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SEX DISCRIMINATION IN HIGHER EDUCATION: DOES TITLE VII WORK?

Mary Ann B. Oakley†

INTRODUCTION

When the Civil Rights Act of 1964[1] was first enacted, Title VII, Equal Employment Opportunity, specifically excluded educational institutions from its coverage.[2] This exemption was deleted by section 3 of the Equal Employment Opportunity Act of 1972,[3] effective March 24, 1972. While debating and passing the 1972 Act, Congress criticized the track record of higher educational institutions regarding employment of women:

> [I]n the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.
>
> When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts.[4]

One Senator called evidence of sex discrimination in universities and colleges "truly appalling."[5] To another, it was "gross" and "blatant."[6]

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000a—2000h-6 (1982)).

2. Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964).

3. Pub. L. No. 92-261, § 3, 86 Stat. 103, 104 (1972) (codified as amended at 42 U.S.C. § 2000e-1 (1982)).

4. H.R. Rep. No. 238, 92d Cong., 2d Sess. 19-20 *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2155.

The focus of this article on sex discrimination in no way minimizes the very real problems of race discrimination or other prohibited forms of discrimination in higher education, or constitutional claims brought against public institutions. Some of the problems are, of course, similar.

5. 118 CONG. REC. 117 (1972) (statement of Sen. Bayh).

6. 118 CONG. REC. 1992 (1972) (statement of Sen. Williams). *See also* CARNEGIE

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Although the 1972 amendments brought educational institutions under the coverage of Title VII, sex discrimination has not been eliminated from higher education, particularly in promotion and tenure decisions. This article addresses why that goal has not been achieved and suggests how the courts can construe Title VII to achieve the goals Congress intended.

I. Reluctance to Second-Guess Academia

Although Congress was convinced of the need to extend Title VII protection to educational institutions, courts have been reluctant to be drawn into academic decision making. For example, the Second Circuit Court of Appeals stated, "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."[7] Because tenure, with few exceptions, is a contract that guarantees lifelong employment[8] and because the decision to grant tenure involves academic sophistication, these decisions are among the most difficult for courts to consider.[9]

Most Title VII cases based on sex discrimination in promotion or tenure require a disparate *treatment* analysis rather than a disparate *impact* analysis. Disparate impact generally applies to situations in which a facially neutral policy not substantially related to successful job performance has a disparate impact on a group protected by Title VII.[10] In such a case, proof of intent to discriminate is not necessary.[11] In contrast, a plaintiff in a disparate treatment action must prove intentional discrimination by the employer.[12] The plaintiff may establish discriminatory intent or animus by di-

Commission on Higher Education, Opportunities for Women in Higher Education (1973); Powell v. Syracuse Univ., 580 F.2d 1150, 1154 n.10 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

7. Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974).

8. *See, e.g., 1940 Statement of Principles on Academic Freedom and Tenure, reprinted in* American Association of University Professors, Academic Freedom and Tenure 33, 36 (L. Joughin ed. 1969) [hereinafter *Statement of Principles*]; Zahorik v. Cornell Univ., 729 F.2d 85, 92 (2d Cir. 1984).

9. *See, e.g.,* Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1381 (5th Cir. 1980); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974); Gutzwiller v. Fenik, 645 F. Supp. 363, 365 (S.D. Ohio 1986).

10. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requirement of high school diploma and passing standardized test in order to be promoted not substantially related to job performance and had disparate impact on black employees).

11. *Id.* at 432.

12. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

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rect or circumstantial evidence.[13]

The plaintiff in a Title VII disparate treatment action first must establish a prima facie case of discrimination. The plaintiff can establish her prima facie case under the test articulated in *McDonnell Douglas Corp. v. Green*[14] by showing that she belongs to a class protected by Title VII,[15] that she was qualified for the position which she sought, that she was either rejected or not considered for the position, and that males of comparable qualifications were treated more favorably.[16] As applied to the higher education setting, the plaintiff must establish a prima facie case by showing that she is a member of a protected class; that she was qualified for the position or rank she sought; that she was denied promotion, reappointment, or tenure; and that males with comparable qualifications achieved the position sought.[17]

Once the plaintiff establishes a prima facie case, the defendant must articulate a legitimate nondiscriminatory reason for the challenged action. Next, the plaintiff must prove her case by showing that any reason articulated by the defendant is pretextual or a cover-up for discrimination.[18]

Applying this rationale and analysis to the educational setting, particularly to tenure and promotion decisions, has proved to be difficult. Under the widely recognized guidelines of the American Association of University Professors, a faculty member must be tenured by the end of her seventh year of teaching.[19] Thus, in most instances, the teacher submits her dossier of materials for consideration during her sixth year of teaching. If tenure is denied, she is usually given a terminal one-year contract after notice of denial. If she is tenured, she is almost always promoted to associate professor. The final step, which comes some years later, is promotion to full professor.[20]

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13. Furnco Constr. Co. v. Waters, 438 U.S. 567, 580 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

14. 411 U.S. 792 (1973).

15. Title VII prohibits certain employment decisions based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1982).

16. *McDonnell Douglas*, 411 U.S. at 802.

17. Smith v. University of N.C., 632 F.2d 316, 340 (4th Cir. 1980).

18. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

19. *Statement of Principles*, *supra* note 8, at 36-37; *see, e.g.*, Griffin v. Board of Regents of Regency Univ., 795 F.2d 1281, 1283 (7th Cir. 1986) (The court noted that at Illinois State University, faculty members were terminated if not granted tenure after seven years of teaching.).

20. *See* Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 172 n.2 (1st Cir. 1978) (The court noted that "normal progression in academic rank is from

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Most institutions of higher education require a faculty member seeking tenure to demonstrate excellence in teaching, in scholarship through research and publication, and in service to the institution and the community.[21] How these factors are weighed depends on the institution and the candidate's field of study.

In most colleges and universities, teaching effectiveness is evaluated by students and members of the candidate's department who have observed her classroom performance.[22] Scholarship is reviewed by experts in her field of study from other institutions. Traditionally, the college or university has kept these evaluations strictly confidential and even the identities of the reviewers have not been available to the faculty member under consideration for tenure.[23] Service is measured by committee work, community activities that relate to or reflect well on the institution, and other activities which contribute to the good of the college or general community or bring credit to the institution.[24] The initial recommendation regarding tenure is usually made by the tenured faculty of the department involved, with further consideration by an interdepartmental or institution-wide faculty group and the academic dean. In most schools, there is an appeal procedure as well.[25]

Courts generally have been reluctant to become involved in tenure decisions. An example of this reluctance is found in *Faro v. New York University*.[26] In *Faro*, the trial court refused to grant a preliminary injunction on behalf of the plaintiff who was denied a tenured position after her research grant was terminated.[27] Although Faro offered evidence that the university hired male doctors rather than offering the job to her, the lower court, applying

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instructor to assistant professor, associate professor, and, finally full professor."), *cert. denied*, 444 U.S. 1045 (1980).

21. *See, e.g.*, Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 475 (8th Cir. 1984); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1340 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); Hooker v. Tufts Univ., 581 F. Supp. 104, 107 (D. Mass. 1983).

22. *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1343 (W.D. Pa. 1977).

23. *See, e.g.*, *Lynn*, 656 F.2d at 1340; Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

24. *See, e.g.*, Merrill v. Southern Methodist Univ., 806 F.2d 600, 603 (5th Cir. 1986).

25. *See, e.g.*, *Id.*; Smith v. University of N.C., 632 F.2d 316, 330 (4th Cir. 1980); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 172-73 (1st Cir. 1978), *vacated*, 439 U.S. 24 (1978), *on remand*, 20 Fair Empl. Prac. Cas. (BNA) 718 (D.N.H. Jan. 29, 1979), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

26. 502 F.2d 1229 (2d Cir. 1974).

27. Faro v. New York Univ., 8 Fair Empl. Prac. Cas. (BNA) 319 (S.D.N.Y. Nov. 9, 1973).

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the *McDonnell Douglas* test,[28] found no evidence to support the sex discrimination claim. The university produced evidence of a legitimate nondiscriminatory motive for its actions: the superior qualifications of the male doctors and the nature of the positions for which they were hired.[29] The Second Circuit affirmed, noting that federal courts should hesitate to become involved in university faculty decisions.[30]

Deference to academic explanations was further echoed in early lower court Title VII decisions involving institutions of higher education, particularly in the refusal of some courts to compel discovery of how the persons involved in tenure decisions voted.[31] Because tenure recommendations and decisions are usually made by committees, access to the process and to the comments and opinions of individual committee members is vital to a plaintiff bearing the burden of proving intentional discrimination. The plaintiff's interest in acquiring information needed to prove her case, however, often collides with the traditional confidentiality interest of the decision makers.

II. The Discovery Dilemma

A sex and age discrimination case questioning salary discrepancies provided the vehicle for an early decision on the discovery dilemma. In *Keyes v. Lenoir Rhyne College*,[32] the plaintiff, alleging sex and age discrimination, sought injunctive and declaratory relief for herself and the class of female faculty members at Lenoir Rhyne College. She initiated the suit after the college refused to extend her tenure past age sixty-five. The court denied relief on

28. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See supra* text accompanying notes 14-17 for discussion of test.

29. *Faro*, 8 Fair Empl. Prac. Cas. at 323-24 (university said that Faro was hired for a research position, not for a tenure track position).

30. *Faro*, 502 F.2d 1229, 1231-32.

31. *See, e.g.*, Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977) (The court refused to allow plaintiff access to the faculty evaluation records since the college did not base its actions on these evaluations. The college's need for confidentiality outweighed Keyes' need for information.); Lynn v. Regents of the Univ. of Cal., 21 Fair Empl. Prac. Cas. (BNA) 313 (C.D. Cal. May 1, 1979), *rev'd*, 656 F.2d 1337 (9th Cir. 1981) (In balancing the university's need for confidentiality against plaintiff's need for information, the court found plaintiff had the greater need since the file had been viewed *in camera* by the court as evidence and plaintiff had discovered enough of the information contained in the file to make its confidentiality unimportant to the university.), *cert. denied*, 459 U.S. 823 (1982).

32. 552 F.2d 579 (4th Cir. 1977).

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both claims,[33] and Keyes appealed.

The Fourth Circuit affirmed the trial court's refusal to allow the plaintiff to discover confidential evaluations of faculty members made by her division and department chairmen, even though she argued that she might find evidence in these documents to show that the explanations given for variances in salaries between males and females were pretextual.[34] In supporting this conclusion, the court observed that the college had not sought to justify the disparity between male and female salaries on the basis of evaluations, but had presented evidence that salary differences were based on nondiscriminatory factors.[35] Although plaintiff's statistical evidence demonstrated that the average male salary exceeded the average female one, no data were offered showing that male and female teachers in the same discipline or department were unequally paid.[36] The court noted: "[H]ad the College seen fit to rely upon [the evaluations to justify salary disparities] we would be faced with the delicate question of whether the court should 'substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.'"[37]

The danger inherent in withholding information about evaluations is illustrated in *Lynn v. Regents of the University of California*.[38] Lynn charged the University of California with sex discrimination under Title VII, alleging disparate treatment in both promotion and tenure decisions. The appellate court found the evidence "highly persuasive" in establishing her prima facie case of discrimination.[39] It, therefore, became necessary to evaluate the defendant's offer of a legitimate nondiscriminatory reason for its decision.[40] The university claimed the denials of advancement and tenure were based on Lynn's deficient scholarship, of which she

33. *Keyes*, 552 F.2d at 579-80.

34. *Id.* at 581.

35. *Id.* at 580-81.

36. *Id.* (plaintiff failed to show that salary differences existed between male and female faculty with substantially equal teaching positions and thus did not establish prima facie case of sex discrimination with statistical data).

37. *Id.* at 581 n.6 (quoting Green v. Board of Regents of Texas Tech Univ., 335 F. Supp. 249, 250 (N.D. Tex. 1971)), *aff'd*, 474 F.2d 594 (5th Cir. 1973). The court stated that if the college had relied on the evaluations, the question of a pretext would have been raised, thereby necessitating a decision as to whether the plaintiff was entitled to access to the evaluations to show the pretext. *Id.* at 581.

38. 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

39. *Lynn*, 656 F.2d at 1342.

40. *Id.* at 1344. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

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had been made aware.[41] The plaintiff then had to show that the defendant's reason was pretextual.[42]

In order to show pretext, a plaintiff must have access to defendant's records. In *Lynn*, the plaintiff was denied access to her tenure review file throughout the pretrial proceedings. At trial, the lower court reviewed the file *in camera*, but refused to disclose the contents to the plaintiff.[43] On appeal, Lynn asserted that the file was reviewed, not for a determination of whether its contents were confidential, but as evidence to rebut her introduction of the minority report of the review committee, containing the opinions of committee members who supported granting her tenure. Lynn asserted that the trial court's use of this file as evidence violated her due process rights.[44] The court of appeals agreed with her assertion.[45]

In determining whether Lynn was entitled to access to the files, the court stated that whenever confidential evaluations serve as "the alleged basis" for the decision to deny promotion or tenure, the interest of a plaintiff in proving her case must be weighed against that of the institution in protecting confidentiality.[46] Because the court remanded the case, it did not determine the results of this balancing. However, the court noted in this case that the university's interest in confidentiality was minimal because Lynn had already discovered much of the information in the file through other sources.[47]

Further guidance on the discovery dilemma is provided by *In re Dinnan*.[48] During a sex discrimination case against the University of Georgia, Professor Dinnan refused to reveal, at his deposition,

41. *Lynn*, 656 F.2d at 1340 (Lynn was denied a merit increase in 1971 based on evaluations that her scholarship was deficient; based on similar assessments for the next two academic years, she was again told her scholarship was deficient.).

42. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (If the defendant meets the burden of production of a legitimate, nondiscriminatory reason for employment decision, the "plaintiff will have a full and fair opportunity to demonstrate pretext.").

43. *Lynn*, 656 F.2d at 1345.

44. *Id.* at 1345-46.

45. *Id.* at 1346.

46. *Id.* at 1347. *See* Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384 (5th Cir. 1980) (plaintiff's interest outweighed university's interest when university defended solely on ground that promotion decision was based on "unbiased faculty evaluations which involved criteria unrelated to sex").

47. *Lynn*, 656 F.2d at 1348. The case was remanded by the court of appeals for a determination of the proper balancing. *Id.*

48. 661 F.2d 426 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1106 (1982).

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which way he had voted on the plaintiff's application for tenure.[49] When he refused to answer after the trial court ordered him to do so, the court found him to be in contempt and imposed a fine and imprisonment.[50] Professor Dinnan moved to have his sentence declared illegal, claiming that his due process rights were violated. His motion was denied, and he appealed.[51]

Dinnan argued that his refusal to reveal his vote was based on the privileges of academic freedom and the secret ballot.[52] The court of appeals, however, viewed the issue as one involving evidentiary matters, not constitutional issues, and stated that Professor Dinnan's claimed privilege, the "right to refrain from testifying . . . [had] not been considered or recognized by any court."[53] The court rejected the professor's argument for recognition of a privilege based on the concept of freedom to speak and teach in academic settings, commonly known as "academic freedom." The court stated, "Quite bluntly, this Court feels that the government should stay out of academic affairs. However, these issues are not presented in the instant case. Here a *private* plaintiff is attempting to enforce her constitutional and statutory rights in an employment situation."[54] The court also rejected a claim for a "secret ballot" privilege, stating that an employment decision "by no stretch of the imagination deserves the protection that is accorded to individual participation in the political process."[55]

While acknowledging the need for academic freedom, the court in *Dinnan* also recognized its limits. The court refused to create a new privilege to allow Dinnan to avoid testifying and stated that it would not expand the concept of academic freedom to allow it to interfere with the goal of eliminating discrimination.[56] When tenure decisions are based on evaluations of the candidate, those evaluations should be discoverable to aid the plaintiff in establishing pretext. Otherwise, the institutions could "hide behind 'academic

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49. *Dinnan*, 661 F.2d at 427.

50. *Id.* (The court imposed a daily fine of $100 for thirty days to be followed by a ninety day imprisonment if Dinnan continued to be defiant.).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 430.

55. *Id.* at 431-32. *But cf.* Gray v. Board of Higher Educ., 92 F.R.D. 87 (S.D.N.Y. 1981), *rev'd*, 692 F.2d 901 (2d Cir. 1982) (in context of a race discrimination claim, the court balanced the need for confidentiality against the need for plaintiff to discover reasons for tenure decision; it found that the balance tipped in favor of plaintiff's need).

56. *Dinnan*, 661 F.2d at 431.

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freedom' to avoid responsibility for their actions."[57]

III. Standards of Proof

While the courts struggled with the conflict between the plaintiff's need for information in order to prove discrimination and the traditionally respected confidentiality of the promotion and tenure review process, they also began developing the standards of proof for discrimination claims in the higher education setting. *Johnson v. University of Pittsburgh*[58] is one of the earliest cases to address these problems, and one of the few times a plaintiff, alleging sex discrimination in tenure, was granted a preliminary injunction.[59]

After she had been denied tenure, Johnson, an assistant professor of biochemistry in the School of Medicine at the University of Pittsburgh, sought a preliminary injunction to prevent her termination a year before her three-year research grant was to expire.[60] The trial court granted the preliminary injunction one month before the plaintiff's projected termination date, finding the evidence established that the plaintiff had a strong likelihood of success on the merits of her claim.[61] In reaching this conclusion, the court found that the evidence indicated sex discrimination existed during Johnson's employment at the university.[62]

Additional evidence demonstrated improper consideration of the tenure criteria in the decision not to grant her tenure: after-the-fact solicitation of "documentation to discredit the plaintiff in an effort to substantiate" the decision not to grant her tenure; application of different standards to a male professor who received tenure; payment of lower salary and smaller pay increases to Johnson than to male faculty; and a history of granting tenure to males, but not to females.[63] The court also found "intentional wrongdoing" based on the school's failure to implement an affirmative action plan to eliminate discrimination and the tenure review committee's failure to apply appropriate criteria to the plaintiff's tenure

57. *Id.* at 432.
58. 359 F. Supp. 1002 (W.D. Pa. 1973) (preliminary injunction issued); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977) (preliminary injunction dissolved following trial). *See also* Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir. 1978).
59. *Johnson*, 359 F. Supp. 1002 (W.D. Pa. 1973).
60. *Id.* at 1004.
61. *Id.* at 1009.
62. *Id.* at 1004.
63. *Id.* at 1004-05.

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decision.[64]

The trial court further concluded that Johnson had established "statistical evidence of a pattern and practice of discrimination against women in the School of Medicine."[65] She had shown disparate treatment in the granting of tenure to a comparably situated male,[66] and that the number of women on the faculty of the School of Medicine had decreased while discrimination complaints were pending.[67] Balancing the irreparable harm Johnson would suffer as a result of termination of her employment—the loss of her research grant and the injury to her professional reputation—against the fact that the university would receive her services pending final disposition of the case, the court ruled that granting the preliminary injunction would serve the public interest.[68] The balance between the university's retention of Johnson's services and her inevitable loss of the research grant apparently was a significant factor in persuading the trial court to grant the preliminary injunction.[69]

The factors that the court cited to support the injunction seemed unimportant four years later, when, in its final decision in the case,[70] the same judge dissolved the preliminary injunction. He stated that, although Johnson originally had presented a prima facie case of sex discrimination under the formula established by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[71] the university had "articulated legitimate and nondiscriminatory reasons for the action taken in failing to grant plaintiff promotion and tenure."[72]

In support of its decision to terminate Johnson, the university presented evidence of deficiencies in her teaching[73] (although there was no evidence of any perceived problems before the fall of

64. *Id.* at 1010.

65. *Id.* at 1011.

66. *Id.*

67. *Id.*

68. *Id.* at 1009-11.

69. *Id.* at 1011.

70. Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977).

71. 411 U.S. 792 (1973). *See supra* text accompanying notes 14-17 for discussion of *McDonnell Douglas* test.

72. *Johnson*, 435 F. Supp. at 1371. The justification for this decision was based on the "ineffectiveness of [plaintiff's] teaching and lack of relevancy of her research to the mission of [her] department." *Id.* During 74 days of trial the court heard 73 witnesses and reviewed almost 1000 exhibits. *Id.* at 1332.

73. *Id.* at 1367.

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1971)[74] and criticized her research as "adequate but . . . in the area of organic chemistry rather than biochemistry, and . . . neither exciting nor relevant to the mission of the department."[75] Even though statistical evidence supported a claim of discrimination,[76] the court found no causal connection had been shown between this evidence and Johnson's termination.[77] Thus, Johnson failed to prove the reasons for denying tenure were a pretext for discrimination.[78]

Furthermore, the court took note of the medical school's success in increasing the number of female faculty during the pendency of the suit, a fact of questionable significance because the increase occurred after Johnson's discrimination suit was filed.[79] In conclusion, the trial court stated:

> On the one hand we have the important problem as to whether sex discrimination is operating to the detriment of women in the halls of academia. If so Congress has mandated that it must be eradicated. . . . On the other hand we also have the important question as to whether the federal courts are to take over the matter of promotion and tenure for college professors when experts in the academic field agree that such should not occur. In determining qualifications in such circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.[80]

Perhaps as important as any evidence offered at trial was the negative reaction of the court to Johnson's behavior between the preliminary injunction and trial. The university presented evidence showing that Johnson "badgered" the dean and her department head and "behaved inappropriately at faculty meetings."[81] The court concluded that her "ostentatious behavior in taking attend-

74. *Johnson*, 359 F. Supp. at 1003.

75. *Johnson*, 435 F. Supp. at 1345.

76. *Johnson*, 359 F. Supp. at 1008. Johnson's statistical evidence revealed that of the School of Medicine's 401 faculty members, only five were tenured women; six departments were all male; eleven departments had no women with tenure; and only three departments had tenured women. The average female salary was $10,500 less than the average male. Furthermore, even though four times as many women as men were eligible for tenure, over the previous six years only three of the seventy-three tenured appointments had gone to women. *Id.*

77. *Johnson*, 435 F. Supp. at 1348.

78. *Id.* at 1353.

79. *Id.* at 1349.

80. *Id.* at 1371.

81. *Id.* at 1348.

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ance . . . , taking notes of faculty meetings and memorializing all incidents by certified letter was inhibiting to the other members of the faculty."[82] Moreover, Johnson distributed embarrassing caricatures and publicly cast aspersions on the defendants' characters, calling them "male chauvinist pigs."[83] Finally, the court concluded that Johnson had revealed the purpose for her actions when she admitted she was "having great fun harassing the Dean."[84]

Thus, in assessing the situation, the court found that much of the difficulty presented by this case was a "clash of personalities" rather than any discrimination prohibited by Title VII.[85] The court also commented on the broad political impact of the case:

> The court is further aware that this case has attracted considerable public attention, particularly among the organizations advancing the cause of women's liberation. We need not characterize the plaintiff as envisioning herself a modern Jeanne d' Arc . . . to recognize that the case is regarded by many as a test of the rights of female professors to gain tenure and promotion in academia under Title VII. This [academia] is regarded as one of the bastions of male chauvinism.[86]

The case illustrates the difficulties with which courts struggle in tenure discrimination cases:

> The case is also an example of the devastating effects of sex discrimination cases of this kind against universities upon the work and calendars of the United States courts, and the commitments and time of trial counsel. Attempts to curtail the case proved fruitless in view of plaintiff's claim, for which there appeared to be a reasonable basis that because of sex discrimination males had been hired and promoted in her department who were less qualified than she was to receive promotion and tenure. This necessitated the examination of the professional credentials of numerous professors, a task for which the court like probably most federal judges was ill suited.[87]

Despite the *Johnson* court's reluctance to second-guess the tenure and promotion process, appellate courts have begun to recognize the need for standards that address the inherent difficulties in

82. *Id.*
83. *Id.*
84. *Id.* at 1349.
85. *Id.* at 1367.
86. *Id.* at 1350-51.
87. *Id.* at 1332.

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promotion and tenure cases.[88] For example, in *Powell v. Syracuse University*,[89] the Second Circuit affirmed the lower court's decision that the plaintiff had failed to prove sex and race discrimination, but reassessed the "hands-off" position it had taken previously in *Faro v. New York University*.[90] Referring to the many decisions that had cited *Faro* "for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices,"[91] the Second Circuit Court of Appeals stated:

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear . . . that the common-sense position we took in *Faro* . . . has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.[92]

In justifying its conclusion that courts should scrutinize charges of sexual discrimination in colleges and universities, the court relied on Congressional intent:

> It is clear beyond cavil, then, that the Congress has evidenced particular concern for the problem of employment bias in an academic setting. Indeed it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias.[93]

Congressional intent may be clear, but courts have had difficulty translating that intent into discernible standards to apply to higher education tenure and promotion decisions.[94]

Almost as well-known as Johnson's unsuccessful battle for tenure is the legal saga of Dr. Christine Sweeney's efforts to obtain promotion to full professor at Keene State College.[95] After trial,

88. *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

89. 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

90. 502 F.2d 1229, 1231-32 (2d Cir. 1974) (court should hesitate to invade faculty appointment decisions). *See supra* text accompanying notes 26-30.

91. *Powell*, 580 F.2d at 1153 (noting five cases directly citing *Faro* and eight other cases which "concurred in its sentiments").

92. *Id.*

93. *Id.* at 1154.

94. *See supra* text accompanying note 80; *see, e.g.*, cases cited *infra* note 110.

95. Sweeney v. Board of Trustees of Keene State College, 14 Fair Empl. Prac. Cas.

the district court held that "defendants . . . have not proven that they had a nondiscriminatory motive in failing to promote Sweeney in the academic year 1974-75."[96]

On appeal, the First Circuit affirmed the lower court's judgment and agreed with the trial court's approach in requiring the college to prove the lack of a discriminatory motive. Noting the problem of proof in a discrimination case against an institution of higher education, the court of appeals stated, "Particularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available."[97] Citing many cases in which the plaintiff had not prevailed as evidence of the difficulty of proof, the First Circuit criticized the approach of excessive deference to academic decision making:

> [W]e voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluations most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.[98]

In affirming the trial court, the First Circuit held that the college had failed to prove the absence of discrimination.[99] The Supreme Court, however, found that in requiring the university to prove nondiscrimination, the lower courts had misplaced the burden of proof.[100] In a two-paragraph opinion, the Supreme Court,

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(BNA) 1220 (D.N.H. Apr. 13, 1977), *aff'd*, 569 F.2d 169 (1st Cir. 1978), *vacated*, 439 U.S. 24 (1978), *on remand*, 20 Fair Empl. Prac. Cas. (BNA) 718 (D.N.H. Jan. 29, 1979), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

96. Sweeney v. Board of Trustees of Keene State College, 14 Fair Empl. Prac. Cas. (BNA) 1220, 1230 (D.N.H. Apr. 13, 1977).

97. Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 175 (1st Cir. 1978). The opinion was written by visiting Judge Tuttle from the Fifth Circuit.

98. *Id.* at 176 (footnotes omitted).

99. *Id.* at 177.

100. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978). The Court remanded the case in light of its decision in Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (defendant has burden of production of articulating a valid nondiscriminatory reason for actions, not proving that no discriminatory motive exists).

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concerned that the court of appeals had confused the standard and had applied too heavy a burden of proof on the employer, stated "that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.' "[101] The employer's burden is to articulate a nondiscriminatory motive for his actions. Then the employee must prove the reason offered for the adverse action is pretextual.[102]

On remand, the trial court, properly placing the burden of proof on Sweeney, again held that she was the victim of discrimination.[103] In a brief opinion, the trial court held that Sweeney was a member of the protected female class, that she possessed the qualifications for promotion to full professor, and that males with no greater qualifications than hers were promoted. The court stated, "Defendants did adduce evidence of legitimate nondiscriminatory reasons for not promoting plaintiff,"[104] but held that Sweeney had proved to the court's satisfaction that her sex was the basic reason for failure to promote her. In reaching this conclusion, the court found that "but for the fact that she was a woman" she would have been promoted.[105] Once again, the First Circuit affirmed,[106] holding that the trial court's decision was not clearly erroneous.[107]

In *Sweeney*, the court of appeals addressed one of the greatest problems confronting women in sex discrimination cases: "the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts."[108] When courts refuse to evaluate comparative evidence carefully and, instead, search for evidence of subtle differences between female plaintiffs and the males with whom these women

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101. *Sweeney*, 439 U.S. at 25 (brackets in original).

102. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

103. Sweeney v. Board of Trustees of Keene State College, 20 Fair Empl. Prac. Cas. (BNA) 718 (D.N.H. Jan. 29, 1979), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

104. *Id.* at 718. In the original opinion, the trial court cited testimony by the Faculty Appeals Committee that the dean never gave adequate reasons to Sweeney for the decision not to promote her. *Sweeney*, 14 Fair Empl. Prac. Cas. at 1225.

105. *Sweeney*, 20 Fair Empl. Prac. Cas. at 718.

106. Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (lst Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

107. *Sweeney*, 604 F.2d at 109, 114. The court found that the district court could have based its decision on the practice that subjects women to higher standards than their male counterparts. Thus, even though one female was promoted and two men were denied promotion along with Sweeney, discrimination still could have existed. *Id.* at 114.

108. *Id.* at 114.

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compare themselves, the courts in effect are doing precisely what the women complain the academic reviewers do. Thus, the courts are inadvertently recreating the original discriminatory decision making process and helping to perpetuate discrimination.

IV. Unsatisfactory Solutions

Even with clearer articulation of standards of proof and various ways to prove discrimination,[109] courts usually rule for the defendant institution.[110] In *Zahorik v. Cornell University*,[111] for example, the appellate court noted that tenure decisions are unlike most employment decisions because they "entail commitments both as to length of time and collegial relationships which are unusual."[112] Furthermore, the inability to transfer from department to department within the academic setting, the sometimes noncompetitive nature of the tenure decision, the fact that the decision is highly

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109. In Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984), the court noted that "no common unit of measure by which to judge scholarship" exists. *Id.* at 93. A plaintiff alleging sex discrimination in a tenure decision may attempt to show that the tenure review committee varied from regular procedures, that individual members were biased, or that a significant number of departmental faculty members or experts in the field favorably view her work. *Id.*

110. *See, e.g.*, Merrill v. Southern Methodist Univ., 806 F.2d 800 (5th Cir. 1986) (The court held the limitation period for filing the professor's claim ran from the alleged discriminatory act, not from when plaintiff first perceived that discrimination caused the institution's actions. The university's denial of tenure was not motivated by sex discrimination.); Sola v. Lafayette College, 804 F.2d 40, 45 (3d Cir. 1986) (The plaintiff's claims of "an inhospitable atmosphere for women," disparate impact on women, and the department head's preference based on an "old-boy" network did not establish a claim of sex discrimination.); Griffin v. Board of Regents of Regency Univ., 795 F.2d 1281 (7th Cir. 1986) (The system of characterizing positions as either regular or temporary was not done on the basis of gender and plaintiff failed to show disparate impact, disparate treatment, or a property deprivation without due process.); Gutzwiller v. Frank, 645 F. Supp. 363 (S.D. Ohio 1986) (The university offered evidence of deficiency in plaintiff's scholarship and plaintiff failed to satisfy the burden of proving her scholarship was sufficient.); Thomasko v. University of S.C., 41 Fair Empl. Prac. Cas. (BNA) 1032 (D.S.C. Jul. 1, 1985) (The plaintiff failed to show she was qualified for promotion and tenure; she produced no evidence to allow the court to compare her tenure decision with others in the department.); Langland v. Vanderbilt Univ., 36 Fair Empl. Prac. Cas. (BNA) 200 (M.D. Tenn. Apr. 27, 1984) (The university articulated a legitimate nondiscriminatory reason for denial of tenure. Plaintiff failed to tie evidence of nationwide availability of women with doctoral degrees to her Title VII action.); Hooker v. Tufts Univ., 581 F. Supp. 104 (D. Mass. 1983) (Plaintiff did not establish a prima facie case of sex discrimination. The university's reasons for denying her tenure—her lack of scholarship and the administrative decision to no longer waive this requirement for the physical education department—were legitimate and not related to plaintiff's sex.).

111. 729 F.2d 85 (2d Cir. 1984).

112. *Zahorik*, 729 F.2d at 92.

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decentralized, and the number of factors under consideration differentiate these situations from the standard employment decision.[113]

Defining the problem, the court stated:

> The context and nature of tenure decisions rarely benefit Title VII plaintiffs seeking to prove that a particular tenure decision was influenced by sex or race. No tenure candidate is without blemishes and a resort to illegitimate considerations can be hidden in the weighing of the numerous factors which are relevant to a tenure decision. Because of the decentralized nature of the decision-making process, comparisons which might tend to show unlawful discrimination are hard to come by.[114]

Having recognized the difficulty of proving discrimination in tenure decisions, the court suggested several methods by which the burden of proof might be satisfied. First, the plaintiff could attempt to show "[d]epartures from procedural regularity, such as failure to collect all available evidence."[115] She could present "[c]onventional evidence of bias on the part of individuals involved."[116] She also could establish a prima facie case by showing that she was denied tenure despite the fact that "some significant portion of the departmental faculty, referrants [sic] or other scholars in the particular field hold a favorable view on the question"[117] of her promotion or tenure. However, unless the plaintiff can show that "such disagreements or doubts [about the merits of her work] are influenced by forbidden considerations such as sex or race,"[118] colleges and universities may establish their own procedures and standards for making tenure decisions. In *Zahorik*, the plaintiff could show neither "evidence of discriminatory intent" nor "clear and convincing evidence of a substantially discriminatory effect."[119]

On appeal, the Second Circuit affirmed the trial court's grant of summary judgment for the defendant,[120] even though the trial court found that Zahorik had been treated less favorably than at

113. *Id.* at 92-93.
114. *Id.* at 93.
115. *Id.*
116. *Id.*
117. *Id.* at 94.
118. *Id.*
119. *Id.* at 96.
120. *Id.*

least one male colleague and had support from some of those voting on her tenure application.[121] Despite a finding that sixty-five percent of the eligible men, but only forty-two percent of the eligible women had been promoted, the court stated that "Title VII does not forbid all employment decisions which result in departures from an ideal statistical norm."[122]

Discrimination in the tenure process remains difficult to prove, in part because statistical evidence has sometimes been ineffective. The use of university-wide statistics has been held insufficient to overcome even a motion for summary judgment in a disparate treatment case when tenure decisions are made by individual departments.[123] If tenure decisions are made on the basis of institution-wide standards, however, a plaintiff should be permitted to present institution-wide evidence.[124] Such evidence, if admitted, may establish a discriminatory climate.

Even favorable evidence of peer support does not always help the plaintiff's case. In *Hooker v. Tufts University*,[125] the plaintiff, a physical education teacher, had received a favorable tenure rec-

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121. Zahorik v. Cornell Univ., 34 Fair Empl. Prac. Cas. (BNA) 147, 151 (N.D.N.Y. Jan. 29, 1981) (application for preliminary injunction denied), *aff'd*, 729 F.2d 85 (2d Cir. 1984).

122. *Zahorik*, 729 F.2d at 96. The court found gross statistics "meaningless" without a breakdown by department. *Id.* at 95. The court held that the statistical evidence did not prove the individual plaintiffs were not treated neutrally. *Id.*

123. *See, e.g.*, Dugan v. Ball State Univ., 815 F.2d 1132, 1136-37 (7th Cir. 1987) (plaintiff introduced university-wide statistics rather than statistics of promotion within the mathematics department); Molthan v. Temple Univ., 778 F.2d 955, 962 (3d Cir. 1985) (evidence that fewer women than men at the university were promoted to full professor "was insufficient as a matter of law to warrant any inference of discriminatory motive"); *Zahorik*, 729 F.2d at 95 (because decisions were "highly decentralized," university-wide statistics of tenure decisions were meaningless). This premise also applies to pay differentials. *Dugan*, 815 F.2d at 1137-38 (statistics showing that male faculty members received pay raises from "salary retention fund" more often than female members were meaningless without a breakdown by department and by gender of applicant to the fund). However, salary differences between male and female faculty, continuing over a number of years, can be proven to be discriminatory by the use of statistics alone if regression analysis is used. Denny v. Westfield State College, 43 Fair Empl. Prac. Cas. (BNA) 1401 (D. Mass. May 12, 1987). The Eleventh Circuit also held in Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987) that a trial court must compute the salary that a victim of unequal pay should have received based upon what she should have gotten in the prior year rather than on actual salary for the prior year. Courts have held, however, that market factor increases which disproportionately favor men can be justified by a greater market demand in predominantly male disciplines. *Dugan*, 815 F.2d at 1137-38; Craik v. Minnesota State Univ., 731 F.2d 465, 480 (8th Cir. 1984).

124. *See infra* text accompanying notes 168-71.

125. 581 F. Supp. 104 (D. Mass. 1983).

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ommendation from her department, which consisted of two female professors.[126] The next review committee voted for her four to zero with one abstention—a male. Most of the outside reviewer letters were complimentary, with only one absolutely negative letter. Her teaching evaluations were neither "exceptionally good [nor] exceptionally bad."[127] The university's tenure review committee voted six to zero to deny the plaintiff tenure. Her two departmental members, both female, urged reconsideration, but the committee refused to reconsider its decision.[128]

The tenure committee stated that Hooker's major weakness was her lack of scholarship. She argued that she should be held to an alternate standard, either "creative scholarship" for her curriculum changes, or waiver of scholarship for the physical education faculty. The committee found her changes insufficiently creative and refused to waive the scholarship requirement, even though the requirement had been waived in the past. Hooker specifically named three men and one woman for whom this requirement was waived in 1970 and 1971.[129]

The trial judge found that the plaintiff had presented insufficient evidence to prove "she was qualified for tenure pursuant to the standards and practices of Tufts."[130] Even though the statistical evidence suggested that a disproportionate number of women left Tufts before obtaining tenure, the record contained no evidence of the possible reasons.[131] The court was not convinced that this decision was discriminatory, relying on the university's right to change administrative policy and discontinue granting academic rank to coaches who failed to meet scholarship standards.[132] In short, there was no "smoking gun."

The structure of the promotion or tenure review process also complicates the ability of a female faculty member to prove discrimination if she is denied promotion or tenure. As noted by the Fourth Circuit, a tenure decision "involves a degree of subjectivity. . . . [S]ince professors are individuals and perform different roles within a department, it is difficult to compare the reasons for promoting one faculty member with the reasons for promoting or not

126. *Hooker*, 581 F. Supp. at 109.
127. *Id.* at 110.
128. *Id.* at 111.
129. *Id.* at 113.
130. *Id.* at 112.
131. *Id.* at 118.
132. *Id.*

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promoting another."[133] In determining whether a candidate for tenure has engaged in sufficient scholarly research, for instance, an objective test such as counting the number of printed words is inappropriate. "[A]cademic scholarship is not measured by volume alone, but by the comprehensiveness and direction of the research."[134]

The Sixth Circuit recently made a similar finding: "By definition the determination of another person's scholarship is a subjective one. It cannot be determined statistically or numerically. It can only be determined by those who are experts in the field."[135] Precisely because of this subjectivity, however, courts should give closer scrutiny to tenure decisions than most courts have been willing to do.

V. The Women's Studies Trap

Although it is assumed that a tenure candidate's scholarship will be competently evaluated by her peers, problems arise when evaluators discount the value of a candidate's work, not because it is insufficient, but because it relates to women or women's issues. In *Lynn v. Regents of the University of California*,[136] the plaintiff, whose field of scholarly endeavor was medieval French literature, was denied tenure on the grounds that her scholarship was inadequate.[137] She had been warned of this inadequacy and was granted sabbatical leave to strengthen her research.

The trial court further identified what it considered to be part of the problem: the topic of her research, not its quality.[138] It found that Lynn's work was influenced by her interest in the role of women, and her evaluators' criticism reflected their dislike for this area as a substantial subject for scholarly work. As a result, the court concluded that the evaluators' disdain for women's studies, not Lynn's claimed insufficient research, had influenced their decision to deny tenure.[139]

In interpreting Title VII, however, the trial court determined

133. Smith v. University of N.C., 632 F.2d 316, 345 (4th Cir. 1980) (footnote omitted).

134. Merrill v. Southern Methodist Univ., 806 F.2d 600, 606 (5th Cir. 1986).

135. Gutzwiller v. Fenik, 645 F. Supp. 363, 365 (S.D. Ohio), *appeal dismissed*, 805 F.2d 1034 (6th Cir. 1986).

136. 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

137. *Lynn*, 656 F.2d at 1340.

138. Lynn v. Regents of Univ. of Cal., 21 Fair Empl. Prac. Cas. (BNA) 313, 314-15 (C.D. Cal. May 1, 1979), *rev'd*, 656 F.2d 1337 (9th Cir. 1981).

139. *Id.*

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that the statute did not prohibit a university from discriminating on the basis of a particular topic of study.[140] The court determined that the same complaint could be directed at a male professor who chose to study the role of women and reasoned that discrimination on this basis was insufficient to support a Title VII claim. Furthermore, the court found Lynn was denied tenure for legitimate reasons and held that she failed to establish a prima facie case of discrimination.[141]

On appeal, the Ninth Circuit found that Lynn's statistical data provided evidence that others with the same education, experience, and number of published works had been granted tenure, and that such evidence was "highly persuasive" in establishing the plaintiff's prima facie case of gender discrimination.[142] Using a different approach than the court in *Zahorik*,[143] the Ninth Circuit held that the use of statistical data represents "sound policy" and reduces the likelihood that courts will make their own judgments about a candidate's qualifications.[144] Reliance on statistics provides a vital check against subjectivity and allows a court "to steer a careful course between excessive intervention and the unwarranted tolerance of unlawful behavior."[145]

The Ninth Circuit relied on trial testimony that the evaluation of Lynn's scholarship was prejudiced by the evaluators' opinions that women's studies are an inferior subject for scholarly endeavor,[146] and disagreed with the trial court's comments that the same "complaint could be lodged against a male professor who felt moved to develop the [women's studies] topic."[147] The appellate court stated, "A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women."[148] The court acknowledged that although some may believe that a focus on women is not valid scholarship, these "concepts may not serve as the basis for job-related decisions in employment covered by Title VII."[149]

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140. *Id.* at 315.
141. *Id.*
142. *Lynn*, 656 F.2d at 1342.
143. Zahorik v. Cornell Univ., 729 F.2d 85, 91 (2d Cir. 1984). *See supra* text accompanying notes 121-23.
144. *Lynn*, 656 F.2d at 1343 n.3.
145. *Id.* (quoting Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir. 1978)).
146. *Id.* at 1342.
147. *Lynn*, 21 Fair Empl. Prac. Cas. at 315.
148. *Lynn*, 656 F.2d at 1343 (footnote omitted).
149. *Id.* at 1343 n.5.

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The court of appeals further stated, "[W]hen plaintiffs establish that decisions regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, *however subtly,* courts are obligated to afford the relief provided by Title VII."[150]

The court of appeals concluded that the trial court erred in holding that the plaintiff failed to state a prima facie under the first prong of the *McDonnell Douglas* test.[151] Although the court agreed with the trial court's conclusion that the university had "articulated [a] legitimate, non-discriminatory reason" for denying Lynn tenure,[152] the appellate court reversed and remanded the case for a determination whether the university's reasons were pretextual.[153]

VI. Service or Disservice?

Female faculty have been denied tenure or promotion for lack of service to the community, even when scholarship requirements and teaching criteria are satisfied. For example, in *Goulianos v. Ramapo College,*[154] the tenure committee attacked the plaintiff's record of service to the college and community rather than challenging her record of scholarship and teaching.[155] The committee chose to attack her service even though women were excluded from some college committees and she had won acclaim through radio and television appearances made as the result of her publications.[156] The court ruled that Goulianos successfully established that the college's articulated nondiscriminatory reason for her tenure denial was a pretext for sex discrimination and concluded that " 'but for' the fact that she was a woman," she would have been tenured.[157]

The plaintiff in *Goulianos,* who had previously been recommended for promotion by the tenure committee, presented evi-

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150. *Id.* (emphasis added).

151. *Id.* at 1343-44.

152. *Id.* at 1345.

153. *Id.* at 1348. In remanding, the court directed the district court to balance the plaintiff's interests against the university's interests to determine whether Lynn should be allowed access to tenure committee evaluations in order to prove pretext. *See supra* text accompanying notes 38-47.

154. 41 Fair Empl. Prac. Cas. (BNA) 329 (D.N.J. Jul. 8, 1986).

155. *Goulianos,* 41 Fair Empl. Prac. Cas. at 336.

156. *Id.* at 338-39.

157. *Id.* at 339.

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dence of a preference for hiring male faculty expressed by the vice-president for academic affairs,[158] evidence of more favorable consideration of a comparable male,[159] and evidence of an attempt to establish a rule that would have excluded from the reviewing committee the only woman on the committee.[160] In conjunction with this evidence, she presented an institutional study "which clearly documented its own history of discrimination against female faculty members."[161] The plaintiff was therefore able to present considerable evidence in this case to rebut the defendant's alleged legitimate nondiscriminatory reason for refusing to grant her tenure. If clear rebuttal evidence is not available, the court still should be willing to evaluate critically the defendant's reasons as the court did in *Goulianos*.

VII. Some Proposed Solutions

In enacting the 1972 amendments to Title VII, Congress expressed its intent to make sex discrimination in academia unlawful and demonstrated its desire to eliminate such discrimination.[162] To accomplish this goal, the law must be effectively enforced. Courts should refrain from using the *Faro* standard,[163] which advocates excessive deference to academic "expertise," and instead apply the *Powell*[164] standard, which calls for careful consideration of academic decisions alleged to be discriminatory.

A need exists for close scrutiny of reasons articulated by defendants as explanations for actions adverse to women. When a plaintiff is able to produce direct evidence of discrimination, the burden

158. *Id.* at 335.

159. *Id.*

160. *Id.*

161. *Id.* at 330 (Plaintiff's excellence in teaching and scholarship were acknowledged by the tenure committee and the court. Many of her students rated her as either outstanding or superior, and the book she authored had received national acclaim.).

162. *See supra* text accompanying notes 4-6.

163. Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974). The court concluded that in reviewing employment practices of universities and colleges, courts should hesitate to substitute their judgments for the universities' decisions and should review them with minimum scrutiny. *See supra* text accompanying notes 26-30.

164. Powell v. Syracuse Univ., 580 F.2d 1150, 1153 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978). Although ultimately finding that the university had successfully rebutted plaintiff's prima facie case of sex discrimination in termination, the court carefully considered the discrimination charge and refused to be bound by a policy of anti-intervention in academic decision making. The court announced its intention not to allow academic freedom to become freedom to discriminate. *See supra* text accompanying notes 89-94.

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shifts to the defendant to prove that the adverse action would have been taken anyway.[165] However, it is unlikely that intelligent and well-educated individuals will make the kinds of statements that readily create the direct evidence necessary to shift the burden of proof to the institution.[166]

Although subjectivity may be necessary in evaluating scholarship, standards for evaluating teaching must be as objective as possible, including giving credit for the number of graduate students which a candidate is supervising in comparison with her male colleagues. If the institution relies on student evaluations of a teacher, great care must be taken to insure that objectivity overcomes the opportunity for poorer students to complain about a strict professor. Although such a problem can affect men as well as women, both sexes should be treated the same way in use of the criteria, and the use of such evaluations should be examined to determine whether they are a pretext for discrimination.

If service to the community and institution is to be a tenure criterion, women should be given equal opportunities for service in academic institutions. Equality does not mean putting the one or two women in the department on every committee, but rather providing all women faculty the opportunity to serve on the same basis as their male colleagues. Women must also be assigned to those committees which are considered important to the academic institution.

The value of broadening the bases of comparison in promotion and tenure cases to the institution rather than merely the department is particularly relevant in light of some recent circuit court cases, which held that subjective selection and promotion procedures may be attacked under a disparate impact as well as a disparate treatment theory.[167] A prima facie case of disparate impact is

165. *See* Thompkins v. Morris Brown College, 752 F.2d 558, 563 (11th Cir. 1985) (when credited, direct evidence of discriminatory policies exist, "defendant's burden is not merely one of production, but rather [one of persuasion]").

166. *See, e.g.*, Goulianos v. Ramapo College, 41 Fair Empl. Prac. Cas. (BNA) 329 (D.N.J. July 8, 1986), which provides a rare example of such clear evidence. The plaintiff presented a study done by the university, which clearly documented discrimination against women in promotion and hiring decisions; a statement of the university vice-president that he would rather hire and promote men; evidence of exclusion of women from college committees; and evidence that she was considered qualified for promotion and tenure. *Id.* at 334-35.

167. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1484 (9th Cir. 1987) (Subjective practices may be used to discriminate; therefore, intent may be difficult to prove. If a causal connection exists between the practices and an adverse impact, "the purposes of Title VII are well-served" by using a disparate impact analysis in addition to

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established by showing that a facially neutral practice has a significant discriminatory impact on a protected group. The most important result in this circumstance is that the burden then shifts to the institution to prove business necessity.[168] If the college or university meets that burden, the faculty member can still show pretext.

The disparate impact theory can be used to challenge both the outcome of the selection process and the subjective elements of that process.[169] Such subjective practices as interviews and recommendations may operate to bar the advancement of women.[170] The disparate impact model should be applied in any case, whether there is an ongoing pattern or a "one shot" application of the selection criteria.[171]

If sex discrimination is to be eliminated, academia must do a better job of monitoring itself. The establishment of affirmative action committees and equal employment opportunity officers has resulted in the initial employment of more women, but the problem of the "revolving door," in which women are hired but their contracts are not renewed or they do not receive tenure, remains. These affirmative action committees and officers also must scrutinize more carefully the attitudes and methods in tenure review and promotion decisions. Comparing departmental, divisional, and institution-wide tenure statistics with hiring statistics might be instructive in many colleges and universities. For example, if hiring statistics reflect a growing pool of available women, arguably promotion and tenure statistics should rise accordingly.

Male faculty must not be permitted to devalue scholarship that focuses on the achievements of women in such fields as art, litera-

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disparate treatment.); Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985) (appropriate to use disparate impact and disparate treatment analysis to challenge results of subjective elements of selection process). *But see* Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 797 (5th Cir. 1986) ("Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model."), *cert. granted*, 107 S. Ct. 3227 (1987); Pouncey v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982) (It is incorrect to use disparate impact model to challenge multiple employment practices. "[P]roof that a specific practice results in a discriminatory impact" is required.).

168. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

169. *Griffin*, 755 F.2d at 1523.

170. *Id.* at 1525. *See also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1987), which interprets the disparate impact model to apply to all selection procedures, whether objective or subjective.

171. Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982); Craig v. Alabama State Univ., 804 F.2d 682, 686 (11th Cir. 1986).

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ture, history, politics, government, and music. The refusal to recognize women's studies as scholarship discriminates not only against women who teach in these areas and the students interested in learning about them, but also denigrates the accomplishments of half of the human species.

CONCLUSION

The legal struggle against discrimination in higher education is not an easy one. Because of the "clearly erroneous" standard of review on appeal of a trial court's findings of fact,[172] the trial court's analysis of the evidence is of paramount importance. Perhaps, the only way to end discrimination in higher education decisions on promotion and tenure is to shift the burden of proof to the defendant institution whenever a plaintiff can present statistical or direct evidence of discriminatory intent or evidence of disparate impact. The courts would then be forced to scrutinize the process more closely and examine the biases that still exist in higher education.

172. FED. R. CIV. P. 52 ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . .").

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