

V. TRANSFORMING INSTITUTIONAL VALUES

The law itself is an adversary system that is inherently gendered. The firms are gendered; the institution is gendered; law practice is gendered.

— male professor

If there is any truth to the above statement, then law school, as the locus of an individual's initial and intense socialization into law, is the pressure point for changing the profession. Law schools have a responsibility to realize their function as key institutions for moving the legal profession beyond numerical parity, toward vertical and horizontal integration. The process of doing so will align the training that female and male students receive with the demands of a changing profession. It will also remove substantial obstacles to women's advancement in law. No less is required of a profession whose central tenets include fairness and equality of access.

Lawyers understand that, in any proceeding, rules and structures determine the fairness and legitimacy of the outcome. This Article has demonstrated how the current rules of engagement in law school favor a subset of students—male law students.¹⁴⁸ Law teachers would do well to consider how their views of procedural fairness apply to their most immediate spheres of influence—their classrooms. Pedagogy is a process, and like a legal proceeding, its rules should minimize irrelevant constraints on the ability of participants to succeed.

This Part urges law schools to invest in pedagogy, bringing what they teach students into conformity with what students need to be good lawyers. By changing their pedagogical practices to respond to changes in the practice of law, law schools will remove early obstacles to female students becoming leaders in the profession. By rewarding depth and thoughtful reflection, in addition to quickness, law school professors will promote the development of more of the skills that lawyers utilize. By promoting greater transparency in the informal transmission of information and guidance that takes place outside of the classroom, law schools will expand opportunities for students who are currently excluded from professionally beneficial relationships with faculty members. Finally, by hiring more female faculty members, law schools will help dismantle a system that reflects a bias in favor of men in ways that are demonstrated,¹⁴⁹ if not fully understood.

148. To the extent we were able to record data on this issue, we noted that among male law students, non-white students faced many of the obstacles that female law students faced, particularly in interacting with faculty members outside of class. *See supra* Part IV.

149. *See supra* Part III (showing that female students speak more frequently in classes taught by female professors); *supra* Part IV (showing that female professors take on a disproportionate share of mentoring responsibilities).

A. Invest in Pedagogy

What happens in the classroom—how professors and students interact during class discussions—affects almost every other interaction between faculty and students and shapes the way students engage the law. The first step in improving the preparation law schools offer to students is to reclaim the importance of reflective pedagogy.

Legal education as it is currently constituted does not respond adequately to sea changes in the way lawyers practice their craft.¹⁵⁰ Law's adversarial system has evolved into an interdisciplinary field in which settlement, mediation, and negotiation are at least as important as trial preparation and practice.¹⁵¹ The skills and behaviors necessary to succeed in this new legal regime include many skills and behaviors that are not rewarded in law school.¹⁵² Instead, law schools reward conduct that, at best, reflects only a narrow subset of the skills needed for good lawyering—such as dominating discussions at the expense of hearing other perspectives.¹⁵³ In doing so, they neglect to reward other skills students need to learn. Current research about men and women in law school describes legal skills along a continuum, noting that many, but not all, women tend to disproportionately exhibit certain skill sets. Unsurprisingly, given the genesis and history of the legal profession, law schools neglect cognitive skills traditionally associated with women, including

150. See, e.g., THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM, *supra* note 97; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

151. Adversarial verbal arguments have come to represent just a small fraction of lawyerly work. See, e.g., Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 181 n.177 (1997) (stating that fewer than four percent of cases on the civil docket conclude in the commencement of a trial, and many adjudicated motions are decided without oral arguments).

152. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 196-99 (2000) (law schools neglect key pedagogical areas including interviewing, counseling, negotiating, drafting, and problem solving, and law schools inadequately address the psychological aspects of lawyering and the social, political, and historical context of formal doctrines); Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 567-68 (1997) (arguing that law schools, particularly highly selective law schools, “emphasiz[e] abstract theory at the expense of practical scholarship”). Peggy Cooper Davis and Carol Gilligan seek to prepare students for the full range of lawyerly activities in their Workways program at New York University. The Workways website describes the program, observing that “the range of intellectual capacities and activities generally valued and developed in law schools is narrower than the range needed to do the work of lawyers.” Workways Forum, <http://www.law.nyu.edu/workways/index.html> (last visited Oct. 10, 2006).

153. Certainly, there will be situations in which trial lawyers will want to dominate a courtroom, in order to push their arguments upon a judge or jury. However, lawyers need to know when to argue loudly and when to listen carefully, when to respond to counter-views and when to ignore them. Giving air time to the same few students who dominate class discussions gives students a distorted view of what it means to argue effectively. It also restricts the diversity of views and perspectives offered. Arguing in court is a very small part of the work done by lawyers, see *supra* note 151, and not all trial lawyers “dominate” in order to argue effectively.

contextual reasoning, relational skills, and narrative intelligence.¹⁵⁴ In failing to value or teach so many of the skills that lawyers actually need, law schools do a disservice to all students, but particularly to female students, whose strengths are more likely to be overlooked.

The test for what skills to emphasize is pragmatic. For example, questioning students in class discussion should be as combative as necessary to prepare students both for litigating and arguing, and for negotiating and settling. Because teamwork and regard for others have become so important to the successful practice of law,¹⁵⁵ classrooms should be run in ways that encourage students to engage each others' ideas and to allocate time among a diversity of speakers. One male faculty member speculated that women's disproportionately high participation in legal clinics stems from their attraction to its collaborative, non-hierarchical structure—a structure that mimics the constructive ways that lawyers work together on projects and cases. Yet clinical work is undervalued at Yale¹⁵⁶ and at many other law schools,¹⁵⁷ and non-clinical classes are often run in ways that disparage contextual reasoning and engagement of alternatives.¹⁵⁸

A wealth of research inside and outside the legal academy provides theoretical and practical ideas for creating an open, inclusive, and effective classroom environment.¹⁵⁹ New York University Law School's lawyering

154. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1554 (1993) (“[V]alues traditionally associated with women have been undervalued in legal education, and . . . their absence has impoverished the professional socialization of both sexes.”); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119, 131 (1997) (discussing the relationship between a combative model of law and legal pedagogy and the undervaluation of women in law schools); Workways Forum, *supra* note 152 (follow “Theory” hyperlink; then follow “Background Paper” hyperlink under “Stereotype Vulnerability”) (“Women and people of color may be strong in cognitive domains that legal education tends most to neglect: interpersonal, intrapersonal, and narrative intelligence and interactive reasoning.”). Our research shows that women and men display different behaviors in law school. Again, we express no opinion on the source of those differences—a discussion of how men and women would behave if they were treated the same, prior to, during, and after law school, is beyond the scope of this Article. We merely argue that, so long as male and female students display different behaviors and are treated differently by law teachers, we should be wary of privileging behaviors that are more likely to be displayed by men.

155. RHODE, *supra* note 152, at 197.

156. For example, in contrast to tenured members of the “academic” faculty, tenured clinical faculty members cannot vote on faculty appointments and are excluded from other decisions made by the faculty. OFFICE OF THE PROVOST, YALE UNIV., YALE UNIVERSITY FACULTY HANDBOOK 48 (2002).

157. See John J. Costonis, *Of Loaves, Fishes, and the Future of American Legal Education*, in THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM, *supra* note 97, at 28, 54 (criticizing law schools for undervaluing clinical teaching and failing to provide students with mentors); Rosalie Wahl, *Building the Educational Continuum*, in THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM, *supra* note 97, at 79, 80 (criticizing law schools for treating clinical professors like “second-class citizens”); Sullivan, *supra* note 73, at 143 (noting that in law schools, clinical professors hold weaker positions than academic professors).

158. Some forms of Socratic questioning, for example, push students to articulate extreme views considered acontextually. See Davis & Ehrenfest Steinglass, *supra* note 150.

159. See, e.g., Catherine G. Krupnick, *Women and Men in the Classroom: Inequality and Its Remedies*, available at <http://bokcenter.harvard.edu/docs/krupnick.html> (last visited Oct. 31, 2006); Tips

program engages students in interactive role plays, under close faculty supervision, as a clinical component of the first year-curriculum. Lani Guinier and Susan Sturm have developed a website, RaceTalks, describing an interactive pedagogy designed both to facilitate discussions about race and gender and to enable more constructive learning in law school classes covering any subject.¹⁶⁰ Other scholars and teachers advocate using, rather than suppressing, political beliefs,¹⁶¹ emotional responses,¹⁶² and moral considerations¹⁶³ to deepen intellectual understanding of cases and doctrines. The goal of these pedagogical innovations is to integrate theory and practice and to recognize multiple forms of intelligence,¹⁶⁴ based upon what the profession demands.

We do not advocate a single-best teaching model. Our work demonstrates, however, that a volunteer-only regime, in which professors fail to solicit broad participation, will result in male-dominated class discussions and women who keep quiet, not because they have nothing to say, but because the type of speech solicited, accepted, and rewarded in class is limited and reflects a bias in favor of men. Professors should ensure that active learning occurs, whether they do so through non-coercive cold-calling, panel discussions, "on-call" systems, response papers, chat rooms, or other creative means. We do not suggest blithely instituting Socratic questioning in which professors play a game of "hide the ball," sometimes by humiliating students.¹⁶⁵ Cold-calling can be effective, especially when combined with other methods, but it should not be an exercise in which faculty members coerce students into giving the answer that they seek and punish students who fail to comply. Professors should take

for Teachers—Sensitivity to Women in the Contemporary Classroom, <http://bokcenter.harvard.edu/docs/TFTwomen.html> (last visited Oct. 31, 2006).

160. Their methods include sharing and rotating power, challenging students to approach material critically, and facilitating trust and balance in class discussions. For a description of the program, see Race Talks, <http://www.racetalks.org/about/index.html> (last visited Oct. 31, 2006).

161. Duncan Kennedy, *Politicizing the Classroom*, 4 S. CAL. REV. L. & WOMEN'S STUD. 88 (1994).

162. Angela P. Harris & Marjorie M. Schultz, "A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773 (1993).

163. Guinier et al., *supra* note 14. Of course, many legal ethicists advocate integrating ethical considerations into discussions of cases and doctrine as a means of promoting professional responsibility. See, e.g., Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 90-98 (2001); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); Deborah L. Rhode, *Essay: The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1201 (2000).

164. See, e.g., Multiple Intelligences—Background Paper, Workways Forum, *supra* note 152 (follow "Overview" hyperlink).

165. See, e.g., Davis & Ehrenfest Steinglass, *supra* note 150, at 249 (warning against coercive or humiliating use of Socratic questioning and its effects in a heterogeneous classroom environment); Rhode, *supra* note 154, at 1555 (arguing that the "Guess what I'm thinking" aspects of the Socratic method puts students into an "intellectual cage"); see also David Garner, *Socratic Misogyny? Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 BYU L. REV. 1597; Jennifer Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37 (1997).

responsibility for seriously engaging all students in the material being taught. Some Yale Law School faculty members acknowledge their reluctance to challenge female students or students of either gender who present themselves tentatively, because they fear that those students are less able to “take” rough treatment. But there need not be anything rough about robustly challenging ideas. The best lawyers argue vigorously—not hostilely. An important duty of teaching is to manage classroom discussions by inviting a diversity of voices.

Indeed, at Yale, many professors have successfully diversified class participation by requiring all students to speak in class.¹⁶⁶ A male professor describes an experience reported by several professors in his comment that, “I started calling on people again when I noticed that few women, and few minorities, were volunteering in class.” Faculty members say that they share students’ irritation with discussions that become hijacked by a small, vocal minority of the class. It is a professor’s responsibility to ensure this does not happen.

Even within traditional classroom environments, teachers should experiment with class size, technique, and organization. Faculty members might devote time at faculty meetings to sharing good teaching practices and improving their own pedagogical methods. They might also observe each other to get ideas and to provide feedback. Some YLS faculty members were surprised by the data for their own classes showing disproportionately low participation by female students and expressed appreciation for the information that the data provided about their own teaching methods. Institutionalizing such feedback will help faculty members reflect on the merits and drawbacks of their teaching methods. As members of the academy, scholarship will remain faculty members’ primary concern, but as members of the legal profession, faculty members must not be complicit in an educational system that disadvantages the next generation of female lawyers.

B. Promote Greater Transparency

Teaching does not end at the classroom door. Where the rules for getting ahead are opaque, insiders will learn them more quickly than outsiders. Making information available to all students will allow them to compete based on their qualifications, not based on how well they have developed relationships with faculty members. Because women are less likely to be part of informal mentoring networks, de-mystifying the rules of engagement will help female students achieve the intellectual and professional objectives they seek.

Professors should make it clear how and how often students should approach them, how well students are doing, and what students need to

166. YALE LAW WOMEN, *supra* note 44, at 31-35, includes numerous suggestions from both students and professors for managing class discussions.

succeed. At a minimum, faculty members should make themselves available on a regular basis through office hours, but they should also make clear their level of availability for collaborative projects, writing supervision, and career advice. Students should not have to guess at how to approach their professors, nor fight with their classmates for faculty attention. Law schools should encourage students to respect that commodity so precious to clients—a lawyer's time. It would seem, then, that faculty members send the wrong message when they (perhaps inadvertently) penalize female students who approach meetings as a professional engagement, to be utilized efficiently—rather than as an opportunity to develop a “buddy” relationship. Law schools should continue to create, evaluate, and enhance mechanisms to facilitate mentoring and role-modeling, to make sure those mechanisms are inclusive.¹⁶⁷

It is also important that faculty members provide quality feedback to all students. A male professor suggested that, “Everyone, but perhaps especially women and minorities, needs to be reassured.” Students without faculty mentors may be more reliant on traditional forms of feedback, including comments on their written class work. *Yale Law School Faculty and Students Speak About Gender* includes a list of teaching practices that faculty members recommend to their colleagues for improving feedback to students.¹⁶⁸ Such feedback should not just affirm student strengths but also identify areas in need of improvement and note when such improvement has occurred.

Finally, faculty should create more transparency about what students need to do to compete for positions in which faculty advocacy is most important, such as clerkships and academic jobs. Of course, faculty members will not give all students equal time and resources, but if they make clear which steps help students reach these positions, a more diverse pool of students will compete for them. Concrete suggestions for faculty include making themselves available periodically for lunches or talks and publicly expressing their willingness to discuss career planning in their fields of expertise.¹⁶⁹

Interventions do make a difference. At Yale Law School, for example, in the 1995-1996 academic year, faculty members formed a committee to investigate why female students were clerking for judges in significantly lower numbers.¹⁷⁰ The committee surveyed students, examined grades, and found that qualified women were choosing not to apply for clerkships because they felt

167. Yale Law School's “small group” system, for example, is an institutionalized opportunity for students to get to know a faculty member at the start of their legal education. The system should continue to be evaluated and re-worked.

168. YALE LAW WOMEN, *supra* note 44, at 78-79.

169. For example, one Yale Law School faculty member gives periodic talks during his classes on “how to be cool in law school”—how to compete for jobs, clerkships, and faculty mentoring.

170. DEAN'S AD HOC COMM. ON THE STATUS OF WOMEN AT YALE LAW SCH., *supra* note 110. The Committee found that, from 1988 to 1996, just 34% of Yale graduates who clerked for federal appellate courts were women, and just 24% of Yale graduates who clerked on the U.S. Supreme Court were women.

they could not obtain letters of recommendation from the faculty. Faculty members implemented some of the committee recommendations, including offering to write letters of recommendation to outstanding female students who did not necessarily request them. The result was a dramatic rise in the number of women clerking, including for highly competitive courts such as the Supreme Court and certain federal appellate courts.¹⁷¹ This experience suggests that institutional reforms can more effectively provide feedback and encouragement to students who may be unaware of their strengths.

Law schools should also facilitate mentoring by creating mechanisms to pair students with faculty members who can help them with particular goals. For example, in the wake of the Yale Study, Yale Law Women established a workshop in which female students present papers to faculty members and to their peers to obtain feedback in a forum that mimics the “job talks” that aspiring academics give as part of the interview process for faculty positions.¹⁷² During the workshop, faculty members share their advice on how to find a job in legal academia. Another Yale Law Women faculty-student workshop offers tips to students about beginning the paper-writing process. These programs connect students to faculty members who can offer specific feedback and guidance in their fields of interest. They create a space for female students to present themselves frankly as being interested in academia by engaging with faculty members about their paper ideas. The workshops are examples of how to distribute scarce faculty resources through a transparent, fair, and dignified procedure.

C. *Diversify Law School Faculties*

The Yale Study yielded literally hundreds of recommendations from faculty and students about how members of a law school community can improve gender dynamics. The dialogue itself was transformative—the process of making professors aware of how students view them and making students aware of professors’ expectations facilitated more tolerant and constructive interactions, including changes at the micro-level. Certainly, changes implemented by individuals are important, and to the extent that female students can recognize the (imperfect) gender dynamics at their own schools, they can make a concerted effort to overcome the obstacles discussed above.

171. Women at Yale Law School secure clerkships, including highly competitive clerkships on the Second, Ninth, and D.C. Circuits, in slightly lower numbers than men. The improvement in competition for Supreme Court clerkships is particularly dramatic. Between 1996 and 2002, 32 Yale Law School graduates clerked for the Supreme Court of the United States. Over this seven year period, 41% of Yale clerks were female and 59% were male, compared to an average J.D. population of 46% women and 54% men. See Appendix D, tbl.1; *cf. supra* note 170.

172. The workshop has operated since 2003, and at least one of the papers presented there by a female legal scholar has been published. See Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose under the First Amendment*, 68 ALBANY L. REV. 815 (2005).

Taking reform seriously, however, requires changing the composition, in addition to the attitudes, of law school faculties.

Faculty members and students at Yale Law School raised concerns about faculty diversity in almost every topic explored in the Yale Study.¹⁷³ Several student respondents observed that classes taught by women create different dynamics than classes taught by men. Hiring a more diverse faculty would create a wider variety of classroom environments and, as a result, foster a richer array of voices in discussions. Not all of these improvements can be pinpointed precisely. For example, we do not know all the reasons that female students are more likely to choose classes taught by women, or why female students speak more in classes taught by women. Are female professors less reluctant to challenge female students? Are they more aware of how inclusive the discussion is? Do they pay more attention to pedagogy? Does their presence as authority figures encourage female students to participate? The answer to one or all of these questions may be yes, or a different dynamic may be at work, but we think that the presence of women at the top of a variety of professions, including legal academia, positively affects lower-ranked women in known and unknown ways.

Some students and faculty reported that mentoring, which has a strong role-model component, is easier among faculty and students of the same gender and/or ethnic identity. We have shown that many female students and students of color feel more comfortable approaching or working with faculty members with whom they feel they can share gender-specific and race-specific concerns. Male and female students and professors acknowledge the reality of same-sex pairing that may occur in mentoring relationships. As long as this dynamic exists, female students are disadvantaged when the faculty is predominately male.

A female 2L observed that the large number of male professors emboldens men to interact more comfortably with male professors: "I think men feel smarter because they see that almost all of the smart people hired are male." Her comment is supported by psychological studies showing the powerful influence of role models on gender stereotypes, namely that seeing women in positions of power helps people visualize women as competent and authoritative.¹⁷⁴ The importance of role-modeling should not be

173. The Yale Study did not explicitly solicit opinions about faculty diversity. It did, however, ask students how many female-taught courses they had taken. Considering women constitute just one-fifth of the faculty, the low numbers are not surprising: 67% of respondents had taken two or fewer non-clinical courses taught by a female professor, and nearly 20% of respondents (all of whom were 1Ls and 2Ls) had never been taught by a woman outside of clinic. Exposure to female professors jumps when clinical courses are considered: 49% of 1Ls who have taken a clinical course have been taught by a female clinical faculty member. YALE LAW WOMEN, *supra* note 44, at 81.

174. See Irene Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242-61 (2002) (building on Mahzarin Banaji's experiments on implicit biases). Beyond role modeling, the presence of women at the top of an institutional hierarchy signals to women that should they, too, try to reach the top of the hierarchy, their efforts will be fairly rewarded.