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TRAPPED BY A PARADOX: SPECULATIONS ON WHY FEMALE LAW PROFESSORS FIND IT HARD TO FIT INTO LAW SCHOOL CULTURES

BEVERLY I. MORAN*

I. INTRODUCTION

In October of 1999, the Association of American Law Schools (AALS) hosted a workshop for female law professors, entitled *Getting Unstuck Without Coming Unglued*. The point of the workshop was to bring women together from across the country to discuss a common problem: no matter how good it looks from the outside, many women find law teaching frustrating. In response to that frustration, a variety of panels dealt with the female professor's need to structure richer career opportunities within the academy.

I was asked, along with Sarah Ramsey of Syracuse Law School and Suellyn Scarnecchia of Michigan Law School, to discuss *How to Keep Sane While Making Change Within Our Institutions*.¹ I must admit that, prior to this invitation, I had not thought much about the topic, primarily because I was spending too much time trying to stay sane. Nevertheless, I welcomed the opportunity to consider what I might contribute. Upon reflection, it occurred to me that one of the barriers to sanity within the academy is the conflict between how law schools actually operate and how female law professors think law schools function. With this thought in mind, I identified two aspects of law school culture that I believe are hard for women to deal with, at least in the early years. They are: (1) the conflict between professional training and academic expectations and (2) the "feminine" aspects of law school culture.

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1. Martha Fineman of Cornell University Law School was also scheduled to appear but was unable to attend.

In Part II, I deal with the conflict between professional training and academic expectations. In this Part, I begin by noting that, on the one hand, legal academics must abandon a client-oriented approach to their careers, and yet, on the other hand, we remain obligated to serve the public in ways not as clearly contemplated by many other parts of the academy. This conflict, which draws all law professors' time, but which can potentially impact women and minorities even more, requires that the "new professor" develop a strategy for guarding her time and protecting her scholarship. This observation leads to Part III, where I offer a series of four "Rules" that I hope will benefit the new teacher in making her way through the many demands on her time and her creativity.

After setting out the "Rules" that I hope will help the new teacher, I go further into a problem that I believe affects many female law professors both new and seasoned: the conflict between how we believe law schools work and how they, in fact, operate. In Part IV, I offer what I call the *Paradox of the Female Law School*. Here, I opine that, based on the idea of female moral reasoning set out by such authors as Carol Gilligan, law schools are much more feminine work environments than most other legal environments.

In Part V, I assert that it is the very nature of the feminine law school that makes life so difficult for female law professors. In this section, I draw on Critical Race Theory and the split between Critical Race Theorists and Critical Legal Studies over the "critique of rights." I use that split to illustrate that relationship-oriented decision-making is, by its very nature, problematic for outsiders who cannot develop the personal connections needed to make the system work in their favor.

Finally, in Part VI, I urge female professors to reclaim the feminine law school because of its many advantages for students and the profession. In this Part, I ask female professors to reclaim their right to shape an environment that nurtures them and their vision.

II. THE CONFLICT BETWEEN PROFESSIONAL TRAINING AND ACADEMIC EXPECTATIONS

I have Professor Dirk Hartog of Princeton University to thank for the insight that law school teaching presents an interesting problem. On the one hand, law teaching offers the benefits of the academic life while, on the other hand, academic life conflicts with the professional training law school provides.

For example, law school professors have the time and the encouragement to follow their own interests. This opportunity alone makes most lawyers look at law teaching as a sort of heaven into which only a select few are admitted. Further, lawyers in practice must often publicly advocate positions that they strongly disagree with while legal academics are rewarded for saying what we think. Finally, in law practice, activism is risky, if not for absorbing billable hours then for the potential for offending clients. However, law school professors are often paid activists. How many practicing lawyers make good livings from Poverty Law, Feminism, Gay Rights, Law and Economics or Critical Race Theory?

Accordingly, it is no surprise that thousands of lawyers try to enter law teaching each year in the hope of opening their souls. What successful applicants miss is that their prior professional training is about to conflict with their new academic obligations.

A. THE OBLIGATIONS OF AN ACADEMIC LIFE

Academic life calls for the pursuit of one's own interests. Yet, while this idea appeals to many lawyers, our professional training teaches us to put clients' interests ahead of our own. Because of this professional training, legal academics encounter more problems than other academics, particularly in developing a scholarly agenda.

From the first seminar paper to the dissertation, graduate students in other disciplines are engaged in a long acculturation process that emphasizes the pursuit of a personal academic vision. They are forced to develop their creativity and their ability to conceptualize and complete unique projects. Without a personal vision and the courage to pursue a self-generated goal, the typical graduate student is lost, unable to get a degree or move on to work in the academy.

In contrast, law professors spend three years of law school (and several years of practice) becoming other-directed. Our focus, our

very reason for being, is to serve others. Then suddenly, and with no guidance, law professors are expected to create and pursue their own course. The more years of professional life that a prospective law professor has, the harder it is to make the switch. The new law professor is often lost in the struggle to abandon old ways of being to become a self-directed scholar. No wonder many legal academics find the transition difficult.

The trouble does not end with the transition. The successful law student—and the successful lawyer—learns to problem solve with others in mind. “What does the judge think? What does the client want? What did Congress intend?” These are the questions that our professional training presents. This training makes us concrete thinkers while the academic life often rewards more abstract thinking, particularly in scholarship. It is not that law practice is not creative. It can be tremendously creative but within constraints that do not generalize to academic life as a whole. Yet each new professor must make the leap to a new type of thinking that asks, “What could be?” or even, “What should be?” without regard for, “What does my client want?”

B. LAW PROFESSORS AS PUBLIC SERVANTS

Not only does law school training differ from graduate training, law schools as institutions have different objectives than many other parts of the university. Law schools are supposed to service the community in very direct ways. The idea that “pure” research will result in a public good is not always accepted by law school faculties and is often actively resisted by other law school constituents, for example, alumni and the bar.

If only because law schools produce powerful social actors, law professors must keep the public in mind. This ideal of reaching out to the larger community is reflected in law school tenure requirements that often demand public service. This additional public service requirement means that law professors, even those who have no problem finding their own voice, must operate as academics, professionals and public servants.²

Thus, our training and our mission push one way while our academic obligations push us in several directions. Given that there are

2. Public service in more “academic” departments is usually focused on the discipline rather than on the general public as understood in law schools.

only twenty-four hours in the day, these multiple obligations can threaten anyone's sanity. Women, with their added child-care responsibilities and their larger obligations as role models, are just that much more at risk.³

C. IS THERE A WAY OUT?

I believe that there are at least four strategies female professors should follow to help reduce the dangers caused by these multiple roles. Some of these rules can help practicing attorneys as well because they go to the question of knowing what you are worth and letting others know as well. Self-knowledge and self-promotion are not traditionally the strongest female skills, but they are an essential part of self-preservation in the academy and beyond.

III. THE RULES

I term these strategies "The Rules" because I see them as guiding principles for getting from lawyer to tenured professor. These rules are not found in any book or article—at least any that I know of.⁴ They are the result of my observations at five different American law schools. They are also the wisdom I received from many people along the way.⁵

These rules come from my belief that a major problem for female professors is doing too much, getting too little credit and then feeling disheartened and isolated. They are meant to relieve some of that pressure by limiting your workload where possible and getting you credit when practical.

As you will see, these rules are not limited to the female professor or even to the academy setting. Many of these suggestions can also help associates in law firms, members of in-house corporate counsel and young lawyers in government.

Rule One for the female law school professor is to evaluate opportunities, especially in the early years. Female professors are asked to do many different tasks, often many more tasks than our

3. See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 574-76 (criticizing the imposition of an obligation to act as a role model on top of other responsibilities).

4. For some general advice to new professors, see *Minority Law Teachers Conference*, 10 ST. LOUIS U. PUB. L. REV. 145 (1991).

5. Two people that I want to acknowledge in particular are Andrew Haines (William Mitchell College of Law) and Kellis Parker (Columbia University Law School). Both were great mentors to me in my pre-tenure years and both have since died and are greatly missed.

male colleagues. This is a potential trap of major proportions. If you accept and do not produce, you will be remembered poorly. If you accept and do produce, what price have you paid and what else has suffered?

Instead of simply agreeing and then doing the task as well as you can, it is wise to ask first how the request enriches your agenda. Are you learning more about your academic subject, your law school and your university? Are you learning more about the academy? It is important to open up to the larger project. Go beyond the task at hand in order to understand how you fit into the whole.

Rule Two is to make one or two areas your specialty. Female professors often have many outside interests. In a sense, this characteristic is what makes us attractive members of the academic community. In many ways, we represent privilege.⁶ In other ways, we are the face of the oppressed. Unlike the other "classic" minorities in American culture, we represent every race, every religion and every part of the political spectrum. As academics, we are decidedly middle class. But as women, we are more likely to experience poverty. Unfortunately, although not as rare as in the 1960s and '70s, we are still under-represented in the professions, especially at the higher ranks.⁷ No wonder everyone wants us on his or her committee. But, simply because we represent so much, it does not follow that we can do everything. As a new professor, you should choose one or two areas that draw on your strengths, and build skills that you want to develop rather than trying to be all things to all people.

Once you have selected your areas of interest, *Rule Three* is to try to fit all of your tasks into that framework. By doing so, you get more for your efforts. For example, try to select graduate students that share your interests, write in your chosen areas and serve on committees that enhance your objectives. This selectiveness should not be seen as limiting but rather as freeing. Think of it as an artist selecting a medium. There are a host of objects that can be produced by oils and another host produced by sculpture. Perhaps you will even expand like Picasso to ink and clay and chalk. So long as your choice is an expression of your creativity, so long as it enriches you, it will

6. Beverly I. Moran, *Quantum Leap: A Black Woman Uses Legal Education to Obtain Her Honorary White Pass*, 6 BERKELEY WOMEN'S L.J. 118 (1990).

7. Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5 (1991) (studying the first women law professors and the growth of the female presence in law schools over the years).

feel nourishing and you will produce good work. But Picasso didn't venture into music and you don't have to serve every master. Make yourself the master by defining your tasks.

Finally, *Rule Four* is to cover your back, that is, protect yourself from misunderstandings and criticism. These misunderstandings and criticism are often the natural outgrowth of taking on many tasks. The more you do, the less your colleagues see you because you aren't always in the office or available for lunch. To avoid being thought of as someone who is doing too little when you are actually doing too much, covering your back comes down to answering four questions:

- (1) Do you know what you are doing, or are you just moving too fast?
- (2) Do other people know what you are doing?
- (3) Do you know why you are doing it?
- (4) Do you know what you have to offer?

A. WHAT ARE YOU DOING? DO YOU KNOW, OR ARE YOU JUST MOVING TOO FAST?

Keep track of your accomplishments. This entails keeping copies of letters, agendas of meetings and invitations. List every item in your annual report. Remind yourself of all you do.

Many women are so overwhelmed by their multiple tasks and responsibilities that they actually have no idea how much they do. This inattentiveness is very dangerous. First, if you don't know how much you do, how can you let others know? Second, your lack of self-awareness can lead you to accept criticism and unfair attacks as truth. In most organizations, there is always someone willing to criticize. Do not be an obvious target and do not be fooled into believing that you are doing less than you actually are.

B. DOES ANYONE ELSE KNOW WHAT YOU ARE DOING?

Fortunately or unfortunately, you have many hurdles from here to tenure. Most of these hurdles are made up of people and what they think of you and what people think of you has a lot to do with what you tell them. Write periodic reports to your dean. Keep your colleagues well informed.

Many professors believe that their colleagues know their accomplishments. This belief is simply not true. Or, even worse, they know

that their work has gone unnoticed but they don't know how to get the word out without appearing pushy or self-absorbed.

To keep your colleagues updated, invite them to talks, circulate your scholarship, ask for advice and give advice when asked. Internal school email lists have made this job easier. However, they are no substitute for face-to-face encounters. It is much harder to hurt someone you know. It is bad enough being overworked without also being underappreciated. Further, by letting others know your plans and goals, you help them match the opportunities they learn about to you and your interests.

C. WHY ARE YOU DOING IT?

Constantly re-evaluate what you are doing to ensure that it fits into your overall goals. As opportunities come your way, ask what they add to your plan. How do requests for your time expand your knowledge, enhance your connections, give you a new perspective or provide a sense of opportunity?

D. WHAT CAN YOU DO FOR OTHERS?

Many people on your faculty feel isolated from the university, the local bar and others in legal education. Make as many contacts as possible outside your law school. Then serve as a matchmaker between your colleagues and others. This activity increases your visibility and power within your school, your university, the community and the field of legal education. It is not by accident that every speaker at the *AALS Conference on Women in the Profession* urged female professors to move outside the law school and into the university for support. It is hard to overemphasize how enriching the world outside the law school can be. Not only are there a host of potential allies and mentors beyond the law school walls, there is also a wealth of ideas that will expand your intellectual horizons and transform your scholarship. Law was never meant to be separate from the world. Help keep your scholarship alive by letting it live in that larger world.

In addition, the academy houses ex-graduate students who learned to create and follow their own vision on their way to becoming professors. Let them teach you, directly and by example. Let them help you find your center and your mission.

Finally, make as many contacts as possible in your school. Have you really investigated everyone on your faculty for the strengths they

have to offer? As schools begin to change, there is a danger of schisms developing between faculties—Young and old. Teacher and scholar. Liberal and conservative. Try to avoid these divisions and cross party lines whenever possible. When you do, you will be amazed at how much everyone contributes to the project.

Do you see yourself as a scholar? You will find that it is the “teachers” who might have the greatest insights into your work and the best ability to help you shape your vision so that it reaches the widest audience. Do you see yourself as a leftist? My experience at every school I have taught at is that I received tremendous help, encouragement and support from political and social conservatives. There is no end to the surprises waiting to be discovered within most law school faculties.

IV. LAW SCHOOLS AS FEMININE CULTURES

Up until now, I have discussed some actions individual female professors can take to document their activities and aid their advancement, especially in the early years. What I turn to now is what I suspect keeps female professors off-center in legal education both in the early and the later years. I call this phenomenon the *paradox of the female law school*.

I was first exposed to the idea of the female law school in the 1980s, when three Yale Law School professors (Lea Brilmayer, Lucinda Finley and Roberta Romano) conducted a traveling road show for female LL.M. and S.J.D. students on entering law teaching. During a session at New York University Law School, Professor Brilmayer said something that illustrates the idea of the female law school. She explained that the process of getting one’s first teaching job mimics the female role in high school dating. The key is never to seem interested and never to ask for a job. Instead, the hiring process requires that the candidate signal to the law school that other high-ranked law schools desire her just as high school girls use one cute boy’s interest to catch another. Directly asking for a job almost ensures rejection.

What should we make of this hiring process, especially in contrast to other legal employment where an application is usually required and where playing the female role is not rewarded as much or at all? After years in the academy, Professor Brilmayer’s analysis seems truer now than when I first heard it almost twenty years ago. So true,

in fact, that I have come to wonder about the rest of law school culture. Is there a way that the hiring process reflects larger truths about faculty life within the legal academy? Upon reflection, I conclude that, when compared to other places where lawyers work, law schools are simply more feminine cultures, at least for professors. Paradoxically, however, rather than helping female professors, our schools' "female" ways of operating actually make women's professional lives more difficult.

Before trying to tie the difficulties females experience to the feminine law school, let me first convince you that the female law school exists. To paint a portrait of this creature, I turn to Carol Gilligan's description of how young girls structure their social relations.⁸

A. ASPECTS OF THE FEMININE LAW SCHOOL

Carol Gilligan's⁹ work with young girls and their moral reasoning supports the idea that law teaching is done in a more feminine environment than other lawyer's work. In particular, support is found in those descriptions of girl culture that reflect:

- (1) An emphasis on individuals and their relationships instead of on teams and team success;
- (2) An emphasis on maternal tasks instead of "bottom line" results; and
- (3) Highly individualized decision-making.

In other words, girl culture tends to involve judging a person based on a shared relationship rather than on what the person has done or failed to do in the particular situation at hand.¹⁰ Or, as Katha

8. Recognizing sex differences does not mean that one sex should be viewed as superior to the other. Carol Gilligan & Grant Wiggins, *The Origins of Morality in Early Childhood Relationships*, in *MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION* 111, 116 (Carol Gilligan et al. eds., 1988) [hereinafter *MAPPING THE MORAL DOMAIN*]. Gilligan and Wiggins looked at sex differences as a means to obtaining a perspective on morality and how sex differences affect moral development. *Id.* Similarly, pointing out law school culture as particularly feminine is not an attempt to judge the feminine as inherently superior or inferior. An evaluation is an attempt to view the mechanisms, which drive the legal academic culture, and how, by recognizing such mechanisms, women professors can make the profession work for them.

9. See generally *MAPPING THE MORAL DOMAIN*, *supra* note 8 (examining how gender can contribute to attitudes about the self and morality); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) [hereinafter *GILLIGAN, IN A DIFFERENT VOICE*] (looking at "different modes of thinking about relationships and the association of these modes with male and female voices").

10. A study of girls showed that girls see people on individual terms and attempt to respond to individual needs. Gilligan & Wiggins, *supra* note 8, at 131-34; Carol Gilligan, *Exit -*

Pollitt puts it, women have a “relationship-oriented” culture as opposed to a culture focused on “abstract rules and rights.”¹¹ Judged against these standards, law schools are simply more feminine places than partnerships or corporate legal departments.

1. *Team Work*

Almost thirty years ago, two pioneering female business school professors set out to understand why some women managed to succeed in the male dominated business world while the majority remained marginalized and shut out from even low-level management.¹² These professors decided to do in-depth interviews and surveys of successful female executives, a rare group now and even rarer then.¹³ After looking at a wide spectrum of these women’s experiences and life choices, the professors opined that what differentiated successful women executives from their less successful peers was childhood experience playing team sports.¹⁴

According to Professors Hennig and Jardim, businesswomen in general had difficulty relating to the male business world.¹⁵ In contrast, successful female executives had less problem understanding, accepting and fitting into male culture.¹⁶ In their study, one characteristic shared by the successful women was team sport experience, which exposed them to the idea that the team is more important than the individual.¹⁷ This acceptance of the team over the individual meant that successful female executives tolerated disagreeable individuals when their work or attributes supported a shared business strategy and were willing to cut their best friends if they did not contribute to

Voice Dilemmas in Adolescent Development, in *MAPPING THE MORAL DOMAIN*, *supra* note 8, at 141, 151 [hereinafter Gilligan, *Exit*]; see also GILLIGAN, *IN A DIFFERENT VOICE*, *supra* note 9, at 8–11 (discussing the “empathy” built into girls’ primary definition of self).

11. Katha Pollitt, *Are Women Morally Superior to Men?*, *NATION*, Dec. 28, 1992, at 799, 799–800 (discussing Nancy Chodorow’s psychoanalytic explanation of “difference feminism”). In another study, Betty Bardige observed that girls sought relationships in which they could be themselves and be able to voice their own opinions, while at the same time be loyal and caring toward others. Betty Bardige et al., *Moral Concerns and Considerations of Urban Youth*, in *MAPPING THE MORAL DOMAIN*, *supra* note 8, at 159, 172. On the other hand, boys tended to think in terms of peer pressure and being part of a group. *Id.*

12. See generally MARGARET HENNIG & ANNE JARDIM, *THE MANAGERIAL WOMAN* (1977).

13. *Id.* at 3.

14. *Id.* at 87.

15. *Id.* at xv.

16. *Id.* at xv–xvi.

17. *Id.* at 87.

that strategy. Professors Henning's and Jardim's point was that the business world is a male world and that businessmen relate to one another based on male culture, in this case, the culture of team sports.¹⁸

Does this observation hold true for law schools as well? Are law schools male cultures where team success and impartial decision-making trump individual relationships? Although we think of law schools as male cultures, my contention is that, although law schools are male dominated, they are not male oriented in the ways described above. For example, an honest assessment would show us that law schools have almost no use for teamwork. Law schools do not encourage team teaching, joint writing projects or class-wide grading. Instead, people are expected to do "their own" work.

In contrast, most lawyers' tasks require many forms of teamwork. Moreover, legal organizations outside the academy reflect what Professors Henning and Jardim found in business, that is, the more "masculine" model of team over individual. As discussed at greater length below, nowhere is this model clearer than in the modern law firm where partners are routinely "let go" as soon as their productivity drops.¹⁹

2. *Maternal Role*

The role of professor (and even dean) has a significant maternal aspect.²⁰ Our main objective is raising the young (rather than besting opponents or dealing with equals) and providing a public (rather than private) service.²¹

Practicing lawyers are not evaluated on how they serve the public or even how they mentor within their firms. Practicing lawyers are more often judged on the "bottom line"—Cases won. Clients wooed. On the other hand, law professors are not evaluated on how much

18. *See id.* at 31–34.

19. *See infra* note 23 and accompanying text.

20. In Kent Syverud's essay on law school deans, he describes the dean's position as tending to the needs of students, faculty, staff, alumni and administrators who feel underappreciated. Kent Syverud, *Three Principles of Effective Deaning*, 31 U. TOL. L. REV. 751, 751–53 (2000).

21. A study of men's and women's approaches to moral dilemmas looked at responses in terms of a justice-focus idealizing equality and a care-focus idealizing attention to need. Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, in MAPPING THE MORAL DOMAIN, *supra* note 8, at 73. The study showed that women tended to be care-focused, expressing attention to the particular needs and circumstances of individuals. *Id.* at 82. Males in the study were more likely to be justice-focused, concerned with whether others were treated fairly and as equal. *Id.*

private benefit they produce. Instead, we are expected to contribute through our service to students and the general public in much less easily quantifiable ways.

3. *Relationship Oriented Decision-Making*

As those who have been on either side of it know, the law school hiring (and tenure) process is very individual and extremely soft. It is not so much what you know, your qualifications or how you help position your school. It is much more a question of “fitting in” which includes knowing elaborate private rules such as the one articulated by Professor Brilmayer that prevent one from even directly applying for a position.

In tenure it is not only possible *but probable* that two people who appear the same on paper will end up with different results. This apparently inequitable situation is in direct contradiction to the stereotype of male decision-making as focused on equality and fairness in the sense of people with similar profiles receiving similar results.²²

Although this type of individualized decision-making may also exist in practice, the most hated person who brings business into her law firm can probably expect reward while beloved “old timers” who no longer “make rain” can expect to be forced out.²³ Not so for the hated person with the article in the *Harvard Law Review* and stellar teaching evaluations. Without tending to her work-centered relationships as well as her work product, that person is looking at a hard tenure decision. Partnership and other promotion decisions are thus more predictable and based on more “objective” standards than law school tenure and hiring decisions.²⁴ In these ways and others, the law professor’s job reflects female culture.

22. *Id.*

23. Marc Galanter, “*Old and in the Way*”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1094–95 (noting that older lawyers are being driven from law firms); *see also* Richard B. Schmitt, *Storied Lawyer, in His Twilight, Sues His Firm*, WALL ST. J., Jan. 4, 2000, at B1 (reporting the story of well-known 75-year-old attorney who sued his firm for age discrimination after being fired).

24. *See* Galanter, *supra* note 23; Schmitt, *supra* note 23.

V. FEMALE PROFESSORS IN CONFLICT WITH FEMININE CULTURE

If I have convinced you that there is at least some merit to the idea that law schools reflect “female” culture, then, of course, the question becomes: if law schools are, in fact, female cultures, then why don't female professors feel better about their work experiences? Why are they unable to take advantage of a culture that reflects their own experience and preference? Why, for example, do they remain underrepresented in leadership roles?

There are at least three possible explanations:

- (1) Law schools are only relatively feminine (i.e., law schools are still male domains);
- (2) Female law professors are less feminine than their male counterparts; and
- (3) There is something about feminine decision making that works against female professors.

A. MAKING THE THEORETICAL CONCRETE—A TENURE THOUGHT EXPERIMENT

To place these possibilities in a concrete context, I ask that you imagine a tenure case. Two women, both with the same number of articles (all well received), have average teaching evaluations and poor prospects for future scholarship. One is well liked, the other not.

Assuming that the well-liked candidate has good prospects for tenure, how should the less tolerated candidate react strategically in order to get similar treatment? In other words, how does our understanding of law school culture inform this candidate's strategy for obtaining tenure? Can she employ either “male” or “female” culture to her advantage by, for example, invoking equal treatment or relying on relationships?

When I first created this scenario I had no idea how well it captured the differences between so called “male” and “female” thinking. Then I received the following criticism of my example from a female law student: “How can you assert that the candidates are the same when one is easy to get along with and the other is hard to get along with? Doesn't it always make sense to hire the person that you like and get rid of the person with the bad personality?” This comment is a classic example of the so-called “female” view of work relationships

(and, I would assert, law school faculties) at least as described by Professors Hennig and Jardim.²⁵

As discussed above, in their early work on female executives, Hennig and Jardim noted that one thinking pattern that alienated businesswomen from their male colleagues was the female executives' unwillingness to work with people they disliked.²⁶ According to Hennig and Jardim, women executives clung to the idea that personality forms an important part of a working relationship. Because of their focus on personalities and relationships, these women ran afoul of the sports informed ideal of male work relationships in which team success is more important than whether individuals get along.²⁷ Under the male/sports view, candidates are supposedly judged by what they add to the team, not by how they are liked or disliked. In contrast, the stereotypical "female" view is to hire the person as well as the package. The claim is that "male" judgments are based on objective criteria such as goals scored or sales achieved while "female" judgments are based on personality matches and fit.

B. CULTURE AND TENURE STRATEGY

How would this conflict between "male" and "female" decision-making affect the candidate searching for a successful tenure strategy? If the male stereotype applied (the perception that what the candidate adds to the team counts for more than her personality) then we would expect the "male" organization to dismiss both candidates. Each candidate might have good scholarship up to the present, but the male organization looks to future performance.²⁸ If each is a poor prospect for future scholarship, then each will bring the team's future average down. Thus, each should be eliminated. In addition, neither one is a stellar teacher. Thus, the lack of future scholarship is not offset in any significant way by support for the school's teaching mission. Further, the record as described shows no great contribution to the law school's public service obligations. In other words, neither candidate presents a record that predicts future achievement.

If we believe the male stereotype of decision-making, both candidates will be gone soon. That dismissal would support the view that

25. HENNIG & JARDIM, *supra* note 12, at 31-34.

26. *See id.* at 32-33.

27. *See id.* at 31-34.

28. *See Galanter, supra* note 23 (noting that law firms routinely force out partners once they cease to produce at increasingly higher levels).

law schools are male cultures. Yet, anyone who knows how law school promotion decision-making works will reach a different conclusion. The *cognoscenti* know that the candidate with the “good personality” is headed for tenure and the candidate with the “bad personality” is headed for the door, despite how equal they appear “on paper.”

What if law schools were “male” cultures? How would this fact help the less-favored candidate? In a “male” culture, the less well liked candidate should use the system to her advantage. She should, for example, invoke the abstract over the individual and the rules over relationships. Her strategy would emphasize that she meets all the known requirements, and that, based on these requirements, she is equal to her counterpart and must, therefore, receive equal treatment. In this way, she at least ties her fate to her counterpart, making it difficult to take one and not the other.

Tying her fate to her counterpart might have some success in a male culture, especially if there are some decision-makers who believe that each candidate has future potential. But, if we truly believe that male culture looks at results and not personalities, then there is no real need to assert that each applicant is tied to the other. That would happen as a matter of course. They both “look” the same and so they will both get treated the same.

Unfortunately for our candidate, equal treatment is not what she wants—at least not in a truly “male” culture. Where the “both or neither” strategy has real potential is in a female culture with “male” rhetoric. In such an environment, the “both or neither” strategy should work because it makes it hard for her counterpart’s supporters to work against the “problem” candidate. In a male *rhetoric* culture with female decision-making, forcing the issue—take both or take neither—might work because it corners decision-makers into abandoning their friend or tolerating their enemy. But, even in a female culture that uses male rhetoric, our candidate’s chances of success are small. What she needs is active support, that is, people who like her and want her to remain. Male reasoning and male rhetoric will not help her. Let us look at three possible explanations why.

C. LAW SCHOOLS AS MALE DOMAINS

An objection to the assertion that law schools are female cultures is the view that law schools are male domains. I have no doubt that law schools are male domains. The numbers speak for themselves. There are twenty female deans out of a possible 182 ABA-accredited

American law school deanships.²⁹ Female-chaired professors are outnumbered by their male colleagues, even controlling for when each group entered law teaching.³⁰ Men outnumber women in law school teaching, especially at the elite law schools.³¹ There is no doubt that, in law schools, male culture takes up a lot of space. But, it is one thing to be male dominated and another to exhibit male culture.

If law schools are male cultures as opposed to merely male dominated, then our outsider tenure candidate should win her rules-based argument. She should be granted tenure or see her counterpart rejected with her. At least that is what we would expect if the law schools' male professors were actually more justice-focused than relationship-oriented.

The candidates are the same and should be treated the same. Personal relationships should not tip the balance against an individual who serves the team or for the person whose future prospects look poor. Individual preferences should yield to the common good. Besides, rules are rules and should be applied evenly. They either both go or they both stay.

This male strategy is often tried in the tenure context and it almost never succeeds. Instead, some reason—or no reason—is concocted to justify keeping the well-liked person and getting rid of the “difficult” person. So much for male decision-making in male dominated law schools.

But, if it is true that female culture rules law school faculties, then why do law professors, especially females ones, continue to invoke “male culture” in the female law school? In this essay, I suggest two reasons: (1) perhaps female professors are less “feminine” than their law schools and so prefer male culture norms even in their “female” law schools, or (2) perhaps female professors are afraid to employ female culture because they know that the inherent dangers in that culture can, and will, work against them.

29. Terry Carter, *Paths Need Paving*, 86 A.B.A. J. 34 (2000).

30. Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 252, 258 & n.184 (1997); see also ABA COMM. ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCE OF WOMEN IN LEGAL EDUCATION* 32–33 (1996).

31. AM. BAR ASS'N, *OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS* 63–72 (Rick L. Morgan & Kurt Snyder eds., 2000 ed. 1999).

D. THE LESS FEMININE FEMALE?

Law school teaching explicitly rejects many aspects of law practice's male culture. Even a standard reason for entering the academy, craving an environment centered on thinking about law without serving a client, is drawn from the feminine emphasis on the individual over the group. Unstated reasons for entering the academy that also conform to a female ideal include: (1) much less competition than at elite government agencies and law firms (given that tenure chances are good compared to elite law firm partnerships or presidential level appointments in government); (2) less direct interference in work product; (3) an ability, even a possible reward, for going one's own way; (4) a wish to help people; and (5) a wish to mentor. We are told that these are all aspects of female culture.³²

But, if law schools are feminine cultures, why do females feel alienated? For female law students the answer may be that they are, in fact, living in a male culture even if their professors are not. No doubt a student's life is very different from a professor's in this regard. The student's life is much more controlled by "objective" rules from LSATs to anonymous grading. A student's after school opportunities are much more subject to the idea of "objective" grades (no matter how subjective in fact). Students are going from male culture to male culture in a different way than female professors.

Female professors are not as caught (as female students are) in the "objective" male law school world. Our environment is, in fact, more subjective and relationship-oriented. Yet, we remain alienated as well. Could it be that we live in a feminine culture but are unable to take advantage of our situation because female law school professors have fewer "feminine" attributes than the female population at large and, perhaps, even less feminine aspects than our male law school colleagues? This might occur, for example, through a process of self-selection.

Consider that women who are drawn to "female" culture as described by Gilligan and others will find few attractive public images of lawyers. Once we get past the general notion of helping people (clearly a part of female culture), the rest of law's public image is fairly grim. Female culture's individualized decision-making is at odds with the concept of "equal under law." Female culture's emphasis on

32. See Gilligan & Wiggins, *supra* note 8, at 132; Gilligan, *Exit*, *supra* note 10, at 151; Gilligan & Attanucci, *supra* note 21, at 82.

caring, personal involvement and responsiveness to personal needs is in conflict with the idea of judgment and is often viewed as a liability in law practice.³³

Thus, it is possible that women who enter law (and later law teaching) are not looking for female work places. Instead, they may be, to use an old phrase, "male identified." In other words, they are women who specifically selected law practice because its public image fit their own male-oriented preferences. This male identification might cause these female professors to miss the female aspects of law school culture and the opportunity to take advantage of those aspects in their own careers.

Once again, when we apply this hypothesis to our tenure candidate, it leads to a rule bound strategy which experience tells us will fail. Under this scenario, female professors are so attracted to male culture that they fail to recognize a situation in which a more feminine strategy would yield better results. Instead of building relationships, the female professor invokes rules. In other words, perhaps a female professor's male-identified preferences get in the way of a more effective feminine strategy.

E. THE LIMITS OF FEMININE DECISION-MAKING

Perhaps the idea of a "male-identified" female professorate is complete nonsense. Perhaps female professors actually do prefer female culture. Is it still possible that the nature of their institutions forces these admirers of female decision-making to become champions of "objective male" rules despite their feminine preferences?

So far, our tenure candidate has two reasons to argue for a "masculine" rule-bound approach. First, it might be that she is actually in a male culture that responds to the "rhetoric of rights." In this case, she will ask for equal treatment because that argument will appeal to her law school's culture.

Second, it might be that her personal preference for male decision-making results in her being out of touch with her law school's feminine culture. Although the law school follows an individualized decision-making model, she prefers the rule-bound approach. This preference might have led her to law in the first place and then to law teaching. In this scenario, the candidate is following her own ideas of

33. Dana Jack & Rand Jack, *Women Lawyers: Archetype and Alternatives*, in *MAPPING THE MORAL DOMAIN*, *supra* note 8, at 263, 264-67.

fairness even though they conflict with the way her school operates. In both alternatives, our candidate ends up losing because she is arguing fairness and rules in a world where preferences and relationships matter. Instead of trying to get as many people on her side by developing a pleasing personality, she is focusing on her work.

A third alternative is possible. Our candidate might feel boxed into a position that meets neither her nor her law school culture's preferences. In the rest of her life she might operate comfortably in female culture and yet, within the confines of her female law school, she feels forced to take a male approach. This might happen, for example, when employing the female approach is simply too dangerous. After all, if females are outsiders in the law school world, what advantage could come from employing a decision-making model that always favors insiders?

To illustrate this point in another context, let's look at the break in Critical Legal Studies over the "critique of rights." In the 1980s, Critical Race Theorists (CRT) broke from Critical Legal Studies (CLS), in part, over the "critique of rights."³⁴ For CLS adherents, "rights talk" was a sham, a way of fooling people into thinking that rights, rather than power, protected even the poor and downtrodden.³⁵ As more racial minorities entered CLS, however, the Critical Race Theorists' response to the CLS critique of rights was to ask how, in the face of power, could minorities protect themselves without rights?³⁶

The CLS/CRT conflict over rights is relevant to the female law professor's dilemma because the CRT adherence to the "rhetoric of rights" is based on the observation that the most dangerous places for outsiders are those where personal connections determine outcomes. In this sense, the CLS "critique of rights" is a female culture critique as well. Relationships—for CLS, power relationships, for girl culture, friendships and family—control outcomes. This is a wonderful outcome for insiders who have developed a network of relationships. On the other hand, it is deadly for outsiders. And who knows this better

34. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxiii–xxvii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY]; Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 750–51 (1994).

35. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, in CRITICAL LEGAL STUDIES 303, 304–05 (Allan C. Hutchinson ed., 1989); Harris, *supra* note 34.

36. CRITICAL RACE THEORY, *supra* note 34, at xviii–xxiv; Harris, *supra* note 34.

than women? Women steeped in girl culture know to be wary of outsider status combined with individualized decision-making. They have seen the danger in every clique and sorority that turned on a girl for no reason other than that she failed to fit in.

This is our candidate's dilemma and the dilemma for all who glorify "female" decision-making. She is not well liked which makes her an outsider. In her tenure case, regardless of her personal (or her cultural) views or style, her best hope is to assert the rules. So long as she remains in the world of relationships, she is doomed.

This is the paradox of the female law school. It is a girl culture that forces women to play like boys. It is a culture that accomplishes this result by keeping females in outsider status. My point is that, although rigid rules may be anathema to female culture, these same rules are hard to reject when they represent safety in a hostile world. Thus, women who might embrace female culture in a safe environment become rule advocates in hostile ones. In contrast men, who might have come to law school teaching because of its feminine aspects, and who are able to get and maintain insider status, prefer and enforce individualized decision-making. This is the paradox: men using female decision making to disempower women and women forced to reject female culture because of its very real—and dangerous—flaws.

VI. RECLAIMING FEMALE CULTURE

Because rules are a traditional source of protection for outsiders, I believe that many female professors unconsciously reject the same aspects of law school culture that attract their male counterparts. Thus, females are drawn to teaching for its male aspects and then fail to recognize the female culture they entered upon becoming professors. Although this is certainly a dangerous situation, it is not without opportunities.

What Professor Brilmayer's dating metaphor demonstrates is that girls can learn to triumph over male values. If teenage boys want to hunt the unattainable prize, then teenage girls oblige. If high school girls can play and win, then when will female law professors join the game in the feminine law school?³⁷ This is an important question

37. See Jack & Jack, *supra* note 33, at 281–86 (discussing women lawyers who reshape legal practice to suit feminine moral reasoning); see also LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 98–101 (1997) (discussing how

because feminine culture is not always bad and, in fact, it has much to offer law schools. For example, learning is a highly individual experience that is best aided by teachers who are willing to treat students in accordance with their own unique strengths and weaknesses. To the extent that male culture dominates, for example, with large classes and with anonymous grading, we see high student dissatisfaction and resentment.³⁸ To the extent that students are nurtured as individuals, for example, by being placed in small classes and clinics, the entire enterprise is more comfortable and productive.

Thus, my point is not that female culture is bad for law schools or for female professors. Instead, my point is that female law professors must find a way to reclaim that culture in an often-hostile environment. The very behavior that makes male professors comfortable and makes law schools feminine is the behavior that drives female professors crazy. The lack of rules, the arbitrary decisions, the individualized evaluations are all against our understanding of the law school ideal.

Yet, these very aspects of law school culture offer female professors an opportunity. If we accept these feminine aspects of law school culture, or are willing to manipulate them to our benefit, then, perhaps, we will become unstuck without becoming unglued.

women "[t]hrough the constant process of dialogue and the struggle to communicate, . . . can give ourselves credibility in our own eyes").

38. See Jack & Jack, *supra* note 33, at 268 (discussing how female students felt alienated in the competitive, monopolizing and self-promoting style of discussion in the classroom).