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ARTICLE ESSAY

RESPECT FOR DIVERSITY: THE CASE OF FEMINIST LEGAL THOUGHT

Carl Tobias*

Respect for diversity was one quality many faculty members considered significant when searching in 1987 for a new dean of the University of Michigan School of Law.¹ Yet other so-called elite law schools and less prestigious institutions recently have evinced little concern for diversity and even indifference toward the idea. Tenure and appointment disputes at several Ivy League schools have sparked heated controversy and call into question their institutional commitments to diversity. Those disputes have involved the legitimacy of work by women in legal theory and feminist legal thought, although considerable contentious activity also seems to reflect a general lack of respect for diversity. The controversies now appear to be increasing in number and intensity, while they particularly threaten what progress has been made in securing women's full participation in the legal academy. It is important, therefore, to discuss the disputes candidly and to search for solutions to the problems raised.²

* Professor of Law, University of Montana. Thanks to Marina Angel, Bari Burke, Jay Feinman, Marc Feldman, Tom Huff, Michael Libonati, Bill Luneburg, John Orth, Michael Risinger, Peggy Sanner, and Marianne Smythe for valuable suggestions, to the Harris Trust and the Cowley Endowment for generous, continuing support, and to Brenda Smith for typing this piece. Errors that remain are mine alone.

1. "Finding" a New Dean, 32 LAW QUADRANGLE NOTES, No. 1 at 2 (1987). Respect for diversity has not always been voiced at Michigan, and the strength of that institution's actual commitment to diversity remains unclear. Indeed, a survey compiled in the 1986-87 academic year showed that of thirty-nine tenured positions at Michigan, one was held by a woman. Moss, *Would This Happen to a Man?*, A.B.A. J., June 1988, at 50, 53. For that survey which includes much valuable data on tenure decisions affecting women and minorities, see Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988). Michigan, however, recently offered a tenured professorship to Catherine MacKinnon. Lewin, *Job Offer to Feminist Scholar May Mark Turn*, N.Y. Times, Feb. 24, 1989, at B5, col. 3.

2. For a recent study of women and tenure in law schools, that draws upon literature which relates in numerous ways to the issues addressed in this piece, see Angel, *Women in Legal Education: What It's Like To Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988). When that literature is particularly applicable, reference will be made to it, although extensive citation is not warranted in the essay format employed. For a recent collection of numerous articles which treat many issues relating to women and legal education and that clearly illustrate the value of having diverse perspectives on scholarship and teaching, see *Women in Legal*

For some time, it has been recognized that law school faculty have diverse and potentially conflicting responsibilities.³ They teach in institutions which are neither completely within nor totally outside the mission and spirit of the university as a whole. Legal academicians are expected to pursue ostensibly intellectual, theoretical endeavors, especially in their scholarship. Faculty members are required to do so, even as they must inculcate professional norms and impart technical skills in students as preparation for practice in a profession which numerous academicians disdain, others have rejected, and some have never experienced.

The law itself has become more difficult to comprehend. For instance, it is decreasingly clear that law is a discipline distinct from other areas of inquiry, that law and politics are separate phenomena, that the substance of law can be divorced from its procedural aspects, or that "contracts" and "torts" denominate discrete fields.⁴ Gone are the halcyon days when, for example, widespread agreement existed that law was a discipline with fixed, ascertainable boundaries or that law could be neatly compartmentalized into clearly definable substantive areas.

Indeed, the present seems to be a period of much more uncertainty and indeterminacy than formerly; the very question of what law is, is being vigorously debated.⁵ The phenomena mentioned above may only be temporary, although they have been apparent for a number of years. The solutions which were adequate in an earlier age no longer will suffice; with the expansion of knowledge, consensus may well become more difficult to achieve. In short, legal academicians are uncertain about precisely what it means to teach, write about, and practice law and what law is and should be in a complex,

Education—Pedagogy, Law, Theory, and Practice, 38 J. LEGAL EDUC. 1, 1-193 (1988). Cf. Zenoff and Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869 (1983) (earlier study of women faculty in law schools).

3. For a cogent exposition of the ideas in this paragraph, see Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968).

4. The Law and Society Association and its journal, *LAW AND SOCIETY REVIEW*, illustrate the first point. The inseparability of law and politics is a central tenet of critical legal studies. See, e.g., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982). For recent treatment of substance and procedure, see Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463 (1987). One classic on contracts and torts is G. GILMORE, *THE DEATH OF CONTRACT* (1974). For a recent analysis, see Feinman, *The Jurisprudence of Doctrinal Classification: Contract and Tort As a Case Study With Special Reference to Product-Related Economic Loss*, 41 STAN. L. REV. 661 (1989).

5. For a more general exposition of the themes in this paragraph, see Saul Bellow, *Foreword* to A. BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS* at 11 (1987).

modern society as well as unclear about their own roles and those of law schools vis-a-vis the rest of the university, the profession and society.

Law schools may be experiencing a period of intellectual confusion similar to that which confronted the French Academy painters more than a century ago.⁶ Those traditional artists, threatened with the prospect of losing their hegemony, rejected the work of Manet and the Impressionists, painters who eventually transformed the very definition of art. Some law schools have treated similarly efforts of women working principally in the fields of legal theory and feminist jurisprudence to be accepted as full-fledged members of their academic communities.

These institutions have rejected (discouraged or granted with great reluctance) tenure and teaching applications of women who have produced outstanding theoretical and practical work.⁷ For instance, burgeoning feminist scholarship and some of the candidates' endeavors in particular have contributed significantly to the amelioration of two ubiquitous societal practices that degrade women the most: wife battering and sexual harassment, especially in the workplace.⁸ The rejection of these applicants has had harmful ramifications beyond the obvious detrimental impacts on the individuals. Students have been deprived of professors who challenge them, who are experts in substantive fields important to the students, and who are valuable mentors. Specific faculties and the law teaching profession have lost the intellectual stimulation, the collegiality, and the diverse viewpoints the candidates would have offered. The adverse employment decisions also have significant implications for the particular institutions, making them more limited, less dynamic and even anti-intellectual. One recent hiring dispute was characterized as a battle for the school's soul in which those who narrowly succeeded in securing appointment of a prominent feminist scholar were said to doubt the value of their victory because the fight had been so divisive.⁹

6. This is a necessarily truncated account. For thorough treatment, see J. CANADAY, *MAINSTREAMS OF MODERN ART* chs. 14-15 (2d ed. 1981).

7. "Rejection" will be used as shorthand for the two possibilities mentioned in the parenthetical. Twenty percent of American law schools are making less progress than others and prestigious schools comprise a significant number of these institutions. Chused, *supra* note 1, at 539, 548.

8. The classic example is C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). For more general discussion of these efforts and the amelioration effected, see Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 642-48 (1986).

9. Adams, *A Battle for Yale Law School's Soul*, Nat'l L.J., Feb. 15, 1988, at 3, col. 1.

The ways these tenure and appointment determinations appear to have been made are particularly troubling in that the women rejected seemed to meet the requirements as clearly as men. An important complication is that some decisions apparently have been premised on the political perspectives of the applicants. One woman's tenure request was refused even though "all parties seem to agree [she had] impeccable credentials," having published a path-breaking article in a law review widely acknowledged to be the nation's second best and having had a book scheduled for publication by Oxford University Press, perhaps the most prestigious such publisher; she claimed that "they don't want women who threaten the status quo too much."¹⁰

Application of the criteria employed in reaching the determinations also appears especially problematic. Significant difficulties are that the criteria themselves are facially so demanding or can be applied so rigidly that they are virtually impossible to meet (of course, few of the already tenured faculty applying the standards could satisfy them).

An individual recently denied tenure received glowing praise from many national and international luminaries in her field, including Jacques Derrida, a preeminent French philosopher. Although the applicant was only an assistant professor, she was said to have written more than any member of the faculty at the same career stage, publishing some fifteen pieces in numerous respected journals.¹¹

Correspondingly, the criteria can be applied in ways that seem technical. For example, although elite and aspiring law schools have accorded less value to scholarship that is doctrinal or practical while theoretical work has enjoyed a special cachet, the theory which is prized has had to fit within a narrow band on the theoretical spectrum. Thus, several women whose candidacies were in dispute discovered or developed new substantive areas, created or reformulated the terms of legal discourse, or imaginatively explored or articulated novel ways of understanding law or of resolving legal controversies.¹² Nevertheless, their contributions proved too much and too little; they were deemed both overly theoretical and uncon-

10. *Down and Out in Cambridge*, NEWSWEEK, Apr. 4, 1988, at 66. The law review article was Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

11. Moss, *supra* note 1, at 50. She is negotiating conditions for reconsideration of the tenure denial and another school "overwhelmingly voted" to offer her tenure. Markoff, *Tenure Offered*, Nat'l L.J., Feb. 27, 1989, at 4, col. 3.

12. Professor MacKinnon's seminal work on sexual harassment is a helpful example. C. MACKINNON, *supra* note 8.

ventional. Indeed, considerable debate involving these individuals' candidacies apparently centered on whether the substance of their work was legitimate, whether the analytical techniques they used were appropriate in the legal academy, whether their endeavors constituted law, and the meaning of law and legal scholarship.

Many of these problems are epitomized by the observations of two male faculty members in a recent hiring dispute and by the advice deans of two elite schools gave women faculty. The first professor allegedly asserted that appointment of someone " 'whose forte is extremist, mystical polemics and who rejects both legal method and scholarship as 'male dominated,' hence invalid, would be a betrayal of our essence' — which he defined as 'responsible scholarship.' " ¹³ The other reportedly stated that, were the applicant hired, the school "could rapidly become a theater of ideological warfare, as well as an insufficiently supervised playground of the mind in which we lose our capacity to resist the charms of superficial and passing intellectual fads." ¹⁴ The deans were said to have advised female faculty that work in the areas of feminist legal theory or gender discrimination simply was not worthwhile. ¹⁵

Of course, these techniques of rejection are venerable, enjoying pedigrees that substantially predate the Academy painters. For instance, by delineating as appropriate particular areas for substantive inquiry and as proper methodologies for addressing them and by prescribing as acceptable certain modes of discourse, it is possible at once to disparage specific fields of endeavor and analytical techniques and to discredit those who work in the areas. ¹⁶

Allegations of some that the rejection of these women reflects sexism cannot be proved. It is difficult to imagine, however, that very many legal academicians would seriously contend that the seminal substantive work and novel approaches to law of James Boyd White or Milner Ball are ill-suited to law schools or that they should depart

13. Adams, *supra* note 9, at 8, cols. 3-4.

14. *Id.* at 8, col. 3.

15. See Moss, *supra* note 1, at 52; Adams, *supra* note 9, at 8, col. 2. One of the deans stated that he could not "conceive of saying anything of the sort." Adams, *supra* note 9, at 8, col. 2. There are indications that some untenured women faculty are being advised not to produce scholarship in areas such as feminist legal thought, lest their tenure opportunities be threatened. Wald, *Women in the Law*, 24 TRIAL 75, 77 (November 1988); Carter, *Women Face Hurdles as Professors*, Nat'l L.J., Oct. 24, 1988, at 1, col. 1, 31, col. 2.

16. Ridicule is another classic technique. In the hiring dispute mentioned above, one of the male professors opposed to appointment allegedly circulated a memorandum entitled "Feminism Unhinged," an obvious attempt to denigrate both Professor MacKinnon and her recent, well-received book entitled FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). See Adams, *supra* note 9, at 8, col. 3.

the academy (treatment suggested as appropriate for Critical Legal scholars by a former dean of one elite school).¹⁷ Nevertheless, the contributions of Professors White and Ball are no more demonstrably "legal" or concrete than the work of the women at the center of these disputes. Moreover, most of the women appear to have met the relevant criteria as clearly as numerous men whose applications were contemporaneously granted without controversy.¹⁸ Given the pervasive, complex and subtle nature of sexism in American society and the very recent entry of women in substantial numbers to law schools and the profession, it would be surprising if sexism were absent from law schools and from these tenure and appointment decisions.¹⁹

In light of the current intellectual state of the law and the present circumstances of legal academia—marked by uncertainty, indeterminacy, and ferment—greater, rather than less, respect for diversity is warranted. What has happened in law schools, however, constitutes movement in the wrong direction. Preferable approaches are to be as inclusive as possible and receptive to the widest practicable substantive inquiry. For example, law schools should foster in their communities enhanced appreciation and expanded application of knowledge developed in non-legal disciplines or derived from systems of law other than Anglo-American ones while increasing the

17. A recent example of Professor White's work is *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985). A recent example of Professor Ball's work is *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985). For the suggestion as to Critical Legal scholars, see Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-27 (1984).

18. For example, the woman, mentioned *supra* text accompanying note 10, claimed "her record was equal to or better than that of seven men voted tenure during the 1986-1987 school year." Moss, *supra* note 1, at 50. Two tenured faculty members stated that the woman, mentioned *supra* text accompanying note 11, may have been denied tenure based in part on gender discrimination. Moss, *supra* note 1, at 50. Moreover, this thesis is implicit throughout Professor Angel's study of tenure decisions involving women at five law schools. Angel, *supra* note 2. Indeed, Drucilla Ramey, executive director and general counsel of the Bar Association of San Francisco, testified before the ABA Commission on Women in the Profession that tenure of women faculty is a "national disgrace." "Ms. Ramey testified that 'it is an absolute open secret among every single woman who teaches . . . in law school today that, in fact, the ordinary schlemiel from these elite law schools who got some clerkship is going to get tenure without too much trouble in our most distinguished schools, whereas women are scrutinized under a microscope and are generally found to be fatally flawed in one way or another.'" Carter, *supra* note 15, at 31.

19. For data on women's entry into law schools and on tenure decisions involving women, see Angel, *supra* note 2. Cf. Chused, *supra* note 1, at 548-52 (more data on tenure decisions). For a recent study of gender differences in the law school and professional experiences of students and graduates of one law school, see *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988).

number of faculty who work in non-traditional fields, such as feminist legal thought.

I am not contending that henceforth all scholarship be replete with references to Continental philosophers or that social scientists be *de rigueur* on every law school faculty. I am not advocating diversity for diversity's sake or suggesting that standards be jettisoned in pursuit of diversity.²⁰ I also am not predicting that those working in the area of feminist legal thought will be the next Impressionists or even the new Legal Realists. Nevertheless, they have offered strikingly new insights to date and promise to make even greater contributions in the future, especially in fields of compelling importance to women and society.²¹

I am arguing that women should not be held to more demanding requirements than men. I urge as well the development and application of criteria which admit of varied theoretical and political perspectives and analytical techniques, although I appreciate that crafting and employing such standards may be difficult. For example, when judging contributions in areas as complex and controversial as gender issues, the criteria should be whether the work stimulates constructive thinking or fosters new ways of analyzing the issues rather than whether it resolves the questions, galvanizes consensus, or ultimately persuades the reader.²² Correspondingly, writing in the area of feminist legal theory would be equally valuable as that in tax or constitutional law, while drafting an ordinance that seeks to limit pornography because it discriminates against women would constitute public service as important as writing a Securities

20. I realize that respect for diversity can cover a multitude of sins and that beyond a certain—or more likely, uncertain—point, diversity alone will not be enough.

21. See, e.g., Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1987) (women's movement seems to be on the verge of mobilizing an entire generation of law students). For an example of their efforts which have helped to ameliorate wife battering and sexual harassment, see *supra* note 8 and accompanying text. Much work remains to be done in those areas and numerous others—such as sexism, gender discrimination in employment, pregnancy policies, and child care—before women will be full participants in law schools, the legal profession, and society. For valuable recent work on these issues, see C. MACKINNON, *supra* note 16; Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

22. The standards listed at the end of the sentence in the text simply are unrealistic and too demanding in areas as unsettled and potentially explosive as gender issues involving delicate, threatening questions of male/female personal and political power. For discussion of such power, see C. MACKINNON, *supra* note 8; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For analysis of new understandings of gender relations in professional settings, see Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

and Exchange Commission regulation or revising a state probate code.²³ There is ample room in law school communities for traditional legal scholarship, Critical Legal Studies, law and economics, and feminist legal thought as well as much more.

This is a call for recognition that pluralism and diversity are healthy and a plea for the broadest feasible endeavor consistent with the multi-faceted missions of law schools.²⁴ Restrictions may be imposed by resource constraints or by felt obligations of law schools to their varied constituencies. Most potential difficulties likely to be encountered have not been considered, much less tested, and it now appears that few will prove intractable.²⁵ The approaches suggested promise to increase the number of members of the academic community who are included in the intellectual enterprise and to enable women to become full participants in legal education. They also should make law schools more stimulating and humane institutions while enriching the continuing quest for a clearer understanding of law as we enter the last decade of the twentieth century.²⁶

23. The suggestions in the text are intended to be just that, suggestive. Others can be offered and should be developed and applied. For instance, faculty who find that the Socratic method impedes learning and who experiment with alternative teaching techniques should not be penalized (and probably should be rewarded) for those choices when their teaching is evaluated for tenure purposes. For criticism of the Socratic method and discussion of alternatives, see Moss, *supra* note 1, at 54-55. For additional helpful suggestions, see Angel, *supra* note 2, at 832-36.

24. At the January 1989 annual meeting of the Association of American Law Schools (AALS), 300 law faculty called for the appointment of an independent commission to study diversity in law school faculties. Petition to the AALS House of Representatives (Dec. 21, 1988) (on file with University of Cincinnati Law Review). Cf. Wald, *supra* note 15, at 77 ("Law schools have much introspection and outreaching to do—quickly" if the legal "profession is serious about bringing women into the mainstream with full rights and benefits.").

25. Indeed, the University of Wisconsin Law School simultaneously extended offers to four minority law professors last year. Markoff, *Wisconsin Does the Impossible; Boosts Minority Ranks by Four*, Nat'l L.J., March 6, 1989, at 4, col. 1. Cf. letter from Professor Richard Wydick, Chair, Faculty Appointments Committee, University of California Davis, School of Law, to Carl Tobias (March 27, 1989) (consistent with school's desire to diversify the law faculty, University of California Davis recently extended offers to three people, one of whom was black and two of whom were Mexican-American).

26. In April, 1989, Professor Herma Hill Kay, President of AALS, strongly called for law schools to promote diversity. She recommended that the AALS "generate its own data on faculty recruitment and retention practices" and that there be "a true acceptance of the differences in background, experience, talent, and intellectual taste that are represented by the concept of 'diversity' [that] will enable all of us to hear and value the many voices of modern legal education." She added that the "reward for all of us, if we are successful, will lie in the intellectual richness that diversity confers upon our joint enterprise." AALS Newsletter No. 89-2, 1-3 (April 1989). For recent work exploring conditions that would be hospitable to diversity in legal scholarship, see Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN'S L.J. 1 (1989).