
Intersectional Barriers to Tenure

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INTRODUCTION

While student diversity has been hotly debated for years in the courts and among the public, little attention has been given to the racial and gender identity of the person in the front of the law school

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classroom.¹ Yet, faculty diversity may play a critical role in attaining the broad goals that courts, schools, and students believe result from classroom diversity. Courts expect that student diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”² Those goals will only be enhanced by having skilled facilitators of various backgrounds leading conversations throughout a student’s law school career. Likewise, if “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds,’” the professors’ own backgrounds surely play a role as well.³

Diversifying legal academia must begin with faculty recruitment and hiring. Currently, of the approximately 11,000 law faculty members teaching in the United States, only 7.0% are women of color — including Black, Latina, Asian American, Native American, Middle Eastern, and multiracial women.⁴ A paltry 7.8% are men of color. While white women are better represented (25% of all faculty), a full 5,090 (43%) of all full-time law faculty are white men.⁵ While diverse faculty are better represented now than decades ago, the rate of progress has been slow and barriers abound.⁶

¹ The Supreme Court has considered affirmative action/student diversity three times in five years: *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016); *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411 (2013). State initiatives also led to debate, including Proposition 209, enacted as CAL. CONST. art. I, § 31 and PROPOSAL 06-02, MICH. CONST. art. I, § 26.

² *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing Petition for Writ of Certiorari at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

³ Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 70 (2011) (quoting *Grutter*, 539 U.S. at 330).

⁴ The statistics were reported by AALS for faculty from 2008 to 2009. They are no longer available online (though the Report and Table are on file with the author). ASS’N OF AM. LAW SCHS., FACULTY STATISTICS (2008–2009) [hereinafter AALS STATISTICS] (on file with author). The ABA reports similar statistics in their Report. See *Law School Faculty & Staff by Ethnicity and Gender*, AM. BAR ASS’N (2013), http://www.americanbar.org/groups/legal_education/resources/statistics.html [hereinafter ABA Statistics].

⁵ ABA Statistics, *supra* note 4. An additional 1502 respondents did not state their race/ethnicity.

⁶ In the late 1980s, there were only approximately 300 law faculty of color compared to over 1,000 today. See Richard Delgado & Derrick Bell, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 354 n.17 (1989); Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 962 (2015) [hereinafter Deo, *Ugly Truth*] (citing AALS STATISTICS, *supra* note 4). Even these numerical increases have failed to yield qualitative improvements in the

Ensuring that a broad population of scholars has access to the legal academy is only the first step in creating meaningful faculty diversity.⁷ To truly diversify the academy and maximize classroom diversity goals, schools must also improve faculty retention. Longevity in legal academia and meaningful success in the profession is often synonymous with tenure. Tenure, “that important gateway to professional success and stability” that leads to “virtually unrivalled job security,” is also “the crucial institutional process through which the legal academy could block or open the doors to gender and racial integration.”⁸ Currently, those doors remain partly obstructed, with women of color obtaining tenure at lower rates than white men and enduring intersectional challenges along the way.⁹ Yet, few scholars have investigated this disparity, and only one recent study has specifically considered intersectionality in the law school tenure context.¹⁰

For an individual to achieve tenure, most law schools require demonstrated excellence in three areas: scholarship, service, and teaching.¹¹ Each requirement of the trifecta brings unique barriers for women of color striving to climb the law faculty ranks. These barriers contribute to the lower rate of success for women of color seeking to

experience of underrepresented faculty. See, e.g., Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 367-75 (2014) [hereinafter Deo, *Looking Forward*].

⁷ For an empirical assessment of the challenges associated with hiring diverse faculty, see Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 457-65 (2015) [hereinafter Deo, *Trajectory*].

⁸ Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 J. LEGAL EDUC. 511, 511 (2012).

⁹ See RICHARD A. WHITE, THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997, at 13 (2004) [hereinafter FACULTY TENURING] (on file with the author) (showing after seven years on the tenure track, 63.2% of women of color remained untenured, compared to 54.5% of men of color and 28.9% of white men and white women); see also Barnes & Mertz, *supra* note 8, at 512 (identifying different professional disparities between male and female law professor hires).

¹⁰ See Barnes & Mertz, *supra* note 8, at 517, 519 (finding that women of color faculty are less likely than those from other groups to find the tenure process easy or fair).

¹¹ See ASS'N OF AM. LAW SCHS., FREQUENTLY ASKED QUESTIONS ABOUT HOW TO BREAK INTO LAW TEACHING (2015), <https://www.aals.org/wp-content/uploads/2015/07/Frequently-Asked-Questions-About-How-To-Break-Into-Law-Teaching-7.22.15.pdf> (“Generally, tenure-track faculty are evaluated in three areas: scholarship, teaching, and service.”).

attain tenure.¹² Combined, they block meaningful diversification of legal academia.

This Article draws from the landmark Diversity in Legal Academia (“DLA”) project to empirically investigate intersectional (raceXgender) experiences with promotion and tenure that contribute to a lack of diversity among law faculty. The data show that to truly diversify law teaching, we must remove barriers to tenure. The Article first introduces some guiding principles for considering the need for and current lack of diversity in legal academia. This research draws from rich scholarly sources rooted in Critical Race Theory, feminist theory, and contemporary legal realist approaches.¹³ This literary framework provides the structure for the Diversity in Legal Academia project, the empirical study at the heart of this Article. In Part II, the Article presents the analytical approach and methods employed in the DLA study as well as brief descriptive statistics of DLA participants. Finally, Part III delivers empirical findings on intersectional (raceXgender) challenges for law faculty seeking to achieve the security and stability of tenure. Separate but interrelated barriers are associated with each of the three hurdles of tenure: teaching, service, and scholarship. A section comparing and contrasting the experiences of women of color faculty with those of white men, white women, and men of color faculty brings the intersectional challenges into focus. The Conclusion discusses implications and proposals for improving legal education by streamlining and correcting the tenure process.

I. CONTEXTUAL APPROACHES

In this Article, Diversity in Legal Academia data are used to elucidate raceXgender challenges associated with tenure and promotion. Specifically, the empirical findings presented include disparate challenges associated with teaching, service, and scholarship. Qualitative data are the primary focus of this Article; thus, the actual words of various law faculty participants in the DLA study are woven together to speak to both their individual and collective experience.¹⁴ While different hurdles block the various requirements of tenure, they all involve intersectional discrimination, including both gender

¹² See FACULTY TENURING, *supra* note 9; see also Barnes & Mertz, *supra* note 8, at 512.

¹³ For more on contemporary legal realism, see, for example, Barnes & Mertz, *supra* note 8 (depicting an example of contemporary legal realism).

¹⁴ All names used are pseudonyms, though the data presented are the actual quotes of individual law professors who participated in the DLA study.

privilege and implicit bias. Additionally, a few existing studies of law faculty inequities lay the foundation for DLA.

A. *Scholarly Investigations of Legal Academia*

In Spring 1989, law professors Derrick Bell and Richard Delgado published an article in the *Harvard Civil Rights-Civil Liberties Law Review* entitled, “Minority Law Professors’ Lives: The Bell-Delgado Survey.”¹⁵ The authors had directly mailed questions to the roughly 300 faculty of color listed in the AALS directory in order to assess and report on the qualitative experience of these underrepresented academics.¹⁶ Just over 100 responded, allowing the authors to make inferences regarding the experiences of these and other faculty of color.¹⁷ That study revealed rampant discrimination in hiring and promotion,¹⁸ alienation among faculty colleagues,¹⁹ hostility from students,²⁰ and a lack of financial support for research and professional development.²¹ One Black professor reported that his offer to teach at a Southern law school was “retracted . . . when they learned he was married to a white woman.”²² Others “believed that [their] scholarship was devalued,” perhaps because many faculty of color write on issues involving race, gender, class, and sexual orientation, which may be seen as less “scholarly” than “core” doctrinal subjects.²³ Relationships with students were colored by the fact that “many of the law students had never seen a black woman ‘out of uniform’ — outside of domestic service.”²⁴ Perhaps because of this, 10.5% of faculty respondents reported that white students had “strong resistance” to their authority in the classroom.²⁵ Hauntingly, the authors concluded their Article with the following prediction:

It seems unlikely that relief will come soon, however — the professors we canvassed sensed little urgency on their institutions’ parts to redress the conditions they described. Yet,

¹⁵ Delgado & Bell, *supra* note 6.

¹⁶ *Id.* at 351-55, 370 n.17.

¹⁷ *Id.* at 353-54.

¹⁸ *See id.* at 361-62.

¹⁹ *See id.* at 357-59.

²⁰ *See id.* at 359-61.

²¹ *See id.* at 363.

²² *Id.* at 362.

²³ *See id.* at 357.

²⁴ *Id.* at 359-60.

²⁵ *Id.*

recognition of the magnitude of the problem may one day spur the search for constructive responses. Without that recognition, plainly nothing will happen. This Article is offered with the hope, admittedly not great, that that day will come sooner rather than later.²⁶

Though their findings were non-generalizable and non-comparative, they provide valuable insights into the professional challenges facing the few legal academics of color at the time.²⁷ More recent research on ongoing challenges in academia confirms those authors' prescient prediction of little progress or improvement.

More recently, the 2012 anthology *Presumed Incompetent* has brought new light and interest to understanding intersectional challenges in academia, especially through the powerful use of personal narratives.²⁸ The book captures the experience of women of color in diverse fields — from law to psychology, feminist studies, and engineering.²⁹ Though none of the chapters that focus specifically on law professors draw from empirical methods, the narrative and normative scholarship included indicate that legal academia is not unique in creating barriers for women of color.³⁰ Common themes include a hostile climate and broad institutional bias.

The book concludes that a hostile academic environment prevalent on many campuses makes women of color feel unwelcome or unable to succeed. One academic had “no words to describe the way it felt” when her colleagues were “trying to pull away the welcome mat as I stepped through the doorways” to begin her first tenure-track

²⁶ *Id.* at 369-70.

²⁷ Delgado and Bell report that their relatively low response rate cautions against generalizability; they also did not include white faculty as participants. *Id.* at 354, 370 nn.17 & 19.

²⁸ Angela P. Harris & Carmen G. Gonzalez, *Introduction* to PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA I (Gabriella Gutiérrez y Muhs, Yolanda Flores-Niemann, Carmen G. Gonzalez & Angela P. Harris eds., 2012).

²⁹ A section titled “Contributors” identifies the academic disciplines of the various contributors to the book. *Id.* at 541-54.

³⁰ See Sun Yee Koh, Book Review, LONDON SCH. OF ECON.: REVIEW OF BOOKS (2013), <http://blogs.lse.ac.uk/lseviewofbooks/2013/04/18/book-review-presumed-incompetent-the-intersections-of-race-and-class-for-women-in-academia> (reviewing PRESUMED INCOMPETENT, *supra* note 28); see, e.g., Elvia R. Arriola, “No hay mal que por bien no venga”: A Journey to Healing as a Latina, Lesbian Law Professor, in PRESUMED INCOMPETENT, *supra* note 28, at 372-92 (discussing her personal challenges as a woman of color at an unsupportive predominantly white institution).

appointment.³¹ She initially “naively believed” that through hard work, she would earn “credit, recognition and acceptance” from her peers;³² yet, over time she saw her position as a woman of color in legal academia for what it truly was: both “precarious and tentative.”³³

Hostility also manifests through silencing women.³⁴ In her chapter, law professor Angela Onwuachi-Willig discusses the multiple meanings that can be drawn from silence.³⁵ Women of color and others who are “outsiders”³⁶ in legal academia often choose to remain silent on campus, in part because “silence may be key to their survival in academia.”³⁷ However, their silence emboldens those with power, who may feel validated in their assumptions about who should speak and whose contributions matter.³⁸ Even in the classroom, where the professor is ostensibly “the most powerful person in the room,” some faculty of color “feel somewhat powerless,” given student pushback in person, on evaluations, and through administrative channels.³⁹ Thus, even in her own classroom, a woman of color may choose to “bite [her] tongue and make no sound when [she] want[s] to speak.”⁴⁰

A third form of hostility deals with a lack of individuality as many women of color are expected to perform particular roles entertaining their colleagues and students. If African Americans “must be entertaining to have a place with other faculty,”⁴¹ then being “too private” rather than outgoing can alienate colleagues with different

³¹ Arriola, *supra* note 30, at 375.

³² *Id.* at 376.

³³ *Id.* at 378.

³⁴ See, e.g., Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 (1994) (explaining the attitudinal, academic, and emotional differences experienced by women in the law school setting); see also Deo, *Ugly Truth*, *supra* note 6, at 977 (noting that intersectional challenges “keep women from speaking up and from being heard when they dare [or] crushes young women into silence by indicating . . . that this is not their world”).

³⁵ See Angela Onwuachi-Willig, *Silence of the Lambs*, in PRESUMED INCOMPETENT, *supra* note 28, at 142-52.

³⁶ *Id.* at 142.

³⁷ *Id.* at 143.

³⁸ See *id.* at 145.

³⁹ *Id.* at 148; cf. Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 33-38 (2010) (discussing the ability of faculty of color, female faculty, and others with personal experience involving issues of race, gender, and sexual orientation to better lead classroom discussions on those topics).

⁴⁰ Angela Mae Kupenda, *Facing Down the Spooks*, in PRESUMED INCOMPETENT, *supra* note 28, at 23.

⁴¹ *Id.* at 21.

expectations.⁴² Students may prefer women of color professors to arrive in class with “a big, warm smile every morning,” indicating their delight in achieving the position of professor; if nontraditional faculty refuse to perform the roles expected of them, students may be even more likely to reject or dismiss them.⁴³ In fact, those who refuse to play the part of both embodying diversity and putting it on display run the risk of alienating colleagues and students alike.⁴⁴ Perhaps in part to compensate, many women of color are as agreeable and accommodating as possible, saying yes to every service obligation, student request, and committee assignment; many feel as one contributor to *Presumed Incompetent* expresses: “It seemed as if everyone wanted me to do everything,” usually without extra compensation or reward.⁴⁵

Put into a broader structural context, these challenges are not only individual, but also institutional. A qualitative study of two elite law schools notes that because legal education is “fundamentally connected to the political system and to the political economy of race,” it inevitably reproduces racism.⁴⁶ The hiring phase represents the first opportunity for law schools to screen out undesirables, anyone that those in power seek to exclude or anyone who is deemed not sufficiently elite to perpetuate the status quo.⁴⁷ Yet, few formal studies have confirmed overt bias.⁴⁸ Women of color face particular obstacles in hiring that prevent an increase in their representation in legal academia.⁴⁹ A recent study begins to provide support for the proposition that bias in the hiring process itself may play a role in the

⁴² *Id.* at 20.

⁴³ *See id.* at 22.

⁴⁴ *Id.* at 26 (noting that one white male colleague accused her of spending too much time with people of color, when instead, “[h]e wanted to show me off more to white people”).

⁴⁵ Adrien Katherine Wing, *Lessons from a Portrait: Keep Calm and Carry on*, in *PRESUMED INCOMPETENT*, *supra* note 28, at 357.

⁴⁶ WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 2* (2008).

⁴⁷ *See generally* PIERRE BOURDIEU, *THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER* (Lauretta Clough trans., Polity Press 1996) (discussing how elite schools are barriers to social mobility because they screen out non-elites, perpetuating the status quo).

⁴⁸ *See* Richard Delgado, *Approach-Avoidance in Law School Hiring: Is the Law a WASP?*, 34 ST. LOUIS U. L.J. 631, 632 (1990).

⁴⁹ *See* Deborah J. 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, 2322 (1992).

continuing lack of faculty diversity at many institutions.⁵⁰ Many have documented their own personal encounters with “otherness” in legal academia.⁵¹ Law professor Adrien Katherine Wing’s chapter in *Presumed Incompetent* mentions how the lobby at her first tenure-track law school was filled with portraits of “dead white males and some living ones.”⁵² She felt these portraits of white men claimed the space for themselves and others from their own racial and ethnic background; it was almost as if they could see her entering their domain, a woman of color on their white male turf, and in response “seemed to be silently screaming — intruder alert.”⁵³

Even after women of color faculty are hired, they continue to face institutional challenges en route to the security that comes with tenure and promotion. Sylvia Lazos’s chapter highlights various studies showing that students “reward” objectively-attractive women of color with higher teaching evaluations than those they find less attractive.⁵⁴ Presentation style seems to matter more than substance, with a charming gibberish-talker capturing more positive student reviews than a straight-talking master of the material.⁵⁵ These arbitrary criteria demonstrate that one institutional hallmark used to assess faculty for tenure — student evaluations — may be seriously flawed, if at all

⁵⁰ See ANUPAM CHANDER, WHY DON’T LAW FACULTIES LOOK LIKE THEIR STUDENTS? SOME CONJECTURES (2012) (presentation slides on file with author).

⁵¹ See Marina Angel, *Women in Legal Education: What It’s Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 799-80 (1988); Teri A. McMurtry-Chubb, *Writing at the Master’s Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 41-43 (2009); Onwuachi-Willig, *supra* note 35, at 142-51; see also Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 293-94 (2004).

⁵² Adrien Katherine Wing, *Lessons from a Portrait: Keep Calm and Carry on*, in PRESUMED INCOMPETENT, *supra* note 28, at 359.

⁵³ *Id.* at 360.

⁵⁴ See Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?: The Perils of “Doing” Gender and Race in the Classroom*, in PRESUMED INCOMPETENT, *supra* note 28, at 167-69.

⁵⁵ See *id.* at 168-69; Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 15 (2015) [hereinafter Deo, *Better Tenure Battle*] (“For instance, one particular study utilized a charming actor to spout gibberish rather than teach any actual material to a class of undergraduate students; the students rewarded him with higher scores than a more forthright expert in the field who taught actual substance to her class. What some have termed the “Miss Congeniality” bias means that highly expressive, friendly, witty, and entertaining instructors receive higher scores than others, regardless of their ability to master or convey the substantive material of the course.” (citations omitted)).

useful.⁵⁶ Yet, student evaluations are used routinely for tenure and promotion purposes, with poor marks routinely cited as reasons for advancement and tenure denials for women of color faculty.⁵⁷

One additional empirical study of law faculty investigates how race, gender, and the intersection of the two affects the experience of tenured faculty, concluding that “despite significant progress toward more diversity, women and scholars of color face continued difficulties.”⁵⁸ For instance, “over one-third of female professors of color (35 percent) believed that the tenure process was not fair” compared to only 12% of white males.⁵⁹ Similarly, “61 percent of all female scholars of color disagreed with the statement that the tenure process was easy, as compared with one-third of white male professors (and about half of male professors of color and white female professors).” The qualitative analysis from that study also reveals “[c]ommon negative themes,” especially involving how “the effects of implicit bias in the tenure process,” create “differential impacts on women and on scholars of color” who are pre-tenure.⁶⁰

Thus, in spite of an increase in the numeric representation of faculty of color and female faculty, existing literature suggests that roadblocks remain to prevent their full access and acceptance as tenured faculty in legal academia.

B. Theoretical Underpinnings

In addition to literature investigating the experience of women of color academics, scholarship offering theoretical frameworks also provides necessary context to this Article. Intersectionality, privilege, and implicit bias all contribute substantially to the theoretical approach used in the DLA study. A hallmark of Critical Race Theory (“CRT”), intersectionality has been popularized by Kimberlé Crenshaw and explored in many other pieces of woman-centered legal scholarship.⁶¹ Crenshaw asserts that the experiences of women are

⁵⁶ See Onwuachi-Willig, *supra* note 35, at 150 (“I understood [as an untenured Black female faculty member] that everything was riding on my evaluations in these courses.”); Deo, *Better Tenure Battle*, *supra* note 55, at 14-17.

⁵⁷ Lazos, *supra* note 54, at 166.

⁵⁸ Barnes & Mertz, *supra* note 8, at 512.

⁵⁹ *Id.* at 516-17.

⁶⁰ *Id.* at 521-22.

⁶¹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40 [hereinafter Crenshaw, *Demarginalizing*]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against*

“shaped by other dimensions of their identities, such as race and class,” indicating that the intersection of various identity characteristics together affect outcomes for women of color.⁶² In their seminal anthology, *Critical Race Theory: An Introduction*, Richard Delgado and Jean Stefancic further explain that intersectionality acknowledges unique challenges facing those individuals whose identity is bound with the “intersection of recognized sites of oppression.”⁶³ Because they face oppression along multiple angles, those who endure intersectional marginalization have experiences that differ from not only the norm, but even from the norms attributed to various minority groups. For instance, women of color may suffer oppression based on a combination of their less valued racial identity and less valued gender identity; their experience differs from those who are racial minorities but in the majority with regard to gender (e.g., Black men), as well as those in the racial majority who face discrimination based on gender (i.e., white women). In legal academia, we can therefore predict that the experiences of female faculty differ from those of their male colleagues, that faculty of color have unique experiences as compared to whites, and that women of color law professors — doubly marginalized by race and gender — have different experiences still. For a progression as emotional, exciting, overwhelming, and fraught with tension as tenure or promotion, we might predict that the intersectional identity of the applicant would have a profound effect on how that individual experiences both the process and the outcome of tenure.

Furthermore, legal scholar Stephanie Wildman’s path-breaking book, *Privilege Revealed*, sets the stage for considering legal education through a lens of privilege.⁶⁴ This framework has been a staple in women’s studies research and other scholarship highlighting gender inequality for decades.⁶⁵ Wildman defines privilege as a “systemic

Women of Color, 43 STAN. L. REV. 1241, 1241-44 (1991) [hereinafter Crenshaw, *Mapping*]; see PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 22 (2d ed. 2000); EVELYN NAKANO GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 6 (2002).

⁶² Crenshaw, *Mapping*, *supra* note 61, at 1242.

⁶³ RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 58 (3rd ed. 2017).

⁶⁴ STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

⁶⁵ See generally Symposium, *Privilege Revealed: Past, Present, & Future*, 42 Wash. U. J.L. & Pol’y 1 (2013) (demonstrating how many pieces of scholarship have built upon Wildman’s seminal work).

conferral of benefit and advantage . . . [based on] affiliation, conscious or not and chosen or not, to the dominant side of a power system.”⁶⁶ Though privilege may be invisible to those who reap its benefits, the un(der)-privileged must adapt to norms established by the privileged, which often compounds disadvantage.⁶⁷ Law schools are not only innately elite institutions, but also serve as escalators to power. As such, legal education reflects and even amplifies broader structural inequality in society as a whole, including inequality based on privilege. Considering both the process and outcome of tenure, this Article explores how privilege creates both opportunities and challenges for faculty members based on each individual’s intersectional identity.

Scholarship on implicit bias also contributes to the theoretical context involving tenure and promotion in legal academia. Scholarship on implicit bias reveals that all people have subconscious attitudes and stereotypes that affect their interactions with various individual actors; they are termed “implicit” specifically because they “operate without conscious awareness or conscious control.”⁶⁸ Even those who believe they are egalitarian make subconscious determinations that draw from race and gender stereotypes, negatively affecting those with less privilege, especially those with intersectionally devalued identity characteristics (i.e., women of color).⁶⁹ Whether coloring hiring, promotion, or everyday interactions, implicit bias likely affects the lives of all women of color in legal academia. DLA data show, for instance, that while few faculty members engage in direct or overt discrimination — for instance, saying outright that they refuse to hire Muslims — they may instead voice discomfort hiring a woman wearing *hijab* (a headscarf); this is implicit bias in legal academia.⁷⁰ These same principles are at work when faculty members vote to make critical employment decisions about their colleagues, including when they determine the value of various types of scholarship, service, and teaching effectiveness for tenure.

⁶⁶ WILDMAN, *supra* note 64, at 29.

⁶⁷ *See id.* at 3, 39.

⁶⁸ Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467 (2010).

⁶⁹ *See* Victor Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 UC IRVINE L. REV. 187, 198-99, 215 (2013).

⁷⁰ For DLA data and discussion on this exact experience, see Deo, *Trajectory*, *supra* note 7, at 462-64.

II. THE DIVERSITY IN LEGAL ACADEMIA PROJECT

The Diversity in Legal Academia project is the first formal empirical study of the law faculty experience utilizing an intersectional lens to investigate how race and gender combine to affect the personal and professional lives of law professors from new faculty to senior scholars. All DLA participants are full-time, tenured/tenure-track law faculty employed at ABA-accredited and AALS-member schools.⁷¹ The study draws from an intersectional (raceXgender) context, with a focus on women of color, specifically non-white women including those who identify as Black, Latina, Asian American, Native American, Middle Eastern, and multiracial.⁷² In order to better understand the experiences of the women of color who comprise the *core sample* of the study, *comparative samples* of white women, white men, and men of color are also included.⁷³ In total, 93 law professors participated in the DLA study, including 63 women of color.⁷⁴ Participants were

⁷¹ See generally E-mail from Herma Hill Kay, Dean, Berkeley Law School, to Meera Deo, Assoc. Professor, Thomas Jefferson School of Law (Jan. 7, 2013) (on file with the author) (“The ABA and the AALS have different, but somewhat overlapping, standards for giving approval to law schools (in the case of the ABA) and for electing schools to membership in the AALS. The former is concerned with ensuring competence to train law students and uses more quantitative measures, while the latter is more concerned with faculty scholarship and uses more qualitative measures Combining these entrance qualifications for my study while omitting non-ABA accredited schools thus ensures that women professors at ABA-AALS schools have met the most rigorous standards used in legal academia.”).

⁷² The DLA study draws from the categories employed by AALS and the ABA in their statistics. AALS STATISTICS, *supra* note 4; ABA Statistics, *supra* note 4. Participants self-identify their race/ethnicity on both the survey instrument and in the course of the interview. *Id.*

⁷³ Though most academics currently acknowledge the social (rather than biological) construction of race, defining race or ethnicity is nevertheless a challenging endeavor. See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 5-6, 19 (1994). DLA participants will self-identify race, ethnicity, and gender on the survey instrument as well as during interviews. This Article uses the terms “African American” and “Black” interchangeably to refer to those who characterized themselves in the study using those terms. The terms “Latino” and “API” are used to refer to those who self-identified as Hispanic/Latino and Asian/Pacific Islander, respectively. The term “whites” refers to participants who identify as white (non-Hispanic) in the study.

⁷⁴ Although an increasing number of librarians, clinicians, and legal writing professors are tenured/tenure-track, they are excluded from this study based on the large number of professional expectations and experiences that differentiate them substantially from other tenured/tenure-track faculty. For similar reasoning, compare Herma Hill Kay, *U.C.’s Women Law Faculty*, 36 UC DAVIS L. REV. 331, 337 n.27 (2003), stating: “My definition of a ‘professor’ includes only tenure or tenure-track

carefully selected to maintain representation according to race/ethnicity, tenure status, leadership, region, tier of school, and other criteria.⁷⁵

A mixed-method approach is especially well-suited to this study, as it allows for triangulation of the data and an opportunity to fully explore the law faculty experience from multiple angles.⁷⁶ In general, the quantitative data is used primarily as framing and context for the more personal, nuanced, experiential qualitative data that make up the heart of the study.

Each research subject completed a short online survey through the research tool [surveymonkey.com](http://www.surveymonkey.com) that covered demographic statistics as well as attitudinal and behavioral questions.⁷⁷ Participants then shared their experiences in roughly one-hour in-depth interviews, most of which took place in person, with some occurring by phone. The interviews were guided by a structured protocol encompassing a range of topics related to the law faculty experience, including the hiring process, tenure and promotion, interest in leadership, work/life balance, interactions with students, relationships with faculty colleagues, and solutions to perceived challenges. Survey data were analyzed using Excel and Stata;⁷⁸ interview data were coded and analyzed using ATLAS.ti, to draw out patterns and inferences in the data along specific lines of inquiry developed in the interview and themes recognized in the course of ongoing data collection and analysis.⁷⁹ These data yield the empirical findings presented here, as

assistant, associate, and full professors. It excludes librarians, clinicians, adjunct professors, and legal writing teachers, even though some of the women who were law librarians during this period held professorial appointments Others have drawn similar distinctions.” Certainly, a distinct study focusing on these populations would add a layer of understanding to our conceptions of legal education.

⁷⁵ For more on the methodology adopted in the DLA study, see Deo, *Looking Forward*, *supra* note 6, at 375-82.

⁷⁶ See JOHN W. CRESWELL & VICKI L. PLANO CLARK, *DESIGNING AND CONDUCTING MIXED METHODS RESEARCH* 62 (1st ed. 2007); ABBAS TASHAKKORI & CHARLES TEDDLIE, *MIXED METHODOLOGY: COMBINING QUALITATIVE AND QUANTITATIVE APPROACHES* 18 (1998).

⁷⁷ For more information on this data collection tool, see SURVEYMONKEY, <http://www.surveymonkey.com> (last visited Sept. 24, 2017).

⁷⁸ Stata is a statistical software package developed and sold by StataCorp. See generally STATA, <http://www.stata.com> (last visited Apr. 22, 2014). For an introduction to Stata aimed at researchers using quantitative analysis, see ALAN C. ACOCK, *A GENTLE INTRODUCTION TO STATA* (4th ed. 2014).

⁷⁹ ATLAS.ti is a qualitative analysis tool for textual, graphical, audio, and video data. See generally ANN LEWINS & CHRISTINA SILVER, *USING SOFTWARE IN QUALITATIVE RESEARCH* (2d ed. 2014) (explaining the functions of the major software programs

well as those included in other published articles and a book in progress.⁸⁰

III. EMPIRICAL EVIDENCE OF INTERSECTIONAL BARRIERS TO TENURE

A. Tenure Basics

Most law schools have a relatively standard set of formal requirements to achieve tenure, which can be summarized as demonstrated excellence in teaching, service, and scholarship. As Emma, a multiracial faculty member says, “So the process is to have a review by my law school faculty that includes getting external review of my scholarship by outside scholars in my field, as well as teaching evaluations, and service evaluations. So teaching, research, and service are the three categories by which tenure is evaluated.” A Middle Eastern law professor named Zahra explains that at her school:

the formal policy is you have to publish about three to four articles and you go up in your fifth year, and, it’s determined by the end of your fifth year. Your teaching evaluations have to be pretty good, not amazing, and then you have to do citizenship — so serve on your committees; citizenship also includes service outside of the school.

The process at the law school where Danielle, a Black woman, teaches law is similar; the applicant will first “submit a letter of application/letter of intent describing your scholarship, teaching, and service.” Once they have the formal application, colleagues “come to view your class, they look over your scholarship, and they ask you about your service.” At an Asian American professor named Smita’s law school, they have “a fast process” where faculty members “go up for tenure for most people in your fourth or fifth year of teaching.” Formally, the policy is that applicants should have “two full-length articles written,” plus “quite a bit in terms of committee work and other activities like coaching a moot court team or doing something that requires a significant commitment.” But from Smita’s perspective, demonstrating

used in studies of this kind, including ATLAS.ti); ATLAS.TI, <http://www.atlasti.com/index.html> (last visited May 1, 2014).

⁸⁰ DLA data has been central to a book manuscript that is forthcoming with Stanford University Press as well as the following published articles: Deo, *Better Tenure Battle*, *supra* note 54; Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 *FORDHAM L. REV.* 3115 (2015); Deo, *Trajectory*, *supra* note 7; Deo, *Ugly Truth*, *supra* note 6.

effective teaching “is the most onerous part of our tenure requirements” since it includes a “classroom visitation process, which is over two semesters and requires every member of your tenure sub-committee — so, five people — to visit each of your classes twice.” In other words, “it’s a total of forty hours of class visitation,” which Smita recalls as “exhausting” for her personally when she went through the process, and likely for the sub-committee members as well. Smita characterizes it as “a terrible process” because of the teaching evaluation component specifically.

While Smita’s school has an exhaustive policy, it is both comprehensive and relatively transparent. Aarti, an Asian American faculty member, appreciates that transparency at her school makes the process less stressful; she explains, “I mean it’s definitely a stressful process, but I can imagine it being much more stressful if it was less transparent.” On the other hand, a Black woman named April laments, “The tenure process at my school is vague and not exactly laid out.” Applicants know that they “have to publish a certain amount of articles, but nobody really knows what the amount is.” They are “judged on scholarship, which would be the articles,” in addition to service, and teaching effectiveness — assessed primarily by student evaluations. Yet, nobody knows what the expectations are. Of course, vague standards are easier to apply differentially and abuse in their application.⁸¹ Bianca, a Latina, dealt with a tenure process that “was absolutely mysterious, confusing, and just filled with deceit.” She blames herself for the tenure denial, to some degree, seeing now that “I was naïve about it all, so I didn’t understand it,” and expected “the whole system [to be] much more fair than it turned out to be.” That obviously set her up for a less than optimal outcome.

Even when policies are laid out clearly, the way that various requirements apply to women of color and other underrepresented or marginalized faculty — as compared to more mainstream faculty — has an effect on both tenure success rates and how faculty members view the process overall. Some places with clear formal guidelines also have vague and inconsistent informal requirements. As Alicia, a Latina full professor, notes, “The criteria are, maybe a little bit less opaque than other institutions, but then of course how they are applied is still

⁸¹ Employment discrimination law covers this topic directly, explaining it as a primary reason for having clearly written policies and guidelines governing workplace issues. See, e.g., U.S. EQUAL EMP’T OPPORTUNITY COMM’N, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1998), https://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (discussing the importance of policies and procedures related to the hiring, evaluation, and promotion of diverse employees).

a different story.” Thus, in addition to the written procedures and requirements, informal standards are also the norm. For instance, the faculty handbook may specify that a faculty member have three published articles before submitting her tenure file; yet, tenured (i.e., voting) colleagues may believe a junior scholar who is truly ready for tenure should have at least five. While Zahra appreciates formal guidelines from her school requiring at least three articles, she also recognizes the additional and different requirements, stating, “I think informally what it really means is probably like five article at least, one a year is recommended, and teaching evaluations should be really good. Citizenship doesn’t really count outside of the law school with mostly committee work that’s really important to the school.”

Research by Katherine Barnes and Elizabeth Mertz suggests that a negative campus climate, challenging law school culture, and implicit bias contribute to the overall “negative themes” characterizing the experience for many people of color in legal academia, especially with regard to tenure.⁸² While the qualitative DLA data confirm this, the survey data alone indicate that most faculty have few objections to the tenure process, regardless of race or gender. There are some intersectional (raceXgender) differences (see Table 1 below). When asked about their level of agreement with the statement, “I am satisfied with the tenure process at my law school,” a full 100% of white men and white women agree, while smaller percentages of men of color (91%) and women of color (57% of multiracials, 60% of Native Americans, 75% of Latinas, 87% of Asian Americans, and 91% of Black women) do.

⁸² Barnes & Mertz, *supra* note 8, at 521-22.

Table 1. Agreement that Satisfied with Tenure Process, Diversity in Legal Academia (N=93) (2013)

		Strong Agree	Agree	Neither	Disagree	Strong Disagree	Total
Black Women	N	10	9	0	2	0	21
	%	47.62%	42.86%	0.00%	9.52%	0.00%	100.00%
Asian Am. Women	N	8	5	0	2	0	15
	%	53.33%	33.33%	0.00%	13.33%	0.00%	100.00%
Latinas	N	5	4	0	2	1	12
	%	41.67%	33.33%	0.00%	16.67%	8.33%	100.00%
Native Am. Women	N	2	1	0	1	1	5
	%	40.00%	20.00%	0.00%	20.00%	20.00%	100.00%
Mid. Eastern Women	N	1	1	0	0	0	2
	%	50.00%	50.00%	0.00%	0.00%	0.00%	100.00%
Multiracial Women	N	2	2	0	3	0	7
	%	28.57%	28.57%	0.00%	42.86%	0.00%	100.00%
White Men	N	6	2	0	0	0	8
	%	75.00%	25.00%	0.00%	0.00%	0.00%	100.00%
White Women	N	6	5	0	0	0	11
	%	54.55%	45.45%	0.00%	0.00%	0.00%	100.00%
Men of Color	N	8	2	0	1	0	11
	%	72.73%	18.18%	0.00%	9.09%	0.00%	100.00%
Total	N	48	31	0	11	2	92
	%	52.17%	33.70%	0.00%	11.96%	2.17%	100.00%

B. Tenure Done Right

Though many women of color are satisfied with the tenure process, others have much to complain about. Earlier research has confirmed that female faculty and faculty of color are more likely to perceive the tenure process as unfair.⁸³ Qualitative data from the DLA study corroborate those findings and add additional details, especially for the intersectional women of color most directly affected by challenges progressing through legal academia.

Yet, some female faculty of color find the tenure process at their law school relatively simple and straightforward. Not everyone faces

⁸³ Barnes & Mertz, *supra* note 8 (“Our findings confirm . . . that female professors and professors of color perceive the tenure process more negatively than their white male counterparts.”).

challenges navigating tenure or promotion. Surya, an Asian American faculty member, states, “I came up for tenure the very beginning of my fourth year and there was no problem.” Similarly, a Black woman named Imani appreciates that at her institution “there’s really not a lot of unwritten rules that I hear about at other institutions.” Imani sees the transparency of the process and clarity of the standard as central to her own positive experience, noting, “We have a very clear standard. When faculty are voting they base their votes based on that standard, so for me it was very positive.” Bianca, a Latina who had been denied tenure at one institution before moving elsewhere, notes the ease and facility with which she gained tenure at her new school, saying, “I mean I basically just walked right into the tenure. It was really very easy.” Because it had been so challenging at her first institution, Bianca could not help but compare the two, noting, “It was just a very different experience. It seemed like the way it should have been the first time around.” Vivian, an Asian American, also had a positive experience with tenure, saying, “I felt very empowered. Nobody ever questioned the content of what I wrote. I remember somebody saying to me, ‘You know it seems as if you’re tenured [already].’ I never really felt vulnerable.” Vivian makes clear that her comfort through the tenure process came from both internal and external sources. Her Dean was very supportive, as were others at her institution; just as meaningfully, she also developed close connections with communities outside of her school, saying, “I think because of the warmth and supportive nature of these people of color networks that I encountered before I started teaching, I felt very supported from outside as well — which I think was important.”⁸⁴

A senior Latina scholar named Alicia also remembers allies guiding her early in her career, saying, “The other piece of advice that I remember that was incredibly useful was to develop a network outside of the school.” As with Vivian, mentors, sponsors, communities, and allies sometimes guide junior faculty through the labyrinth of tenure and promotion.⁸⁵ As a Black senior scholar named Brianna notes, “I think mentors are really important for everybody’s path. For mine they were instructive and they were instrumental in terms of the information that was shared, but also the support that was provided.”

⁸⁴ The Diversity in Legal Academia book manuscript explores supportive communities and networks more fully. See MEERA E. DEO, *DIVERSITY IN LEGAL ACADEMIA* (forthcoming 2018).

⁸⁵ The importance of allies and sponsors cannot be overstated. Mentors are instrumental in the professional lives of women of color law faculty. See, e.g., Deo, *Ugly Truth*, *supra* note 34, at 1008-09.

Patrice, a Black female law professor, also relied on mentors through the tenure process — both for practical advice and political suggestions; she realizes how fortunate she was at her institution, noting:

I had really good mentors who were also sort of fantastic political strategists who were able to sort of give me the advice early on, the sort of pitfalls to avoid, the people to be nice to, and the kind of the stuff they'd be looking for in my packet. So I never felt I was sort of just left hanging, and that, um you know, I feel so lucky for that because I've run into so many women of color who feel like they reinvented the wheel, or [had been kept] in the dark the whole process. They had no idea what was expected of them. Everything was just really explicit [for me].

A multiracial woman named Hannah also had smooth sailing, recalling that “the tenure process was wonderful.” Hannah attributes much of her positive experience to those who opened doors to guide her through, giving credit to “mentorship by senior faculty members” as well as other colleagues “that I can just randomly knock on their door and ask them questions.” She notes that one white female faculty member in particular “took me under her wing, so that’s the first person I think of as a mentor.” Also, at Hannah’s institution, “the rules and the expectations were incredibly clear. I knew exactly what I needed to do” to achieve tenure. Having clear standards and mentors to guide her through the process helped Hannah tremendously.

Interestingly, Hannah and many other female faculty of color relied on mentors who were themselves not women of color — whether white women, white men, or men of color. For instance, a Black woman named Karen emphasizes that her primary mentor when she was a junior legal scholar was “an older white man who for years was so critical to shepherding me through the process of getting tenure.” She provides details of his investment in her, saying, “I mean, he read all of my stuff. For most of the time that I was on tenured-track before I got tenure, he was on the promotions committee. And so he was just [telling me], ‘This is what you need to do. This is what you should be worried about. This is what you shouldn’t be worried about.’ So it was really great.” Perhaps especially when the woman of color going up for tenure is one of very few women of color at her institution, she must rely on those with different backgrounds to facilitate the process. Mariana is a Latina law professor who is the first “female brown person” to earn full professor in her state; she recalls the tenure

process itself as “scary and frightening because you are a woman of color and you’re the only one at the time I was the only brown person there and you’re just a little bit isolated.” Since there were no women of color on her faculty to guide her, she relied on the support of colleagues from different backgrounds and women of color at other institutions who encouraged and mentored her. While she was sometimes worried about whether her record would be sufficient to earn her tenure, “I was told repeatedly I would be fine.” And her mentors were right.

C. *Challenges with the Trifecta*

While some female faculty of color enjoy relatively smooth sailing, the tenure or promotion process for others is littered with obstacles. Frequently, these challenges are not purposeful or overtly discriminatory, though they apply forcefully to the full trifecta of tenure requirements: teaching, service, and scholarship. Some who face open hostility or discrimination respond with resignation; others answer with litigation.

1. Teaching Barriers

Challenges facing women of color law faculty in the classroom have been well-documented, from confrontational students to the presumption of incompetence.⁸⁶ Here, we briefly revisit some to tie them directly to the tenure and promotion process, in order to better understand how classroom confrontations and biased evaluations affect the ability of women of color law professors to succeed professionally.

Lola, a Latina law professor, faced a number of student challenges in the classroom. While it certainly made her day-to-day teaching more difficult, those few unruly students also impacted her long-term professional trajectory. The promotion process was both fresh and raw for Lola during her DLA interview, since, “I actually went up for promotion last year. I was the first minority to go up for promotion, not tenure but be promoted to Associate Professor.” She was nervous

⁸⁶ See, e.g., PRESUMED INCOMPETENT, *supra* note 28, at 1 (a collection of essays examining “the ways that higher education reflects and reproduces . . . the social hierarchies that pervade American society, including race, gender, class, and sexuality”); Deo, *Better Tenure Battle*, *supra* note 54, at 22-32 (detailing classroom confrontations between minority law professors and students); Deo, *Ugly Truth*, *supra* note 6, at 993-99 (discussing the presumption of incompetence and resulting classroom confrontations minority law professors experience).

at the outset, being the first person of color to even apply; yet, she also was hopeful, since she felt confident that she had satisfied all of the requirements. Ultimately, however, “I was denied promotion, which was pretty brutal for me because I met all the criteria.” She learned then that “while there [are formal] criteria, there’s also informal criteria.” Here again, we see how formal standards supplemented by informal requirements can derail the tenure process for particular faculty members. When asked what reasons were given for her denial, she recalls “a very tense discussion, because after the Dean tells me, ‘You’ve met all of the criteria but we’re not giving you promotion,’ you know, I tried to understand.” The sole reason given for her promotion denial was that the Dean “claimed that my teaching evaluations were a bit polarized. So students either loved me or hated me and um that wasn’t really true.” She admits that while there may be individual students who complain or confront her, the vast majority are big supporters. Especially “ironically, I got rewarded professor of the year yesterday, so everything came full circle.” While she was discouraged by the promotion denial, she would not let that keep her down. Instead: “They tried to blame it on my evaluations, and I keep improving. I don’t know how much more I can improve. I’m [now] almost at the 100% mark for everything.” In her opinion, her colleagues “couldn’t get me on scholarship because I published more than they require” in the tenure guidelines. Her service was impeccable, since as Lola notes, “I go out of my way to support my colleagues and whatever they’re doing for the school or you know, personally.” Thus, the “only thing they could knock were some racist, mean comments in my evaluations,” which they used to deny her. In the meantime, she has learned that the administrators at her institution eventually learned that her promotion denial “was a huge screw up and that they realized what they did. And that it was a complete, huge mistake.” Though she suffered greatly, she says that “no one at school knew the pain and the betrayal I was feeling, and that was incredibly exhausting to come to work every day and pretend like nothing was wrong.” She relied on family and friends “for that relief of the stress and disappointment and all of that.” She did not share her disillusionment with her colleagues because though she has some cordial relationships with work colleagues, in general, “I don’t fully trust people here.”⁸⁷

⁸⁷ For more on challenging interpersonal relationships between faculty colleagues, especially involving women of color, see Deo, *Ugly Truth*, *supra* note 6, at 964-84.

Potential mistakes made when Aisha, an Asian American law professor, applied for promotion from Assistant to Associate Professor later eased her way through the tenure process. During the DLA interview, she noted that she had recently received word of her “unanimous tenure vote, but that’s only because my promotion process was so incredibly horrible.” At her institution, the process for promotion in the third year mirrors that of tenure in year five, where the faculty engage in “a full on review of your teaching, scholarship, and service,” including external review of scholarship. Aisha was then and still is confident that “I had met and exceeded the standard, my teaching was solid, but they voted me down. My faculty voted me down.” Not only did they deny her promotion, but also “they refused to give me any reasons at all as to why.” Instead, she had to gather anecdotal evidence, noting that “there were rumors floating around that it was a teaching thing, that the issue was teaching.” While her sub-committee said she had exceeded the standards for teaching and highlighted how her student evaluations had steadily improved over time, the full faculty “made a lot of sort of hay out of my first semester in my first year of teaching,” when her evaluations were not as strong. Many women of color face an uphill battle in the first years of teaching, working against a presumption of incompetence.⁸⁸ Yet Aisha’s full faculty refused to see her trajectory of improvement, and instead “took those teaching evaluations [from the first year], which were a bell curve so they weren’t skewed too horrible, they were curved, and they essentially asserted that that proved that I was an incompetent teacher.”

A Native American named Mia admitted in her DLA interview, “Well, this is my tenure year and I knew that the faculty would vote no.” Even her hiring had been contentious. She was the first woman of color hired at her institution in many years, and “it was an all-white faculty” except for two other people of color. She soon discovered that there “were several members of the faculty from my very first year who said that they would vote no” when it came time for her to apply for tenure. Those faculty members had not wanted to hire Mia at the outset, rejecting the Dean’s attempts “to build diversity in the faculty.” They “had voted no in the hiring meeting;” when they were outvoted and Mia was hired, “they vowed to vote no in the tenure process.” Thus, “there was a contingency from day one that they did not want to hire me and said they would vote no in the tenure process.” Imagine putting together an application for tenure, with full knowledge that

⁸⁸ See Deo, *Better Tenure Battle*, *supra* note 54, at 14; Lazos, *supra* note 53, at 177.

your colleagues had never supported you and would ultimately reject you. Consider the pain of interacting with those colleagues on a daily basis, teaching your classes, working on scholarship, and contributing service all with the knowledge that a contingency of your peers wished you had not been hired and vowed to derail your application for tenure. Yet, even knowing that the process would be stacked against her, she moved forward with her application to create a record:

[S]o what I decided to do was to put together a dossier as much for me to reflect on my time here and developments here, as well as to try to explain to them — because I don't think they realize how I was treated; I don't think they get it. So it was to reflect for myself to try and explain to them how I felt I was treated, and in doing that to also create an official record.

Ultimately, “what I knew would happen, happened.” Of course, they could not state as their formal reason for rejecting Mia that they did not support diversity; instead, they claimed that she “does not meet expectations in teaching.” They reached this conclusion “even though I had positive peer reviews” from colleagues, instead relying primarily on “student evaluations [that] were below average,” especially from her first years, to deny her. Also, and in spite of her explanation of why people in her niche area would have the best understanding of her scholarship, “they got nobody with that criteria,” leaving her with outside reviewers unfamiliar with her area of research. Mia started with an institutionally-assigned mentor, who ultimately left her school; another mentor could perhaps have provided support, but Mia “was terrified to tell her” about the challenges she faced, admitting, “I mean, I felt like I had failed her.”

2. Service Challenges

Most law schools also demand that successful tenure candidates demonstrate a commitment to service; this requirement remains somewhat vague, with some schools expecting service to the institution, others to the broader community, or some other entity altogether. Regardless of how or whether it is defined, the disproportionate amount of service work that most women of color engage in actually creates a tenure and promotion obstacle precisely because the extra time they spend on service often comes at the expense of scholarship.

Many women of color choose to invest a significant amount of time on service work because it is personally important to them. For

instance, Emma says, “I think my personal values involve being part of a team, working with people to achieve common goals, thinking about service to others, [and] service to the public.” Prior to her academic position, she worked in government and developed a “public service way of thinking,” though she sees academia as much more “individualistic and very much driven on individual success.” Thus, she spends a greater time on service than many of her colleagues.

Women of color often pick up the slack of service, meeting with students, advising organizations, and serving on extra university committees.⁸⁹ A Latina law professor named Carla casually mentions that she has served so long on so many heavy-hitting and labor-intensive committees — including “the appointments committee, the rank and tenure committee, faculty misconduct, and decanal review” — that she is seen as someone who has “specialized” in them all. Valeria, a Latina, found herself heading the Appointments Committee as a junior faculty member. A number of leadership positions shifted at her school, opening up others. Because she had been on the Appointments Committee as a junior member in her first year of law teaching, the administration chose to appoint her to lead it. They encouraged and supported her in the role, in part because they wanted a diverse representative of the school in that position. Valeria recalls it this way, “They were like, ‘We would really like for you to take this. We think you could handle it. We think you’re a great representative for the school, so what do you say?’” She said yes. While she appreciates the opportunity, she knows it is a huge task for an untenured second-year law teacher who should be focused on building her scholarly portfolio to secure tenure.

Extra service responsibilities create a central dilemma for many women of color in legal academia. Often, the tasks they are encouraged to do are in line with their own values and priorities. When asked to Chair the Appointments Committee, many realize they could have a hand in helping to diversify their faculty. When asked to serve on a Dean Search Committee, others realize they bring a unique perspective to the group, as one of few people of color at their school. Yet, the extra service benefits the institution greatly and can hinder

⁸⁹ The emotional impact of physical and emotional stress have led some to attribute work overload to illness and even untimely death; termed the “Clyde Ferguson syndrome” after the revered Black Harvard Law School professor who some believed was literally worked to death. See Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 419, 427 (1986); see also Deo, *Looking Forward*, *supra* note 74, at 369; Deo, *Ugly Truth*, *supra* note 6, at 981-84.

individual faculty whose contributions go unrewarded. Brianna wonders if “disparate ‘housekeeping’ requirements” keep down particular groups within legal academia, because “of the extra burdens of service that people of color carry.” Women of color faculty are rarely offered trade-offs for taking on herculean service responsibilities. In fact, their extra efforts are rarely recognized or remunerated. Instead, they are expected. For instance, a multiracial professor named Grace recalls a missed opportunity for extra summer funding for faculty developing “innovative ways of teaching.” Her Associate Dean “said to me, ‘I told the Dean not to give you that because you . . . would do it anyway, so we don’t need to pay you to do it because you’ll do it anyway.’” Of course, Grace “thought that was crazy.” Yet, it fed right into her existing knowledge of “the sheer amount of service that certain groups do disproportionately,” and do not receive rewards for doing.

Though most institutions evaluate tenure using scholarship, teaching, and service, the three are rarely weighted equally. Emma makes clear that to get promoted at her institution, the faculty primarily respect what “is typical in academia, which is the strength of one’s scholarship,” over both teaching and service. In fact, most institutions value both scholarship and teaching significantly more than service. When asked what is valued at her law school, a Black female law professor named Alexandra responds, “I say scholarship and teaching.” One of her mentors is also an administrator who reminds her to keep her eyes on the tenure prize and do what is necessary to achieve it; she says her mentor is always “saying to say no” to service work and “tells me, ‘You are not going to not get tenure over service.’” In other words, the service component is considerably less important than the other two since nobody will deny an applicant tenure for contributing less service — though less than stellar teaching evaluations or a lackluster publication record are common grounds for a tenure denial.

3. Scholarship Hurdles

While most schools adhere to the tenure trifecta — service, teaching, and scholarship — the litmus test for most schools is scholarship.⁹⁰ Colleagues may make excuses for less-than-stellar

⁹⁰ For instance, online materials from Yale Law School students preparing for a career in law teaching state, “At the majority of schools, the single most important factor in obtaining a tenure-track academic law teaching position is demonstrated scholarly achievement.” *Legal Scholarship*, YALE LAW SCH., <https://law.yale.edu/studying-law->

teaching or fewer-than-average service engagements, but an Assistant Professor who does not publish will likely not get promoted. This is why academic success is characterized by the common adage, “Publish or perish.” Unfortunately, as discussed in this section, both teaching and service get in the way of many women of color faculty excelling at scholarship. Those who excel generally do so in spite of the extra time spent on service duties and in managing or mitigating classroom confrontations.⁹¹ The overload of service and extra attention given to teaching often come at the expense of time that could be spent on scholarship.

An Asian American female law professor named Chris says that “the biggest tension for me is trying to figure out . . . how much time and energy to put into scholarship as opposed to service work.” She admits that “that’s the biggest criticism that I’ve been getting since I started my career, that I’m doing too much service work” at the expense of scholarship. She personally feels a pull toward service work, though she is also a prolific scholar. She says, “On the one hand I recognize that and I do want to spend more time on scholarship,” both because she enjoys it and because her institution values it. Yet, “on the other hand I feel like I have this privilege in this place with tremendous resources and what I want to do is make sure that those resources make it out to the community, that we are not an ivory tower.” Because Chris gets “a lot of energy and personal and satisfaction” from service work, she continues to emphasize that part of her professional role. Imani has to set aside time away from campus to work on her writing, saying that “when it’s time to do scholarship, I often do that outside of the office because I just can never really find the time or space to do it while I’m here in the office.” Students, colleagues, and other service responsibilities are hard to avoid unless Imani literally walks away from them.⁹² Vivian also admits that when juggling her various personal and professional responsibilities, “The thing that continually gets short shrift is my own writing.” She may manage to find time for “the teaching; I’ll do the administration stuff, and I’ll do

yale/areas-interest/law-teaching/law-teaching-program/preparing-career-law-teaching/legal-scholarship (last visited Sept. 5, 2017).

⁹¹ Women of color are especially prone to challenges to their authority in the classroom, drawing from a presumption of incompetence that many students believe since these faculty members do not look like the older white men many students expect and prefer. For more on classroom confrontations, see Deo, *Ugly Truth*, *supra* note 6, at 993-99.

⁹² Imani’s reference to work/life balance is explored more fully in DEO, *supra* note 83 (manuscript at 235-36).

the stuff I have to do at home, and it's very, very hard to find the time to write.”

In addition, the type of scholarship that many women of color law faculty produce is sometimes undervalued at their institution and by their colleagues, creating additional complications in the tenure and promotion processes.⁹³ Many women of color law professors publish articles, essays, or even op-eds involving the interaction of law with race, gender, sexual orientation, socio-economic status, or other identity-related areas.⁹⁴ These non-traditional legal fields may be viewed with suspicion by colleagues who, at best, do not understand them, but at worst feel threatened by the work itself — and respond by derailing a junior colleague's tenure or promotion application. Cindy notes that scholarship drives rewards and advancement at her institution (as it does at many others); she laments that the highly valued scholarship is “mostly male generated at our school,” whereas the scholarship that many of the women produce “is not valued in the same way as traditional scholarship is valued.” In spite of even the Dean trying to voice his support for their work, she says that “women are still really undervalued.”

Armida, a Latina faculty member, agrees, noting specifically that at her school she not only fights the perception of “assumed incompetence” from students in the classroom, but also from her colleagues in regards to scholarship. She notices how other faculty members at her institution discount her work based on the subject matter, saying that they believe that “because I write on diversity issues, somehow it's not scholarly.” That attitude results in “diminishing the work that I do.” As she continues on her path through legal academia, she is learning how to push back, noting that she is “not going to conform myself to fit” their expectations, but will stick with her research priorities since, “this is what I want to do so I'm going to try and do my best.” Though her colleagues may want her

⁹³ In the 1980s, Delgado & Bell revealed a lack of support for scholarship produced by and about faculty of color in the 1980s; DLA data discussed in this section confirm those findings. Delgado & Bell, *supra* note 6.

⁹⁴ Recent op-eds by women of color law faculty include those on: racial identity as a social construct, Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs>, dreamers options under Trump, Rose Cuison Villazor, *What Do Dreamers Do Now?*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/opinion/trump-daca-repeal-security.html>, and Muslim and LGBTQ unity in the wake of gun violence, Sahar Aziz, *Don't Let Terror Divide LGBTQ, Muslim Communities*, CNN (June 14, 2016), <http://edition.cnn.com/2016/06/14/opinions/lgbtq-muslim-community-cooperation-aziz>).

to focus her research “in the more traditional doctrinal way,” her preference is to engage with more experimental and critical theoretical approaches, and “I’m going to do that because that’s what I want to do and that’s what I’m excited about. So I think just as I get older, I get more confidence in what I’m doing and that comes from experience, but I still face challenges.” When Patrice was asked about the tenure process she had recently gone through, she replied, “Oh my god. [Sigh.] I have post-traumatic stress disorder.” In part, she faced a challenge common to many scholars of color and others who are underrepresented in the legal academy and choose to focus on identity issues dear to them personally as part of their scholarship. As Patrice recounts it, “[W]e have these white guys on the faculty who are . . . hostile to race work.” She knew their perspective even before she applied for tenure and contemplated how that might affect her work, thinking it “was tricky because I wanted to be able to do the work I wanted to do, but I also wanted tenure, right?”

4. Responses: Fight or Flight

In addition to challenges directly associated with teaching, service, and scholarship, some women of color faculty face overt discrimination or bias as they work their way through the tenure or promotion process. Responses to these challenges range from resignation to initiating litigation. Brianna was matched with a formal mentor when she entered law teaching; though he was supposed to help further her career, she thinks perhaps he may have tried to sabotage it. She recalls, “I got some really bad advice when I started from a person who was trying to mentor me at [my institution]. And what he said to me, this was a white man, ‘Don’t worry about writing for your first three years.’” Brianna believes it “was the dumbest advice he could have ever give me [and] thankfully I didn’t trust him and I didn’t take it, but then I knew he was trying to tank me.” This realization was swift and obvious to Brianna, who thought to herself, “Don’t write for the first three years? The tenure-track was only six years!” She was therefore wary of him the rest of her time at that school. In fact, the theme of receiving poor advice from senior colleagues is another common one throughout the DLA data. Brianna notes specifically that she herself tells young female faculty of color, “Don’t listen to any stupid advice about people telling you that you can take it easy [your first year]. You can’t take it easy.”⁹⁵

⁹⁵ In fact, when asked to provide advice for junior scholars, most senior scholars of color in the DLA study suggest that publishing prolifically from their very first year

Leanne, an Asian American law faculty member, notes the significant difference in “the support given to particularly young male professors” as compared to other junior scholars; this leads many of the junior white women and women of color to distrust their more senior colleagues who display this blatant favoritism. She provides a poignant example of a white male junior colleague “who went up early for promotion and tenure” with the support of many senior colleagues; yet, the two women hired at the same time as that male colleague were discouraged from applying early — even though they published at roughly equivalent rates as “the golden guy.” Leanne was similarly discouraged from applying for promotion by her Associate Dean for Faculty Development, the person tasked with helping faculty grow and advance. He told Leanne initially that she “needed to wait another year or two” before applying, although she feels “it’s ridiculous how long I’ve been waiting.” Now, that same senior administrator “keeps saying, ‘Oh you’re golden. You’re totally a cinch. Don’t worry about it.’ And I’m like, ‘Really? Because you worked really hard to tell me not to go up. You explicitly said I should not go up.’” Thus, in Leanne’s experience, even the senior administrator tasked with advancing the careers of the faculty cannot be fully trusted when it comes to the professional development of junior female faculty of color.

Many women of color have similar experiences with colleagues, leading to the current distrust that characterizes faculty relationships.⁹⁶ Alicia also says that it is common at her institution for her white faculty colleagues to act friendly towards the faculty of color to their faces, but “behind closed doors” there is the “[d]enigration of the person’s work, their scholarship or their teaching.” In fact, the existing literature suggests that Critical Race Theory, feminist legal scholarship, and other social justice-oriented research is often devalued by many faculty colleagues at legal institutions, though many women and people of color gravitate toward that work as central to and validating of their own experiences.⁹⁷ Alicia recounts recent conversations where “several people came to my office and said, ‘Did you know that so and so goes around speaking ill of X?’ And then they said, ‘And so and so is also

is a requirement especially for female faculty of color, fully expecting they may be judged with harsher standards and against higher expectations than white junior faculty.

⁹⁶ For more on distrust that many women of color feel for white colleagues, and the hostility causing this response, see Deo, *Ugly Truth*, *supra* note 6, at 964-84.

⁹⁷ See Delgado & Bell, *supra* note 6, at 357; Tara J. Yosso, *Whose Culture Has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE ETHNICITY & EDUC. 69, 74 (2005).

speaking ill of Y and Z.” It turns out that “X,” “Y,” and “Z” are all people of color whom Alicia’s colleagues did not support for promotion. Alicia notes that “there were two African Americans and one Latina who were up [for promotion]. All three of them were targeted.” While she did her best to protect them, this produced great anxiety for Alicia even though she herself was already tenured. Perhaps because she was already tenured, she felt the need to do whatever she could to protect those junior faculty being bad-mouthed by her colleagues, although she did not know how best to proceed. She “didn’t know which one was going to survive [the character and scholarly assassination attempts] because . . . it’s random at some level. Everybody has weaknesses. Everybody has strengths.” She saw her colleagues as playing on particular stereotypes about people of color to target those applying for promotion, but agonized over how best to tailor her response and even over whether one would be productive; she wondered, “When is the subtle stoking of the stereotypes going to succeed and when is it not? I can’t always predict.”

Similarly, Surya was one of five junior scholars who applied for tenure at the same time at her school. While she “was the only one who had a bad experience,” she attributes it primarily to “one person on my tenure committee who clashed with me, so she made it a little bit miserable.” She thinks of it generously as “a bit of a hazing process,” where this particular white female colleague put pressure on her and put her down. Surya remembers that colleague “was just very, very mean to me.” For instance, this colleague was tasked with conducting a peer evaluation of Surya’s class; on days when she “would review my class [she would] storm out” half-way through, ostensibly because “she claimed that she couldn’t stand my teaching and had to walk out” — this, in spite of Surya maintaining “very high teaching evaluations” from students and positive peer reviews from other colleagues. This one individual on Surya’s committee “just made it very difficult, so I was very bent on getting tenure as fast as possible to get [her] out of my life.” It felt to her like “a bullying situation,” and she wondered to herself, “God, why do I have to put up with this?” Over time she has come to attribute the behavior to jealousy, after having two articles published in top law reviews in her first few years of teaching. But she knows that colleague “just didn’t want me to succeed,” which may have motivated Surya to push herself even more. When faced with this form of microaggression — “subtle verbal and non-verbal insults directed toward non-whites, often done

automatically or unconsciously” — Surya is motivated to work even harder.⁹⁸

Not all women of color can respond positively to bullying, discouraging, and disrespectful colleagues. Many instead have a fight or flight response. Recall how faculty at Mia’s institution who opposed diversifying the faculty vowed to block her tenure vote after she was hired against their wishes. When “the committee voted no,” the Dean told Mia she would have one terminal year to continue in her position; she could either send her application to the full faculty — where they would likely support the committee decision to vote no and her denial “would be part of the employment record” — or she could withdraw her application and keep her record intact. At the time of our interview Mia was planning to spend her final year teaching before returning to her hometown to pursue other interests.

On the other end of the spectrum are those who respond to hostility with the urge to fight; these include Lola (a Latina), Aisha (an Asian American), and April (a Black woman). Earlier in this Article, Lola described how her Dean cited “polarized” student evaluations as the reason for her promotion denial. She plans now to skip the application for promotion and apply directly for tenure (an option at her school); since her tenure denial a year ago, she has won teacher of the year and improved her evaluation marks further. Of course, she thought she would be promoted last year — and was assured that she did formally meet the criteria — so she remains uncertain about her tenure vote going forward. This time, though, she is ready to fight. Lola sees the criteria, and especially how they are applied, as both arbitrary and dependent on the relationships forged between the applicant and whoever happens to be on the Promotion and Tenure Committee; thus, she says, “[I]t’s really about who likes you and who doesn’t on that committee.” She believes her colleagues “ride a fine line between doing things that are professional and doing things that might trigger a lawsuit.” Because she now wonders whether their denial of her application for promotion may have crossed over into illegal territory, she is committed to responding differently should they act in a similar fashion when she applies for tenure next year. Lola asserts, “I will be very honest: if I don’t get tenure next year, I’m suing the school because before me white men and white women have gotten tenure on

⁹⁸ Daniel Solórzano, Walter R. Allen & Grace Carroll, *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 17 (2002). Other responses to microaggressions include giving up, fighting back, or disengaging. See *id.* at 67-69.

less . . . than I had at [even the] promotion level.” If they deny her again, then “all of that would have to come out” in court.

Aisha also responded with the urge to fight when she was denied promotion from Assistant to Associate Professor, with no reason given for the denial. As noted earlier, her promotion application was denied by a full faculty vote, and “the Dean immediately signaled to me that he wanted me to withdraw my candidacy,” preserving her right to apply again the following year. At a crossroads, she recalls that “at that point then. . .mentors really became important.” Though external mentors suggested she withdraw her application, senior supporters at her own school “who knew about [the internal workings] immediately told me, ‘Sue them.’” She followed the internal advice and “threatened to sue them. I hired the scariest lawyer I could. I filed a complaint with the EEOC and basically said, ‘You can articulate grounds for why you [denied me] or you can face a massive lawsuit.’”⁹⁹ Predictably, the Dean then asked the Committee to articulate grounds for her denial — but the sub-committee that worked actively on her application had actually “unanimously voted for promotion. And in fact in the teaching section they asserted that I met the *tenure* standard, which is a higher standard than the promotion standard.” Though the Committee as a whole, and subsequently the full faculty, did not follow the recommendation of her sub-committee to promote her, they also did not follow procedure to articulate grounds for their recommendation to deny her. Both the University Provost and General Counsel got involved, along with the Dean and the relevant committee members “and it was them flurrying around [in] full-on panic mode.” For four months, the Committee refused to issue a report detailing the grounds of her denial. During that time, the Dean “hired outside counsel, and their lawyer was negotiating with my lawyer” — including one proposal that would grant her promotion if she agreed to leave within a year (“I said no.”) and another that would grant her promotion if she agreed to a set of conditions involving “a lot of just made-up bullshit” involving changes to her teaching and publications (“I rejected that.”). Aisha felt, “I’ve met the bylaw standards. Nobody else has been required to do anything extra. I refuse to. Why should I leave?” Ultimately, she says, “I stuck to my guns and they caved.” The Provost “read my file very carefully” and issued a report confirming that “she meets the standard” for promotion and “that was that.” Over

⁹⁹ In Aisha’s case, there was what she calls “a smoking gun” involving race, involving actual assertions made during the faculty vote on her tenure application. The details of this “smoking gun” are not discussed here to preserve the anonymity of this particular participant.

the next few years, “the Dean kept asking me whether I still had my lawyer, and I said, ‘I will be lawyered up until I leave.’” And she has been. She thinks because she “had won at that level” and created a record, “there’s already a history of discrimination” so “they could do nothing to me for the following two years.” Not surprisingly, when she went up for tenure two years after the promotion debacle, it was a smooth and easy process.

April faced a small hurdle at the promotion level that in no way prepared her for the disaster awaiting her tenure application. In her third year, when she was first eligible to apply for promotion, a “faculty member told me they wouldn’t promote me if [my newest] article didn’t have an offer, so I withdrew my application for promotion.” She applied again the following year after that article had been published and was promoted. Earlier in this chapter, April explained how the tenure standards at her institution had been “vague”; yet, immediately before she applied for tenure, the faculty at her institution decided to “develop some new rules” to govern the process. April says, “I believe in having rules as well,” but the ones that were adopted immediately before she applied put her at a clear disadvantage. The new process required that when sending out materials for outside review, each scholar “had to be someone who possessed the title of Professor of Law and had been tenured for at least ten years.” While those requirements may seem neutral at face value, for people of color — whose work often is in conversation with other people of color on issues of race, intersectionality, privilege, and cutting edge critical theory — this rigidity “knocks out the vast majority of minority women.” This is true when considering the small number of women of color in academia, let alone the miniscule number that held the Professor of Law title and were tenured for at least ten years when April applied; consider also that outside reviewers “also have to be in your field.” Nevertheless, April went forward with her application. Her portfolio was so strong that in spite of the new rules, the committee responsible for issuing a recommendation on her tenure application “recommended that I be tenured.” Yet, at the ensuing faculty meeting to discuss her application, “the tenured faculty voted not to tenure me, not to accept the recommendation of [the] Committee.” April recalls, unsurprisingly, “I was devastated.” Yet, the case became more complicated: her Dean followed her committee’s recommendation, rejecting the full faculty vote to refuse her tenure. In other words, “my committee says yes, my Dean says yes, my faculty says no.” Because there was “a split decision,” and April did not withdraw from consideration, her file was then “sent to the office

of the President” for his recommendation, “on advice from the Provost.” At that point, “[t]he Provost reads all my stuff and the President reads all my stuff and they decide I should be tenured.” Their endorsement then went to the University Trustees, who, after some back and forth with the General Counsel about the politics of awarding April tenure after her faculty voted to withhold it, finally “vote to tenure me.” April did ultimately secure a positive outcome, but only after a miserable process. She remembers the time between February (when her faculty voted to deny her tenure) and May (when the Trustees granted her tenure) as “the longest months of my entire life. It was agonizing and painful, full of guilt and bad feelings about how I have ruined the life of my entire family.” April had been a successful big-firm litigator in a large metropolitan city before uprooting her family to move to what she thought of in those months as “the armpit of America, the backwater of life. This is where I moved my family and now I have fucked it up. What will become of us?” As you can imagine, April “was devastated for months and then I got tenure. In the process I also lost I think 20 pounds and it was just horrific.”

D. Comparison and Contrast

In contrast, not one of the white male professors who participated in the DLA study expressed concern about his own tenure process (whether completed or anticipated). In fact, the qualitative data mirror the quantitative data showing 100% are satisfied with the tenure and promotion process. An untenured faculty member named Matt says that when he applies for promotion next year, “I actually expect it will be really, really friendly.” Matt believes that at his institution, “the big screening process is at the initial hiring stage” so that “[e]verybody who is hired here, the expectation is that the faculty will help them get tenure as opposed to screening them out.” John is going through the tenure process now, and laments that “the committee hasn’t been as transparent as I would have liked”; because of that, “I had to be more proactive in finding out what’s happening when, but besides that it’s been pretty smooth sailing and I don’t expect to have any hiccups.” In fact, when pressed on how a lack of transparency may affect his actual application, John is clear that he does not take it personally but believes simply that a lack of organization by the person who happens to Chair the Tenure Committee has kept him slightly out of the loop. Overall, though, when asked if he is at all concerned, he responds emphatically, “I’m feeling very confident. I’m not concerned at all.” Similarly, when Adam applied for tenure in his fourth year, he learned

that the full faculty would have to approve his decision to apply early. While the actual tenure vote went through without opposition, he did ruffle some feathers with his decision to apply early. Thus, while the process to secure his ability to apply early “was challenging because I went up earlier” than usual, the actual tenure process went forward without a hitch.

Amazingly, when one thinks about the many challenges associated with tenure and promotion today, the process decades ago at most institutions was streamlined, simplified, and very informal. A former white male Dean named Christopher summarizes his tenure process as follows:

The Dean who hired me made the tenure decision unilaterally, did not consult with the faculty, did not have a faculty vote, did not have a formal review. Basically you were appointed an Assistant Professor for three years and if you did your teaching well and if you wrote an article or two then the Dean would say, “OK, now you’re an Associate Professor with tenure.” It was that simple.

While this is clearly not the process at perhaps any law school today, one must wonder how many of the older mostly white mostly male law faculty members still teaching today benefitted from that informal process, especially as compared to the women of color who have joined law teaching in increasing numbers in the past two decades and face overt obstacles and covert barriers to tenure and promotion.

The experience for men of color is also relatively straightforward. As an Asian American named Jack says, “I felt relatively confident.” Ryan, a Black man, says his process “was at moments stressful,” though that was “primarily because you’re sitting around and you know you’re being evaluated and judged for every little thing.” So his stress came “not because the faculty was placing stress on me, but because I was stressing myself. It was an internal stress.” Yet, some standard issues apply and external pressures do cause additional unnecessary stress. A Latino named Jorge is roughly half way through his school’s “five year process” for tenure. Unfortunately, rather than being transparent, it is “a little murky. They say it’s a three-publication requirement, but I get the sense that it’s not [laughing].” Thus, before Jorge applies for tenure, he will have to determine what is hidden behind the lack of transparency including any informal requirements, such as additional publications or specific service requirements. As of now, he says, “I get the sense that it’s three well-placed, very strong publications.” His “plan for that is essentially I know that I’m going to be doing a lot of

writing and it's going to be more than three publications so I'm not worried about that requirement or the teaching or the service." The one thing "that gives me pause" and "that you can't control is how other people will respond" to his research. Though he "will have a lot of strong supporters," he also anticipates "people that really don't like the work I'm doing." Thus, innovative or atypical topics or methods employed by people of color continue to be devalued by some colleagues, which could also affect the trajectory of nontraditional faculty applying for tenure and promotion.

Jorge, like many women of color and men of color, plans to exceed the publication requirements before applying. Asim, a Middle Eastern professor, remembers his tenure process as "very straight forward, very easy, no complaints." Likely, this is in large part because he "exceeded the number of articles required," and his colleagues were also "very transparent in the sense of the process." Dwayne, a Black senior scholar, applied for tenure early — in his third year rather than the normal sixth year — "because I had a lot of publications." At his school, "the unspoken rule was that you had to have two articles; I had seven in my first year. So after the second year, I figured I might as well come up." He also had "very good teaching evaluations" so was not concerned.¹⁰⁰

Stuart, a Native American, also "wrote a lot of articles" and so there were no "real issues involving the substance of his tenure application." Yet, his colleagues did complicate his process. He applied at an appropriate time, though not at the earliest opportunity. Because of that, "there were a lot of people who would ask why I wasn't tenured, and people started talking behind my back and it kind of concerned me." Ed, a multiracial faculty member, "felt my whole tenure and promotion process was virtually free from any drama whatsoever or tension or any types of constraints. I have had an overwhelmingly positive experience." He does admit to "a little bit of a worry" because he heard that "some of the older members and more conservative members of the faculty . . . had a little concern that I was not on campus enough." Of course, being one of few people of color on campus adds another dimension to the expectation of "face time" — since their absence is more obvious and noted than when white men — who make up the majority on most campuses — are missing. Ed also benefitted from a mentor who told him before he applied that he

¹⁰⁰ For more DLA data on teaching evaluations for men of color, see Deo, *Better Tenure Battle*, *supra* note 54, at 33.

should buffer his application with yet another publication “so your tenure packet will be invincible.”

White women senior scholars also benefited from more relaxed tenure guidelines from decades ago. Lisa “wrote one article” before applying for tenure. Her colleagues “read it, they liked it, and that was it. One article, three years, and I was at full Professor.” Abigail’s law school “had very clearly articulated standards about the number of articles and we had a process of faculty evaluations of teaching in tandem with student evaluations of teaching.” She met the requirements early, applied early, and believes “the tenure process for me was not a problem at all.”

Chloe was hired along with a cohort of other diverse candidates, who all applied for tenure simultaneously at the appropriate time years later. Mysteriously, as with April, new tenure guidelines went into effect the same year that the diverse candidates applied. The process for her “was difficult in the sense that people were coming to visit classes, [though] that hadn’t been done before for anyone.” She felt confident that these changes came about because “there we were: the women and people of color [applying for tenure], so all of a sudden you had to have [more] publications, you had to have classroom visits,” though these were not required previously. Scarlett’s school is still “in the process of writing down standards” for tenure — though the school has been around for decades.

Some white women have had a more challenging time navigating the system, more in line with the experience of women of color. Sydney was awarded tenure but not promoted to full Professor, an atypical move for her school. She remembers it as “a really weird process for me because I don’t really know 100% what went on.” The tenured faculty discussion of her application was kept confidential, but she understood that some people were concerned about her writing, others thought she “had enough writing” but questioned her “commitment to the institution” so decided “to give [her] tenure but not promote [her].” When Sydney found out, she says, “I was devastated.” She was also, understandably, “ashamed of what was happening and didn’t want to share it” so did not discuss it with mentors or others who could have provided support or advice. Family helped some: “My mother’s take on it is that they’re just jealous.”

An expectation of extra service and face time also played a part in Ava’s difficult tenure process. Remembering the year she applied, Ava says, “I felt overloaded. I had a lot of responsibilities.” Ava “was one of the few women in the building and certainly the only young one and I got surrounded by students all the time and they just wanted my

attention.” Furthermore, the white male “hired at the same time was teaching upper level elective courses with low enrollment, and I was teaching 100 people each semester, plus a writing course.” While the male hire “was big buddies with the male Dean at the time” and encouraged by her colleagues, her faculty did not make Ava “feel at all supported. I felt like I was drowning,” with no colleagues “to help guide me at all.” Add to her teaching and service obligations the stress of applying for tenure, and Ava was “really anxious. I was really stressed. I was depressed [to the extent that] I ended up seeing a therapist.” A white female professor “who I thought would be a [friendly] colleague was really hostile to me [and later] was in charge of my tenure package.” That colleague “wrote up the worst external review [summaries] that you can imagine. She took all the criticism and ignored every nice thing.” Ava knew that tenure committees that support the applicant “try to focus on the positives and downplay the criticism, but she basically did the opposite” with the letters. After reading the summaries, Ava’s “faculty as a whole said, ‘We need to rewrite this because this does not look like we’re supporting this candidate for tenure.’” Luckily, two senior male scholars stepped in “and sort of salvaged what would have been a disastrous tenure process to say, ‘Well, there’s actually a lot of really good stuff. Three or four of them were really glowing,’” and should be highlighted. Ava eventually “got through tenure, but it was miserable and I did not feel supported. And I kind of knew that on paper that didn’t make any sense [since] I actually published pretty well.” She had four articles, in spite of “not having the time and space to [write] because of my teaching obligations” and service responsibilities. When she “tried to work at home and get away from the students and try to create a safe space to get work done, I was criticized by the Dean, saying I need to get in the office.” Once again, the expectation of face time was used to single out an underrepresented faculty member, one who stood out as the only young woman on the faculty.

CONCLUSION

While litigation has been effective, it cannot be the best or only means to achieve diversity in legal academia. Significant challenges persist, resulting in unfair processes and unequal outcomes for women of color faculty. A Black woman named Marjorie recalls that when her colleagues were dismissive of her scholarship, her mentor “practiced a little tough love, and was like, ‘This will not be the first time or the last time that some white man annoys you, or somebody dismisses your work because of the work you do. Suck it up and get back out

there.” She did and subsequently earned tenure. Yet, it cannot fall to individual marginalized and underrepresented faculty to resist biased colleagues or policies. Administrators should also contribute significantly to improve the experience for law faculty, and thereby improve legal education as a whole. Both individuals and institutions should correct for bias related to scholarship, service, and teaching — so that women of color faculty who do excel at all three attain tenure.

Service burdens should of course be distributed equitably; yet, when individual faculty members go above and beyond, that should be recognized and rewarded too. Melissa, a Native American law professor, implores administrators to focus on “recognition for all the many roles often women of color play in the law school,” especially because all too often, “the advising and the retaining students role is completely undervalued.” In addition, a Native American law professor named Jennifer suggests that “broadening the conception of what service means, might be helpful for women of color,” who contribute disproportionately not only within their institution to students, faculty, organizations, and committees, but also provide broader community service to church families, immigrant groups, civic organizations, and others in need of legal support.

Finally, administrators and senior colleagues reviewing teaching evaluations for tenure purposes should follow the advice of Marisol, a Latina law faculty member, by asking, “Do your evaluations suck because you suck as a teacher, or is there something else going on?” Often, they will find hidden bias prompting bad student reviews. Negative student reviews can sometimes be countered by glowing peer reviews. Susan, a Black law professor reached out to “the people who had the reputations of being the most critical of teaching” at her institution and invited them into her classroom to observe her at their leisure and without advance notice the year she applied for tenure. The evaluations from her faculty colleagues were filled with praise, as they appreciated her curriculum, pedagogical approach, and effectiveness in conveying the material. Susan is confident that “having that as the counter balancing narrative in my tenure file was the only way I got promoted, because my teaching evaluations from students were abysmal.”

These and other mechanisms are the way forward to improve diversity — not only at the access point of hiring, but to retain law faculty of color through the tenure process and beyond. Individual faculty should learn from the “best practices” shared here, and avoid the pitfalls discussed. In addition, and to increase diversity, even greater than individual action could achieve on its own, administrators

and senior scholars should follow the suggestions put forth above not only to improve the experience for individual faculty members, but also to advance legal education for students who seek to learn and faculty who strive to publish scholarship, contribute service, and teach students to their maximum potential.