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# DO DEANS DISCRIMINATE?: AN EXAMINATION OF LOWER SALARIES PAID TO WOMEN CLINICAL TEACHERS

Robert F. Seibel\*

## INTRODUCTION

This article describes findings of salary differentials between male and female clinical law teachers and, with somewhat less data, salary differentials between whites and people of color in the same narrow branch of the academy — clinical legal education. The findings have significance beyond the direct injustice they describe for two reasons.

First, these salary differences are probably caused by subtle forms of bias that are emblematic of more widespread contemporary modes of discrimination. If law school deans act in ways that disadvantage women and minorities, overt or conscious bias may not be the impetus.<sup>1</sup> Well-meaning individuals, perhaps unknowingly, perpetuate institutional and societal factors that lead to discrimination. It is particularly difficult to ameliorate an unfair impact when some of the key people in power believe they are acting in a neutral or nondiscriminatory way. The findings of this research reflect many situations in modern American society where actions and policies that appear superficially unbiased

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1. This article focuses on deans because, while basic faculty hiring decisions in most law schools are within the province of the faculty, setting salaries is within decanal authority.

nevertheless result in unfair treatment of traditionally ill-treated groups. These findings should awaken those who believe that the need for affirmative action or other remedial efforts has passed, and that society has progressed to a point where merit and fairness prevail.

Second, many people will share my surprise about the findings. Privileged individuals generally have difficulty perceiving the many ways in which those who are relatively without privilege experience their disadvantage. The term "relatively without privilege" reflects the reality that we are all privileged with respect to some other group or groups. For example, I began this research with the assumption that clinical teachers are generally disadvantaged relative to traditional substantive law faculty.<sup>2</sup> As a member of the disadvantaged clinical group, I have experienced a lack of privilege. However, I assumed that within the group of clinical teachers we were treated equally regardless of gender or ethnic background. As a white male (and I thought of myself as a liberal and sensitive white male), I did not see that my colleagues who are women or people of color have different experiences as clinical teachers. Yet my findings indicate that teachers in these groups are generally disadvantaged relative to white clinical faculty. My experience reveals how hard it is to believe and understand the plight of those who are less advantaged than oneself, no matter where one stands on the hierarchy of privilege.

This article first relates the background of the research and describes the methodology. The article then reports findings of salary differentials based on gender and race from data collected for the 1993-94 academic year. Finally, it analyzes some possible causes of these salary differentials.

## I. INITIAL RESEARCH AND METHODOLOGY

I began collecting data in 1989 about clinical teachers'<sup>3</sup> salaries and some of their demographic characteristics. I did not set

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2. Clinical faculty can be described as disadvantaged because the job security of tenure is often not available to clinical teachers. Clinical teachers' salaries are often lower than those for similarly credentialed traditional faculty, and clinical faculty usually have no franchise, or only a limited franchise, in faculty decision-making.

3. For purposes of this article, clinical teachers include those who teach in-house real client clinics, field placement programs, and simulation-based courses where clinical teaching methodology predominates. Many of the respondents teach traditional substantive law courses as well.

out to prove a particular hypothesis.<sup>4</sup> I wanted to collect data so that clinical teachers would have some basis for comparing themselves to other similarly situated clinical faculty and to national and regional averages.

I did not expect to find that female clinical teachers were being paid less than similarly situated male clinical teachers for three reasons. First, I was examining a group within an academic environment where, compared to other work environments, a sense of meritocracy is particularly strong. Second, an unusual degree of consistency in work expectations exists across clinical teaching positions. The type and amount of work expected of faculty within an institution, and even across institutions, is relatively similar.<sup>5</sup> Third, my focus was on law schools, and since discrimination is a legal issue, I least expected to find it in institutions committed to knowing and teaching about law and legal issues.

My data collection initially covered three consecutive academic years: 1989-90, 1990-91, and 1991-92. I mailed a one page survey form to clinical teachers and distributed it at clinical teaching conferences. Each year, 225 to 250 full-time clinical teachers responded. This response rate seemed reasonable, and therefore representative of the group of clinical teachers as a whole.<sup>6</sup> I was encouraged that the data over the three years was fairly consistent, suggesting that there was little reason to mistrust the data.

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4. I did think that clinical teachers were paid less than nonclinical faculty with similar experience, and that I might be able to compare my data with other data available from the American Bar Association (ABA) or other sources to validate this hypothesis. However, this intuition was not a primary reason for collecting the data.

5. One reason often advanced to justify lower pay for clinical teachers is that, as a group, we do different work than traditional faculty. We often spend more time teaching and less time producing scholarship. It may be that there is a wider range of responsibilities among clinical teachers than among the nonclinical faculty, since some of us are not required to publish, while virtually all traditional faculty are expected to be productive scholars.

6. The exact number of clinical teachers nationwide is unknown. Estimates range up from about 800. In part, the numbers depend on the definition of "clinical teacher." Most definitions would include externship teachers as well as real client clinical faculty. A few definitions would include at least some simulation teachers. My survey asked respondents to estimate the number of full-time clinical teachers (no definition was provided) at their schools. Extrapolating from those answers, I estimate that there were about 925 to 1000 clinic teachers active in 1993-94. My data for the earlier years was therefore probably based on a sample of over 25%, and though there was self-selection in terms of who responded to the survey, I had no reason to believe that the sample was not representative.

A pattern emerged. The data for each of the three years shows that, overall, women clinical teachers were paid less than men. Table 1 presents the data for 1991-92 based on rank and years since graduation from law school for the 229 responses from full-time teachers.

TABLE 1  
1991-92 COMPARISON OF SALARIES BY GENDER,  
RANK AND EXPERIENCE

RANK	MEN		WOMEN		PERCENT DIFFERENCE
	NUMBER	AVERAGE SALARY	NUMBER	AVERAGE SALARY	
Tenured <sup>7</sup>	41	\$81,969	13	\$80,988	1.21%
Tenure Track	25	62,164	29	60,109	3.42%
Long-Term (LT) Contract <sup>8</sup>	26	71,338	22	55,318	28.96%
Short-Term (ST) Contract	28	54,668	45	43,763	24.92%

  

YEARS SINCE GRADUATION (GRAD.)	#	TOTAL AVERAGE		MEN AVERAGE		WOMEN AVERAGE		PERCENT DIFFERENCE
		#	AVERAGE	#	AVERAGE	#	AVERAGE	
1-5	14	\$39,866.29	5	\$42,000.00	9	\$38,688.89	8.56%	
6-10	56	50,806.77	17	54,922.65	39	49,012.67	12.06%	
11-15	70	59,910.93	35	63,685.74	35	56,136.11	13.45%	
16-20	55	72,565.93	38	72,928.32	17	71,755.88	1.63%	
21-25	25	83,057.60	21	84,361.43	4	N/A <sup>9</sup>		
>25	7	74,328.57	5	N/A	2	N/A		

In each category, whether by rank or by years since graduation from law school, women were paid less than men. In addition, the data reflects a pattern of job segregation: the greatest number of women clinical faculty were clustered in the the lowest paid and least secure category.<sup>10</sup>

7. Some schools have a separate track for "clinical tenure." I left it to respondents to determine whether this was really tenure or more like a long-term contract. I believe that most indicated that they were tenured or tenure track if they were on a "clinical tenure" track.

8. Respondents had discretion to determine whether to consider themselves long- or short-term contract employees if they were not tenured or tenure track. Generally, those with at least a three year contract would be long-term contract employees. Most short-term contract employees are on annual contracts.

9. I do not report salary averages where the number of responses is less than five, partly to help preserve anonymity and partly because, with so few responses, a single response can have too great an impact on the overall average, rendering results less reliable.

10. Many of these positions are funded by "soft" grant money, grants of limited duration. See *infra* p. 552.

Job segregation operates on a broader level as well. In this 1991-92 survey, 48% of respondents were women.<sup>11</sup> This result concurs with Professor Richard Chused's earlier finding that over two-thirds of the legal writing positions, lower status and lower pay positions at most law schools, were occupied by women.<sup>12</sup> These numbers contrast dramatically with the 1994 findings of the American Bar Association (ABA) which reported that the percentage of faculty (including deans, administrators, librarians, teaching fellows, adjuncts, and permanent part-time teachers) who were women was 36%.<sup>13</sup> This comparison illustrates that women are disproportionately represented among clinical faculty.

Table 1 also shows that there were fewer women in the most experienced categories. The preponderance of more experienced men in each faculty rank might suggest that the salary differentials were based more on experience than on gender. In order to test this hypothesis, a direct comparison by both gender and experience is required. However, such comparisons using this data would yield many categories in which the number of respondents would be too small to be reliable. Therefore, although my initial research seemed to clearly reflect a pattern of salary discrimination, I thought it was worthwhile to collect data for another year, making an extra effort to increase the total number of responses. A greater number of direct comparisons based on both rank and experience would thus be possible. I conducted another survey in 1993-94, the results of which are presented and analyzed below.

## II. REPORT OF DATA FOR 1993-94

The survey form used for collection of data in 1993-94 is found in Appendix 1. Over 1200 people received this form.<sup>14</sup>

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11. In the prior two years, the percentage of women respondents was about 52%.

12. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 552 (1988).

13. *Faculty Composition*, CONSULTANT'S DIGEST: OFF. OF THE CONSULTANT ON LEGAL EDUC. TO THE A.B.A., Nov. 1995 at 4 [hereinafter CONSULTANT'S DIGEST]; BARBARA A. CURRAN, A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, *WOMEN IN LAW: A LOOK AT THE NUMBERS* 40 (1995). Undoubtedly, the actual percentage of full-time teaching faculty who are women is much smaller. For 1986-87, Richard Chused found that 15.9% of tenured and tenure track law school faculty members were women. Chused, *supra* note 12, at 548.

14. I mailed the form to all members of the American Association of Legal Scholars (AALS) Section on Clinical Education, to all members of the Clinical

After the initial responses were processed, I sent follow-up letters and forms to individuals at all schools from which I had not received any responses, or from which I had received only one or two responses and those initial responses indicated there might be a significant number of additional clinical teachers.

The 1993-94 survey yielded 432 responses, 406 of which were from full-time teachers.<sup>15</sup> This response rate was an increase of nearly 80% over the number of full-time teachers reporting in the 1991-92 survey. I estimate that this number of respondents is somewhere between 33% and 50% of all full-time clinical teachers.<sup>16</sup> In addition, the fact that over 150 schools are represented in the sample indicates the breadth of the information contained in the database.<sup>17</sup>

Table 2 presents the 1993-94 data in the same format as Table 1 to allow a direct comparison to the results of the earlier survey.<sup>18</sup>

Once again, in each individual category, whether by rank or by years since law school graduation, women were paid less than men. Also, 52.5% of the respondents were women, almost exactly the same percentage as found in 1989-90 and 1990-91, and slightly more than the 48% from 1991-92. This percentage confirms the continuing validity of the earlier data which indicated both job segregation and gender-based salary differentials.

The higher number of responses permitted more reliable comparisons within each rank. This comparison reveals whether

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Legal Education Association (CLEA), to all people who had attended a conference or workshop sponsored by either the AALS Section or CLEA during the prior three years, and to the dean or director of clinics at every school for which there was not at least one clinical teacher already on my mailing list. I also made the forms available at the AALS Workshop for clinical teachers in Newport Beach in June of 1994, attended by about 300 people.

15. The survey was not intended to be restricted to faculty who teach *exclusively* in clinical programs, but it was primarily focused on full-time faculty members who considered themselves to be clinical faculty.

16. See *supra* note 6.

17. One hundred fifty (150) different schools were identified in the survey responses. In addition, nine responses did not specify the name of the school. There may also have been some law schools that did not have any faculty who would identify themselves as clinical teachers.

18. Those who count closely will note that 213 women reported that they were full-time clinical teachers, but two of them did not report their rank. One hundred ninety-three (193) men responded that they were full-time clinical teachers, but one failed to indicate the number of years since he graduated. Hence, the table contains minor differences in the total numbers reported.

TABLE 2  
1993-94 COMPARISON OF SALARIES BY GENDER,  
RANK, AND EXPERIENCE

RANK	MEN		WOMEN		PERCENT DIFFERENCE
	#	AVERAGE	#	AVERAGE	
Tenured	79	\$86,510	42	\$79,244	9.17%
Tenure Track	25	72,430	44	65,249	11.01%
LT Contract	43	70,435	52	61,241	15.01%
ST Contract	46	53,074	73	50,777	4.52%

YEARS SINCE GRAD.	TOTAL		MEN		WOMEN		PERCENT DIFFERENCE
	#	AVERAGE	#	AVERAGE	#	AVERAGE	
1-5	17	\$44,252.94	4	\$ n/a	13	\$44,100.00	n/a
6-10	65	53,593.88	28	53,796.43	37	53,440.59	0.67%
11-15	93	60,586.24	27	64,183.33	66	59,092.06	8.62%
16-20	123	67,397.63	53	70,404.92	70	65,120.67	8.11%
21-25	73	82,922.88	52	83,301.78	21	82,002.67	1.58%
>25	35	88,808.82	29	91,432.14	6	76,566.67	19.41%

women were paid less than men despite equal rank and experience.

The ranks of tenure track and long-term contracts provide clear confirmation of salary differentials. This data is shown in Tables 3 and 4, respectively. Within each experience range for both of these ranks, men earned more than women.

TABLE 3  
COMPARISON OF TENURE TRACK CLINICAL  
TEACHERS BY GENDER AND YEARS SINCE  
LAW SCHOOL GRADUATION<sup>19</sup>

TENURE TRACK	MEN		WOMEN		PERCENT DIFFERENCE
	#	AVERAGE	#	AVERAGE	
OVERALL	25	\$72,430.04	44	\$65,748.86	10.16%
YEARS SINCE GRAD.					
<=15	8	\$69,612.50	32	\$64,278.13	8.30%
16-20	11	71,203.00	8	63,131.25	12.79%
>15 <sup>20</sup>	17	73,755.94	12	67,837.50	8.72%

The most reliable comparisons can be made in the narrower experience ranges in which there is greater assurance that differ-

19. Again, I did not rely on any category with fewer than five responses. Therefore, some of the categories in this table and Tables 4 and 5 contain a greater span of years in order to provide at least five responses from both men and women. See *supra* note 9.

20. Note that this category encompasses responses reported in the line immediately above. It seemed worthwhile to also examine the expanded category which contains a larger sample.

ences in experience do not account for the differences in salaries. Therefore, the most significant category in Table 3 is the 16-20 Years Since Graduation category in which a relatively equal number of responses for each gender yielded a dramatic difference in salaries. Men in this narrow range earn an average of 12.79% more in salary than women. Although it is not shown in Table 3, 5 men and 23 women comprise the 11-15 years subcategory of the  $\leq 15$  year category.<sup>21</sup> The men earned an average salary of \$67,300 compared with an average of \$66,313 for the women. Although this dollar differential is smaller than the differential in the 16-20 years category, the data in the 11-15 years subcategory indicates that gender rather than experience is the explanation for the difference.

TABLE 4  
COMPARISON OF LONG-TERM CONTRACT CLINICAL  
TEACHERS BY GENDER AND YEARS SINCE  
LAW SCHOOL GRADUATION

LONG-TERM CONTRACTS	MEN		WOMEN		PERCENT DIFFERENCE
	#	AVERAGE	#	AVERAGE	
OVERALL	43	\$70,434.52	52	\$61,241.18	15.01%
YEARS SINCE GRAD.					
$\leq 10$	8	\$57,162.50	5	\$51,840.00	10.27%
11-15	8	69,431.25	18	50,514.71	37.45%
16-20	14	68,250.00	25	65,474.00	4.24%
$\geq 21$	13	82,500.00	4	n/a	n/a

Similarly, in Table 4, the 11-15 and 16-20 categories offer the most reliable comparisons. In the 11-15 category, women outnumber men by more than two to one, but the average salary for the men is an astonishing 37.45% higher than the average for women in the same category. The salary differential is much smaller in the 16-20 category, although again the women outnumber the men by almost two to one.

The data for the ranks represented in Tables 3 and 4 (tenure track and long-term contracts) strongly confirms gender bias against women in the salaries of clinical teachers.<sup>22</sup>

21. Recall that where the number of respondents in a category was less than five, I expanded the size of the category to include more people. Segregating the 11-15 category here would have left only three men in the  $\leq 10$  category. See *supra* note 9.

22. There are relatively small numbers of people in the categories for the least time since graduation from law school. Clinical teaching positions often require

The data for the short-term contract rank, shown in Table 5, does not present as clear a picture. Although the overall average salary for men is higher than for women, women earn a higher average salary in the categories of least experience. Yet, in the categories where men's salaries are higher, the percentage difference is also greater.

TABLE 5  
COMPARISON OF SHORT-TERM CONTRACT CLINICAL  
TEACHERS BY GENDER AND YEARS SINCE  
LAW SCHOOL GRADUATION

SHORT-TERM CONTRACTS	MEN		WOMEN		PERCENT DIFFERENCE
	#	AVERAGE	#	AVERAGE	
OVERALL	46	\$53,074.02	73	\$50,777.45	4.52%
YEARS SINCE GRAD.					
<=10	19	\$45,452.63	35	<b>\$48,798.94<sup>23</sup></b>	<b>(7.36%)</b>
11-15	7	49,900.00	18	<b>51,124.67</b>	<b>(2.45%)</b>
16-20	13	59,369.62	14	55,124.79	7.70%
>=21	7	65,242.86	6	51,133.30	27.59%

In the two categories of less time since graduation, women significantly outnumber men and have higher salaries. In the two more experienced categories, the number of respondents is about equal, but the salaries of the men are higher. Again, the more significant comparisons are in the 11-15 and 16-20 categories because they contain narrower experience ranges. There are women with higher salaries in one category, and men with higher salaries in the other, although the difference in salaries is much greater where the men have higher salaries.

One possible explanation of higher salaries earned by women, as reflected in Table 5, relates to job segregation. Schools are trying to increase their overall percentage of women faculty by hiring more women clinical teachers. Hiring women for clinical teaching positions is cheaper than hiring women for traditional teaching positions. Schools are willing to pay women more

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three to five years of practice experience for entry level candidates. Thus, there are very few clinical teachers of either gender who have less than five years experience since law school graduation. This experience requirement contrasts with nonclinical, entry level hiring for which many law schools prefer to hire recent law school graduates or people with no experience in the practice of law.

23. The instances in which the average salaries of women are higher than those of men are rare. These unusual salary differentials and the accompanying percent differences have been printed in bold for emphasis.

than men in the least experienced categories because the total expense is still much less than if the women were hired for traditional positions. There may be fewer men than women in the clinical teaching categories of least experience because men are offered better paying traditional teaching positions. In effect, schools are able to increase the number of women on the faculty at a low cost.

Since these short-term contract positions are not tenure track positions, schools may not expect that the women will stay for very long. This explanation is confirmed by an examination of some of the salary data in relation to teaching experience. For clinical teachers in the short-term contract rank with only two years or less teaching experience, the average salary for the 32 women respondents was \$50,076, while the 13 men were paid an average of only \$47,500. However, for short-term contract teachers with more than ten years of teaching experience, the 6 women earned an average of only \$53,650, while the 5 men with similar experience earned an average of \$64,490.

These salary differentials indicate that schools may be willing to pay a small premium to women just entering the clinical teaching profession, as compared to men who have no teaching experience. However, it appears that a large number of women are not being retained in these positions, and that those who do stay ultimately earn significantly less than men with similar teaching experience. Thus, while women with short-term contracts may enjoy a salary advantage in their earlier years, this advantage tends to disappear over time.<sup>24</sup>

Finally, the picture that emerges from the tenured rank is the least clear. The most significant issue relating to tenured clinical faculty is the small number of women in the category rather than the salary differentials. Nevertheless, it is informative to examine the salary data for this rank, which is set forth in Table 6.

The tenured rank is the only rank in which responses from men outnumber responses from women, and by nearly two to one. Tenured faculty occupy the highest paid, most secure, and most respected positions. The fact that this is the only category in which men substantially outnumber women confirms the existence of job segregation. In the most significant salary compari-

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24. Again, a high turnover rate would be consistent with Chused's findings regarding women legal writing instructors. Chused, *supra* note 12, at 552-53.

sons, those for the 11-15, 16-20, and 21-25 year ranges, women have higher average salaries in the lowest and highest experience

TABLE 6  
COMPARISON OF TENURED CLINICAL TEACHERS  
BY GENDER AND YEARS SINCE LAW  
SCHOOL GRADUATION

TENURED	MEN		WOMEN		PERCENT DIFFERENCE
	#	AVERAGE	#	AVERAGE	
OVERALL	79	\$86,510.25	42	\$79,243.95	9.17%
YEARS SINCE GRAD.					
<11	2	n/a	0	n/a	n/a
11-15	7	\$70,242.86	7	\$76,684.29	(9.17%)
16-20	15	81,394.87	22	72,468.18	12.32%
21-25	33	87,971.03	11	91,650.55	(4.18%)
>=21 <sup>25</sup>	55	90,577.28	13	92,088.92	(1.67%)

groups. Interestingly, the middle experience range is the only one in which women outnumber men, and in that group the average salary for women is lower than for men. Perhaps in the >=21 year experience category a relatively small supply of women is sought after by a large number of schools and therefore can command a premium salary.

The highest experience category shown in Table 6 overlaps with the 21-25 year category. The >=21 year category is included because it shows the large additional number of men with more than twenty-five years of experience as compared to women with similar experience (there were 22 men and only 2 women in the >=25 year category). The significantly larger number of men explains why the overall average salary for tenured men was higher than the overall average salary for tenured women, even though the salaries of women were higher in two of the experience categories.

### III. ANALYSIS OF 1993-94 DATA

After reflecting on the cumulative results shown in these Tables, it appears that the findings in the second part of Table 2, comparing men and women of similar experience regardless of rank, may offer the most persuasive proof of discrimination. This part of the table compares people with similar experience doing similar work. However, this data might be explained as indica-

25. Note that the >=21 category overlaps with the 21-25 category.

tive mostly of job segregation and not direct salary discrimination. It is the detailed analysis of the salary data for similarly experienced women clinical teachers within the same rank as men that confirms that women are also generally paid less than men for similar work. Thus, the cumulative data confirms both job segregation discrimination and direct salary discrimination within the same rank and experience. Before addressing the question of why the salary differentiation based on gender occurs, it is important to consider some of the implications of job segregation.

The preponderance of women in the short-term contract rank, together with the relative paucity of women in the tenured rank raise some very significant issues. More than one-third of the women who responded to this survey indicated that they were in the lowest paying and least secure rank, short-term contracts. Nearly 41% of the men indicated that they were in the most secure and highest paying rank, the tenured rank. While this finding may be partially excused by the argument that there was only a small pool of women law school graduates prior to the late 1970s, this argument offers an incomplete explanation.<sup>26</sup> There were 136 women respondents with eleven to twenty years of experience. These women are presumably experienced enough to be considered for tenure, but only 29 of them (21%) were tenured. There were only 79 men in the same experience range, but 22 of them (28%) were tenured. The percentage of tenured men within this prime experience category is 33% higher than for women.

The implications for the future are disturbing. Many of the short-term contract positions are funded by soft money — grants of limited time duration. Nearly 60% of the respondents in this survey who were on short-term contracts indicated that they were supported by soft money. Two of the main sources of grants for clinical legal education have been Title IX, under the auspices of the U.S. Department of Education, and the Clinical Legal Education grant program of the Legal Services Corporation. Both of these sources are targeted for elimination by Congress, though at the time of this writing neither has been definitively terminated. Because of their higher representation

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26. For a discussion of reasons contributing to the lack of advancement by women in law firms, despite increasing numbers of women being hired by firms, see S. Elizabeth Foster, *The Glass Ceiling In the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. Rev. 1631, 1633 (1995).

in the short-term contract rank, women clinical teachers are disproportionately threatened by the proposed cutbacks in grant programs.

Similarly, many law schools have been facing tighter budgets and the prospect of declining applications and perhaps enrollments. This trend may place constraints on the willingness or ability of some schools to grant tenure over the next few years. Women outnumber men in all ranks in this survey, except the tenure rank.<sup>27</sup> Of the 69 tenure track respondents, 44 were women (64%) and only 25 were men (36%). If law schools begin to cut back on the granting of tenure, women clinical teachers will be disproportionately harmed.

While this data shows that women clinical teachers generally are suffering from job segregation and pay differentials, it is important to examine whether there is a further discriminatory effect on women of color.

#### IV. INTERSECTION OF RACE AND GENDER

As in other areas of professional life, the impact of poor employment conditions is not experienced equally by all women (or men). Of the full-time clinical teachers who indicated their race or ethnic background in the 1993-94 survey, 365 (90.4%) were white, and 39 (9.6%) were people of color.<sup>28</sup> Finding categories in which there were enough women teachers of color to make direct comparisons to either men of color or white women was difficult because of the small number of responses from clinical teachers of color.

Overall, the 1993-94 data indicates that people of color averaged about 90% of the salary of whites. For example, 213 white

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27. Although the short-term contract rank contains the greatest number of women, the tenure track rank contains the highest proportion of women.

28. In the fall of 1994, the ABA Consultant on Legal Education reported that the percentage of faculty of color was 12%. CONSULTANT'S DIGEST, *supra* note 13, at 4. This figure was comprised of part-time faculty, full-time faculty, administrators, and teachers. The actual proportion of full-time clinical teachers of color is probably much higher than the proportion of nonclinical teaching faculty of color. In 1987, Chused found that 3.7% of tenured and tenure track faculty were black. Chused, *supra* note 12, at 538, 540 n.19. Other racial minorities made up less than 2% of law school faculties, including clinical teachers and administrators. *Id.* at 538.

Significantly, men comprise a majority of the full-time faculty of color (not counting deans, administrators, and librarians) in the overall faculty numbers reported by the ABA Consultant, whereas women made up 67% of the full-time clinical teachers of color who responded to my 1993-94 survey. CONSULTANT'S DIGEST, *supra* note 13, at 5.

full-time clinical teachers had been out of law school for at least fifteen years, and their average salary was \$75,844. In comparison, 16 people of color with a similar experience level earned an average salary of \$68,225.

An important comparison can be made between the relative salaries of women of color and men of color. Twenty women of color had been out of law school for at least ten years, and their average salary was \$59,014.70. By contrast, 10 men of color had similar experience, and their average salary was \$79,870.46. The only category in which there were enough women and men of color to make a direct comparison based on both rank and experience was that of tenured clinical teachers who had been out of law school for ten years or more. This category contained 5 women and 5 men, with average salaries of \$62,600 and \$77,140 respectively. Clearly, men of color earn more than similarly situated women of color.

Another important comparison can be made between white women and women of color. Among respondents, 152 white women had been out of law school for at least ten years, and their average salary was \$65,463. This average is about 10% higher than the average for the 20 women of color at the same experience level. This disparity is consistent with the above-mentioned finding that on average people of color earned about 90% of the salary of whites.

In addition, as indicated above, 5 tenured women of color who were at least ten years out of law school responded to the survey, and their average salary was \$62,600. Thirty-seven (37) tenured white women in the same experience range responded, and their average salary was \$81,493. The difference might be attributable to experience rather than to race if the white women were generally more experienced than the women of color in this open-ended experience category. To test this explanation, I limited the group of tenured white women to those with ten to fifteen years of experience since law school graduation, thereby eliminating the most experienced, tenured white women clinical teachers. While only 5 respondents fit this limitation, their average salary was \$75,158, still considerably higher than that of the 5 tenured women of color.

Six (6) women of color were on the tenure track and had been out of law school for at least ten years. Their average salary was \$64,167. Thirty-one (31) white women with similar experience were in the tenure track rank; their average salary was

\$67,234. Again, I eliminated the most experienced tenure track white women from the comparison. Only 20 tenure track white women had between ten and fifteen years of experience. Their average salary was \$66,860, still about 5% higher than that of the women of color.

Finally, I compared the 5 women of color who had been out of law school for at least ten years and who were on short-term contracts with similarly situated white women. The women of color had an average salary of \$48,609. In comparison, the 38 white women earned an average salary of \$52,612. Limiting the group of short-term contract white women to those who had from ten to fifteen years of experience left a group of 20 with an average salary of \$50,115, still higher than that of the women of color.

Based on the above analysis, the evidence indicates that women of color who are full-time clinical teachers fare worse financially than their white female colleagues and their male colleagues of color.

#### V. ANALYSIS OF DATA: DO DEANS DISCRIMINATE?

What factors explain the salary differentials and job segregation? Of course, intentional and overt bias against women is a possible answer. More likely, a combination of factors working together lead to this situation. There are a variety of factors that might handicap women with respect to salary equality. Besides intentional discrimination, the possible contributing factors to lower salaries for women might include: market economics (comparable salaries or supply and demand); lower productivity; family and personal commitments; motivation by nonmonetary rewards of the work; failure to negotiate effectively; socialization to expect less; and political or professional orientation.<sup>29</sup>

A thorough discussion of all of these factors is beyond the scope of this article. Indeed, many of the factors which might at first appear to justify lower salaries are ultimately explainable by additional aspects of discrimination and bias against women.<sup>30</sup>

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29. See, e.g., Canadian Bar Association, *Touchstones for Change: Equality, Diversity, and Accountability*, REPORT OF THE CANADIAN BAR ASSOCIATION TASK FORCE ON GENDER EQUALITY IN THE LEGAL PROFESSION, ANNOTATED BIBLIOGRAPHY ON GENDER EQUALITY IN THE LEGAL PROFESSION, Appendix 14 (1993).

30. By analogy, consider the phone company's attempt years ago to explain its refusal to hire women as line repairpersons based on their physical difficulty climbing the poles; it turned out that the distance between the pegs for climbing the poles

The basic purpose of this article is to document the existence of lower salaries for women clinical teachers which exist even when the most significant factors (experience and rank) are the same for women and men. This finding suggests that immediate action is required to correct the situation, even if the complex causation is not completely understood.

Nevertheless, examination of some of the factors may lead to a better understanding of how to solve the problem. Three potential factors that may play important roles are market economics, family responsibilities, and productivity.

#### A. *Market Economics*

Market economics is one factor operating against women clinical teachers. Rather than practicing overt discrimination against women clinical teachers, deans probably participate in the operation of the market economy by tying salaries for women clinical teachers to their prior salary level. Thus, if women are paid less than men generally as lawyers, they would similarly be paid less as clinical teachers.

In fact, women are generally paid less than men in the practice of law.<sup>31</sup> For example, the Indiana Commission on Women found that women attorneys in Indiana earned less than men with similar experience.<sup>32</sup> The results in Indiana are remarkably consistent with findings in other states.<sup>33</sup> Faculty salaries for nonclinical positions may be less sensitive to market forces than are salaries in legal practice. Many entry level faculty positions are filled by recent graduates who have not practiced law, and the salaries of lateral hires are more influenced by the candidate's salary at their last law school employment. Of course, the effect of the market is pervasive and will have some effect even on traditional faculty salaries. In comparison, most entry level clinical teaching positions require three to five years of practice experience, and clinical salaries are therefore more likely to be influenced by the nonacademic lawyering market. Market economics is therefore a plausible and perhaps the most powerful

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was based on the average height of a man, so the superficial justification tied to physical limitations really was explainable by discriminatory action at a different level.

31. CURRAN, *supra* note 13; ABA COMMISSION ON WOMEN IN THE PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 7 (1995).

32. Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941, 947-48 (1991).

33. *Id.* at 960.

factor in the differential salaries among male and female clinical law teachers.

In some ways, it is reassuring to find a logical and likely explanation of salary differences other than intentional or even unintentional bias on the part of law school deans. However, law schools are not justified in disadvantaging women and rationalizing the result on the basis of factors beyond the confines of the law school world. Women should be paid fairly and comparably within law schools regardless of what the "market" dictates elsewhere in the legal profession. Law schools should be held responsible for the plight of women clinical teachers, even if market economics, rather than intentional discrimination, can be cited as a cause of women's differential treatment. Law schools must act equitably toward all faculty and set an example for the rest of the profession.

#### B. *Family Responsibilities*

Another factor that may explain why women earn less than men is that women often take time off from their careers to tend to children and other family responsibilities.<sup>34</sup> My survey form asked respondents to report whether they took time off from their profession (excluding sabbaticals). Seventy (70) people indicated that they had interrupted their career at some time, and within that group, 50 were women. Since women comprised 52% of all respondents, but comprised over 71% of those who took time off from their career, it seems clear that women clinical teachers are more likely to interrupt their careers than men.<sup>35</sup>

Conventional wisdom might suggest that a career interruption creates a similar negative impact on salaries of women and men, but that the disproportionate number of women taking time off causes career breaks to have a more widespread impact on women. Table 7 shows that for the 50 women in the 1993-94 survey who took time off, a career interruption actually correlated

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34. However, family ties are less of a factor than commonly believed. Deborah J. Merritt et al., *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395, 396, 422, 425. Men are also more affected in a positive way than is commonly expected. Chused, *supra* note 12, at 554. Assuming that there is statistical proof to show that women take more time off to care for children and family, there are issues of gender bias which influence this result. Such analysis is beyond the scope of this article.

35. Respondents may have taken time off prior to becoming clinical teachers. The survey question did not limit answers to breaks taken while employed as a clinical teacher.

with a *higher* salary than for the women who worked without interruption. Similarly, the 20 men who took time off seem to have benefitted in their average salaries compared with those men who did not interrupt their careers. Conventional wisdom clearly fails as an explanation. A career interruption actually correlates with higher rather than lower average salaries. Interestingly, despite the fact that a much greater number of women than men interrupted their careers, the apparent salary benefit associated with taking time off did not narrow the gap between the salaries of male and female clinical teachers. Women who interrupted their careers earned an average of 18.32% less than men, while women who did not do so earned an average of 18.20% less than men.

TABLE 7  
SALARIES OF CLINICAL TEACHERS  
WITH AND WITHOUT CAREER  
INTERRUPTIONS

INTERRUPTED CAREER			DID NOT INTERRUPT CAREER		
NUMBER	AVERAGE SALARY		NUMBER	AVERAGE SALARY	PERCENT DIFFERENCE
50	\$62,865.10	WOMEN	162	\$61,698.14	1.9%
20	74,385.00	MEN	173	72,926.91	2.0%

The survey form asked respondents to explain why they interrupted their careers. Over 73% of the women indicated that their reason was family-related, most often to give birth or tend to young children. Only 25% of the men gave similar reasons for their career breaks. This data confirms that women are more likely than men to experience a career break, and are more likely to do so for family-related reasons.<sup>36</sup>

A detailed analysis of subgroups by experience reveals some interesting nuances within this data. Within the group of women who have ten or fewer years of experience since law school graduation, those who have taken time off earn an average salary that is 18% higher than those women who did not take time off. But in the 10-15, 16-20, and 21-25 years of experience categories, the women who have taken time off actually earn less than the wo-

36. Of the 26 people who reported that they were part-time teachers, over 80% were women. The survey did not request that respondents give a reason, but it is not unreasonable to assume that the most common reason for working part-time is family responsibilities that demand a significant time commitment. The average salary for part-time women was lower than the average for part-time men.

men who have not interrupted their careers. Thus, the apparent salary enhancement for women who experience a career break is actually limited to those women at the earliest stages of their careers. For women who are more established in their careers (who may have taken their break many years previously), the time off appears to have become a negative factor.<sup>37</sup> In contrast, men in each experience category who took time off earn more than their male counterparts who did not interrupt their careers. This finding echoes other findings suggesting that family-related responsibilities are not as strong a negative factor for less-experienced women teachers in law schools. For men at all teaching experience levels, family-related responsibilities may be a positive factor.<sup>38</sup>

### C. Productivity

Another explanation sometimes offered for salary differentials is that women are less productive on the job than men.<sup>39</sup> This purported reason is troublesome because it is difficult to define and quantify productivity, and because nearly any measurable differences in women's productivity can be tied to other discriminatory factors in the workplace.<sup>40</sup> In an academic environment the main indicia of productivity for the teaching faculty are scholarly production and teaching load.

Measuring the relative value of scholarly output is difficult because there are widely varying views of what kinds of publications are important, and what role quality (which is also difficult to assess) should play in the measurement. I asked people to indicate the number of various publications they had authored within the three years prior to the 1993-94 survey. I examine

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37. Possibly, people who have been working for a longer time earn more and feel more secure in their positions; therefore, they may feel more freedom to take time off. This explanation does not apply to women who take time off to care for young children, which is more likely at the earlier stages of their careers. The data does not permit more specific analysis since the survey did not ask when the career break occurred.

38. Merritt et al., *supra* note 34, at 395, 397.

39. Economists consider a sex differential in wages to be discriminatory if the differential cannot be explained by sex differences in productivity. No statistical study has been able to explain the major part of the sex-wage differential by differences in productivity. Janice Fanning Madden, *The Persistence of Pay Differentials, in WOMEN IN WORK: AN ANNUAL REVIEW* 176 (Laurie Larwood et al. eds., 1985).

40. For example, it is generally recognized that women provide more child and family care and are responsible for more of the demands of "domestic" life.

only law review article production as a relatively undisputed measure of law school faculty productivity.

Overall, tenured men reported producing an average of 1.28 law review articles, while tenured women produced 1.07 articles. While the men's average is somewhat higher overall, within the category of 11-20 years of experience, the 22 men averaged 1.05 law review articles, and the 29 women averaged 1.1 articles. This production difference is certainly minimal, but the men in the 11-20 category earned an average salary of \$77,846.50 while the women averaged only \$73,485.86.

For tenure track clinical faculty, the overall law review article production for men was .84 articles, while women produced an average of .68 articles. Within the 11-20 year experience range, the 16 men averaged 1.0 articles and the 31 women produced .71 articles. Men in this category earned an average salary of \$69,983.31, while women earned only \$65,491.94.

This data is admittedly insufficient to produce secure conclusions. However, there is no clear pattern of higher production by men, and certainly none that would justify their higher salaries. This inconclusive finding comports with the mixed results found by non-law school studies of scholarly production.<sup>41</sup>

Examination of clinical teaching loads is particularly difficult because of a variety of factors — the number of students supervised, the number of cases handled by each student, the number of credits awarded, the presence and extent of a classroom component within the clinical course, and teaching requirements outside the clinic. My data includes some information about the number of students supervised each semester. While this number is a very rough proxy for teaching load, it would have some importance if there was a large gap between the teaching loads reported by men compared to women. However, in the survey responses, men and women clinical teachers reported approximately the same distribution of responsibilities over the four supervision load categories.<sup>42</sup>

Productivity is difficult to define and quantify in an academic context. The data in this survey relating to productivity

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41. Gail M. McGuire & Barbara F. Reskin, *Authority Hierarchies at Work: The Impacts of Race and Sex*, 7 GENDER & SOC'Y 487, 487 (1993); Susan K. Kovar & Edward L. McGlone, *Faculty Publication Rates: An Analysis*, 62 J. PHYS. EDUC. RECREATION & DANCE 67 (1993).

42. The categories were: 5 or fewer students, 6-10, 11-15, and over 15. See Appendix 1.

does not justify the salary differentials between male and female clinical teachers.

#### CONCLUSION

The data collected in 1993-94 concretely demonstrates that women clinical law teachers suffer from salary discrimination. The evidence does not justify the differentials on the basis of productivity or career interruptions. Law schools perpetuate general market inequities, instead of making efforts to provide fair and equitable compensation to women with similar rank and experience as men.

The finding of discrimination demonstrated in this article has significance beyond the injustice done to women clinical teachers. The finding exemplifies subtle ways in which discrimination pervades the job market and other aspects of contemporary society, even in places presumed to operate on principles of equity and fairness. Many academics, especially white males, may be surprised that this situation exists. Their failure to be aware of this inequity is symptomatic of a society in which those with some privilege often fail to comprehend the different experiences of those who are comparatively disadvantaged.

APPENDIX 1

CLEA 1993-94 Clinic Teacher Salary and Demographics Survey

Please Answer Based on Information for 1993-94 Academic Year

For this survey, clinic courses include in-house client programs, externships and simulation courses.

- 1. My law school is  public  private. Name of school \_\_\_\_\_
- 2. Student body is  under 500  500-1000  over 1000
- 3. Geographic area  N'East  South  Midwest  Rockies/West Coast
- 4. My status is  tenured  tenure track  non-tenure long term contract  non-tenure short term
- 5. My position is funded with  hard money  soft money
- 6. My basic contract is to teach for  academic year (9-10 mo.)  full year (11-12 mo.)
- 7. My salary for 1993-94 is \_\_\_\_\_. My estimated additional earnings this year from consulting or private practice are \_\_\_\_\_. From research grants \_\_\_\_\_. From other legal work \_\_\_\_\_.
- 8. I do clinic work during the summer with no additional compensation  yes  no.
- 9. I am director or chief administrator of my clinic courses  yes  no
- 10. I am required to produce scholarship  yes  no.
- 11. Number of items I published in each of the following in the last 3 years:  
 \_\_\_\_\_ law reviews; \_\_\_\_\_ law practitioner pubs; \_\_\_\_\_ other professional journals;  
 \_\_\_\_\_ general interest news and magazines; \_\_\_\_\_ other
- 12. The course(s) I taught this fall were: \_\_\_\_\_  
 The course(s) I teach this spring are: \_\_\_\_\_

Please indicate if each course is mostly (C) Client Clin., (E) Ex/Internship, (S) Simulation, (T) Traditional

13. Number of students I supervise each semester this year (Check correct boxes for the types of courses you teach):

- In house/real client clinics Fall:  5 or less  6-10  11-15  over 15  
 Spring:  5 or less  6-10  11-15  over 15
- Simulation courses Fall:  5 or less  6-10  11-15  over 15  
 Spring:  5 or less  6-10  11-15  over 15
- Externships Fall:  5 or less  6-10  11-15  over 15  
 Spring:  5 or less  6-10  11-15  over 15

- 14. \_\_\_\_\_% of my total teaching time is spent on clinical courses
- 15. I am  Woman  Man 16. I am \_\_\_\_\_ years old.
- 17. I am  white  African-American  Hispanic  Native American  
 Asian-American  Other
- 18. The name of the law school from which I graduated is: \_\_\_\_\_
- 19. My last job before starting teaching was \_\_\_\_\_
- 20. I have been teaching for \_\_\_\_\_ years. I teach  full time  part time.
- 21. I have been out of law school for \_\_\_\_\_ years.
- 22. I believe the number of full time clinic teachers at my school is \_\_\_\_\_; of which \_\_\_\_\_ are tenured, \_\_\_\_\_ are tenure track, \_\_\_\_\_ are non-ten. long term cont., and \_\_\_\_\_ are non-ten. short term.
- 23. Since graduating from law school I  have  have not taken time off from my career. If you have taken time off, please say how long \_\_\_\_\_, and the reason \_\_\_\_\_.
- 24. I can vote on:  all faculty matters;  all matters except appointments;  no matters.

PLEASE RETURN FORM TO BOB SEIBEL, CORNELL LAW SCHOOL, MYRON TAYLOR HALL, ITHACA, NY 14853