

2003

In Support of a Unitary Tenure System for Law Faculty: An Essay

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Recommended Citation

Tarr, Nina W. (2003) "In Support of a Unitary Tenure System for Law Faculty: An Essay," *William Mitchell Law Review*: Vol. 30: Iss. 1, Article 6.

Available at: <http://open.mitchellhamline.edu/wmlr/vol30/iss1/6>

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IN SUPPORT OF A UNITARY TENURE SYSTEM FOR LAW FACULTY: AN ESSAY

Nina W. Tarr[†]

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I. INTRODUCTION

I began my clinic teaching career in the spring of 1984 at William Mitchell College of Law in a half-time, soft money¹ position that I shared with Professor Ann Juergens.² I lacked confidence that our circumstances would change, so the following summer I began the process created by the Association of American Law Schools to find a tenure-track position at another school. In order to take a tenure-track spot, I left William Mitchell in the summer of 1986 and, ironically, Professor Juergens and I were both tenured and promoted to full professor at the same time years later. By then, I had taught at three schools and Professor Juergens had stayed the course at William Mitchell.

To date, I have taught at five law schools,³ conducted American Bar Association site inspections at five schools,⁴ and

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1. The positions were funded with money from Legal Services Corporation.

2. Professor of Law, William Mitchell College of Law.

3. William Mitchell College of Law, Northern Illinois University College of Law, Washburn School of Law, The University of Illinois College of Law, and as a visitor at Washington University School of Law.

4. Every law school accredited by the American Bar Association must have a

formally consulted at another. I have participated in numerous meetings, conferences, and clinical organizations, which have given me the opportunity to speak with clinicians from around the country. I have taught courses in Evidence and Professional Responsibility to large classes on a regular basis at a variety of schools, and periodically I have taught seminars, simulation courses, and experimental classes. I have published six articles of various lengths. I have served on almost every significant law school committee at one time or another and been active in local bar activities in a number of communities. Based on these experiences and observations, I have come to the conclusion that it is in the best interest of universities, law schools, law students, law clinics, clinic clients, the bar association, and individual faculty for law schools to have a unitary tenure system for permanent faculty. Such a system would give clinic faculty the same employment security, status, monetary and non-monetary benefits, rights of citizenship, academic freedom and autonomy that full-time teachers on a law faculty are currently afforded.

This does not mean that faculty who teach in the clinics must be the same as faculty who do not teach in the clinics. On the contrary, law faculties are made up of diverse groups of people who contribute to the academic mission in a variety of ways. Given this, there is no reason to isolate one subset—those who teach in the clinic⁵—and treat them differently when it comes to influence,

site inspection once every seven years. A team of lawyers, academics, and members of the bar are provided detailed information regarding every aspect of the law school before spending two to three days conducting a fact-finding mission at the school. The team is responsible for writing a factual report that serves as the basis for the ABA Council of the Section on Legal Education and Admission to the Bar's decision regarding accreditation. AMERICAN BAR ASSOCIATION, ACCREDITING AGENCY FOR LAW, *available at* <http://www.abanet.org/legaled/standards/foreword.html> (last visited Aug. 16, 2003) (stating that the Council of the Section is the entity recognized by the U.S. Department of Education to accredit the professional school of law). See the ABA's website at www.abanet.org/legaled for more information. Team members have the opportunity to immerse themselves in information about the schools that even members of the faculty are not always aware of, with the exception of salary information, to which team members are not privy. As a result of a consent decree between the ABA and the U.S. Department of Justice that was approved in June 1996, the ABA may not collect information regarding compensation paid to faculty, deans or staff as part of the accreditation process. AMERICAN BAR ASSOCIATION, D.O.J. CONSENT DECREE, *at* www.abanet.org/legaled/standards/foreword.html (last visited Aug. 16, 2003).

5. I would make the same argument about the people who teach research and writing, but I will leave that argument for another person and another day. See, e.g., Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of*

power, autonomy, access to resources, security, or remuneration. In short, to give them a different “status” has become a historical anachronism. I agree with Judge Harry Edwards that a law school should be

a truly integrated model of legal education, one that fully embraces theoretical and doctrinal scholarship, critical legal studies, clinical education, strong involvements with members of the judiciary and practicing bar, a new “global” law component focused on international issues, and powerful support of public interest ventures. Faculty hiring [should be] focused on diversity of perspectives, with no ideological or academic group having favored status. As a result, practical, theory-oriented, and critical legal scholars, along with their clinician counterparts—all with very different interests—[can] flourish in an environment of mutual respect, sharing equal status and prominence on the faculty.⁶

This essay presents my view of the academic world and how I think that world should be constructed. My criticism is aimed at legal education as a whole, not on the individuals throughout the country who have spent endless hours struggling with these issues and who have either come to different conclusions or made pragmatic compromises.⁷ When I do site inspections and whenever

Legal Writing Instructors, 5 LEGAL WRITING 225, 225-29 (1999). See also Elizabeth M. Iglesias et al., *Labor and Employment in the Academy—A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section on Minority Groups*, 6 EMPLOYEE RTS. & EMP. POL'Y J. 129, 134-44 (2002) [hereinafter *Labor and Employment in the Academy*]; Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067 (1999).

6. Chief Judge Harry T. Edwards, *A New Vision for the Legal Profession*, based on an Address to the Seventy-Fourth Annual Meeting of the American Law Institute (May 19, 1997), in 72 N.Y.U. L. REV., June 1997, at 572-73 [hereinafter *New Vision*]. Edwards initially criticized the legal academy for abandoning its responsibilities to the profession in his article *The Growing Disjunction Between Legal Education and the Legal Profession; a Postscript*, 91 MICH. L. REV. 34 (1993), but in *New Vision*, he stated that his pessimism has been diminished by his observations of the developments at New York Law School.

7. I was invited to join the faculty at the University of Illinois College of Law to create the first in-house clinic program in the college's history. As a lateral hire, I entered the college as a tenured, full professor. Much to my disappointment, I was unable to convince the faculty to create tenure-track faculty positions for the other faculty who would be teaching in the clinic. The faculty was willing to

I am consulted regarding an institutional problem, I am conscious that context is the paramount consideration and I do not judge situations by the standards articulated in this essay. So, I ask other clinical teachers to read this piece as a rallying cry for the future rather than as a critique of their past choices.

It is difficult to gather accurate statistics on status issues because neither the ABA nor the AALS asks law schools to report with sufficient specificity the distinctive status of faculty, and this is an area in which small distinctions can make a large difference. When people join the Clinical Legal Education Association or the Association of American Law Schools Section on Clinical Education, they are asked to volunteer information on their "status," and this self-reporting has resulted in some information⁸ which reveals that few clinical teachers are on a unified tenure track.

Most law schools have multiple missions, with some variations in emphasis, including the education of law students, the study of the law and consequential production of scholarship, and service to the academy, community (broadly defined) and the profession.

comply with American Bar Association, Section of Legal Education and Admissions to the Bar, Standards for Approval of Law Schools, 405(c) (2001-2002) to create "clinical tenure" positions with employment security, academic freedom, participation in governance except for voting on employment issues of tenure track faculty, and most non-monetary perquisites. However, the clinic faculty salaries are lower than even the entry-level non-clinical faculty, and the clinic faculty position can be eliminated if the clinic is diminished.

8. According to one set of authors who attempted to interpret these statistics:

Presently, there is tenure or contract status information on 789 clinicians, with 134 out of 183 schools reporting at least one clinician who was tenured or on tenure-track; thirty-one schools reporting at least one clinician who was clinical tenure or on the clinical tenure track; seventy-one schools reporting at least one clinician who was on a long-term contract; and 112 schools reporting at least one clinician who was on a short-term contract.

With respect to tenure, 245 clinicians reported that they had tenure, and ninety-three clinicians reported that they were tenure-track but had not yet attained tenure. In addition, twenty-nine clinicians reported that they had clinical tenure and twenty-five clinicians reported that they were clinical tenure-track but had not yet attained clinical tenure. In terms of those clinical faculty with contract rather than tenure status, 161 clinicians reported that they were on long-term contracts of three years or more, and 236 clinicians reported that they were on short-term contracts.

Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 31 (2000).

Examining the role law faculty play in accomplishing these missions demonstrates that distinguishing one group of teachers from another can only be explained as an attempt by a select group to hang onto its monopoly on power in the legal academy because that group fears being exposed as emperors in new clothes.⁹ As Elizabeth M. Iglesias has suggested, how we assess the terms and conditions of employment within a law school depends on how we define the goals of legal education: to provide education that results in graduates securing high-paying, high-status jobs; to encourage individual “self-actualization” rather than to feed existing structures in society and the practice; to ensure that society has sufficient lawyers to enforce the rights of those who are without power and resources; or to provide a place where people rethink all existing legal paradigms for “the common good.”¹⁰

Or put differently, dominant political and ideological commitments have a direct impact on how we answer questions about the way work in the academy should be organized. Thus, any effort to transform the terms and conditions of work in the academy will have to examine the underlying political, ideological and sometimes the more directly transparent self interests of those in control of individual law schools and other institutions whose interests are implicated in, and affected by, the organization of legal education.¹¹

II. WHO TEACHES WHAT AND HOW DO THEY TEACH IT?

I prefer the term “faculty who teach in the clinic” because I see those individuals who are full-time, permanent members of the faculty as just that: faculty. Who “counts” as a clinic teacher is extremely difficult to discern.¹² They are faculty who, as part or all

9. See, e.g., *New Vision*, *supra* note 6, at 572.

10. Iglesias et al., *supra* note 5, at 130.

11. *Id.* at 131.

12. According to Barry, Dubin, and Joy:

While precise figures are not available due to less systematic record keeping before 1995, the AALS Directories of Law Teachers for 1989-90 and 1999-2000 reflect an increase from approximately 800 Clinical Legal Education Section members in 1989-90 to 1300 a decade later. By the end of 1999, there were 183 U.S. law schools with clinical programs in the database maintained by Professor David Chavkin on behalf of the AALS Section on Clinical Legal Education and CLEA.

of their teaching responsibilities, work with students using experiential learning as a teaching method. One of the main arguments that I would make against creating distinctive classes of “clinic” faculty is that at any given moment in a law school, many teachers are using a variety of teaching methodologies. Moreover, in the course of an academic career, an individual will vary his or her teaching methods for a wide variety of reasons. Consequently, the notion that faculty should be categorized because of the use of a specific teaching methodology at a given time is nonsense. I refer readers to other articles on the history and development of both legal education and clinical education during the twentieth century,¹³ but suffice it to say that the assumption that Langdell’s model of law teachers with only J.D. degrees standing in the front of a large lecture hall, engaging in a “Socratic method” and relying on a doctrinal case book is no longer an accurate snapshot of legal education.

Consider what law schools do teach. The American Bar Association Standards for Accreditation are not specific except for requiring that students receive instruction on the Model Rules of Professional Conduct of the American Bar Association.¹² Otherwise, the standard is that the curriculum should provide “instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to

The total database includes 1736 persons who self-identified themselves as clinicians. Of this number, 849 persons indicated that they regularly teach in-house clinics, and 234 persons indicated that they regularly teach in externship clinics. Thus, approximately 80% of reporting clinicians indicate that they regularly teach in-house clinics. A little over a decade earlier, only 33% of all law schools reported that they had in-house, live-client clinics and the total number of clinicians in the Section was less than the number who now self-identify as in-house clinicians.

Barry et al., *supra* note 8, at 30-31.

13. See, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 3-32 (2000) (footnote 6 provides a list of materials on the history of clinical education); Martin H. Belsky, *Law Schools as Legal Education Centers*, 34 *U. TOL. L. REV.* 1, 1-12 (2002); Jerome Frank, *Why Not a Clinical Law School?*, 81 *U. PA. L. REV.* 907, 908 (1933); James P. White, *Rethinking the Program of Legal Education: A New Program for the New Millennium*, 36 *TULSA L.J.* 397, 398-404 (2000).

12. See AM. BAR ASS’N, *SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS*, 302(b) (2001-2002).

effective and responsible participation in the legal profession.”¹³ Thus, schools are left to devise curriculums based on historical traditions, pressures created by the *U.S. News & World Report* rankings, resources, faculty interests, bar passage rates, current student demand, and some vague notions about expectations about what employers demand. In terms of what students are taught from a substantive and procedural perspective, the first-year curriculum at most schools is fairly uniform and based on tradition, and the upper-level courses usually include standards that will be on the bar exam. Otherwise, law school course offerings provide an array of substantive, procedural, and boutique courses.

The old adage that the goal of a law school is to teach students to “think like a lawyer” was both elaborated on and expanded by the MacCrate Report.¹⁴ Although the report made clear that it was not to be used as a tool of accreditation or to create a specific curriculum, it was an attempt to articulate the core skills and values lawyers would need.¹⁵ Even though it has been the rare school that actually reformed its curriculum based on the MacCrate Report,¹⁶ the past ten years have seen significant changes in teaching goals as faculty have come to appreciate that they are not simply teaching analytical thinking and legal research, but also, at a minimum, the skill of problem solving.¹⁷

How, rather than what, people are teaching is the key to my argument. Among other things, clinical teaching primarily relies on using “experience,”¹⁸ and my observations around the country

13. *Id.* at 301(a).

14. AM. BAR ASS’N SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 131-33 (1992) [hereinafter MACCRATE REPORT].

15. *Id.*

16. See, e.g., John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1137 (1997); Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 144-48 (2001).

17. Engler, *supra* note 16, at 147 (footnote 35 provides a good beginning bibliography on the implementation of the MacCrate Report); Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 404 (2000); Margaret M. Russell, *Beginner’s Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 CLINICAL L. REV. 135, 142 (1994).

18. Barry et al., *supra* note 8, at 17-19. Footnote 65 lists some of the major works on methodology. *Id.* at 17 n.65.

indicate that many faculty have integrated experiential learning into their courses regardless of the content, from corporations to constitutional law.¹⁹ Textbooks are now “problems” books, people use role playing and video clips, students are put into “law firms” to discuss strategies, drafting problems abound, electronically based exercises such as CALI put students in lawyers’ roles, interdisciplinary courses require law students to adopt the part of the lawyer, etc. These trends are particularly apparent in upper-level courses. Add to these developments the proliferation of simulation courses or programs, where students can add on a “clinical” component such as legal ethics courses where students do extra credit pro bono work, and it is clear that the clinical method has spilled into the rest of the curriculum. If that is the case, how can it be argued that a group of faculty who use this method with live clients rather than simulations should be treated any differently than the rest of the faculty?

When modern clinics were first being developed in the 1960s and 1970s, faculty often assumed that the person they were hiring to teach in the clinic was a temporary employee of some sort. We now see that paradigm as a thing of the past. Faculty who teach in clinics are making a career of teaching and, as with all law professors who stay in the academy, over the course of their careers they can contribute to a wide range in the curriculum unless constrained by artificial barriers. The experience of teaching in a number of settings and using a number of teaching methods benefits the professor, the institution, and the students. For example, when I began teaching Evidence, I was forced to learn the breadth of the law in a manner I would not have if I had not had that teaching assignment. In turn, this assignment greatly enhanced my teaching in clinics. Similarly, in the Evidence classroom, I was able to help students learn the substantive and procedural material better because I applied techniques I had developed in teaching clinics. Like many others, I began only teaching in the clinic and in simulation courses, but now am available to the law school to teach in every setting: large classroom, seminar, interdisciplinary simulation, and live-client clinics. I move

19. See, e.g., Barry, et al., *supra* note 8, at 33-50; Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 358-59 (1998); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 600 (1994).

in and out of these settings seamlessly and have become an asset to an institution with diverse curricular needs.

As someone who teaches a variety of courses and in a variety of settings, I have an appreciation for the law school curriculum as a whole. Ceasing to distinguish clinic faculty as the “other” will lead to a lessening of the siege mentality that pits faculty members against one another for economic, human, and physical resources. When we see ourselves engaged and contributing to a common enterprise, we see where our work benefits one another. In the same way that we talk about “second generation” diversity issues constituting an examination of not only a presence of a diverse group of people, but also a valuing and enhancement of the whole, full participation of people who teach in the clinic will have exponential benefits to the curriculum.

Some argue that clinic teachers get “burned out” and, if given an opportunity to teach outside the clinic, are likely to abandon the clinic as soon as possible. This argument posits that if clinic teachers are given tenure, then deans will have to show them the same deference they now show tenured faculty. While there certainly have been cases where people received tenure and abandoned clinical education, these are exceptions, not the rule. If someone is hired to teach a particular “field,” from tax to property, he or she is expected to stay in that field. I am unconvinced that clinic faculty, who have academic freedom, resources, and autonomy, are any more likely to get “burned out” than classroom teachers who are hired to teach contracts when they are twenty-seven years old and face forty years of teaching the same course to first-year students. In fact, clinic teachers have more opportunity to reconstruct their own lives than contracts teachers because clinic teachers can teach new cases, teach new skills, or take a different tack to the same substantive area. So, I consider the “burnout” argument a red herring.

In an interesting reversal, recently I have spoken with several people who have had fairly traditional law teaching careers who have begun to look at clinic teaching as an intellectually stimulating, satisfying alternative to classroom teaching. Consequently, they are experimenting with teaching in the clinics as a part of their teaching load. Speaking with them made me wonder how many “closet” clinicians are floating around in law schools: people who are tired of the traditional classroom and the concomitant distant relationships they have with their students,

bored with the same teaching, and who want to feel that they are contributing to the betterment of individuals and the profession. I suspect that there are law professors who would have liked to have been clinic teachers, but felt their careers would be stymied or they would be professionally stigmatized if early in their careers they taught in a clinic. As these folks feel more secure in their professional identities, and as we eliminate the artificial distinctions among faculty types, everyone will have an opportunity to participate.

As a final note on the benefit of recognizing all law teachers as law teachers, I would argue that law schools will benefit economically if all are treated as engaging in a common activity rather than putting the faculty who teach in the clinic in a ghetto.²⁰ Clinical education usually requires a low student-to-faculty ratio, making it more expensive than many other models of legal education. When clinic teachers are encouraged to teach outside the clinic, they become less expensive because they can teach more students. “Instructional Units” (IU) or “Contact Hours” are terms used by some universities to measure teaching load. These are the total of the number of students multiplied by the semester hours for a course. For example, eighty students in a three-credit-hour course produces 240 IUs or contact hours. By teaching courses with larger enrollments, faculty who teach in the clinics increase their economic value to the institution. Interestingly, the actual contact hours spent with students doing individual instruction in a clinic do not enter into these calculations. Perhaps one way that law schools can rethink valuing clinic work is to consider individual time with students. This would also affect how service, such as coaching teams, which is labor-intensive, is valued. Most law schools need faculty to pull their weight in teaching enough students because that is the source of tuition dollars that finance the schools.

Some might argue that clinic slots are lost when faculty who normally teach only in the clinics reduce clinic opportunities in order to teach in other settings. My response is that that perspective is provincial. If the law school curriculum is seen as a common enterprise, more opportunities will ultimately be created for students to participate in clinics. Moreover, if faculty who teach in the clinic feel they have full citizenship, they are more likely to have higher morale and provide better experiences for their

20. Barry et al., *supra* note 8, at 24-31.

students and they are likely to stay in their jobs longer. Curricular isolation benefits no one.

III. SERVICE

The issues around service become quite complex for faculty who teach in the clinic. Law schools cannot operate without people providing service to the institution both formally and informally, but the value of service is inevitably discounted when individuals are assessed by the academy.²¹ For faculty who view those who teach in a clinic as “others” whose work is not important, the idea of shifting internal service to the clinic teachers is appealing. This is particularly true when the service work is invisible, time-consuming, requires individual meetings with students or student groups, and is unlikely to result in the only gold standard—scholarship. Since many folks who teach in the clinic often are service-oriented, care about students, and have the skills to do these tasks, we tend to accept these responsibilities and perform them well. As a result, we are given more to do. To the extent that clinic teachers have no employment security, a not-very-subtle form of blackmail is at play here—do this or else. If the faculty member who teaches in the clinic does not participate in faculty governance, vote on committees or have full citizenship, he or she is unrepresented and likely to be the recipient of assignments that those with power would decline. Exacerbating the situation is that faculty who teach in the clinic often are already attempting to provide service to the profession by being active in some aspect of the local bar association, which is something few non-clinic faculty do.

Ironically, clinic faculty who do not have “regular” tenure are often excluded from the service to the law school that most impacts the culture and future of the school. The most common exclusion is from participating on committees that make decisions about the rest of the faculty: hiring, assessment, retention, and promotion. Many forces define a law school, but clearly the makeup of the faculty, how they are valued, and whether they stay are among the most critical elements. We delude ourselves if we try to convince ourselves that it does not matter because these are just decisions about “them.” “They” are our world.

Some faculty who are not in a tenured position make the

21. See, e.g., Iglesias et al., *supra* note 5, at 145-48.

argument that they are just as happy to avoid having to participate in faculty committees and wars on tough issues. From my perspective, this is a cop-out. Having sat through many horrible blood baths, having been shocked at what some people will say and do, and having left committee and faculty meetings despairing for the future of the world, I firmly believe it is my civic responsibility to participate. It surprises me that clinic faculty who will struggle for social justice, even if it means not sleeping at night, will abdicate responsibility for their own working community.

I find it ironic that faculty who teach in clinics are often given less respect than others within their institutions, but when deans organize publicity for recruitment and fund-raising, the work of the clinics is prominently and proudly displayed. Law schools and universities point to the work of clinic teachers as the source of service to the profession and to the community. As such, the people who do this work deserve the equivalent recognition in their status within the law schools.

IV. SCHOLARSHIP—WHO IS WRITING WHAT, WHY, AND FOR WHOM?

It is beyond the scope of this essay to fully explore how “scholarship” has come to dominate the entire fabric of the assessment of the prestige of law schools, especially given the shifts in the focus of legal faculty writing from doctrinal to theory and interdisciplinary pieces.²² It appears to me that, regardless of the stature and the mission of the law school, every institution has become painfully self-conscious of the drive to produce law review articles that are published in the most prestigious law reviews. The pressure comes from *U.S. News & World Report*, American Bar Association site inspection teams, central university administrators who fuss over rankings, and, sadly, law students who suffer under the impression that the value of their law degrees in the job market is influenced by the quantity and placement of faculty articles because of the impact of the “rankings.” Essentially, scholarship has become a commodity and its historic purposes of communication, dissemination of knowledge, and intellectual debate have been lost in the ranking game.

Two arguments dominate the discussion of having a unitary tenure system for all faculty. The first argument is that faculty who

22. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

teach in the clinic should engage in scholarship in a manner similar to all law faculty. Alternatively, it has been argued that scholarship should not be a factor in determining whether faculty are tenured, and that other contributions to the institution that benefit the students, the profession, the development of the law, and the institution should be the basis for receiving the status of tenure.

Faculty who teach in the clinic do write articles that are published in a wide range of law reviews and journals.²³ In order to write, any law professor needs teaching loads, weekly schedules, annual teaching calendars, leaves, support staff, research assistants, mentors, and other support. If law faculty who teach in the clinic have employment conditions similar to those who do not teach in the clinic, they are as likely to be productive scholars as anyone else. Institutions who deny these resources to specific faculty and argue that they are not productive scholars have created a situation ripe for failure. The worst of all worlds is a system that creates a parallel track for clinic faculty with fewer resources and less status, autonomy, and pay and yet creates an expectation of traditional scholarship for success. Some strongly argue that scholarship takes time away from important clinic work so it is better to decline tenure if it means being expected to engage in such a frivolous activity.²⁴ I began teaching at a time when clinical theory and practice were passed on through an oral tradition: we diligently attended all conferences so that we could support and learn from one another. At the time, clinic faculty were fewer in number, the nature of clinical methodology was more limited, the focus of clinic programs was less diverse, and the careers of clinic teachers were short-lived. As these factors have changed, scholarship has served an important role in providing alternative means for communicating. Moreover, faculty who teach in clinics are in unique positions to bridge many gaps in legal scholarship between doctrine, theory, practice, and interdisciplinary work. Although I do not believe everyone must engage in scholarship, or that the definition of valuable scholarship that dominates the discourse is

23. See, e.g., the Clinical Legal Education Association web page at <http://clrn.law.cuny.edu/clea/clea.html> (last visited Aug. 16, 2003) (including an extensive annotated bibliography of scholarship related to clinical education). Faculty who teach in clinics publish on topics not related to clinical education, so this is just a sampling of their work.

24. Elson, *supra* note 16, at 1139-42.

correct,²⁵ I do believe that we neglect our responsibilities if some of us do not engage in scholarship.

I also support the second position that contributions other than scholarship should lead to tenure because it is consistent with my position regarding teaching. Law schools' value systems have shifted in a number of arenas—for example, the inclusion of non-J.D. faculty who have Ph.D.s in other fields. Given this, there is no reason that institutions cannot rethink what activities can lead to tenure. For example, if a law professor engages in significant administrative activities before tenure, that should be taken into account. Diversity in activities that give the institution national recognition, improve the development of the law and profession, enhance students' educations, and otherwise benefit the institution should "count." Law schools would then need to educate central campus committees about the why candidates are being put forth for tenure.

V. CONCLUSION: WHY CARE?

An easy solution to this debate would be to eliminate tenure²⁶ for everyone. At some point in the future, the concept of tenure may disappear from the academy, but for the foreseeable future, particularly on law faculties, tenure is the dominant paradigm. The distinctive categories of tenure create second-class citizens—and separate does not mean equal.²⁷ Depending on the institution, faculty who have "clinical tenure" may get paid less, have fewer voting rights, have less access to professional development, get fewer law school resources, have more limited autonomy to develop courses, have less academic freedom, and receive less respect from colleagues, administrations, students, and the university community.²⁸ Consequently, the individuals and institutions do not

25. See, e.g., *id.*

26. In this piece, I discuss tenure and not the issue of promotion through the ranks from Associate, to Assistant, and then Full Professor. At some law schools, the standards for promotion are different than for receiving tenure, but the issues are not really that distinguishable for the purposes of this essay.

27. Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 *How. L. J.* 31, 41-44 (1993).

28. See, e.g., <http://www2.wcl.american.edu/clinic/> (a database managed by David Chavkin at American University) (last visited Aug. 16, 2003); Barry et al., *supra* note 8, at 30-32. (synthesizing the data on status); Neumann, Jr. *supra* note 17, at 327. See Herma Hill Kay, UC's Women Law Faculty, Brigitte M. Bodenheimer Memorial Lecture on the Family (Feb. 21, 2002) in 36 *U. C. DAVIS L.*

get the full benefit of their participation.

Those who have looked at the demographics of legal education have seen the trend of “pink collar ghettos” where women are disproportionately put in lower status positions.²⁹ Richard Neumann found that statistics indicated that, “with one exception, wherever a law school has more than two faculty jobs outside the conventional tenure track, the female percentage of the faculty filling those jobs is substantially higher than the female percentage of conventionally tenured and tenure-track faculty.”³⁰ He goes on to note that hiring practices are not gender blind because higher percentages of women are hired into entry-level jobs with titles such as lecturer or instructor and the premium entry-level jobs go to men.³¹ Women with lower status are paid less than men, and even women who are in clinical tenure-track positions are often paid less than men in equivalent positions.³² Moreover, women who start in non-tenure-track positions are less likely than men to move to a tenure-track position.³³ The perpetuation of distinctive positions perpetuates gender inequity in law schools. I have been unable to find current information on the status of faculty of color, so I would only be speculating should I draw any conclusions on their current situation within law schools.³⁴

REV. 331 (Jan. 2003). For a description in the discrepancies in tenure and clinical tenure, see footnote 88, which describes the history and status of clinical faculty at the University of California law schools. *Id.* at 348 n.88.

29. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 333-36, 338 (2000); Deborah J. Merritt, *Are Women Stuck on the Academic Ladder?: An Empirical Perspective*, 10 UCLA WOMEN'S L.J. 249 (2000); Deborah J. Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 98 (1995).

30. Neumann, Jr., *supra* note 29, at 332.

31. *Id.* at 334.

32. *Id.* at 338.

33. Merritt, *supra* note 29, at 251.

34. See, e.g., *id.* at 250 n.3; Deborah Jones Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2301 (1992) (finding that women of color suffered from double discrimination and were more likely to find themselves in lower-status positions within law schools); Miguel A. Mendez & Leo P. Martinez, *Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 BERKELEY LA RAZA L. J. 59, 75-76 (2002) (providing statistics on the low number of Latina/os law faculty); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. LEE L. REV. 405, 436 (2000) (stating that only 3.5% of the law faculty in this country are racial minorities). See also Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L.

Even those who are primarily concerned with clinical education should be persuaded that only when the faculty who teach in the clinics are allowed to fulfill their full potential throughout the institution, will clinical education be able to fulfill its full potential. As Professors Barry, Dubin, and Joy point out, “the most effective approach to clinical studies is to integrate clinical methodology throughout the law school’s course offerings while at the same time constructing a series of progressive clinical experiences. In this way, a broad range of lawyering capabilities would be developed throughout the curriculum, and students would have clinical experiences that provide opportunities to test and reflect on the lessons learned in class.”³⁵

In sum, we who teach in law schools are engaged in a common enterprise with our peers. Whether in the areas of teaching, service, or scholarship, there is no reason for institutions to create distinctive classes of people and it is the responsibility of faculty who teach in clinics to fully participate in their law schools.

REV. 51 (2002) (discussing the struggle to diversify the faculty at Harvard.); LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* (2002).

35. Barry et.al., *supra* note 8, at 46.