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Marsha N. Cohen

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## Teaching While Pregnant: The History of Faculty Maternity at UC Hastings

*Marsha N. Cohen\**

A women's law journal wasn't anywhere on the horizon when I started teaching at Hastings in 1976-77.<sup>1</sup> Women were, however, starting to apply to and attend law school in far greater numbers than even a few years earlier. The UC Hastings Class of 1971 had 17 women and 213 men (numbers similar to those I experienced at Harvard, where my first-year section had

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\* Marsha N. Cohen is Hon. Raymond L. Sullivan Professor of Law, University of California, Hastings College of the Law.

1. I was hired originally to start in the fall of 1975, half-time to see if I liked the work and they liked me, by Professor Russell Niles on behalf of a faculty appointments committee. After letters were exchanged in which, as requested, I noted the courses I felt I could and could not teach, I was instructed when I arrived in the summer (after moving from the east coast) to call the Dean to get my fall teaching assignment. Early in July I called Dean Marvin Anderson, introduced myself, and asked about my teaching assignment. He replied, tersely, "We have nothing for you to teach." End of conversation. A few months later I was hired to teach half-time for two quarters at UC Davis Law; that spring I was hired by Dean Anderson to start, half-time, at UC Hastings the next year. An interesting beginning.

This was not, as some might think, a matter of gender discrimination. In fact, as I have just learned from my colleague and former Chancellor and Dean Mary Kay Kane, when she attended the Association of American Law Schools (AALS) convention in January 1974 during her first year of law teaching at SUNY-Buffalo, the dean of Stanford Law School told her that UC Hastings was looking for women professors. The Stanford dean urged Dean Anderson to contact her, which he did, and she met with Professor Niles and Dean Anderson that week and agreed that she would be a visitor at Hastings in 1975-76. Dean Anderson explained Hastings' desire for women professors but the concern about "untried" ones in light of the high level of experience of, and the age gap with, the 65 Club faculty. As planned, she returned to Buffalo after her visit for 1976-77 and joined the faculty permanently the next year.

I too had heard the concern about hiring the inexperienced. When we first met, Professor Niles told me there was a rule that, in light of the 65 Club, only people with five years of teaching experience would be hired. With nothing to lose at that point, I asked how UC Hastings would ever be able to find women or minority faculty members, given the dearth of both in the profession at the time. Professor Niles responded it was Dean Anderson's rule, "and he's a lawyer." I later received a letter indicating the willingness to waive the rule in my case. My hiring, firing, and later rehiring thus was a matter of decanal annoyance at the faculty trying to exert typical faculty prerogative in hiring. That had apparently not been done in the era of predominantly 65 Club faculty members, who were all on one-year contracts and thus at the mercy of the dean. I was just collateral damage in a faculty/dean power struggle.

121 men and 11 women).<sup>2</sup> By the Class of 1977, those numbers were 114 women to 354 men,<sup>3</sup> and by the Class of 1989, when the *Hastings Women's Law Journal* was born, 207 women to 236 men.<sup>4</sup> In contrast, the Class of 2019 enrollment was 211 women and 135 men.<sup>5</sup> In those earlier years there were lots of “returning” women, returning after working or raising children to a profession that now seemed open to us as never before.

I don't recall any of my colleagues—who at the time, virtually all were male—making me feel uncomfortable in any way. As I regularly joked to my friends, with most colleagues old enough to be my grandfather, there wasn't a lot of social interaction beyond a regular morning coffee time in the faculty lounge. As that year went on it became increasingly obvious that I was *teaching while pregnant*. This was apparently a first for a regular faculty member, though someone told me there had at least once been a pregnant adjunct. I wondered what the reaction by male faculty would be. And wondered some more. And then more. You could not, by the middle of spring semester, miss this fact from my appearance.

One day, over ten o'clock coffee, Professor Ray Forrester said he'd taught a case that day which he thought would be of great interest to me. What case? It was *Cleveland Board of Education v. LaFleur*, which also resolved a suit by Susan Cohen against the School Board of Chesterfield County, Virginia.<sup>6</sup> It was not the plaintiff's name that Professor Forrester thought would be of interest, but the fact that the Court found the school boards in violation of due process for setting arbitrary cutoff dates in their maternity leave policies that conclusively presumed that all pregnant women were unfit to teach past a set point in their pregnancies.<sup>7</sup> It also held that arbitrarily limiting teachers' rights to return to the classroom after bearing children had the same constitutional flaw.<sup>8</sup> Yes, I was interested, also that in this way Professor Forrester was acknowledging my changing shape, apparently too uncomfortable to be more straightforward.<sup>9</sup>

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2. See *University of California Hastings College of the Law: 1971 Graduates*. PLACEMENT DIG. OF 1971 (UC Hastings C. of the L.), 1971 at 6, 6-44.

3. See *Presenting the Graduates of 1977*, BLIND AMBITION '77 – A Y.B. (UC Hastings C. of the L.), 1977 at 37, 37-51.

4. See HASTINGS C. OF THE L. CLASS OF 1989 (UC Hastings C. of the L.), 1989 at 1, 1-12.

5. From 2008 through 2018, 2,128 women and 1,898 men have graduated from Hastings (while some students on campus are nonbinary all of the enrolled students for these years chose the male or female designation). The Class of 2019 enrolled the highest percentage of women in this range of years. Email from the Records Dep't of Univ. of Cal. Hastings College of the Law, to Cynthia Haueter, Staff Editor of *Hastings Women's Law Journal* (April 5, 2019, 11:44 AM) (on file with *Hastings Women's Law Journal*).

6. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

7. *Id.* 651.

8. *Id.*

9. My husband and I greatly enjoyed our friendship with Professor Forrester and his wife Celine through our time together at Hastings. Mrs. Forrester was surely among the faculty wives (most themselves grandmothers) amazed to watch my husband take care of our five-

One faculty member, however, was straightforward. That was Professor George S. Prugh, Jr., our alumnus, who retired after serving as Judge Advocate General of the Army and then taught and served as Hastings general counsel from 1975 to 1982. He had long known my father-in-law (also named George) and knew our relationship. Noting my pregnancy one day he immediately said, excitedly, “Will this be George’s first grandchild?”

Otherwise male silence continued, classes ended, and my baby was due in early July. One afternoon in late June, I drove into the garage of the 198 McAllister school building to deliver my box of graded bluebooks and grade sheet to the Records Office. Walking out, I bumped into Professor Leo Kanowitz. Professor Kanowitz, not a 65 Club member,<sup>10</sup> wrote one of the first books about sex discrimination and the law, which I had read early in my own law school years. I found it empowering that someone was taking these issues seriously.<sup>11</sup> Professor Kanowitz taught a women and the law course for a number of years.<sup>12</sup> I greeted him, and he returned my greeting, asking, “What are you doing this summer?” “*I’m having a baby this summer,*” I answered (surely with a tone of “*obviously*” in my voice). “No,” he replied, “I mean professionally.”

In truth I had a new course to prepare for the fall, when I would first be teaching full-time five weeks after the birth of my son; I had recently been appointed to the California State Board of Pharmacy; and had just completed service on a federal investigatory advisory committee that had been running for two years and produced a mountain of reports. But obscuring everything else atop my to-do list at that time was the impending new role of parent.<sup>13</sup> That was unrecognized, it appeared, even by a colleague who taught and

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week-old during the 1977 faculty retreat (held out-of-town, the weekend before classes began). All three of us went to that: it was way too early to leave a nursing infant at home. When the sleeping infant at the side of the room where dinner was held suddenly awoke with a loud cry—during particularly droning faculty comments praising the dean—it did cause several colleagues, at the end of the dinner, to comment on my son’s obvious intelligence.

10. *Our Story, 65 Club*, UC HASTINGS, COLLEGE OF THE LAW (last visited Apr. 17, 2019), <https://www.uchastings.edu/our-story/> [<https://perma.cc/P7N9-4ERB>] (“Founded in 1940, the Sixty Five Club pulled from a group of brilliant minds involuntarily retired at 65 to provide Hastings with one of the most distinguished faculties of any American law school.”); *see also supra* note 1 (which also references the 65 Club).

11. The book was Leo Kanowitz, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (University of New Mexico Press, 1969). For more about Professor Kanowitz, see his *San Francisco Chronicle* obituary: Bob Egelko, *Leo Kanowitz, Early Proponent of Women’s Rights, Dies at 81*, S.F. CHRON. (Aug. 24, 2007), <https://www.sfgate.com/bayarea/article/Leo-Kanowitz-early-proponent-of-women-s-rights-2508390.php> [<https://perma.cc/EV3B-WECP>].

12. I do not know when he no longer taught that course at UC Hastings, but my recollection, confirmed by Dean Kane, is that there arose agitation for a woman to teach it instead.

13. There has been considerable scholarship since those years about work and caring for family, traditionally the woman’s role, as well as some policy progress. *See, e.g.*, Joan C. Williams and Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77 (2003).

wrote on women's issues and was himself a parent.

I suspect the average reader right about now is wondering about maternity leave. Maternity *what?* There was no notion of maternity leave at Hastings then—nor when I was the second faculty member to teach while pregnant, three and a half years later. That second child was due in late December—and yes, the timing was not accidental. I was allowed to arrange to teach three of my four class sections in the fall semester so that I would have only one class in the spring (along with my infant and toddler, and about a year before I was up for tenure). Concerned that I could deliver early, or experience pregnancy complications that might interfere with teaching at some point, I set up the syllabus of my two fall-semester 2-unit community property sections to include two Saturday morning two-hour classes. I would record them for those whose family or other responsibilities prevented their attendance; I would also bring snacks. If I never had to miss a class during the semester (which is what happened), the course would end two weeks early, leaving the students extra time before paper deadlines and exam week. This seemed a mutual benefit of the students and me. I was obviously pregnant when these classes began, and explained this schedule hedged against class cancellations and makeups that could be inconvenient for them. There still was some grumbling by (male) students, although to their credit apparently no one complained to the administration (or I didn't hear about it). My son waited until the first week of January to be born, so he was rather tiny when my second semester class began.

There were some additional women faculty hired in those early years; two came and left before reaching the point of tenure consideration.<sup>14</sup> Mary Kay Kane, later the Academic Dean and then Chancellor & Dean, was, as noted in footnote 1, a visiting faculty member in 1975-76, and returned in 1977-78.<sup>15</sup> Vivian Wilson, for whom the law was a second career, was a Hastings alumna who was hired to be an assistant dean for student affairs, then transitioned into teaching; she was at Hastings before both Mary Kay Kane and me.<sup>16</sup> Six women were hired between 1980 and 1984, four of whom remained long-term members of the faculty, among them Kelly Weisberg, hired in 1982.<sup>17</sup> It is more than slightly ironic that Professor Weisberg, who teaches family law and children and the law, has the most dramatic maternity leave tale to tell.<sup>18</sup>

Professor Weisberg had her first child in March 1986. She requested that Hastings follow the newly adopted maternity leave policy of the University

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14. Herma Hill Kay, *Brigitte M. Bodenheimer Memorial Lecture on the Family: UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 344 (2003).

15. *Mary Kay Kane*, UC HASTINGS COLLEGE OF THE LAW (last visited Apr. 3, 2019), <https://www.uchastings.edu/people/mary-kay-kane/> [https://perma.cc/EW76-UUC5].

16. Hill Kay, *supra* note 14.

17. *Id.* at note 191.

18. Professor Weisberg's recollections of these events were recently recounted to the author.

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of California, and Dean Burt Prunty did so. That was the first maternity leave granted at UC Hastings. My family joke is that I had to have a third child (in August 1986) in order to enjoy (at last) a maternity leave that fall.

Pregnant with her second child due at the end of spring semester 1989, Professor Weisberg requested maternity leave for fall 1989, citing the UC Academic Personnel Manual that provided for one semester of paid leave to those with “substantial responsibility for the care” of newborns (or a child under five placed for adoption or foster care).<sup>19</sup> But the leave was denied; instead she was offered a leave during the spring 1989 semester, before the anticipated birth of the baby, with the explanation that a spring leave would be less disruptive for students. But she didn’t need a leave during her pregnancy; after the birth, however, she needed the leave to continue to nurse and bond with the baby once the summer was over. The latter was of particular concern because she lived at a great distance (an hour and a half commute) from Hastings in Santa Cruz, where her husband was a member of the UCSC faculty.

Professor Weisberg considered this decision to be pregnancy discrimination like that involved in the *Cleveland Board of Education* case that Professor Forrester had used as his sideways means of acknowledging my pregnancy some years before. Hastings had cited an administrative convenience reason for wanting her to take the leave during rather than after her pregnancy. Was this based on stereotypes about the unfitness of pregnant women, even after several campus pregnancies—two of them mine—that involved no inconvenience at all? She refused that offer and appealed the denial of her request for a fall 1989 semester leave. During a meeting with the Dean (not the same dean who had granted her earlier leave), she explained the basis for her appeal. He berated her, saying he “seriously questioned her commitment to law teaching” (note that Professor Weisberg had already achieved tenure), and thereafter affirmed the denial of the leave. At the same time the Academic Dean had hired an adjunct faculty member to teach Professor Weisberg’s spring courses—which she had every intention of teaching. Would she have to seek an injunction, she wondered, to prevent being replaced without her consent?<sup>20</sup>

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19. At the time Hastings maintained that it followed the UC Academic Personnel Manual regarding faculty benefits. Parental leave involves “active service—modified duties”; the faculty member is not assigned any classes to teach but is expected to do the other duties of a member of the faculty.

20. Professor David Levine, who was familiar with the dispute at the time, believes now that the Dean based his decision then on an opinion from the UC Hastings general counsel, Angele Khachadour. Levine recalls that, in consultation with UC’s Office of General Counsel, Khachadour had concluded that in Professor Weisberg’s circumstances (a spring semester birth), the Dean had no power to grant a fall semester leave under the UC policy. Part of the concern was unfairness to staff to whom a similar, but less generous, policy applied: unlike UC faculty members, they could not tack their 16-week maternity leaves onto a three-plus month summer break.

Professor Weisberg filed a pregnancy discrimination complaint against UC Hastings with the California Department of Fair Employment and Housing, which found in her favor. The Dean nevertheless still refused the maternity leave request for fall 1989. She then tried to file the first-ever grievance against the Hastings administration, but was denied the right to file it. She then took her grievance to the Association of American Law Schools (AALS), protesting the denial of her right to have the grievance hearing. Only after AALS found her rights had been violated did Hastings grant her the grievance hearing.

This process had taken so long that Professor Weisberg could not attend the faculty grievance committee hearing on May 5, 1989, as she gave birth that very day. By a 3-2 decision, the committee decided that the Dean was not required under the UC policy to grant the fall 1989 leave (two believed she had an entitlement to it).<sup>21</sup> But it concluded unanimously that the Dean should have exercised his discretion to do so given the circumstances.<sup>22</sup> The Dean nevertheless still refused to grant the fall leave, and the matter dragged on.<sup>23</sup> However, after the *San Jose Mercury News* published a story about the grievance committee's decision—headlined “Law School Takes Leave of Its Senses”—and other media picked it up,<sup>24</sup> two female state legislators intervened. One of the two legislators, Jackie Speier (UC Hastings '76), now a member of the U.S. House of Representatives, was then a member of the California State Assembly, and invited the Dean to appear before the Assembly budget committee to talk about this issue. At that point the Dean relented, but called the fall leave a “research leave” rather than a maternity or parental leave.<sup>25</sup>

Shortly thereafter Professor David Jung requested parental leave following the birth of his baby and, based on the Weisberg precedent, it was granted.<sup>26</sup> As a result, parental leaves of one semester became the norm.

It's now four decades since my experience of pregnancy invisibility, and three decades since Professor Weisberg had to engage counsel to get the maternity leave she sought. The numerous women on the UC Hastings faculty have had maternity leaves in the ensuing years; if there were any

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21. Christina A. Dalton, *Weisberg Controversy Settled*, HASTINGS LAW NEWS, Aug. 31, 1989, at 2.

22. *Id.*

23. *Id.*

24. Jim Trotter, *Law School Takes Leave of Its Senses*, SAN JOSE MERCURY NEWS, Aug. 4, 1989; see also Jack Viets, *Hastings College: Professor Denied Maternity Leave*, S.F. CHRON., Aug. 5, 1989, at A7.

25. He agreed that legal fees expended to demand the grievance hearing that had been initially denied would be covered by Hastings, but not all the legal fees expended on this matter. Also, Professor Weisberg wasn't given sabbatical credit for that semester. I don't recall getting sabbatical credit for my 1986 maternity leave, but that was not a significant concern at the time.

26. *Another Faculty Member Assigned Similar Leave*, HASTINGS LAW NEWS, Aug. 31, 1989, at 11.

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disputes, they have not been public. But childbearing poses additional hurdles, particularly to women, who still bear the primary burdens of childcare.<sup>27</sup> I remembered my own struggle to find stretches of uninterrupted time beyond class preparation and the like to do research and writing, with the tenure clock running. So when I was elected to the Faculty Executive Committee I suggested provision be made for part-time teaching, to free time for research and writing, with part-time years aggregated to count toward tenure years. That suggestion got precisely nowhere, and never again would I be elected to that committee.<sup>28</sup>

And what about pregnant students, and those with small children? I was periodically consulted by students in those early years asking when during law school or early in their career would be the best time to have a child. I didn't, however, hear very much about issues confronting pregnant students at UC Hastings: Perhaps readers of these reminiscences could follow with their own? Once I heard that a student whose baby was due during final exam period was assured that if she missed her final exam because she was delivering her baby she could take the exam the next day. Or the day after that. So much for understanding.

Where are we now? Among the faculty, which is of course dramatically more youthful than in those earlier years, the joys and occasional sadness of pregnancy and childbirth are broadly celebrated and mourned. It is, I think, fair to say that the administration is supportive of faculty dealing with parenting issues, although Hastings has not adopted the more generous maternity leave policy that is in the current University of California Academic Personnel Manual.<sup>29</sup> Benefits, of course, are not without costs, so choices have to be made. I would have been extremely grateful to have one semester without classes when I had my first two children, as I had when I had my third. At a recent faculty meeting it was announced that, during the 2019-2020 academic year, there would be a trial program offering financial assistance for dependent care during professional travel in recognition of the extra costs involved when a faculty member either must take along a dependent (and perhaps a caregiver) or have extra childcare at home in order to speak at a conference or attend an educational workshop. The situation is much better than it was but nevertheless far from perfect—and women in many other employment situations would regard faculty benefits as an amazing luxury. Perhaps someday children—everyone's children—will be recognized as a social

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27. These hurdles play out in many ways, as Professor Weisberg and others have demonstrated. *See, e.g.*, Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind*, 6 HASTINGS WOMEN'S L.J. 295(1995).

28. For some time now there have been pre-tenure research leaves and reduced course loads in advance of the tenure deadline, not connected with parenting concerns.

29. U.C. OFF. OF THE PRESIDENT, ACAD. PERSONNEL MANUAL, 760-28 (2018) provides for two semesters of parental leave ("active service—modified duties") for both male and female UC faculty members responsible for fifty percent or more of the care of a newborn or child under five newly placed for adoption or foster care.

good in whom we should invest generously, from their birth through their education, for the overall benefit of society.