1983).

155. ABA, STANDARDS, *supra* note 19, at Standard 402(b). The rules also require that such a faculty member have "no outside office or business activities and whose outside professional activities, if any, are limited to those which relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, or are of service to the public generally, and do not unduly interfere with one's responsibilities as a faculty member." *Id.* at Standard 402(b).

156. Zenoff & Barron, *supra* note 15, at 497 n.21.

157. Nastoll, *Current Dilemmas in Law School Accreditation*, 32 J. LEGAL EDUC. 236, 254 (1982).

couraging part-time tenure positions, even if designing criteria for such positions proves feasible. Certainly, part-time attorneys can and should continue to add to the breadth and depth of the law student's educational experience, but their major commitment lies elsewhere. Unquestionably, law schools should be flexible enough to accommodate temporary leaves for illness, government service, practice experience, and parenting demands, but these practices are quite different from the creation of a part-time tenure faculty. The latter practice seems incompatible with maintaining either a distinguished school or a distinguished academic career.

Proposals to establish new hiring or promotion criteria also may raise definitional problems. It is not always clear whether the purpose of a particular proposal is to eliminate discrimination against women, benefit all teachers, or accommodate women's dual career problems.

For example, advocacy of a lengthened pre-tenure period could be predicated on the belief that women, especially those writing on women's issues, find publication difficult because of sex bias against either the author or the subject matter.¹⁵⁸ On the other hand, proponents of a longer period may believe that a school's insistence on two publications in three years is unreasonable for any new law teacher, man or woman. Lastly, the suggestion might emanate from the knowledge that those who spend substantial time caring for an infant or pre-schooler have neither the time nor the energy to engage in scholarly writing.

Unless the purpose of each reform is specified, they probably all will be regarded as concessions to women's child care obligations.¹⁵⁹ Although the proponents of these measures intend to benefit women, it is doubtful that the adoption of their proposals will achieve this goal. Instead, their long range effect is likely to make law schools more resistant to increasing the number of women faculty and to reinforce the view that they put less time into their teaching and scholarship than their male colleagues. The more women and their supporters press for special rules, the more their professorial endeavors will be perceived as a "second career"—subordinate to family obligations.

Some evidence of this perception of women lawyers exists, or at least is espoused by law firm hiring committees and judges seeking clerks. Increasingly, women students are reportedly being questioned by interviewers about their marital plans, whether they intend to have children, and if so, how many. Such practices were presumably abandoned in the 1960s when a depressed economy forced a larger number of mothers into the

158. At a meeting of women law professors in the New York area, several women expressed the belief that their articles on women's issues were not being published because of the subject matter. This meeting was described at the AALS New Teachers Workshop in Washington, D.C., in July, 1983.

159. Law schools do not always distinguish between childbearing and childrearing. Mendel-Meadow, *supra* note 73, at 24. A Stanford Law Review project reporting the results of a study of employer and student attitudes toward family/work conflict designates "maternity" as the time immediately preceding or following childbirth, and "childcare" as the longer term arrangements. Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263 n.11 (1982).

work force,¹⁶⁰ more couples sought a higher standard of living than one income alone can provide, and society became increasingly more cognizant of a woman's right to pursue a career outside of the home.¹⁶¹ Under these conditions, it is, of course, a misnomer to consider child care solely a woman's responsibility, and in recognition of that fact, such phrases as "parenting," "paternity leaves," and "childrearing leaves for men" have come into vogue. Despite the theoretical acceptance of the idea of joint child care that these phrases imply, the traditional belief that the brunt of child care duties should be borne by the mothers still exists¹⁶² and hampers efforts to translate theory into practice.¹⁶³

Actions, such as the recent establishment of a day-care center for employees of the United States Senate, which recognize the parental obligations of both sexes are likely to be more helpful to children and their career mothers than suggestions for decreasing women's professional commitments so that they can better balance their roles as wives and mothers.

VI. DO WOMEN PROFESSORS MAKE A DIFFERENCE?

The subject of women law professors would be of little practical significance if employment discrimination were the only reason for examining it. Granted, a few hundred women would find the subject critical. However, in a profession in which academics constitute no more than one percent of the whole,¹⁶⁴ the practical importance of the matter would be limited. The subject is important because what is really at issue is the role of women in a powerful profession which affects the lives of all citizens.

First, the underuse of women in law teaching is a waste of talent. The number of gifted teachers and scholars is not so abundant that overlooking substantial numbers of qualified attorneys is inconsequential. Next, the underrepresentation of women at the gateway of the profession reinforces

160. For some mothers, work is a necessity and provides economic benefits that may constitute a major share of their offspring's support. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, *supra* note 150, at 2. In March 1981, 54% of the children under 18 years had mothers in the work force. *Id.* at 1. Additionally, between March 1980 and March 1981, the number of working mothers increased by 600,000, to reach 18.4 million, and those with children below age 6 were responsible for 60% of this gain. *Id.* at 1.

161. In 1981, both parents were earners in about 60% of all married couple families with children under 18 years. *Id.* at 1.

162. The Stanford Law Review survey found that: (1) male students expected women to perform most child rearing tasks; (2) child care provisions at firms were not a factor in employment decisions for most male students; (3) and that those espousing equal parenting either underestimate the time demands or are paying lip service to the concept. Project, *supra* note 159, at 1265, 1280 & 1289. The study also showed that only one-fifth of 195 law firms had any policy of or experience with paternity leave. *Id.* at 1272-73. Nor do many law schools grant a leave of absence for paternity to either faculty or students. Bysiewicz, *supra* note 3, at 511. Preliminary results of a SALT survey reported at the 1983 AALS convention show little change. *See also* C.F. EPSTEIN, *supra* note 11, at 373-78 (who found that fathers, although they participate, do not share equally in child care responsibility).

Although 50% of women law students in the Stanford University survey expected their partners to shoulder half of the burden, they nevertheless allotted almost twice as many hours to child care as did their male counterparts. Project, *supra* note 159, at 1280. *See generally*, C.F. EPSTEIN, *supra* note 11, at 373-78 for women's attitudes about their spouses' role in childrearing.

163. It is arguable that the lack of paternity leave policies reflects a lack of demand for them by both men and women.

164. Fossum, *supra* note 21, at 506.

and perpetuates the assumption that women attorneys are less competent than men. If most authority figures in the law school world are male is this due to their superior ability? Will not both women and men law students expect and accept the same hierarchy in private practice, government service, and the judiciary?¹⁶⁵

More important, however, may be the effect of women professors on the law's development. Francis Allen, in noting the contributions of legal education to society, made the point that "there was scarcely an idea of law reform which was not first advanced in a law school classroom or a law review article."¹⁶⁶ For the most part, however, issues uniquely affecting women have been an exception to his statement. In fact, when such topics as reform of rape, abortion, wife abuse, credit, name change, and domicile laws finally entered the law school world, they seemed more a response to legislative and judicial decisions than a suggestion for reform. Even then, their study was relegated largely to women and the law courses, the only response to women students' complaints that coverage of these topics was noticeably lacking in the curriculum.

In contrast, one cannot read *Simple Justice*¹⁶⁷ without being struck by the pivotal role played by the Howard Law School faculty in creating the intellectual climate which proved vital in winning legal battles against segregation.¹⁶⁸ The assertion that injustices to women and minorities are more likely to receive scholarly attention from faculty who have suffered from bias is not a charge that the white male majority deliberately discriminates. Nor is it a call to women and minority faculty that they should bear the burden of efforts to eliminate discrimination from the legal system. It must be acknowledged, however, that historically white males have exhibited little interest in economic, social, and legal injustices affecting women and minorities.

165. Judge Wald claims women lack equality in academia, private practice and government. They are overrepresented in the ranks of the unemployed, those having non-law related jobs, as perennial senior associates, and permanently nontenured faculty. Women also are underrepresented in high government positions and as partners in law firms. Wald, *Women in the Law*, *Stage 2* 52 UMKC L. Rev 45, 46-47 (1983).

166. Allen, *The New Anti-Intellectualism in American Legal Education*, 28 MERCER L. REV. 447, 448 (1977).

167. R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976).

168. *Id.* at 126.

A law school for Negroes was different from a medical school for Negroes or, say, an engineering school for Negroes. Hearts and lungs and glands worked the same way inside Negroes as in whites. And the principles of thermodynamics or the properties of the hypotenuse did not vary with the color of the man contemplating them. But the laws of the United States did not operate to provide equal justice for whites and blacks, and so it would not do just to learn about them in general and in principle. Charles Houston set out to teach young Negroes the difference between what the laws said and meant and how they were applied to black Americans.

See id. at 126-132. Whether law schools for women staffed principally with women faculty would produce lawyers who would be as interested in and successful at obtaining equal rights for women may be a moot point. Portia and Cambridge, the law schools, seem to be the only ones exclusively for women and the latter was short-lived. Whether women would support such schools today will probably never be known because the reasoning of the majority in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) at least casts doubts on the constitutionality of such a venture.

Perhaps the reason for the males' lack of interest in these topics is that they are not considered prestigious in the legal profession.¹⁶⁹ "Big business" specialties such as securities, tax, and antitrust evidently are at the top of the prestige scale, while at the other end of the scale are the "people" problems encompassed in personal injury, consumer, and criminal law, with the lowest prestige rating given to family law problems of indigent clients.¹⁷⁰ When these same specialties were rated by academic and research specialists for legal complexity¹⁷¹ and intellectual challenge, rankings substantially similar to the prestige groupings were obtained.¹⁷² It is possible, as Laumann and Heinz conclude, that the intellectual challenge ratings reflect the accurate perception that the law in these areas may be mastered quickly, after which the cases become rather routine.¹⁷³ Other explanations are also possible. The raters may share, at least to some extent, the belief of practitioners that the principal commitment of the law is to big business.¹⁷⁴ It is also possible that the raters have a quite narrow view of the problems involved in some of these areas. For example, varied problems litigated in family law during the last two decades certainly go far beyond divorce. A list of only a few of the new and complex questions in family law would include: life and death for defective newborns and persons kept alive by artificial means, psychological or biological parent entitlement to custody, parentage when an embryo develops in a "borrowed" uterus and the extent to which non-married persons have the benefits and responsibilities of family members.

The legal profession has been urged to diversify its outlook and the background of its members¹⁷⁵ not only out of fairness to those who want to enter, but on the assumptions that:

- 1) greater diversity of outlook and background will improve the quality of justice;
- 2) greater confidence in our legal system will occur when all members of the population can identify more closely with its members; and
- 3) the delivery of legal services to individuals and groups previously unrepresented will be facilitated.¹⁷⁶

Certainly, the addition of substantial numbers of women in the legal profession has made it more diverse, but the hoped-for consequences of this development have not been achieved. Conceivably, more diversity is needed in the front of the classroom also. As long as women are a relatively small proportion of the law teaching profession, it is unlikely that

169. Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RESEARCH J. 155.

170. *Id.* at 166. And increasingly those indigents are households headed by women. P. WALD, *supra* note 165 at 50-51.

171. The experts who rated the specialties for intellectual challenge were a sample of 19 persons, composed of Northwestern Law School professors and American Bar Foundation research specialists on the legal profession. *Id.* at 167. The subjects that they taught and the sexual composition of the group were not given.

172. *Id.* at 166.

173. *Id.* at 203.

174. *Id.* at 205.

175. Knauss, *Developing a Representative Legal Profession*, 62 A.B.A.J. 591 (1976).

176. *Id.* at 592.

they will contribute substantially to diversity of thought. How can it be otherwise when they are hired by men, granted or refused tenure and promotions by men, on the basis of standards selected by men, and are advised to stay away from scholarship not considered significant by men?¹⁷⁷

Not only in substantive law reform, but also in the administration of justice, women could prove to be an asset to society. Derek Bok recently commented that law schools should place more emphasis on "the gentler arts of reconciliation and accommodation."¹⁷⁸ Ironically, these gentler qualities of females, which presumably render them likely to seek alternatives to advocacy for dispute resolution, were the very reasons advanced in the past for barring them from the legal profession.

Less costly legal proceeding and more extensive legal representation for the poor and middle classes are other needed reforms Bok mentions.¹⁷⁹ Again, at least in the past, women with such goals have been faulted for trying to be social workers or "not being real lawyers."

Of course, all segments of society—the corporation and the individual, the rich and the poor of every race, color, religion, and sex should receive equal legal representation. Nothing indicates that lawyers who are members of these groups are more skilled at representing their fellow members than attorneys who are nonmembers. Nevertheless, the skills of women attorneys are being underutilized and their abilities are being undervalued with consequences that reach beyond the law schools.

Law schools have a duty to their women students, alumnae and faculty to re-examine two assumptions about women in the law which have prevailed for at least the last decade. The first is that impediments to women's progress in the legal profession have been eliminated. *Hirshon v. Spaulding*¹⁸⁰ makes it clear that they have not. The second assumption is that the plight of women practitioners and teachers is exclusively a women's problem. This is contradicted by the fact that men make almost all appointment, promotion and firing decisions.

Instead of continuing to operate on these assumptions, law schools need to investigate why women are not making more progress. If lack of competence is the reason, legal educators need to discover why women who enter law school with credentials equal to their male classmates, leave as less qualified graduates. If lack of diligence is a factor, it is no kindness to women to leave them in ignorance of this defect in their performance. And if neither lack of competence or diligence is the answer, it is time that legal educators direct their considerable analytic skills to identifying and resolving the real issues.

177. There are problems with women writing on women's issues being considered serious scholars not only in law but also in other fields as well, as the controversy over Stanford's denial of tenure to historian Estelle Friedman demonstrates. *Chron. Higher Educ.*, Jan. 16, 1983, at 5, col. 1. Professor Friedman was subsequently granted tenure when the provost reversed the decision of the Committee on Appointment and Promotions.

178. Excerpts from comments on the American legal system and law schools by Derek C. Bok in his annual report to the Harvard Board of Overseers, *Chron. Higher Educ.*, May 4, 1983, at 8, col. 2.

179. *Id.* at 8.

180. 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

If there is nothing more powerful than an idea whose time has come, there is nothing more ubiquitously pervasive than an idea whose time won't go.¹⁸¹

181. Elizabeth Janeway, quoted in Ginsberg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUM. RTS. 1, 19 (1977).

