



# Becoming Gentlemen: Women's Experiences at One Ivy League Law School

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## ARTICLES

### BECOMING GENTLEMEN: WOMEN'S EXPERIENCES AT ONE IVY LEAGUE LAW SCHOOL

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*Am I to be cursed forever with becoming  
somebody else on the way to myself?*

—Audre Lorde<sup>1</sup>

## INTRODUCTION

In this Article we describe preliminary research by and about women law students at the University of Pennsylvania Law School—a typical, if elite, law school stratified deeply along gender lines.<sup>2</sup> Our database draws from students enrolled at the Law School between 1987 and 1992, and includes academic performance data from 981 students, self-reported survey data from 366 students, written narratives from 104 students, and group-level interview data of approximately eighty female and male students.<sup>3</sup> From these data we conclude that the law school experience of women in the aggregate differs markedly from that of their male peers.<sup>4</sup>

<sup>1</sup> AUDRE LORDE, *Change of Season*, in CHOSEN POEMS, OLD AND NEW 40, 40 (1982).

<sup>2</sup> Our research is only about the University of Pennsylvania Law School and may not apply to other institutions of legal education which do not share Penn's history, traditions, dominant first-year pedagogy, and predominantly male faculty. See *infra* note 150 (identifying traditions and histories that may be peculiar to Ivy League institutions). On the other hand, the same phenomena we identify in legal education at this law school are, of course, in evidence in most of legal education throughout American law schools. See ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 106-07 (1992) (acknowledging that a significant number of women in law school feel disempowered, report low levels of class participation, do not feel competent, and find the law school experience both sexist and dehumanizing); Robert MacCrate, Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 22 [hereinafter MacCrate Report] (noting a gendered experience in the legal profession, both because men find the adversarial nature of their work more important with respect to job satisfaction than do women, and because persistent bias and stereotyping aid in maintaining a "glass ceiling," in both legal education and the legal profession, above which women cannot rise); see also Memorandum from Robert A. Gorman, Associate Dean of the Law School, University of Pennsylvania, to Lani Guinier, Professor of Law, University of Pennsylvania 3 (July 19, 1993) ("What is striking about American legal education is not the differences but the sameness."). Moreover, other studies have documented findings similar to those we present here. See *infra* notes 34-66 and accompanying text; *infra* notes 151-52.

<sup>3</sup> See *infra* notes 19-28 and accompanying text.

<sup>4</sup> Our findings contradict much of the early literature on law school performance of women in the 1960s and 1970s. See *infra* notes 34-40 and accompanying text. The results of this study are also inconsistent with contemporaneous data about University of Pennsylvania undergraduates. At the college level, the grade point distribution does not appear to be gendered, according to statistics maintained by the University. See Interview with Susan Shaman, Director of Institutional Research and Planning Analysis, University of Pennsylvania, in Philadelphia, Pa. (Oct. 15, 1992).

First, we find strong academic differences between graduating men and women. Despite identical entry-level credentials, this performance differential between men and women is created in the first year of law school and maintained over the next three years.<sup>5</sup> By the end of their first year in law school, men are *three times more likely* than women to be in the top 10% of their law school class.<sup>6</sup>

Second, we find strong attitudinal differences between women and men in year one, and yet a striking homogenization by year three.<sup>7</sup> The first-year women we studied are far more critical than their first-year male peers of the social status quo, of legal education, and of themselves as students.<sup>8</sup> Third-year female students, however, are less critical than their third-year male colleagues, and far less critical than their first-year female counterparts.<sup>9</sup> A disproportionate number of the women we studied enter law school with commitments to public interest law, ready to fight for social justice. But their third-year female counterparts leave law school with corporate ambitions and some indications of mental health distress.<sup>10</sup>

Third, many women are alienated by the way the Socratic method is used in large classroom instruction, which is the dominant pedagogy for almost *all* first-year instruction.<sup>11</sup> Women

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<sup>5</sup> See *infra* part II.A.

<sup>6</sup> See *infra* text accompanying notes 72-74.

<sup>7</sup> See *infra* notes 101-06 and accompanying text. This finding is based on an analysis of only one group of first-year women who responded in 1990 to a self-reporting survey. See *infra* note 20 and accompanying text. Unlike our academic performance data or our findings regarding women's alienation, this finding does not reflect a longitudinal database. Nor is it generalizable beyond the women who provided the data—those who responded to the 1990 Bartow Survey. But cf. *infra* note 102 (hypothesizing that differences between first- and third-year women are probably significant where first- and third-year men do not show comparable distinctions and where first-year women consistently distinguish their interests from first-year male counterparts in other self-reported value surveys conducted between 1988 and 1991).

<sup>8</sup> See *infra* notes 97-100 and accompanying text.

<sup>9</sup> See *infra* text accompanying note 101.

<sup>10</sup> See *infra* notes 103-04, 111 and accompanying text.

<sup>11</sup> We refer here to the Socratic method, or case-study method, which was developed and originally implemented by Christopher Columbus Langdell at Harvard Law School in the late 19th century. Both Langdell and his methodology came to prominence through Harvard Law School, and for this reason, the case-study method is often called the Harvard method. In its most extreme form, the case study method teaches law exclusively through the study of appellate decisions. Typically, the class session is devoted to the professor's questioning the student (or students) about details of the court's decision in an effort to extrapolate the legal principles embedded in the opinion. This method was intended not only to convey legal principles, but also to aid the student in developing legal reasoning skills and becoming an independent thinker. See JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF*

self-report much lower rates of class participation than do men for all three years of law school.<sup>12</sup> Our data suggest that many women do not "engage" pedagogically with a methodology that makes them feel strange, alienated, and "delegitimated."<sup>13</sup> These women describe a dynamic in which they feel that their voices were "stolen" from them during the first year. Some complain that they can no longer recognize their former selves, which have become submerged inside what one author has called an alienated "social male."<sup>14</sup>

Law school is the most bizarre place I have ever been. . . . [First year] was like a frightening out-of-body experience. Lots of women agree with me. I have no words to say what I feel. My voice from that year is gone.<sup>15</sup>

Another young woman added, "[F]or me the damage is done; *it's in me*. I will never be the same. I feel so defeated."

Even those women who do well academically report a higher degree of alienation from the Law School than their male counterparts, based in part on complaints that "women's sexuality becomes

HARVARD LAW SCHOOL 11-12 (1978) (relating the origins of the Socratic method); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 53 (1983) (discussing the development of the Socratic method along with the case method); Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 1-20 (1951) (describing the goals and elements of the Socratic method).

<sup>12</sup> See *infra* notes 85-86 and accompanying text.

<sup>13</sup> See *infra* notes 114-20 and accompanying text (describing how the Socratic method of classroom instruction does not reach a large segment of the student body at this law school). Our research suggests that women's alienation is not exclusively derivative of an intimidating classroom pedagogy, but is also related to the hostility that female students perceive the methodology generates or encourages in their male peers. See *infra* notes 128-29, 143 and accompanying text. This conclusion is consistent with findings from a study of nine Ohio law schools. See COMMITTEE ON GENDER ISSUES IN THE LAW SCHOOLS, OHIO SUPREME COURT AND OHIO BAR ASS'N, THE ELEPHANT IN OHIO LAW SCHOOLS: A STUDY OF PERCEPTIONS—EXECUTIVE SUMMARY [hereinafter EXECUTIVE SUMMARY] (finding that 64% of women, compared to 51% of men, believed the Socratic method did not allow a free exchange of ideas).

<sup>14</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1308-09 (1987) (defining "social male" as a person assuming characteristics deemed culturally male, independent of "biological" gender); see also *infra* text preceding note 128.

<sup>15</sup> All quotations from students are taken from the narrative portion of the Bartow Survey, the small-group interviews, or seminar discussions. See *infra* text accompanying notes 19-20, 107-09. All speakers were guaranteed anonymity, but we have identified a speaker's year in school, gender, and race whenever important for context. In some instances, comments may reflect multiple observations from the same individual. We do not present our qualitative data to represent the opinions or views of the Law School community in general. We present the actual comments to triangulate our data. See *infra* notes 23-31 and accompanying text.

a focus for keeping [women] in their place." For these women, learning to think like a lawyer means learning to think and act like a man. As one male professor told a first-year class, "to be a good lawyer, behave like a gentleman."<sup>16</sup>

Finally, we document substantial material consequences for those women who exit the Law School after sustaining what they describe as a crisis of identity. These women graduate with less competitive academic credentials, are not represented equally within the Law School's academic and social hierarchies, and are apparently less competitive in securing prestigious and/or desirable jobs after graduation.<sup>17</sup>

We propose three related hypotheses to explain our primary empirical finding, which is that men outperform women at the University of Pennsylvania Law School. Our research suggests that (1) many women feel excluded from the formal educational structure of the Law School; (2) many women are excluded from the informal educational environment; and (3) some women are individ-

<sup>16</sup> We use the term "gentlemen" throughout this Article to evoke the traditional values of legal education, including its mission to train the legal minds of detached, dispassionate advocates. For the purpose of this Article, the term gentlemen describes the lawyer's role as a neutral, unemotional, but courteous advocate for a client's interest. Although gentlemen primarily refers to men, and in particular men of "good breeding," it assumes men who possess neither a race nor a gender. Cf. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* 1 (1988) (unpublished manuscript, on file with author) (arguing that white men's race and gender are an "invisible package of unearned assets").

The lawyer's role is still occasionally described in terms such as "behaving like a gentleman." See Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93, 93 n.2 (1990-91); see also Rosabeth M. Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 HARV. WOMEN'S L.J. 1, 8 (1978) (describing the law firm management as running a "gentlemen's club," an enterprise that depends on a "sharing of standards from similar cultural experiences"); *infra* note 134 (discussing the view that law schools aim to create advocates who are competitive, adversarial, and ruthless, and who favor logic over emotion, neutrality over commitment, and individual rights over community interests—all traditionally male attributes). Helene Schwartz recounts an experience in which a judge nearly addressed her as "gentleman." She did not insist that the judge acknowledge her gender. Although she was not active in the women's movement, which at the time sought to minimize formal gender distinctions, her feminist consciousness was apparently consistent with efforts to be considered "one of the boys." See HELENE E. SCHWARTZ, *LAWYERING* 139-40 (1976). Of course, an alternative explanation is that women pioneers prefer not to call undue attention to themselves. See Kanter, *supra*, at 13-14 (discussing the "unobtrusiveness phenomenon").

<sup>17</sup> See *infra* part II.A (documenting that women's academic performance lags behind that of men at the Law School); *infra* part III.A (positing that women experience a depressed social position at the Law School).

ually affected by the gendered stratification within the Law School, in terms of potentially adverse psychological consequences and more limited employment opportunities. We believe that our data documenting the differing experiences of male and female law students offer an opportunity to reconsider the educational project of law school. Although some have said in response to our data that perhaps women are not suited to law school or should simply learn to adapt better to its rigors, we are inclined to believe that it is law school—not the women—that should change.<sup>18</sup> Indeed, changes to the existing structure of the law school might improve the quality of legal education for all students.

This Article reports our empirical findings, assesses them in the context of studies of women at other law schools, and suggests several ways to place our findings within the ongoing debate about individual assimilation into hostile, elite, and previously all-male organizations. Further, this Article indicates directions for future research and identifies the potential for transforming legal education's principal pedagogy and assumptions about hierarchy in order to train and support the needs of *all* students.

## I. THREE WINDOWS INTO THE LAW SCHOOL

### A. *Methodologies*

In April 1990, a third-year law student at the University of Pennsylvania Law School surveyed the school's full population of 712 students about their views of gender and the law school experience.<sup>19</sup> Questionnaires were placed in the mail folders of every first-, second-, and third-year student. Of the 366 students who responded, 174, or 47.5%, identified themselves as female (compared to 41% then enrolled at the Law School), and the remaining 192, or 52.5%, identified themselves as male. The responses of female and male Penn Law students were compared across the first, second, and third years of law school and used to investigate anecdotal observations by several female law students about stigmatization, harassment, and general malaise related to their gender.<sup>20</sup>

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<sup>18</sup> See *infra* notes 224-42 and accompanying text.

<sup>19</sup> For the Bartow Survey questions, see Appendix A. For survey responses and related statistics, see Bartow Survey (1990) (on file with authors).

<sup>20</sup> Ann Bartow, while a third-year student, brought these concerns to Professor Lani Guinier. Bartow asked that Guinier supervise an independent study to develop a film script parodying Bartow's own experiences at the University of Pennsylvania

The survey consisted of a multiple-choice questionnaire and one open-ended question designed to elicit narrative responses. One hundred four of the 366 respondents answered the open-ended question. The data, analyzed by gender and year in law school, revealed significant gendered attitudes and beliefs among the respondents, who constituted 51% of the men and women enrolled at the Law School in 1990.

Intrigued by the initial results, we set up a multiple-method research design to assess the comparative status of women and men when they enter, as they participate in, and when they leave law school. Our three-part research design investigated gender-related differences in levels of academic performance, law student attitudes toward career goals, and general satisfaction with law school experiences.

The Bartow cross-sectional survey of 366 law students formed the initial database, analyzed by gender and year in law school. This database was not longitudinal and was affected by a selectivity bias.<sup>21</sup> The Bartow Survey represents the attitudes and experiences

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Law School. Guinier proposed the survey as a means to investigate whether the concerns of Bartow and a few other vocal female law students were widely shared. Bartow intended to develop a videotape of her law school experience along the lines of a comparable documentary produced by female medical students who reversed traditional gender roles associated with their medical school experience. The medical school videotape, entitled *Turning Around*, contains role reversal vignettes. For example, all the medical students study as typical the female body, all the professors are women, and "a female doctor leers at a male nurse, admires the fit of his uniform, pats him on the rear and calls him 'a good boy.'" Camille Peri, *Battling Stereotypes*, IMAGE, July 3, 1986, at 6.

The idea for the survey was that a videotape would be most useful if it addressed concerns shared by significant numbers of women law students about practices perceived to be sexist. Portions of the survey were adapted from a questionnaire distributed as part of a 1987 *Stanford Law Review* study. See Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1234 (1988). Other survey questions were independently created based on concerns raised by law students in various contexts over the past few years.

<sup>21</sup> Although we employed random sampling techniques to administer the Bartow Survey, we nevertheless ended up with a selectivity bias by gender in our final sample. A significantly larger number of women than we would have expected and a smaller number of men than expected answered the survey.  $p < .001$ . Because we make no generalizations and draw no conclusions about the entire cohort from which this sample was drawn and only speak about the cohort in terms of men versus women—two samples that are indeed randomly distributed—such a selectivity bias does not affect the arguments made in this Article. In fact, although there are many possible reasons as to why a disproportionate number of women responded to the survey, we hypothesize that the gendered response bias in the final sample is related to the gender experiences described throughout the Article.



of a little over half (366 out of 712) of the men and women enrolled at the Law School in 1990. Discovering significantly gendered attitudes and beliefs, we sought to analyze student performance data.

Our second database comprised a quantitative cohort analysis of the academic performance of 981 students at the Law School.<sup>22</sup> This database was longitudinal and was designed to determine the relationship, if any, along gender lines between incoming credentials and law student academic performance. The second database began in 1990 as an archival cohort study of the 712 students then enrolled in the Law School. With the full cooperation of Colin Diver, Dean of the University of Pennsylvania Law School, we subsequently analyzed performance data for all students enrolled at the Law School during the academic year ending June 1991, in order to confirm our initial findings. As a result, we collected and analyzed performance data for a total of 981 students, 712 of whom were enrolled at the time of the 1990 Bartow Survey, and 366 of whom submitted responses to her survey. We have the full academic performance data for the classes of 1990 and 1991, the first two years of law school for the class of 1992, and the first year of law school for the class of 1993.

The Law School furnished us with an anonymous listing for each of the 981 students, including gender, race, undergraduate grade point average (GPA), Law School Admission Test (LSAT) score, undergraduate institution, undergraduate rank, and law school GPA for each year in law school. We did not receive information about size of individual law classes, gender of the professor, or type of examination. We did not examine, therefore, possible correlations between these variables and student performance by gender. These

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<sup>22</sup> Statistical analyses were conducted with a cohort sample of 981 students at the Law School. These students comprised the classes of 1990 through 1993. This group of 981 included data on 676 third-year students, 700 second-year students, and 929 first-year students. We did not have complete transcripts for 101 students, who were therefore not included in the study. Some of these students may have transferred to other educational institutions; others may have dropped out or pursued joint degrees. We did not find significant differences in what we are calling the attrition rates between men and women (or between white students and students of color) in our initial cohort study of 712 students. The  $p$  value for attrition rates between men and women is  $p < .30$ . The  $p$  value for attrition rates between people of color and Whites is  $p < .50$ . Fourteen percent of the men and 11% of the women during the 1987-91 period are in this category, as are 11% of the people of color and 13% of the white students. We have no reason to believe that the attrition rates in our later examination of the performance of 981 students (712 of whom were included in our initial analysis) are significantly different from those found in the original study.

areas of study may prove fruitful for future research.

Finally, in order to generate more detailed hypotheses regarding the gendered experiences of law school as suggested by the quantitative survey and academic performance data, we created a third, qualitative database. Qualitative data have become central to the work of social scientists, enabling them to produce more valid explanations of social life by checking their own assumptions and biases against the perspectives and understandings of the researched populations or subjects.<sup>23</sup> Our qualitative data include the 104 narrative responses to the open-ended question about student experiences of gender discrimination in the Bartow Survey,<sup>24</sup> focus group data collected from twenty-seven students (including white students and students of color, both male and female),<sup>25</sup> our obser-

<sup>23</sup> See, e.g., MARGOT ELY, *DOING QUALITATIVE RESEARCH: CIRCLES WITHIN CIRCLES* 2 (1991) (noting the rise in recent decades of qualitative research methods as an alternative to traditional methods of empirical research and suggesting that qualitative researchers may reduce the distortions created by their own subjectivity by consciously recognizing the perspectives and interpretations of their research subjects); Frederick Erickson, *Qualitative Methods in Research on Teaching*, in *HANDBOOK OF RESEARCH ON TEACHING* 119, 131-34 (Merlin C. Wittrock ed., 3d ed. 1986) (stating that qualitative research methods lead to a better understanding of effective teaching in the classroom, and of how insiders see and talk about an institution, than standard positivist research methods); Karen L. Henwood & Nick F. Pidgeon, *Qualitative Research and Psychological Theorizing*, in *SOCIAL RESEARCH: PHILOSOPHY, POLITICS AND PRACTICE* 14, 27-28 (Martyn Hammersley ed., 1993) (noting the current use of qualitative research methods in psychology); Elliot G. Mishler, *Meaning in Context: Is There Any Other Kind?*, 49 *HARV. EDUC. REV.* 1, 8-11 (1979) (arguing that the social and behavioral sciences should abandon the traditional scientific method's search for universal, context-free laws in favor of context-dependent laws, so better to explore novel hypotheses, confirm and disconfirm varied explanations, and generate new interpretations of data); see also SHULAMIT REINHARZ, *FEMINIST METHODS IN SOCIAL RESEARCH* 22 (1992) (noting that qualitative data may be presented as a corpus or offered through illustrative quotations); Rosalind Edwards, *An Education in Interviewing: Placing the Researcher and the Research*, in *RESEARCHING SENSITIVE TOPICS* 181, 183-85 (Claire M. Renzetti & Raymond M. Lee eds., 1993) (describing the frequent use of qualitative methods in feminist research).

<sup>24</sup> For the text of the open-ended question in the Bartow Survey, see *infra* note 139 and Appendix B.

<sup>25</sup> The focus groups were held in 1992 to test and update the findings of Bartow's original survey. Students were solicited by memoranda placed in student mailfolders and through recommendations from other students in order to reach editors of the *Law Review*, students in the top 10% of their class, members of several first-year legal writing sections, members of the Black, Asian, and Latino Law Students' Associations (BALSA, APALSA and LALSA, respectively), and the Women's Law Group.

We conducted seven focus groups, each of which included between three and six students. Two of the focus groups were held among white women, two were held among male and female African-American students, and the remaining three included male and female students of color and white students from diverse racial and ethnic

vation of and participation with two classes of a critical perspectives seminar,<sup>26</sup> a meeting with the Women's Law Group,<sup>27</sup> and several meetings with Law School faculty.<sup>28</sup>

Each of the three databases provides different windows into the students' gendered experience of law school. The academic performance data represent the entire population of students enrolled between 1990 and 1992. It is a definitive statement reflecting the

backgrounds. Three of the focus groups included only first-year students, and the remaining four groups were composed of third-year students. The interviewers were third-year students who asked a scripted list of four questions.

At the beginning of each session, students were asked to identify themselves by race, gender, and year in law school. Each group discussion lasted 45 minutes; discussions were tape recorded and then transcribed. The students were asked to discuss the following four questions:

1. Are you different from the person you were when you first entered law school? In what ways? Do you consider these changes for better or worse?
2. How do you feel that other students, or the faculty and administration, perceive you?
3. What are the conditions that make a classroom situation comfortable for you?
4. Have you ever talked to professors after class or outside of class? Do you have a relationship with any professors in the school? Why or why not?

The interviews took place in April and May 1992. The participants in the focus groups were given neither information about the ongoing study nor details from the study, either prior to or during the discussion sessions.

The decision to conduct interviews was a response to suggestions made by Law School faculty colleagues with whom we discussed our data. The most formal faculty meeting regarding our data took place on May 4, 1992. Seventeen faculty attended, four of whom were women. Four law students—Rebecca Bratspies, Deborah Stachel, Laura Nussbaum, and Nicole Galli—also attended and took extensive notes on the proceedings. Other, more informal discussions with faculty occurred in the fall of 1992 and the early spring of 1993.

<sup>26</sup> These students were enrolled in a spring seminar at the Law School entitled "Critical Perspectives on the Law: Issues of Race and Gender." The seminar originated in 1990 in response to the interest of students seeking to study the legal academic literature of feminist and race theorists whose perspectives they felt had been ignored by the more traditional law school curriculum. Based on continuing student demand, the seminar has become a regular course offering available to second- and third-year law students.

We presented our initial findings at two meetings of this seminar, once in 1991 and again in 1992. During our discussions with the students we observed and recorded their responses to our data. A total of 41 students participated, including men and women of various ages from diverse racial and ethnic backgrounds. The group was self-selected based on interest in participating in a student-initiated seminar on this subject matter.

<sup>27</sup> These students were members of the Women's Law Group of the University of Pennsylvania Law School who were interviewed as a group or individually by Professor Guinier. The Women's Law Group is a student-run organization that meets to address issues of mutual concern, including career options and networking.

<sup>28</sup> See *supra* note 25.

disparity in grades between men and women during the period of our research. We used the additional two sets of data to help formulate hypotheses explaining the relatively weak academic performance of female law students.

The Bartow Survey is representative of the experiences and attitudes of the 366 men and women who participated in the survey in 1990. The 104 narrative responses elicited from Bartow's open-ended survey question about student experiences of gender discrimination are also representative of the attitudes and experiences of these men and women. These responses were based on the same random sample as the rest of the Bartow Survey.

The narrative responses are part of our qualitative database. They offer qualitative data that are reliable, meaning that the instrument for collecting the data is likely to generate the same response over several observations taken in the same time period.<sup>29</sup> They are also valid, meaning that the categories of analysis used by the researchers are the same categories that the subjects employ.<sup>30</sup> The focus groups and responses to the presentation of our data were neither randomly selected nor necessarily representative. They are substantively valid, but not necessarily generalizable. We use these qualitative data to generate hypotheses explaining the more reliable quantitative data.<sup>31</sup>

By triangulating our databases, that is, moving back and forth among the three sets of data collected during our research, we have developed a number of observations regarding the divergent experiences of many men and women at the University of Pennsylvania

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<sup>29</sup> Reliability is "[t]hat quality of measurement method that suggests that the same data would have been collected each time in repeated observations of the same phenomenon." EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH*, at G7 (6th ed. 1992).

<sup>30</sup> Validity is "a descriptive term used for a measure that accurately reflects the concept it is intended to measure." *Id.* at G8. The narrative responses to the survey, the discussions of focus groups, and the responses to the presentation of our data are substantively valid but not necessarily generalizable. These qualitative data are not generalizable to the extent that they were collected from nonrandomly chosen samples of students active in the professional and social life of the Law School. We do not argue that these responses are reflective of all students' experiences at the Law School in 1990; nor do we generalize the attitudes and experiences expressed in our focus groups and those responding to the presentation of our data.

<sup>31</sup> We use quotations from the transcriptions of the interviews and narrative responses to contextualize observations generated by the more reliable quantitative data to allow us to hear the "emic" perspective. See, e.g., Erickson, *supra* note 23, at 150-51 (suggesting that an emic perspective is important in determining how insiders see and talk about an institution); see also ELY, *supra* note 23, at 58 (arguing that an interview allows a researcher to see the world from the interviewee's perspective).

Law School. Our multimethod design seeks to contextualize and explain our primary empirical finding: given traditional academic predictors, women at the University of Pennsylvania Law School underperform compared to their male counterparts.

### B. *Related Research*

We designed our study to compensate for some of the untested assumptions in the literature. Although other studies found lower rates of classroom participation among women law students,<sup>32</sup> no one had systematically documented the extent of gendered difference; nor had anyone researched the academic and emotional costs paid by women for their "different" or "dominated" experiences.<sup>33</sup> Our study is the first that attempts to weave a full analysis out of self-reported survey data, actual academic performance data, and open-ended narrative responses.

Early surveys of law students generally failed to examine the experience of legal education critically.<sup>34</sup> The original studies of women's experiences narrowly focused on women's entry into<sup>35</sup> and motivation for going to<sup>36</sup> law school, how women adapted to

<sup>32</sup> Five empirical studies of women law students found that women engage less frequently than men in class discussion. See Taunya L. Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 141-42 (1988) (examining five unidentified law schools); Robert Granfield, *Contextualizing the Different Voice: Women, Occupational Goals, and Legal Education*, 16 LAW & POL'Y 1, 6-12 (1994) (surveying half of the 1540 students attending Harvard Law School in 1987 regarding their orientations toward law and legal practice); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 37-38 (1989-90) (studying Boalt Hall Law School); Taber et al., *supra* note 20, at 1239 (considering Stanford Law School); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1335 (1988) (evaluating Yale Law School).

<sup>33</sup> We try not to take a position in this paper on the nature versus nurture debate. See *infra* note 222 and accompanying text.

<sup>34</sup> See, e.g., Audrey J. Schwartz, *Law, Lawyers, and Law School: Perspectives from the First-Year Class*, 30 J. LEGAL EDUC. 437, 441 (1980) (examining how law students' "world views" changed during the first year of law school); Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 556 (1973) ("A primary aim was to uncover any changes in the backgrounds, motivations, career expectations, and politics of law students during the increasing turbulence of the 1960's.").

<sup>35</sup> See, e.g., David M. White & Terry E. Roth, *The Law School Admission Test and the Continuing Minority Status of Women in Law Schools*, 2 HARV. WOMEN'S L.J. 103, 103 (1979) (focusing on the effects on women resulting from law schools' increased reliance on the LSAT).

<sup>36</sup> See Georgina W. LaRussa, *Portia's Decision: Women's Motives for Studying Law and Their Later Career Satisfaction as Attorneys*, 1 PSYCHOL. WOMEN Q. 350, 353-58 (1977) (examining women's motives for attending law school and how they relate to later career satisfaction); see also Stevens, *supra* note 34, at 611-16 (noting that men

law school and professional success,<sup>37</sup> and what type of practice women pursued after graduation.<sup>38</sup> When women were novel in the field of law,<sup>39</sup> researchers were asking more simple questions: Were women too "feminine" to succeed in a "masculine" field? Could they adequately adapt to and incorporate the necessary attributes (that is, male styles) of professional conduct?<sup>40</sup> They wanted

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identified more with the traditional role of lawyer as adversary whereas women wanted to use the law to change society or help the underprivileged).

<sup>37</sup> See, e.g., Alice D. Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 J. LEGAL EDUC. 462, 467-68 (1972) (noting that women students' clannishness harmed them because it removed them from those vital parts of law school culture that serve as successful preparation for professional life); E.R. Robert & M.F. Winter, *Sex-Role and Success in Law School*, 29 J. LEGAL EDUC. 449, 450 (1978) (exploring how women achieve success in law school despite "the considerable disparity in sex role socialization" that seems to favor men).

<sup>38</sup> See, e.g., LaRussa, *supra* note 36, at 360-63 (examining trends in career satisfaction among women lawyers); Paul W. Mattessich & Cheryl W. Heilman, *The Career Paths of Minnesota Law School Graduates: Does Gender Make a Difference?*, 9 LAW & INEQ. J. 59, 60-61 (1990) (reviewing a study commissioned by Minnesota Women Lawyers on the Status of Women in the Legal Profession); see also Stevens, *supra* note 34, at 611-24 (comparing several motivating factors and assessing their relative influence on the decision by women, men, and people of color to attend law school).

<sup>39</sup> The Union College of Law (now Northwestern School of Law) was the first law school to admit women in 1870. See D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485, 494 (1977). In 1972 women gained access to all ABA accredited law schools. See Donna Fossum, *Law and the Sexual Integration of Institutions: The Case of American Law Schools*, 7 AM. LEGAL STUD. ASS'N J. 222, 224 (1983); see also CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 49-59 (1981) (providing a historical overview of women's admission to law schools, and noting the increase in women's admissions in the late 1960s and early 1970s).

<sup>40</sup> Studies that attempted to answer this question focused on women in law school in the 1960s and 1970s. They found that many women performed as well as, if not better than, their male counterparts. See, e.g., Stevens, *supra* note 34, at 572 n.46 ("[O]ver 53 percent of the women [in the class of 1972], compared to only 38 percent of the men, graduated in the top 10 percent of their undergraduate class. And average LSAT did not vary significantly by respondent's sex.").

One can generate many hypotheses to explain the findings of these studies. Perhaps the first wave of female law school students felt they had to prove their fitness just to be in law school "taking a man's place." As early pioneers, these women may have emulated an aggressive style without the ambivalence of their contemporary counterparts. Or, because only a small group of women were then in law school, these trailblazers may have self-selected themselves because of their "male" traits. Today, however, with a larger pool of women in law school, enrollment reflects a wider range of women with "traditionally female" values or aptitudes, whether cultural or biological. Cf. *infra* note 52 (discussing the possibility that law schools are now more hospitable to women and that women, finding themselves a larger subgroup in law schools, are more comfortable). Without actual performance data from that period, we can also speculate that the early literature, based primarily on self-reporting, may not be entirely accurate. Although the nature of this question seems to essentialize maleness, our study suggests that the failure to consider fully the

to know if women could "fit" into law school; the structure and practices of the school were not considered problematic. The only interesting question was could women "make it?"

The more recent studies have tended to contemplate "the gender question" as a feature of the law school process.<sup>41</sup> More concerned with how male and female students experience law schools, these projects analyze gender by classroom performance and degree of social alienation. Many have been particularly intrigued, for instance, by women's silence in legal classrooms.<sup>42</sup>

gendered attributes of law school has had serious and harmful repercussions for women law students.

<sup>41</sup> See *supra* note 32 (discussing recent empirical studies). In addition to the empirical data, there has been an ever growing body of narrative literature about the law school experience and legal education with specific emphasis on its impact on women. See Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 155 (1988) (analyzing two common approaches to legal instruction and arguing for a feminist approach to legal issues and teaching); Cynthia L. Hill, *Sexual Bias in the Law School Classroom: One Student's Perspective*, 38 J. LEGAL EDUC. 603, 603 (1988) (presenting an imaginary interview concerning a woman's perceptions about the treatment of women in law school); Faith Seidenberg, *A Neglected Minority—Women in Law School*, 10 NOVA L.J. 843, 845-49 (1986) (suggesting that legal education techniques which could better aid women in their law-related experiences be incorporated in a course structured to meet women's needs); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 152-54 (1988) (urging professors to determine why female law students tend to speak less in class than male law students and suggesting techniques to encourage greater participation in class, including support networks, role playing, and sharing of personal experiences); K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1156 (1985) (rejecting the "[u]nquestioning acceptance of the immutability of a 'male voice' monopoly on legal thought and practice" and urging incorporation of a "female voice" in the law).

<sup>42</sup> See, e.g., Banks, *supra* note 32, at 141-45. Professor Banks focused on female law students' silence in the classrooms at five unidentified law schools. Through a self-reporting survey, Banks asked questions about levels of volunteering in class, the influence of professorial attitude on class participation, how the gender of the professor affects class participation, and informants' views of gendered "humor" and comments in the classroom.

With regard to voluntary participation, Banks found that close to twice as many women as men reported never volunteering (17.6% to 9.6%, respectively), but 44.3% of men and 32.1% of women reported voluntary participation on a weekly basis. See *id.* at 141. Banks further broke down the rates of women's participation by age. Here she found significant differences: whereas 44.6% of women over age 30 volunteered weekly, only 27.7% of 25-30 year-olds and 26.5% of the 21-24 age group did the same. See *id.* at 141 n.19.

Banks found that the gender of the professor affected perceptions about whether women were called on as frequently. Almost twice as many women as men (12.9% versus 7.2%) reported that the gender of the professor affects the frequency with which they are called on in class. See *id.* at 143. Moreover, 70.8% of women

The more recent studies have been prompted predominantly by women law students and/or legal professionals, and have been influenced by the women's movement and feminist legal theory. The law school experience, especially that of being silenced in the classroom, provoked some women to search for broader understandings of what others termed "personal problems." This phenomenon originally motivated Bartow's 1990 study at Penn.<sup>43</sup> Carol Gilligan's early writings on women's "different voices"<sup>44</sup> were pro-

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respondents, as opposed to 55.4% of men, believed that women professors are more encouraging of student participation. *See id.* Nearly twice as many women as men (11.0% versus 5.8%, respectively) also reported that the gender of the professor affects their voluntary class participation. *See id.*

Banks argued that women's silence derives from their exclusion from the structure of the institution, especially the law school classroom, and from women's self-perceptions of inferiority. *See id.* at 146. The claim that women's silence was a response to alienation and exclusion helped begin to focus attention on the structural problems of the law school itself.

<sup>43</sup> *See supra* note 20 and accompanying text; *see also* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863-67 (1990) (discussing consciousness-raising as a methodology of inductive reasoning in which individual stories become the basis for a shared consciousness about general phenomena). Another example of this is found in the Weiss and Melling study, which grew out of a women's law school discussion group. *See* Weiss & Melling, *supra* note 32, at 1299. After experiencing a classroom situation in which men participated at much greater rates than women, the authors decided to count the number of comments, both volunteered and requested, by men and women in a large number of classes. They then looked for average performance rates based upon the total number of women and men in each class. *See id.* at 1363.

<sup>44</sup> *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan found that women and men (and girls and boys) speak about and understand moral questions differently. Unlike many of the women she studied, men often adopted a rights-based, abstract justice approach in which they resolved moral conflict through the rigid application of general rules. The women tended to resolve conflict from a flexible standpoint of care and connectedness, in which they sought to find the compromise that would benefit the greatest number of people. *See id.* at 18, 43-44. Gilligan posits an ethic of care as a distinctly female approach to moral reasoning based on a different self-perspective. *See id.* at 19.

Gilligan's work is not without its critics. *See, e.g.,* Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1154 n.158 (1986) (noting strong feminist reaction to Gilligan's work); Ruth B. Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*, 4 LAW & INEQ. J. 143, 148 (1986) (arguing that the difference debate depends on overgeneralizations without emphasizing enough the individual differences within gender). In particular, Catharine MacKinnon argues that the differences found by Gilligan reflect existing power relationships in which women's so-called different perspective is a consequence of their social, economic, and physical standing. *See* CATHARINE MACKINNON, FEMINISM UNMODIFIED 38-39 (1987); *see also* Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—A Conversation* (Oct. 19, 1984), in 34 BUFF. L. REV. 11, 27 (1985) (reprinting a discussion in which



foundly influential in these works,<sup>45</sup> as were the writings of Catharine MacKinnon on domination and identity formation,<sup>46</sup> and Mari Matsuda's theorizing about the multiple consciousness of outsiders.<sup>47</sup> Studies at both Berkeley and Yale Law Schools drew heavily from Professor Matsuda's suggestion that outsiders experience their presence within mainstream institutions as a forum for both assimilation and resistance.<sup>48</sup>

Students at Stanford Law School were especially interested in testing Gilligan's proposition that men and women employ distinct types of moral reasoning when confronted with legal problems, as well as examining how female and male law students experience law school and think about the law and their lifestyles.<sup>49</sup> The study

Catharine MacKinnon attributes gender differences to women's status as a subordinated class).

<sup>45</sup> See, e.g., Homer & Schwartz, *supra* note 32, at 8, 18 (discussing Gilligan's theory of gender difference in moral development and reasoning); Janoff, *infra* note 53, at 201-03 (same); Taber et al., *supra* note 20, at 1212-15 (same); Weiss & Melling, *supra* note 32, at 1302-04 (same).

<sup>46</sup> See MACKINNON, *supra* note 44, at 32-45; Marcus, et al., *supra* note 44, at 25-30; see also Taber et al., *supra* note 20, at 1217 (discussing MacKinnon's objective of destroying the hierarchy that allows men to set comparative standards); Weiss & Melling, *supra* note 32, at 1300 n.4, 1308-09 (discussing MacKinnon's goal of freeing women to control themselves and their world). MacKinnon's thesis has been supported by work in other disciplines. See, e.g., Sara E. Snodgrass, *Women's Intuition: The Effect of Subordinate Role on Interpersonal Sensitivity*, 49 J. PERSONALITY & SOC. PSYCHOL. 146, 147-48 (1985) (arguing that the subordinate role of women may cause women to protect themselves by developing sensitivity to feelings of others); Wendy Wood & Stephen J. Karten, *Sex Differences in Interaction Style as a Product of Perceived Sex Differences in Competence*, 50 J. PERSONALITY & SOC. PSYCHOL. 341, 342 (1986) (maintaining that social roles involving dominance and subordination create what appear to be gender-related differences).

<sup>47</sup> See, e.g., Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989) (noting that outsiders sometimes employ a dualistic approach to the legal system, simultaneously working within the system as legal realists and attacking the injustice the system perpetuates against women and people of color). In her more recent work, Carol Gilligan also recognizes the phenomenon of "double vision" in which the adherents of one voice are also aware of the other—in fact, she contends that both men and women engage in this dynamic. See, e.g., Marcus et al., *supra* note 44, at 46-49 (discussing the presence and use of both voices by both men and women).

<sup>48</sup> See Homer & Schwartz, *supra* note 32, at 21-22 (discussing women as outsiders in the law classroom setting); Weiss & Melling, *supra* note 32, at 1300-02 (referring to the status of women as outsiders); cf. Granfield, *supra* note 32, at 7, 10 (noting that many of the women at Harvard Law School described a sense of "marginality and otherness," and that a significantly larger proportion of women than men also claimed to have become more interested in social change while in law school).

<sup>49</sup> See Taber et al., *supra* note 20, at 1212-14, 1218-22. This study was published in 1988 by the *Stanford Law Review* based on data collected from current and former Stanford Law School students. The researchers expected to find gendered responses

found only slight differences between men's and women's responses to two of the three hypotheticals pertaining to moral reasoning.<sup>50</sup> Although the differences were "in the predicted direction," these disparities reached a statistically significant level inconsistently, and for only a few questions per hypothetical.<sup>51</sup> The Stanford survey concluded that "few gender differences [are found] among [law] students" in their reactions to these hypotheticals, and that the students therefore displayed few differences in moral reasoning.<sup>52</sup>

This finding of few differences may reflect the influence of legal education on the moral reasoning of both men and women.<sup>53</sup> It may also be attributable to the design of the survey<sup>54</sup> and the ano-

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and believed that Gilligan's theory would explain these differences. *See id.* at 1212-14. Their questionnaire included problems that were intended to serve as moral measurements. Respondents were given questions with a spectrum of responses ranging from "contextual" responses at one end to "abstract" responses at the other. Based on Gilligan's research, men were expected to choose "abstract" responses and women "contextual." *Id.* at 1236.

<sup>50</sup> These differences were based upon the weight women and men placed on the importance of preselected factors. *See id.* at 1248-49.

<sup>51</sup> *See id.* at 1249.

<sup>52</sup> *Id.* at 1240. The survey editors attributed this lack of disparity to a "more responsive and hospitable" law school environment, women's "comfort in being one of a sizable subgroup within the law school population," and/or changes in women's lives that "allow women to accommodate more easily to the law school environment." *Id.* at 1242-43.

The survey did find differences among current law students for level of class participation and reasons for going to law school. *See id.* at 1238-39. On a scale of one to five, with five indicating most frequently, male students reported a higher frequency than did women of asking questions in class (2.98 versus 2.43), volunteering answers (2.96 versus 2.48), and asking professors questions outside of class (2.61 versus 2.30). *See id.* at 1239.

The survey found no gendered responses for academic performance in law school and was unable to test for differences in class rank based on gender because of the fact that Stanford does not officially rank students. Therefore, students could not self-report this information. *See id.* at 1239. The one indicator of rank the survey did use, Order of the Coif, did not reveal any gender difference from graduate reports. *See id.* at 1239-40.

<sup>53</sup> *See, e.g.,* Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 237 (1991) ("In the study's sample, women and men revealed significantly different response patterns at the beginning of the year but showed no significant difference at the end of the year."). *But see* Weiss & Melling, *supra* note 32, at 1300 (arguing that the law school experience differs for men and women).

<sup>54</sup> With regard to the moral reasoning section of the Stanford survey, the design of the test may have had some effect on the results. Respondents had only limited choices in response to the hypotheticals and were not given space for additional comments. *See* Taber et al., *supra* note 20, at 1234. Moreover, the legal nature of the hypotheticals may have led women to respond in a legal manner (that is, Gilligan's male, abstract voice). *See* GILLIGAN, *supra* note 44, at 32 (explaining the difference between women's contextual morality and men's abstract moral judgments). Other

malous environment of Stanford.<sup>55</sup> Other studies of gender in law school conclude that women's experience as "outsiders" differs from the experience of men,<sup>56</sup> causing them to formulate a larger critique of the educational enterprise.<sup>57</sup>

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models that analyze moral reasoning may capture this nuance more readily. Compare Taber et al., *supra* note 20, at 1234 (using a rigid questionnaire) with Janoff, *supra* note 53, at 212-13 (using open-ended interviews to compile responses). Indeed, if Gilligan's hypothesis is true, and women shy away from quantifiable responses to rules, an abstract survey may not "hear" women's voices.

Another problem with the Stanford study as a whole is that it was entirely self-reported. The study was, therefore, unable to match respondents' perceptions to actual data. But see *infra* notes 59, 65 (noting correlation between women's perception of decreased performance and actual decline in academic performance). Moreover, in using Order of the Coif to measure academic performance, the study did not "consider the fact that the top ten percent of the class elected to Order of the Coif is not necessarily (or even logically) representative of the performance distribution among men and women in the other 90%." Homer & Schwartz, *supra* note 32, at 13.

<sup>55</sup> Stanford is distinctive with regard to teaching method and style. The authors reported that most professors did not use the Socratic method. See Taber et al., *supra* note 20, at 1254. In addition, the Dean and many members of the Stanford Law School faculty who are openly identified with Critical Legal Studies have articulated an interest in creating a nonhierarchical classroom environment, or at least a nontraditional one. See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 78, 120-23 (1983) (criticizing the "legal hierarchy" and proposing a model solution). The authors of the Stanford study concluded that no gender gap exists because women's ways of learning and lawyering have already been incorporated into law school and the legal world. See Taber et al., *supra* note 20, at 1242-43. Yet, prior to receiving the empirical data, the authors themselves perceived a gender difference of sufficient degree to motivate an ambitious study.

<sup>56</sup> See *supra* notes 32, 48 and accompanying text.

<sup>57</sup> For example, the authors of *The Legal Education of Twenty Women* attribute power to their outsider perspective, which gave them the unique consciousness to evaluate their experience at Yale Law School and form a special bond with other outsiders. See Weiss & Melling, *supra* note 32, at 1300; cf. Matsuda, *supra* note 47, at 7-8 (noting that "outsiders" have unique perspectives relevant to legal study). The Yale women render their law school experiences a moral issue, with narratives by female law students at the heart of the piece.

Various forms of alienation were described by women during their years in law school: alienation from self, alienation from the law school, alienation from the classroom, and alienation from the content of legal education. See Weiss & Melling, *supra* note 32, at 1299. This was the first piece to grapple so explicitly with the qualitative aspects of women's law school experience. See Homer & Schwartz, *supra* note 32, at 11 (some women who read the Yale study felt that "someone [had] at last 'told it like it is'"); cf. Granfield, *supra* note 32, at 10 (stating that many women at Harvard Law School reported feeling isolated from the educational process and "were critical of what they perceived as the male-dominated worldview of law and legal reasoning that pervaded the law school environment"). The Granfield study found partial support for the difference theory based on 391 questionnaires representing the responses of about one-fourth of the students attending Harvard Law School in

More typical is a study of Berkeley law students that began with the presumption that men and women experience law school differently, and that these differences disadvantage women.<sup>58</sup> The authors of the study assumed that some women do not feel good about themselves, despite performing as well as men.<sup>59</sup> Thus, the primary objective of the survey questions was to test self-esteem.<sup>60</sup> Many women students expressed intense feelings of pain, frustration, and isolation.<sup>61</sup> The vast majority of survey responses split along gender lines,<sup>62</sup> most noticeably regarding participation in class.<sup>63</sup>

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1987, supplemented by in-depth interviews conducted from 1986 to 1988 with about a fourth of those students who returned the questionnaire. *See id.* at 6-7. Granfield concluded that women experienced legal education differently in relation to preexisting occupational goals, and not simply in relation to fundamental gender-specific personality traits. *See id.* at 15. Those women whose career goals focused on financial security, prestige, and personal advancement were more like their male counterparts than other women, including "social feminists." *See id.* at 18.

<sup>58</sup> *See* Homer & Schwartz, *supra* note 32, at 23. The Berkeley authors had feminist goals and designed a feminist survey. The methodology combined statistical information with survey questions designed to give respondents the opportunity to speak in their own words. The survey questionnaire was divided into six parts: "(1) career plans and goals; (2) academic experience at Boalt; (3) psychological and emotional reactions to the academic experience ([entitled] 'General'); (4) academic performance; (5) demographic information . . . and (6) the section for open-ended comments." *Id.* at 24. At the end of the questionnaire the authors left respondents one and one-half blank pages on which to write anything they wished. *See id.*

<sup>59</sup> The researchers anticipated a distinction between "*what women do* in law school and *how they feel about it*." *Id.* at 15. "Based on our hypothesis, we expected that objective indicators such as grades and academic honors would demonstrate that women had learned to play the game quite well; what we wanted to learn was how they perceived themselves for doing it." *Id.* at 25. Nevertheless, the respondents self-reported a decline in women's academic performance over time and an increase in men's performance. "For example, in [1988], approximately one in six men received High Honors grades in Contracts, compared to only one in sixteen women. In 1984, the proportions had been approximately one in ten for both groups." *Id.* at 30. The Berkeley study avoided the problems of self-reported grade data faced by other studies by receiving grades for two specific courses from "a source within the Boalt administration." *Id.* at 30 n.101. Entering statistics, namely college GPA and LSAT score, revealed no preexisting indicator of this performance differential. *See id.* at 39 & n.109 (showing that men and women had virtually identical entering statistics).

<sup>60</sup> *See id.* at 24.

<sup>61</sup> *See id.* at 43-44. The study also found that women's levels of satisfaction with academic performance were lower than men's. *See id.* at 30, 41, 51 (Table 5, "Satisfaction with Academic Performance"). Over half of the women, but only 29% of the men, "felt intelligent prior to law school but not now." *Id.* at 52 (Table 8A, "Self-Perception").

The study found that most women deemed the grading process arbitrary. Only 28% of all women thought that their grades accurately reflected their abilities as law students as compared to 39% of all men. *See id.* at 51 (Table 5, "Satisfaction with Academic Performance").

<sup>62</sup> The Berkeley study also found that race and ethnicity were "critical factor[s] in

In our view, each of the prior studies contained important methodological flaws. For example, unlike the Berkeley study, which had not been published when we began our work, we did not begin our research assuming that men and women experience law school differently. Indeed, we initiated the Bartow self-reported survey to investigate this very claim. Unlike the Stanford study, we did not assume that gendered differences could be captured in answers to hypotheticals about moral reasoning. Our survey did not ask about hypothetical situations. We developed instead a number of focus groups in which women and men were invited to reflect informally on their perceptions of their actual law school experiences.<sup>64</sup> In contrast to the Stanford survey, we also included in the written survey an open-ended question for narrative responses.

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many of [its] findings." *Id.* at 27; *cf. infra* note 74 (noting that gender differences at Penn Law do not fluctuate across racial groups).

<sup>63</sup> The Berkeley authors focus on women's silence, *see* Homer & Schwartz, *supra* note 32, at 10, with stark statistics.

TABLE I

|       | NEVER ASK QUESTIONS<br>(percentage of group) |             | NEVER VOLUNTEER<br>(percentage of group) |             |
|-------|--|-------------|--|-------------|
|       | White  | Of<br>Color | White                                    | Of<br>Color |
| Women | 53   | 61          | 49                                       | 65          |
| Men   | 36   | 55          | 36                                       | 52          |

*See id.* at 50 (Table 3, "Classroom Participation"). Nevertheless, the authors argue that this result demonstrates that being silent is a form of empowerment for those who refuse to abide by dominant rules. Rather than viewing silence as evidence of passivity within a cowed and trembling female student body, these authors theorize women's classroom silence as a powerful form of resistance, a technique for coping through an outsider perspective. *See id.* at 38 ("Silence appears to have evolved into a deliberate expression of resistance by many students to an educational system unresponsive to the free expression of nonconforming ideas."). For a general discussion of the outsider perspective and the role of resistance in that perspective, *see* Matsuda, *supra* note 47, at 8-9 (positing that "outsiders" can work within the system at the same time as they rebel against its injustices).

The law school experience was less gendered, but just as significant, regarding future plans. The Berkeley survey found a marked shift away from public interest work for both women and men. After being at Boalt for at least one semester, "[a]lmost half of the women who originally had public interest goals abandoned them, and over half of such men did so." Homer & Schwartz, *supra* note 32, at 42.

<sup>64</sup> *See supra* note 25 and accompanying text.

From Banks's pioneering attempt to document women's silence in the classroom to the more full-bodied examination of the law school experience of outsiders at Berkeley, all studies of female law students have been based primarily on self-reported data.<sup>65</sup> Unlike these studies, we did not limit ourselves to self-reported data, nor did we assume that men and women achieve similar levels of academic performance. With the support of the Dean, we received unlimited access to four cohorts of academic performance data and designed a study to assess actual performance by following three separate classes of law students throughout much of their law school careers.<sup>66</sup> Our research thus builds on the methodologies and findings of prior studies.

## II. ON GENDER

### A. *Quantitative Data on Academic Performance*

We investigated academic performance to determine whether a gendered relationship exists, and, if so, whether differences in the accumulated grades and credentials earned by men and women up to the point that they leave law school are explained by differences in entry-level credentials.<sup>67</sup> From these analyses, detailed below, we conclude that there is indeed a gendered academic experience. But the differences we identify are not predicted by those entry-level credentials on which the Law School bases admission decisions. In fact, women and men begin Penn Law School with equally stellar credentials. Holding incoming statistics constant, however, women graduate from the Law School with significantly less distinguished professional credentials.

Both men and women come to the Law School with very impressive, and quite comparable, records based on undergraduate GPA

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<sup>65</sup> This includes Granfield's 1987 study of Harvard Law School, which was not published until after we completed our own data collection. *See supra* note 32 (citing Granfield's study). No means of comparison existed in most studies between a respondent's self-reported evaluation of how she performed in law school and the actual data (either individualized or generalized for gender, race, etc.). *But see* Marilyn Tucker et al., *Whatever Happened to the Class of 1983?*, 78 GEO. L.J. 153, 156 (1989). In a preliminary study to determine the validity of self-reported data, Tucker et al. found that self-reports on rank in class had a correlation of .91 with the actual rank. Similar relationships existed for undergraduate GPAs and LSAT scores. *See id.* Therefore, while not verifiable, self-reported data from other sources may be more accurate than generally assumed.

<sup>66</sup> *See supra* note 22 and accompanying text.

<sup>67</sup> *See supra* note 22.

and rank in class, LSAT, Lonsdorf Index,<sup>68</sup> and undergraduate institution. On two of the admission criteria, the women actually present incrementally stronger records. The men, on average, achieve a 3.49 undergraduate GPA, whereas women attain a 3.52. Men, on average, enter with an undergraduate class rank of 78.44, and women with 80.13. On a scale from one to forty-eight, the men's mean LSAT is 40.98, and the women's is 40.87. Finally, the men's average Lonsdorf Index is 4.73; the average for the women is 4.74. None of these differences is significant at the .05 level.

TABLE II  
MEAN STATISTICS FOR INCOMING STUDENTS

|       | College GPA |      |          | Rank in College |       |          |
|-------|-------------|------|----------|-----------------|-------|----------|
|       | <i>N</i>    | Mean | $\sigma$ | <i>N</i>        | Mean  | $\sigma$ |
| Men   | 542         | 3.49 | .31      | 544             | 78.44 | 20.35    |
| Women | 408         | 3.52 | .28      | 409             | 80.13 | 18.45    |
|       | $p = .143$  |      |          | $p = .188$      |       |          |

|       | LSAT       |       |          | Lonsdorf Index |      |          |
|-------|------------|-------|----------|----------------|------|----------|
|       | <i>N</i>   | Mean  | $\sigma$ | <i>N</i>       | Mean | $\sigma$ |
| Men   | 544        | 40.98 | 4.16     | 543            | 4.73 | .370     |
| Women | 413        | 40.87 | 4.09     | 408            | 4.74 | .367     |
|       | $p = .677$ |       |          | $p = .685$     |      |          |

Tracking law school GPAs for men and women across years one, two, and three, Table III reveals a solid and stable gender difference in performance.

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<sup>68</sup> The Lonsdorf Index represents a formula used by the University of Pennsylvania Law School for admissions purposes during the period of time covered by our data, weighing LSAT score, median LSAT score at undergraduate institution, and undergraduate grade point average. The index is computed by a formula of  $0.05399(\text{LSAT}) + 0.04427(\text{MLSAT}) + 0.0124(\text{RIC})$ , where LSAT = applicant's LSAT score; MLSAT = mean LSAT from applicant's college; and RIC = applicant's rank in undergraduate class. Starting with the class of 1995, the Law School has employed a new predictive index that reduces the weight of MLSAT.

TABLE III  
MEAN LAW SCHOOL GPAS<sup>69</sup>

|       | First-Year GPA<br>(GPA1) |       |          | Second-Year GPA<br>(GPA2) |       |          | Third-Year GPA<br>(GPA3) |       |          |
|-------|--------------------------|-------|----------|---------------------------|-------|----------|--------------------------|-------|----------|
|       | <i>N</i>                 | Mean  | $\sigma$ | <i>N</i>                  | Mean  | $\sigma$ | <i>N</i>                 | Mean  | $\sigma$ |
| Men   | 532                      | 0.932 | .524     | 397                       | 1.005 | .456     | 382                      | 1.047 | .425     |
| Women | 397                      | 0.771 | .475     | 303                       | 0.853 | .429     | 294                      | 0.923 | .416     |
|       | $p = .000$               |       |          | $p = .000$                |       |          | $p = .000$               |       |          |

Although men and women enter with virtually equal statistics, men receive, on average, significantly better grades by the end of year one. Further, they maintain this advantage through graduation.<sup>70</sup>

<sup>69</sup> GPA2 and GPA3 are cumulative statistics, incorporating the prior years' grades.

<sup>70</sup> Because the indicators used by law schools to predict success are nearly identical for men and women, the GPA data essentially speak for themselves. We have, however, performed an ordinary least squares (OLS) regression analysis for law school GPAs, regressing for gender, LSAT, and college GPA. We do not include college rank or Lonsdorf Index in this model because college rank is too strongly correlated with college GPA and the Index is only a linear combination of the LSAT and college GPA variables. Furthermore, we found no statistically significant interactions between gender and the other two independent variables in the model.

TABLE IV  
EFFECTS OF COLLEGE STATISTICS AND GENDER ON LAW SCHOOL GPAS

(figures are ordinary least squares coefficients  
and their standard errors)

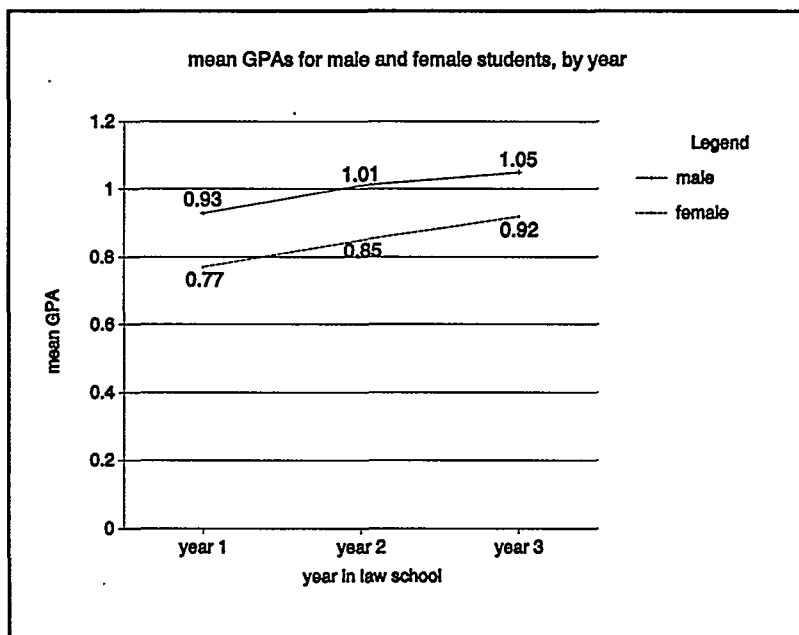
|                          | Intercept        | Gender         | LSAT           | College GPA    | $r^2$ |
|--------------------------|------------------|----------------|----------------|----------------|-------|
| GPA1 =<br><i>N</i> = 901 | -2.654<br>(.232) | .161<br>(.030) | .048<br>(.003) | .410<br>(.051) | .23   |
| GPA2 =<br><i>N</i> = 685 | -2.300<br>(.240) | .137<br>(.030) | .044<br>(.004) | .386<br>(.051) | .24   |
| GPA3 =<br><i>N</i> = 661 | -2.020<br>(.230) | .106<br>(.029) | .039<br>(.004) | .388<br>(.049) | .23   |

The OLS coefficient "measures the amount of increase or decrease in [GPA] for a one-unit difference in the [indicator], controlling for the other [indicators] in the equation." GEORGE W. BOHRNSTEDT & DAVID KNOKE, *STATISTICS FOR SOCIAL DATA ANALYSIS* 389 (2d ed. 1988). The intercept is the "constant value in a regression equation that shows the point at which the regression line crosses the *Y* axis [if all the



Figure I shows that the gender difference for mean GPA is stable across the three years in the Law School.

FIGURE I  
MEAN GPAS FOR LAW STUDENTS



In terms of rank and GPA, first- and second-year men are 1.6 times more likely to be in the top fiftieth percentile of the class than are women. Third-year men are 1.5 times more likely to be in the top fiftieth percentile.<sup>71</sup> Figure II shows that 53.8% of the first-year

indicators] equal zero." *Id.* at 494.  $r^2$  measures the "amount of variation in the [GPA] explained or accounted for by [all the indicators in the equation]." *Id.* at 269. In the case of gender,  $r^2$  is a dummy variable for which men are equal to one and women are equal to zero. Therefore, a coefficient of .16, for example, implies that men's GPAs in the first year of law school are 0.16 units higher than women's. Furthermore, all of the above coefficients are statistically significant at the .05 level.

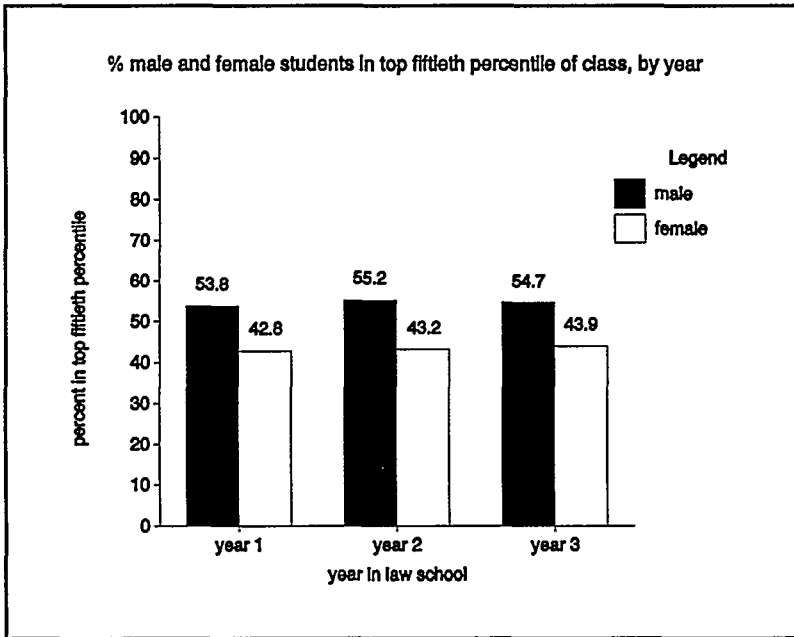
<sup>71</sup> All of these odds ratios are significant at the .05 level. We calculated the ratios by dividing the number of men in the top 50% of the class by the number of men in the bottom 50% and then dividing this quotient by the quotient obtained from dividing the number of women in the top 50% of the class by the number of women in the bottom 50%. In Figures II and III we have illustrated the percentages of men versus women in the top 50% and top 10% of the class in years one, two, and three.

These tables can, of course, be converted back into odds ratios. For example,

male law students are in the top fiftieth percentile of their class, compared to 42.8% of the first-year women.

FIGURE II<sup>72</sup>

## PERCENT OF STUDENTS IN TOP FIFTIETH PERCENTILE OF CLASS



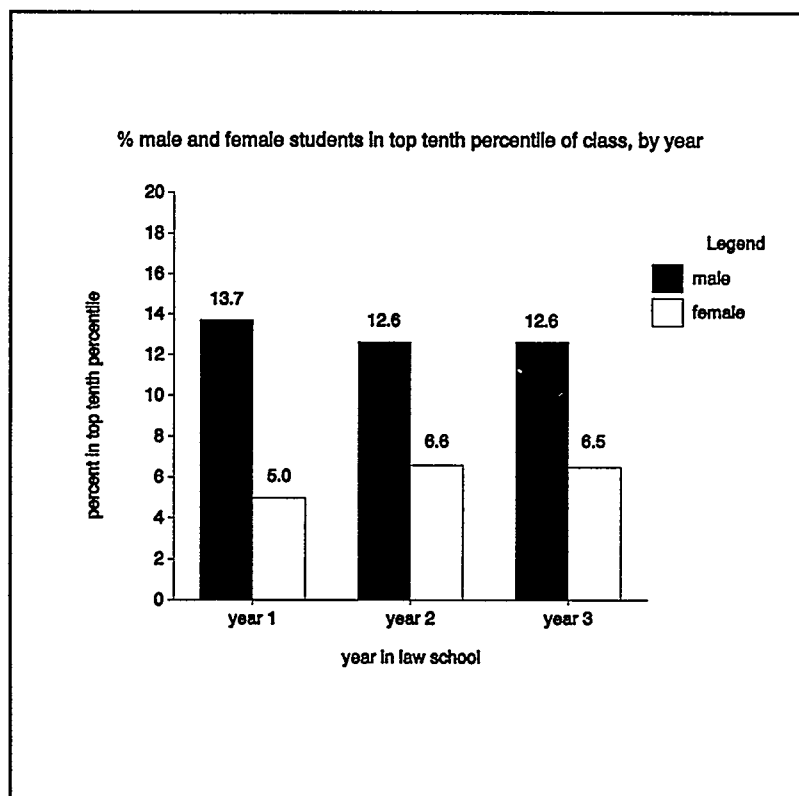
to determine the odds ratio between men and women for being in the top 10% of the class by year three in law school, we took the 12.6% of the men in the top 10% of the third-year class, divided this number by the percentage of men in the bottom 90% of the third-year class (87.4%), and then divided this quotient (0.144) by the quotient obtained when dividing the 6.5% of the women in the top 10% of the third-year class by the 93.5% of women in the bottom 90% of the third-year class (0.07). The calculation of these odds and odds ratios shows that men are twice as likely to be in the top 10% of the class by year three than are women.

In an ideal world, regardless of the number of men and women in the class, the odds of any person being in any particular decile should be the same and should not reflect differences based on gender.

<sup>72</sup> The actual population of men and women in the Law School varies; during the period we studied, women represented between 39% and almost 47% of the student body. The percentages in Figure II, however, are not simply a rough approximation of the relative numbers of men and women law students attending the Law School. These percentages represent the number of men in the top fiftieth percentile of the class as compared to all men in their class, and the number of women in the top fiftieth percentile of the class as compared to all women in their class. Again, ideally, we should see an equal percentage of men and women in each percentile of the class.

If we rely upon an even more stringent measure—the top 10% of the class—we find that in the first year men are almost three times more likely than women to reach the top 10%; in the second and third years, men are two times more likely to do so. Figure III illustrates this differential.

FIGURE III  
PERCENT OF STUDENTS IN TOP TENTH PERCENTILE OF CLASS



The data document that women and men enter the Law School with comparable credentials.<sup>73</sup> In a pattern established firmly in the first year and maintained thereafter, however, women receive relatively lower grades, achieve lower class ranks, and earn fewer

<sup>73</sup> See *supra* note 68 and accompanying text.

honors.<sup>74</sup>

As a consequence of these disproportionately low class ranks, women law students are underrepresented in the Law School's prestigious positions and extracurricular activities. Over the three years of our study—from 1990 to 1992—women were underrepresented in the Order of the Coif,<sup>75</sup> the graduation awards given by the faculty, the *Law Review* membership and board, and the moot court competitions and board.

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<sup>74</sup> This gender differential holds across racial groups but is statistically significant at the  $p < .05$  level only for white students.

In terms of our race data, we find that people of color experience trends in academic performance similar to those experienced by women. Even when we hold constant LSAT and college GPA, race alone continues to be a highly significant predictor of law school performance across the first, second, and third years:

TABLE V  
EFFECTS OF COLLEGE STATISTICS AND RACE ON LAW SCHOOL GPAS

(figures are ordinary least squares coefficients  
and their standard errors)

|                   | Intercept        | Race            | LSAT           | College GPA    | $r^2$ |
|-------------------|------------------|-----------------|----------------|----------------|-------|
| GPA1 =<br>N = 901 | -1.362<br>(.302) | -.307<br>(.051) | .034<br>(.004) | .258<br>(.056) | .24   |
| GPA2 =<br>N = 685 | -0.929<br>(.309) | -.348<br>(.054) | .027<br>(.005) | .235<br>(.056) | .26   |
| GPA3 =<br>N = 661 | -0.816<br>(.298) | -.310<br>(.053) | .023<br>(.005) | .258<br>(.053) | .25   |

Despite the fact that people of color are entering law school with significantly different background statistics, our regression equations indicate that race continues to play a strong independent role in predicting law school performance. In the above model, race is also a dummy variable for which people of color equal one and caucasians equal zero. All of the coefficients in this model are statistically significant at the .05 level.

<sup>75</sup> This pattern apparently continues. Although not part of the original study, in the class of 1994, five out of the 23 students elected to the Order of the Coif were women. See UNIVERSITY OF PA. LAW SCH., COMMENCEMENT PROGRAM: CLASS OF 1994, at 4 (1994).

TABLE VI  
MEN AND WOMEN SELECTED FOR VARIOUS HONORS, BY CLASS<sup>76</sup>

|  | Class of 1990 |       | Class of 1991 |       | Class of 1992 |       |
|--|---------------|-------|---------------|-------|---------------|-------|
|  | Men           | Women | Men           | Women | Men           | Women |
| Order of the Coif                              | 19            | 5     | 16            | 7     | 21            | 7     |
| <i>Law Review</i> Member (Non-Board)           | 25            | 3     | 16            | 12    | 21            | 11    |
| <i>Law Review</i> Board                        | 13            | 2     | 11            | 4     | 11            | 4     |
| Moot Court Finalist                            | 7             | 0     | 4             | 2     | 7             | 1     |
| Moot Court Board                               | 12            | 4     | 11            | 1     | 10            | 2     |
| Faculty-Chosen Graduation Awards <sup>77</sup> | 12            | 8     | 11            | 8     | 15            | 6     |

Part of this disparity is due to the grade differential just described. Many honors are distributed, in whole or in part, on the basis of academic performance. For example, selection for membership on the *University of Pennsylvania Law Review* is based partially on first-year grades, and thus women, despite applying at rates proportionate to their numbers in the Law School, are less likely to be selected than men.<sup>78</sup> Graduating as a member of the

<sup>76</sup> The figures in Table VI represent the number of men selected for various honors, and the number of women selected for these same honors.

<sup>77</sup> These figures represent the number of individual male and female students selected, based on faculty recommendation rather than the student's grades, to receive awards for their law school achievements. These figures may understate the gender differential for all graduation awards (including those based on grades) because 18 people received multiple awards during the three-year period. For example, in 1992 there were a total of 36 awards given to 28 persons. All of those receiving multiple awards in 1992 were men.

<sup>78</sup> Any first-year student who wishes to join the *University of Pennsylvania Law Review*, the most competitive and prestigious of the three journals at the Law School,

must complete a writing competition in the week following spring semester exams. Students must pick up the competition materials immediately following their last exam and turn them in 11 days later. Based on a combination of competition score (graded anonymously) and first-year grades, the *Law Review* selects approximately 45 people to serve as Associate Editors in their second year of law school.

For the years under study, the "pick-up" and "return" rates for men and women were virtually identical to their representation in the class. Under these circumstances, one would expect that the students selected would also represent the gender ratios of the class. This did not prove to be the case.

TABLE VII  
LAW REVIEW COMPETITION STATISTICS

|  | Class of 1990 |       | Class of 1991 |       | Class of 1992 |       | Class of 1993 |       |
|--|---------------|-------|---------------|-------|---------------|-------|---------------|-------|
|  | Men           | Women | Men           | Women | Men           | Women | Men           | Women |
| Number in class                        | 129           | 94    | 130           | 105   | 169           | 110   | 118           | 104   |
| % of class                             | 58            | 42    | 55            | 45    | 61            | 39    | 53            | 47    |
| % turned in as part of total turned in | 64            | 36    | 56            | 44    | 60            | 40    | 54            | 46    |
| % selected as part of total selected   | 85            | 15    | 68            | 32    | 68            | 32    | 68            | 32    |
| Number selected                        | 34            | 6     | 30            | 14    | 29            | 15    | 30            | 14    |

With respect to the class of 1994, 16 women were selected for *Law Review*, breaking a historical ceiling (14) for the number of women selected in any previous year. Even so, the number of women was still not proportionate to the number of women in the class or the participation rate of women in the competition. This increase merits further study. Although it is beyond the scope of this Article, an initial assessment would suggest that a choice by the *Law Review* in 1992 to reduce the weight of grades in calculating the competition score may have been partially responsible for the breakthrough increase in the representation of women.

For several reasons, the figures representing the number of male and female students selected for *Law Review* differ from the figures in Table VI that illustrate male and female *Law Review* members. Cf. Table VI. First, the former category does not include third-year students who "write on" to *Law Review* by submitting a publishable comment; the Table VI figures do include these students. Likewise, "Number Selected" does not encompass the selection of transfer students, who

Order of the Coif requires a student to be ranked in the top decile. In 1991 and 1992, men were almost twice as likely to be selected for the Order of the Coif as were women, and in 1990, men were more than twice as likely to be selected.<sup>79</sup>

Underrepresentation in other areas may be related to the fact that some honors are awarded on the basis of subjective judgments made by faculty and, at times, student peers who have internalized the academic hierarchy established during the first year.<sup>80</sup> For example, in 1990, each of the three student-run publications (*Law Review*, *Comparative Labor Law Journal*, and *Journal of International Business Law*) was headed by a male editor-in-chief.<sup>81</sup> Women also serve less frequently than men as editorial board members on the *Law Review*.<sup>82</sup> Additionally, women are rarely selected as finalists

participate in a separate competition in the beginning of their second year; the "*Law Review Member*" category does reflect the presence of transfer students who become members. Also, some students selected for the *Law Review* do not accept the offer of membership; these students are included in "Number Selected" but are excluded from the Table VI figure. Finally, the "*Law Review Member*" category also excludes those students encompassed within the "*Law Review Board*" category; all of these students are included in "Number Selected," however.

<sup>79</sup> See *supra* Table VI; see also *supra* Figure III (illustrating the percentage of male and female students in the top 10% of their class).

<sup>80</sup> Some examples of faculty- or student-initiated graduation awards at the University of Pennsylvania Law School include the Dean Jefferson B. Fordham Human Rights Award ("to the student in the Law School who during the year has made the most outstanding contribution to the advancement of individual freedom and human dignity"), the Edwin R. Keedy Law Review Award ("to the editor of the *Law Review* who, during his or her third year, makes, in the opinion of the dean, the most scholarly or otherwise most significant contribution to the *Law Review*"), the Fred G. Leebron Memorial Prize ("to the graduating student who has written the best paper in the field of constitutional law"), the Samuel F. Pryor, III, Esq. Prize ("for the student comment that, in the opinion of the Board of Editors of the *Journal of International Business Law*, best exemplifies the *Journal's* commitment to the exchange of ideas and information about the legal environment of business throughout the world"), and the Wapner, Newman and Wiggrizer Award ("to the graduating student demonstrating special promise in the area of civil trial advocacy"). UNIVERSITY OF PA. LAW SCH., COMMENCEMENT PROGRAM: CLASS OF 1994, at 5-6 (1994).

For an additional perspective on subjective judgments, compare Kanter, *supra* note 16, at 7 ("[W]hen standards for performance are vague, people tend to fall back on social standards and social characteristics in making their judgments.").

<sup>81</sup> It should be noted that for the first time in five years, the *Law Review* selected a woman student to be Editor-in-Chief for the 1993-1994 academic year.

<sup>82</sup> For the class of 1990, 13 out of 15 of the board members were male; 12 out of 15 were male for the class of 1991; 11 out of 15 were male for the class of 1992. For the classes of 1993 and 1994, five of the 15 editorial positions were held by women. After completing the second year as an Associate Editor, each *Law Review* member may elect to run for the editorial board, become a third-year editor, or decline to participate on the *Law Review*. Any *Law Review* member may run for a position on

in the moot court competitions or members of the Moot Court Board.<sup>83</sup>

When Ann Bartow first approached Professor Guinier in January 1990 about doing a video documentary of the experience of women law students, she related a story that resonates with these data. Bartow, then a student at the Law School, reported that some of her male colleagues chose their upper-level law school classes based on the number of women enrolled in each class. Women were perceived as "Q-absorbing" buffers, with Q ("Qualified") being the lowest passing grade on formal and informal grading curves.<sup>84</sup>

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the board, as long as she has fulfilled the writing requirement by submitting a completed comment. The current board selects the new board by evaluating each candidate's performance as an Associate Editor. Objective criteria and formal scoring mechanisms are not utilized. Grades are not factored into this process either, because board members are not given access to them. Informal knowledge of grades, however, may taint the *Law Review* board's evaluation of each candidate. Additionally, grades may affect which Associate Editors choose to apply for board positions.

Because the proportion of men and women who applied for the *Law Review* board is unknown, it is impossible to say whether women were in fact underrepresented in comparison to the number who ran. Whatever the reason, be it the selection criteria or the participation rates, the end result is a consistent underrepresentation of women in prestigious positions on *Law Review*.

<sup>83</sup> The moot court competition is held during the second semester of the students' second year. Students enroll in the competition—run by the third-year students on the Moot Court Board—which requires them to write an appellate brief and deliver a series of oral arguments with randomly selected partners. The arguments and briefs are based on a case pending before the United States Supreme Court.

The briefs and oral arguments are graded by the third-year students on a point system based on objective criteria. The briefs are graded anonymously. Oral arguments are graded based on performance before local, mostly male practitioners. With slight variations each year, the seven students with the highest number of points become the competitors in the two moot court tournaments sponsored by the Law School. The five next-highest point receivers become members of the Moot Court Board. The 11 other board members are appointed by the Law School, which chooses those students with high grades who are not on the editorial board of one of the school's law journals.

For the class of 1990, only four out of 16 Moot Court Board members were female, and every single moot court competition finalist (seven out of seven in 1990) was male. For the class of 1992, there were two women on the Board and one woman among the eight competition finalists (with one woman overlapping). For the classes of 1991 and 1993, only one Moot Court Board member was a woman, and in 1991 this individual was one of the two women among the six competition finalists.

Again, the reason for women's underrepresentation compared to their population in the class cannot be immediately assessed. Participation rates, unavailable at the present time, may play a role. We can only speculate that the inherently subjective nature of grading oral or written presentations may have a greater impact because most of the graders and questioners are male. The formal and informal use of grades may also be involved. Regardless of the precise cause, women's continued relative absence is a matter of concern.

<sup>84</sup> Professors at the University of Pennsylvania award, with few exceptions, grades



These men assumed that their own chances of receiving a grade higher than Qualified increased as the number of women enrolled in the class increased because the women would absorb a disproportionate number of the Qualified grades. They sarcastically referred to large groups of women in a class as the "Q quotient." At the time Bartow related this story, she was using it as an example of male stereotyping. What she did not articulate, but her male colleagues perhaps intuitively realized, was that our findings about women's performance were already known on some level within the Law School community.

### B. *Quantitative Data from the Bartow Survey*

The 1990 Bartow Survey tracks the academic performance differential between male and female law students to reveal attitudinal and experiential differences by gender. Female law students are significantly more likely than male law students to report that they "never" or "only occasionally" ask questions or volunteer answers in class.<sup>85</sup> Women, more than men, report that

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of Excellent (E), Good (G), and Qualified (Q). In the first year, the Law School, as a matter of policy, institutes a mandatory grading curve whereby approximately 20% of the students in each course receive Excellents, 40% receive Goods, and 40% receive Qualifieds. In the second and third years, the mandatory curve is officially eliminated, and the general distribution of grades shifts upward. Occasionally, professors award a superlative grade of Distinguished (DD), or they may give a failing grade of Unsatisfactory (U).

<sup>85</sup> The significance of the difference between the number of men versus women responding to the question in this way was examined through one-way analysis of variance (ANOVA) tests. One-way ANOVA tests are one type of hypothesis test based on inferential statistics. Grimm and Wozniak explain that the use of inferential statistical techniques

permits a decision to be made, with a known probability of error, about whether a sample characteristic is different from a population characteristic (the single sample cases), or whether differences between samples are large enough to allow the conclusion that the populations represented by the samples are different on a certain characteristic (the cases with two or more samples).

JAMES W. GRIMM & PAUL R. WOZNIAK, BASIC SOCIAL STATISTICS AND QUANTITATIVE RESEARCH METHODS 301 (1990).

When employing hypothesis testing, social scientists state a null hypothesis and an alternate hypothesis. Grimm and Wozniak explain:

The null hypothesis ( $H_0$ ) states that there is no difference, or that means, variances, or proportions are equal. The alternative hypothesis ( $H_1$ ) states that there is a difference and may specify the direction of the difference . . . .

In all of science and in all tests of hypotheses in social research, it is always and only the null hypothesis that is tested. Tests of hypotheses

men ask more questions, volunteer more often, enjoy greater peer tolerance of their remarks, receive more attention from faculty during classes, get called on more frequently, and receive more post-class “follow up” than women.<sup>86</sup>

provide information on the probability of rejecting a true null hypothesis. The error of rejecting a true null hypothesis is called an alpha ( $\alpha$ ) or Type I error . . . .

The error of failing to reject a false null hypothesis is called a beta ( $\beta$ ), or Type II, error. As the likelihood of committing an alpha error is reduced, the probability of committing a beta error increases. However, the magnitude of the beta error depends on what exact value of the alternative hypothesis is specified . . . .

The decision to reject a null hypothesis occurs only if the probability of committing an alpha error is at an acceptably low level, customarily  $\alpha = .05$  or  $\alpha = .01$ .

. . . Most researchers feel confident in rejecting a null hypothesis as long as there is a less than 5 in 100 ( $\alpha = .05$ ) or a less than 1 in 100 ( $\alpha = .01$ ) chance of being wrong.

*Id.* at 302-03.

Throughout this Article, the null hypothesis is that no differences exist between the male and female populations. We report the probability of committing a Type I, or alpha, error as “ $p < .xxx$ ” after each related observation. Analysis of variance one-way tests are administered when testing the hypothesis that several means or proportions are equal or that they all come from the same population. *See id.* at 316. Finally, for all the items in this paragraph, the differences between men’s and women’s response rates were statistically significant at  $p < .0001$ .

<sup>86</sup> Women ask and volunteer very little in class. In fact, men report a participation rate that is almost twice as frequent as that reported by women.

TABLE VIII

|       | NEVER ASK QUESTIONS<br>(percentage in gender group) |    | NEVER VOLUNTEER |    |
|-------|---|----|-----------------|----|
|       | 1L  | 3L | 1L              | 3L |
| Women | 67  | 72 | 55              | 68 |
| Men   | 44  | 62 | 35              | 57 |

When the three years are aggregated, twice as many men as women ask questions at least once a week and more than half of the women never or only occasionally ask questions or volunteer answers. Men ask and volunteer less over time—they become more like the women in this respect—and all grow satisfied with their relative silence as students.

Note, however, the differences in the performance of working-class and poor women who made it to law school. *See* Telephone Interview with Catherine G. Krupnick, Professor of Education, Harvard University (July 11, 1994) (describing a presentation at New England Law School (in Boston) on women in legal education). Professor Krupnick asked these women, who were vocal, active class participants, why

Perhaps because of their differing rates of participation, women and men also seek distinct qualities in law professors.<sup>87</sup> Students were asked to name the three qualities they admired most in a law school professor. The men and women both chose "knowledge of subject matter" and "enthusiasm for teaching" as their top two qualities. Ninety-three percent of the women, however, selected

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they thought their performance did not follow the trend of women at more elite schools, who were silent during classes. *See id.* In response the women explained: "If we came from Ivy League schools we'd be concerned with doing things right." *Id.* These working-class women had grown accustomed to challenging societally prescribed roles during their struggle to gain admission to law school. Once they were in law school, they were not about to give up. In other words, these women had socialized themselves to be successful, active participants who took charge of their education as they had taken charge of the course of their lives and careers. *See also* GLORIA STEINEM, *REVOLUTION FROM WITHIN* 111-17 (1992) (discussing the relative strength of working-class women compared to college-educated women).

<sup>87</sup> We were also interested in understanding how women and men students view the "fairness" of female and male faculty. With regard to perceived male faculty bias, gender differences are most apparent. In year one, women are four times more likely than men to say that male professors favor male students; by year three, the discrepancy remains. Most interestingly, 14% of first-year women versus 6% of first-year men indicate that only female faculty treat students equally. This discrepancy in perceptions continues through year three. In addition, male students are dramatically more likely to rate female faculty as favoring female students.

TABLE IX  
PERCEPTIONS OF FACULTY FAVORITISM BASED ON GENDER

(percentage of group)  
(columns may exceed 100% because multiple selections permitted)

|                                       | 1L<br>Women | 1L<br>Men | 3L<br>Women | 3L<br>Men |
|---------------------------------------|-------------|-----------|-------------|-----------|
| Male faculty favor men                | 33          | 8         | 26          | 5         |
| Male faculty favor women              | 3           | 4         | 0           | 7         |
| Female faculty favor men              | 14          | 3         | 4           | 0         |
| Female faculty favor women            | 0           | 13        | 12          | 21        |
| Male faculty treat equally            | 16          | 25        | 8           | 7         |
| Female faculty treat equally          | 14          | 6         | 16          | 5         |
| Male and female faculty treat equally | 32          | 48        | 48          | 53        |

"treats students with respect" as their third most admired quality,<sup>88</sup> whereas 82% of men selected "expresses ideas clearly."<sup>89</sup> We also observed sex-based responses that differed significantly with respect to qualities such as a professor's "openness to questions outside class," (valued by 69% of women, 55% of men) and "friendly with students" (valued by 65% of women, 56% of men).<sup>90</sup>

Across years, male students appear to be far more comfortable speaking with faculty of either gender than female students.<sup>91</sup> When asked, "How comfortable are you in interactions occurring outside of class with professors of the same or opposite sex?" 60% of the men, compared to 40% of the women, reported that they felt "very comfortable."<sup>92</sup> Men, in group interviews, confirmed their substantially greater degree of comfort with faculty.<sup>93</sup> In contrast, many women indicated their inability either to approach faculty or, once engaged in conversation, to sustain a useful interaction. Several women in follow-up interviews expressed frustration at what they perceived to be aloofness on the part of the faculty.<sup>94</sup>

<sup>88</sup> By contrast, 79% of men valued a professor who treats students with respect.

<sup>89</sup>  $p < .05$ . By contrast, 88% of women valued a professor who expresses ideas clearly. When students in a 1991 seminar were asked why men and women might choose different qualities as important, they responded that men are already treated with respect and therefore do not value that quality as much. An alternative explanation offered by a female colleague is that respect is related to Gilligan's ethic of care. See *supra* note 44.

<sup>90</sup>  $p < .05$  for both items. On one quality, however, both men and women agreed: both valued "good at socratic dialogue" to the same degree and almost twice as often in the first year as in the third year. Forty-two percent of first-year students valued "good at socratic dialogue" compared to 21% of third-year students. Year-based responses to this quality were significantly different at  $p < .05$ .

<sup>91</sup> In interactions outside of class, 58% of the men were very comfortable speaking with male professors; 62% of the men were very comfortable speaking with female professors. Only 40% of the women were very comfortable speaking with professors outside of class, with virtually no difference based on the gender of the professor.

<sup>92</sup>  $p < .001$ .

<sup>93</sup> A representative response from a male student follows:

I tend to find [professors] more accessible outside of class than I do in class actually. Yes I do have, yes I do talk to professors outside of the classroom. And I do have relationships with them, but it's divided up into different groups though. I talk to a lot of professors outside of class.

<sup>94</sup> Some women's responses follow:

Third-year Woman:

A lot of it I guess has to do with the professors I think. For some reason, the atmosphere, the law school atmosphere at Penn doesn't really engender um that type of um communication where I feel I can approach a professor and we can develop some kind of a relationship. For instance like I mentioned before I'm interested in criminal law. Now [Professor X] is the

The rates of participation reported by women as first-year students and as third-year students differ only to the extent that they reflect a transition from women never asking questions to asking questions infrequently. Women's level of satisfaction with this relatively stable rate of nonparticipation, however, increased over time. To the question, "Are you comfortable with your level of voluntary participation in class?" we see dramatic gender differences for year one (28% of the women responded "yes" versus 68% of the men).<sup>95</sup> By year three, however, 64% of the women respond that they are now comfortable with their essentially unchanged level of participation, as do 72% of the men.<sup>96</sup>

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type of person where if you have a question, you'll get an answer and he'll answer but he's not really a person you can hold a conversation with, just talk about like just day to day things. . . . He does, divert his eyes, like, instead of like, he averts his eyes, instead of giving like eye contact, and you know holding a conversation if he sees you in the hallway, so I felt uncomfortable with that so I just dropped that and I would like to develop a relationship with him. And um, I don't know if it has to do with his race or whatever, I mean this guy is Mr. Liberal but . . . . As far as the other professors now, without mentioning names, there were times when I did feel uncomfortable when I went into their offices.

Third-year Woman:

I rarely speak to professors. Um, I am more likely to speak to professors of color or women or those teaching, like I said, the courses that I'm interested in that involve people and I can you know discuss people's issues. I can't imagine going up to a professor and talking about security regulations after class. It doesn't interest me enough . . . . But then again I don't think most of them are approachable. A lot of them are aloof, a lot of them act busy.

Third-year Woman:

I have very few interactions with any law professors. I don't even like to, I don't usually even go to talk to them when I have questions. I usually figure it out myself or ask somebody else.

For an explanation of this Article's qualitative methodology and a discussion of the usefulness of qualitative data, see *supra* part I.A.

<sup>95</sup>  $p < .001$ .

<sup>96</sup>  $p < .05$ . Some of the difference in comfort level may reflect the fact that during their second and third years at Penn, students have more flexibility in course selection, with the option of choosing courses based on class size and teaching methodology. On the other hand, the level of self-reported participation for second- and third-year women did not change significantly from first year.

Moreover, we are not asserting that upper-class women are completely satisfied that they are being treated fairly. Women are more likely to agree that the "nature and content of classroom interactions between professor and students are affected by the sex of the student" and that the use of gender-neutral language is "very important" ( $p < .0001$  for all items).

In sum, women and men report significantly different assessments of their own classroom performance and perceptions of gender bias in the classroom. Also interesting, however, are the highly significant differences between the responses of the first-year women and all other categories of students. First-year female students, more than all other groups, report that men are called on more often than women<sup>97</sup> and receive more time and more follow-up in class,<sup>98</sup> that the sex of students affects class experience,<sup>99</sup> and

TABLE X  
STUDENT USE OF GENDER-NEUTRAL LANGUAGE  
(percentage of group)

|   | 1L<br>Women | 1L<br>Men | 3L<br>Women | 3L<br>Men |
|---|-------------|-----------|-------------|-----------|
| Use gender-neutral language                               | 54          | 32        | 50          | 41        |
| Change to gender-specific language outside the Law School | 19          | 33        | 16          | 28        |

Women were, across the board, more likely to use gender-neutral language and *not* change to gender-specific language when outside the Law School. On the other hand, men appeared, over time in the Law School, to grow somewhat more adept at using gender-neutral language (from 32% to 41%), and to become less likely to revert to gender-specific language away from the Law School (from 33% to 28%). Over the three years of law school, however, men remained more likely than women to change to gender-specific language when they left the law school building.

In addition, women were significantly more "concerned that knowledge of . . . gender (based on handwriting) may consciously or unconsciously influence the way that a professor grades your exam." ( $p < .001$ ). Women rated their peers as more competitive than men did, and women saw male students particularly as more competitive than female students. ( $p < .001$ ). Women were significantly more likely to agree that "sexist comments and actions by students are permitted under the informal 'house rules' of this law school" ( $p < .001$ ), and a majority of women and a plurality of men reported that sexist comments were permitted under the informal house rules ( $p = .001$ ). Cf. *infra* notes 144-47.

<sup>97</sup> In the Bartow Survey, 41.2% of first-year women reported that men were called on more frequently in class than women, compared to 32.8% of second-year women, 14.0% of third-year women, 11.3% of first-year men, 7.9% of second-year men, and 8.6% of third-year men.

<sup>98</sup> Our findings show that 34.9% of first-year women thought men who had been called on received more class time than women who had been called on, compared to 34.5% of second-year women, 12.0% of third-year women, 1.4% of first-year men, 3.2% of second-year men, and 5.1% of third-year men. Additionally, 39.7% of first-year women believed that men received more follow up questions in class than women, compared to 36.1% of second-year women, 12.0% of third-year women, 7.0% of first-year men, 7.9% of second-year men, and 8.6% of third-year men.

<sup>99</sup> The Bartow Survey data illustrates that 88.9% of first-year women reported that the sex of students has some effect on class experience, compared to 88.6% of

that sexist comments are permitted under the informal "house rules" of the Law School.<sup>100</sup> The concerns expressed by first-year women with male dominance in the classroom and failure to use gender-neutral language, as well as their perception that sexist comments are permitted, are not identified as problems by third-year female respondents.<sup>101</sup> After three years at the Law School, either women seem to tolerate displays of what they, as first-year students, interpreted as offensive incidents of sexism, or, in fact, the frequency of such incidents diminishes.<sup>102</sup>

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second-year women, 72% of third-year women, 63.3% of first-year men, 65% of second-year men, and 62% of third-year men.

<sup>100</sup> Another finding of the Bartow Survey was that 84.1% of first-year women reported that sexist comments are permitted, compared to 68.8% of second-year women, 64.0% of third-year women, 46.4% of first-year men, 58.7% of second-year men, and 48.3% of third-year men.

<sup>101</sup> See *infra* notes 143-48 and accompanying text. By contrast, mental health problems are reported more frequently in women than men and persist consistently across law school years. See *infra* text preceding note 111. Of course, we acknowledge that our data on frequency of crying and other indicia of mental distress may reflect preexisting problems or gendered socialization regarding acceptable ways to express those problems. But cf. *infra* note 121.

<sup>102</sup> Of course, the self-reported survey data on which we rely is merely a snapshot of the Law School at one point in time. We do not have statistically significant longitudinal data about the process of women's assimilation. Some may argue, therefore, that the survey reflects a picture of a unique group of first-year students. We have considered this argument but are persuaded that our data are nevertheless significant for several reasons. First, the incoming credentials of the women in the class of 1992 are comparable to those in the other classes studied. Their responses to the Center on Professionalism Values Survey are also comparable to responses from the women in the classes of 1991 and 1993. Across all three years, the responses of first-year women showed a similar demographic breakdown with respect to age (around 80% of respondents under age 25, and over 90% of respondents under age 30); indicated that the most common undergraduate major of women respondents in all three years was political science/government; and consistently illustrated a greater interest in the field of public interest law among first-year women than among first-year men (7% of the women in the class of 1991, compared to none of the men; 11% of the women versus 2% of the men in the class of 1992; and 22% of the women to 13% of the men in the class of 1993). See CENTER ON PROFESSIONALISM, UNIVERSITY OF PA. LAW SCH., SURVEY OF ATTITUDES AND VALUES: FIRST YEAR LAW STUDENTS, SEPTEMBER, 1988, CLASS OF 1991, at 6-9 (1988); CENTER ON PROFESSIONALISM, UNIVERSITY OF PA. LAW SCH., SURVEY OF ATTITUDES AND VALUES: FIRST YEAR LAW STUDENTS, AUGUST, 1989, CLASS OF 1992, at 5-9 (1989); CENTER ON PROFESSIONALISM, UNIVERSITY OF PA. LAW SCH., SURVEY OF ATTITUDES AND VALUES: FIRST YEAR LAW STUDENTS, AUGUST, 1990, CLASS OF 1993, at 6-9 (1990). Second, our archival cohort analysis and group-interview data confirm our interpretation that the first-year women who responded to the survey in April 1990 are more typical than unique. Third, the first-year men who responded to the survey look very much like their third-year counterparts. Finally, since the Law School Admissions Office did not use any special process for admitting women to the class of 1992, we have no reason

A dramatic difference between the positions of first- and third-year women is also reflected in responses to questions about career aspirations. Many more women than men come to the Law School expressing a commitment to public interest law. A quarter of the first-year women, compared to 7% of the first-year men, indicated that they expected a job in public interest law.<sup>103</sup> In response to a similar item, "What kind of law do you expect to practice?" we found the following distributions:

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to believe that the women are any less representative than the men in that class.

Some may conclude that our data instead show that sexist incidents decrease by the third year. See *infra* note 148. This is possible, especially because the large first-year Socratic classroom with its mandatory grading curve is not as pervasive in upper-level courses. See *infra* note 115. Our analysis of the qualitative data, however, reveal a pattern of response suggesting that the women change both in terms of their tolerance of sexism and in terms of what they define as sexism. See *infra* Table XV; see also *infra* note 127 (quoting a third-year woman who claims law school changed her because she now feels more ambivalent about what constitutes sexism: "I am more willing to tolerate sexist comments or to assume they are jokes rather than offenses.").

<sup>103</sup>  $p < .001$ . Students were asked, "What kind of job do you expect to have after law school?" Choices included: sole practitioner, law firm, government, academic, corporate general counsel, nonlegal corporate, foundation/university counsel, and public interest. For the most popular jobs, we found the following distribution:

TABLE XI  
EXPECTED JOB—MOST POPULAR SELECTIONS

(percentage of group)  
(columns may exceed 100% because multiple selections permitted)

|                 | 1L<br>Women | 3L<br>Women | 1L<br>Men | 3L<br>Men |
|-----------------|-------------|-------------|-----------|-----------|
| Law Firm        | 57          | 84          | 88        | 79        |
| Government      | 22          | 12          | 12        | 18        |
| Public Interest | 25          | 8           | 7         | 7         |



TABLE XII  
EXPECTED AREA OF PRACTICE

(percentage of group)  
(columns may exceed 100% because multiple selections  
permitted)

|                 | 1L<br>Women | 3L<br>Women | 1L<br>Men | 3L<br>Men |
|-----------------|-------------|-------------|-----------|-----------|
| Corporation     | 33          | 28          | 56        | 41        |
| Labor           | 28          | 6           | 10        | 10        |
| Litigation      | 28          | 38          | 46        | 44        |
| Public Interest | 33          | 10          | 8         | 5         |
| Estate          | 23          | 18          | 23        | 18        |
| Bankruptcy      | 11          | 18          | 10        | 17        |

First- and third-year men consistently expressed minimal interest in public interest work. In contrast, the first-year women were at least three times more likely than men to express interest in public interest law. Third-year women's level of interest, however, was nearly as low as that of first- and third-year men. Whereas 25% to 33% of the first-year women planned to practice some form of public interest law, only 8% to 10% of the third-year women expressed such intentions.<sup>104</sup> This suggests that, over three years

<sup>104</sup>  $p < .001$ . These ranges reflect the responses in Tables XI and XII. One explanation for this shift in career emphasis is that women are simply responding to market forces. The pre-law-school perception that the public interest and public service areas were among those most open to women, *see Kanter, supra* note 16, at 9, is also consistent with this explanation. This assumption may have triggered women's initial decisions to attend law school, and once the assumption was revised in response to information about actual job opportunities, women may have reoriented their career goals.

Market forces, however, do not explain the remarkably gendered difference within the first-year class itself regarding aspirations for a public interest career. First-year women may be responding less to financial incentives and more to gendered perceptions of their "role" as lawyer. *See, e.g., id.* at 5 (noting that the client is usually either "diffuse and abstract (such as the public) or is not directly choosing or paying the lawyer. The office provides the identity, and the woman does not have to worry about establishing her individual reputation. Women are . . . drawn to legal services as a protected setting with a social welfare orientation."); *id.* at 9 (reporting that traditionally women treated law as a "helping profession," which they entered to "do good") (quoting Cynthia Epstein, Discussion at Harvard Law School Conference on Legal Profession (June 2, 1977)); *see also* Jacquelynne S. Eccles, *Gender Roles and*

at the Law School, women students come to sound more like their male classmates, and significantly less like their first-year "selves."<sup>105</sup> One could conclude that women become more "like men" over time in this particular law school, at least in terms of their reported attitudes toward gender, sexism, and career goals. Yet women's academic performance over time does not mirror that of men. As we described in the preceding part of this Article, a disproportionate number of women—including those who move away from an interest in public interest law or drop their initial social critique—also graduate with significantly less impressive credentials than their male counterparts. Attitudinally they become closer to men; academically they move apart.<sup>106</sup>

### C. Narrative Data

After we crafted a preliminary summary of the data from the Bartow Survey, in the spring of 1991 and 1992 we asked two groups of self-selected law students in a Race and Gender seminar to reflect on their experiences as first-, second-, and third-year law students. Each group of approximately eighteen to twenty-three students was diverse with respect to age, gender, and race/ethnicity.<sup>107</sup> Another group of approximately ten first-, second-, and third-year female students who were members of the Women's Law Group also responded orally to a report of the data.<sup>108</sup> We conducted in-depth interviews with twenty-seven additional students who were selected to represent a better cross-section of law school opinion. Those

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*Women's Achievement-Related Decisions*, 11 PSYCHOL. WOMEN Q. 135, 151 (1987) (finding that women's career choices reflect greater interest in family and relationships). These forces also do not account for the gendered treatment some women report in law firm interviews. For example, females more than males have, "during the course of a job interview, been asked questions about marital or family status that [were] . . . considered inappropriate." ( $p < .001$ ). Also relevant is the finding that women are more likely to anticipate that "gender will be [a] hindrance" to their legal careers. ( $p < .001$ ).

<sup>105</sup> See *supra* text accompanying notes 14-15. Although their career aspirations merge after three years in law school, sex-based differences remain an explanation of their choices. When asked, "What factors are highly important to you in a law-related job?" 68% of the third-year women and 52% of the third-year men valued "independence" ( $p < .1$ ); 42% of the third-year women and 62% of the third-year men valued the "ability to earn a high income." ( $p < .05$ ).

<sup>106</sup> The attitudinal transformation compares first-year and third-year responses. The academic changes measure differences among entry-level credentials, first-year performance and third-year graduating statistics.

<sup>107</sup> See *supra* note 26.

<sup>108</sup> See *supra* note 27.

interviewed included editors of the *Law Review*, students in the top 10% of their class, instructors of first-year legal writing sections, and separate groups of white, African-American, Latino, and Asian-American students.<sup>109</sup> We also analyzed the 104 responses to the open-ended question on the Bartow Survey.

We acknowledge the limited population from which these reflections have been drawn. Indeed, we concede that the students who volunteered to participate in our group interviews were unusually motivated to tell their stories. Although the composition of these focus groups was representative by gender, year in law school, involvement in law school activities and journals, and class rank, the students we interviewed were arguably among the more alienated members of the school population. Similarly, those students who chose to respond to the open-ended questions in the Bartow Survey may not have been typical of the entire student body.

We nevertheless believe that the stories we report in this section are important for several reasons. First, the stories come from students who excel academically as well as those who do not. Second, the comments of individual students echo the responses to the open-ended narrative question in the 1990 Bartow Survey. These narrative responses came from over 50% of the student population in that same year and were received at a rate proportionate to the gender distribution in the survey as a whole. The narrative responses, too, suggest the gendered nature of alienation at the Law School. Third, in addition to reinforcing "more objective" data collected independently, the individual stories give context to our other empirical findings. The women students we interviewed almost universally expressed stronger and more passionate feelings of alienation and outrage than the male students we interviewed, even when we control for year in law school and rank in class. By triangulating our three databases, we observe the following about students' perspectives of their law school experience: many women express high levels of alienation; the law school experience, which is designed to establish an academic hierarchy, in turn generates gendered alienation; and many men at the Law School deny both the gendered effects and institutional impact of this hierarchy.

In particular, almost all the women we interviewed described their first-year experience as a radical, painful, or repressive experience, one that they will never forget (or remember). Several

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<sup>109</sup> See *supra* note 25.

women reported their voices were “stolen” from them in the first year. Some of these women who felt alienated did very well academically, yet they did not recognize their former selves, which they perceived as submerged in the pursuit of succeeding as a “social male.” One woman who articulated this dynamic felt silenced by what she termed “a group of frat boys who call you man-hating lesbian, or feminist—as though those are bad—if you are too outspoken.” Other women reported suffering from hissing, public humiliation, and gossip, simply for speaking aloud in class.<sup>110</sup> They expressed profound alienation from the Law School, the educational process, and, most disturbing, themselves, or who they used to be.

Female student:

I try to block out the entire experience. I won't take pictures, talk on tapes; I hope to forget this whole thing as soon as I'm gone. I hope to skip that space in time.

Female student:

[W]hatever ideals we came in with, they get bashed out of us.

Male student:

The first year is like basic training. They need to mold you.

Female student:

There are so few safe spaces for women in this law school.

These women often internalize their difficulties, seek counseling more frequently than the men, and look to other women for support. This is illustrated by an interaction we observed between male and female students in 1991. One male student stated:

[A]fter my first year I realized that I was making a mountain out of a molehill.

A female student then responded:

But you're not listening to what [the previous speaker] said. She said, “It entirely shook my faith in myself. I will never recover.” Some of us just sunk deeper and deeper in a mire, and just keep sinking lower and lower.

Another female student agreed:

That's right. I used to be very driven, competitive. Then I started to realize that all my effort was getting me nowhere. I just

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<sup>110</sup> See *infra* note 128 and accompanying text.

stopped trying; just stopped caring. I am scarred forever.

Still another female student said:

I came here with something to prove and at that moment [in first year] I lost all my drive. Talk about a light switch—it went off. It just shook my faith, all my self-esteem.

The women, as opposed to the men participating in this and the previous exchange, attributed their academic difficulties to themselves. As one woman explained:

When we get bad grades, we just think we're stupid. You guys get over it! Men suppress their feelings, so it doesn't take a toll. I used to never cry; last year [as a first-year student] I cried every week. Guys think law school is hard, and we just think we're stupid.

In response to a series of mental health inquiries, we found that although men and women report no differences with respect to involvement in fights or the use of alcohol or drugs, women are significantly more likely to report eating disorders, sleeping difficulties, crying, and symptoms of depression or anxiety. Whereas 68% of the men reported that they never cried during law school (compared to 15% of the women), 35% of the women reported that they cried at least once a month (compared to only 4% of the men). Women were five times more likely to seek professional help for law-school concerns, with rates of 15.5% for the women, compared to 3.6% for the men.<sup>111</sup>

Other women seek support from each other. Several women described a pact they had made during their first year to follow up on the comments of any woman who spoke in order to minimize their experience of isolation.<sup>112</sup> For them, supporting other

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<sup>111</sup>  $p < .001$  for all items.

<sup>112</sup> The pacts were described in two different focus groups in 1992; one consisted exclusively of first-year students and the other of third-year students. The first-year focus group was surprised to learn that their third-year peers had made the same pact.

A similar experience occurred at the University of Michigan Law School, where a group of first-year women organized Take Back the Class, an effort to encourage women to speak up because "the women in our classes have not been very vocal this semester." Memorandum from Take Back the Class, University of Michigan Law School 1 (1992) (on file with authors). The group met 20 minutes before two of their classes to exchange ideas and give encouragement to each other to participate. In class, the women prefaced their statements with "As X stated, . . ." as a means of reinforcing a female speaker and validating her remarks. See also Weiss & Melling, *supra* note 32, at 1311, 1335, 1343 (describing a similar pact at Yale Law School).

women became a crucial precondition to the learning process, indicating how far they had to go even to begin to learn in this environment. This informal attempt at support and solidarity may have helped to combat some of the alienation that these women felt, but it was a temporary solution that addressed a symptom and not the cause of their alienation.<sup>113</sup>

Furthermore, we are inclined to see this "gendered effect" as implicating the institutional design of the law school experience, rather than personal qualities of individual female or male students. The pedagogical structure of the first year—large classes, often constrained by limits on student participation, fierce competition, a mandatory grading curve, and few women faculty—produces alienation and a gender-stratified hierarchy.<sup>114</sup> Indeed, some

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<sup>113</sup> See, e.g., Jacobs, *supra* note 37, at 468 (noting that women's patterns of association, though beneficial in terms of providing comfort and encouragement, remove women from vital parts of law school culture); cf. EXECUTIVE SUMMARY, *supra* note 13, at 5-6 (finding that a higher percentage of female students than male students report a loss of self-confidence since entering law school and attributing this decline in self-esteem to "something in the law school experience," which values "male" characteristics); Robert A. Josephs et al., *Gender and Self-Esteem*, 63 J. PERSONALITY & SOC. PSYCHOL. 391, 391 (1992) (discussing self-esteem difference between men and women and noting that men's self-esteem "can be linked to a[n] individuation process in which one's personal distinguishing achievements are emphasized" while women's self-esteem "can be linked to a process in which connections and attachments to important others are emphasized").

<sup>114</sup> Third-Year Woman:

I really resent being an instrument for many, and I think it is true for many, not all of the professors, for a professor's lecture. I really resent feeling like after I am laying out all of this money and putting myself under a pretty unpleasant process, that on top of this, I should be forced to participate. . . . I took this Critical Perspective class and I couldn't shut up. It was interesting and something was going on that was interesting. We are all teaching it ourselves. I had been worried until I took this class that maybe I had lost my ability to like think and participate in class the first year. It's not that, I just don't find most of the classroom experiences here to be particularly valuable.

Third-Year Woman:

[J]ust look at the way many professors here conduct their classes. They call on men predominantly. I sat in classes and had not heard a single female voice and we sort of, one year we did a study of that, an informal thing amongst ourselves. . . . I think if you look at the people in our class who have formed relationships with professors, they are very much the same men who all of us despise in class. The ones who feel they can monopolize the class time, the ones who rush up after class and make sure that other people can't ask the professor a question because they have something very long to say.

variation of the Socratic method is almost universally used<sup>115</sup> in first-year courses at Penn, thereby exposing all students to the Law School's model of how lawyers "are."<sup>116</sup> Many women report, however, that when speaking feels like a "performance," they respond with silence rather than participation, especially when the Socratic method is employed to intimidate or to establish a hierarchy within large classes. This pressure to speak is especially problematic for students who perceive that they are expected to "perform" as spokespersons for their racial or gender group.<sup>117</sup>

Several women who described Socratic-style questioning as intimidating stated matter-of-factly that they could not learn in an intimidating environment. One admitted that she even had a principle of law named after her, which she was called upon weekly

<sup>115</sup> To say that the Socratic method is used universally is not to suggest that it is used uniformly. There are certainly as many different approaches to the use of the Socratic method as there are law teachers. At Penn, however, all of the first-year courses (Contracts, Property, Torts, Criminal Law, Civil Procedure, Constitutional Law, and Labor Law), with the exception of the spring elective, are taught in the large classroom, Socratic style. After the first year of coursework at the Law School, professors employ the Socratic method much less frequently, or at least use Socratic questioning to initiate a dialogue rather than to dominate or intimidate.

<sup>116</sup> This model lawyer displays all of the characteristics Gilligan and others attributed to male patterns of reasoning. See GILLIGAN, *supra* note 44, at 31-38. He is a lawyer who uses rights-based reasoning to analyze legal problems in terms of competing, mutually exclusive claims. He can argue all sides of any issue, because he has no personal stake in any of his arguments. In form, the model lawyer also demonstrates characteristics traditionally associated with maleness: aggression, willingness to fight, emotional detachment, and exaggerated bravado. Women who learn that lawyering equals maleness may be stifled in their ability to form a whole, integrated professional identity. See PETER WOODS, *SOCIOLOGY AND THE SCHOOL: AN INTERACTIONIST VIEWPOINT 2* (1983) ("Individuals can only develop complete selves to the degree that they are able to assume the attitude of the social group, of which they are members, towards the group's activities."). Although female students can mimic maleness, they can never attain it. For all practical purposes, many women students are faced with the choice of trading their identities as women for identities as lawyers. See Guinier, *supra* note 16, at 93-94 (discussing how the author's law school professor continually referred to the class as "gentlemen," which "symbolically stripped[ed the author] of [her] race, . . . gender, and . . . voice").

<sup>117</sup> See *infra* note 170 (discussing the feelings of students of color when asked to "testify" with respect to issues of race). Some students noted that when a professor used the word "nigger" in a hypo during a first-year class, none of the African-American students spoke up. These African-American students were silent even as white students copied the professor's language in responses modifying the hypo. Several African-American and Asian-American students reported getting physically "hot" but remained quiet because of the burden of being a group spokesperson. Cf. Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 6-9 (1989) (describing the silencing effect of testifying as a racial partisan).

to restate. In the large classroom atmosphere, she would repeat the principle by rote without ever truly comprehending its significance. Two years later, she reported that at the time she did not understand the principle, nor could she now explain to her listeners what it meant. A few men also reported discomfort with the Socratic style, although they seemed less permanently disabled by it.<sup>118</sup>

The hierarchy within the large first-year Socratic class also includes a hierarchy of perspectives. Those who most identify with the institution, its faculty, its texts, and its individualistic perspectives experience little dissonance in the first year.<sup>119</sup> On the other hand are students who import an ambivalent identification with the institution, who resist competitive, adversarial relationships, who do not see themselves in the faculty, who vacillate on the emotionally detached, "objective" perspectives inscribed as "law," and who identify with the lives of persons who suffer from existing political arrangements. These students experience much dissonance.<sup>120</sup>

<sup>118</sup> See *supra* exchange preceding note 111; cf. *infra* note 125 (describing law school survival as learning to "play the game"). This seems to reflect findings that women, more than men, tend to internalize defeat or interpret it as personal failure. See *supra* text accompanying notes 110-11.

<sup>119</sup> See *infra* notes 135-42 and accompanying text (finding that the mandatory grading curve and other pedagogical "features" of the first year translate "demographic" credentials into deeply raced and gendered definitions of merit); see also Josephs et al., *supra* note 113, at 391 (finding that women are more likely to have a "collectivist, ensembled, or connected schema for the self" whereas men are more likely to have "an individualist, independent, or autonomous schema"). For some women, then, other people are part of the self; for many men, other people are distinct. If self-esteem "derives from succeeding at what is valued in a given socio-cultural niche," then positive self-evaluations for many men involve a sense of "being independent, autonomous, separate, and better than others." *Id.* at 392. For many women, "feeling good about one's self . . . [derives from] being sensitive to, attuned to, connected to, and generally interdependent with others." *Id.*

<sup>120</sup> Third-Year White Woman:

I think that maybe in view of the whole Rodney King thing that we need to keep in mind that it's not just issues of race and it's not just issues of gender. Issues of class, really, you never discuss them. You never discuss them, unless it's a course devoted to speaking about welfare or the underclass, you never talk about the difference in perspective, not in criminal law and not in constitutional law, unless somebody brings it up and it is so unlikely because we are all reduced to that white-male and middle-class perspective.

Her concerns were echoed by a First-Year Hispanic Woman:

Likewise, I think that there is a lot of discrediting on the side of the white students. I don't know, maybe it's a paranoia, or [I] wonder how people are perceiving me. I guess the sense that, perhaps, people won't listen to me as much as if I was a white person saying it. I think when they listen to me, they say "of course she is going to say that because she is speaking for her



A disproportionate number of women of all racial and ethnic groups also experience alienation in that they enter law school with a zeal for public interest work, but end having opted for corporate or other private sector employment. Our data suggest that there is an academic cost, and perhaps a mental health cost, to discarding passions, politics, emotions, and community-based identities that were once central to the student's identity.<sup>121</sup> In their narratives, for example, women indicate that law school is a moment in adult socialization in which their political and professional identities become "zippered"—with legal perspectives internalized as neutral professionalism. Many express deep feelings of alienation from their backgrounds, passions, and communities.<sup>122</sup> The disjunction

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own self-interest" and as a result, I don't feel our feelings are ticking as individuals.

Two First-Year Black Women voiced similar views:

I think that still most people do not understand why African-Americans are still struggling or why they are struggling. To me it's incredible because it's like blindness and I listen to some of the comments in class and I realize that I am coming from an entirely different world in that perspective than most people, just because I'm more aware of history and the law and things like that, as it relates to black people.

I think that part of it has to do with the fact that [the] perception of white students is that they are going to be lawyers. They can be whatever kind of lawyers they want to be. They don't have to represent all black people as mentioned earlier. Some of us have changed our career paths because it is necessary to help people in our community as opposed to being able to go out there and just do whatever it is for you and I think that perception is somewhat different from the whole administration's idea. I don't know, it seems to gear you towards what you kind of need to do and make you feel like no one else is going to do it so you need to. It is sort of like a heavier burden on us, as black students, that we have to consider the community as well as ourselves and we can't just have a free and easy life as a law student.

<sup>121</sup> Although higher levels of psychological distress in women law students compared to men law students may simply reflect general population differences by gender, studies of medical students do not find comparable gender-based levels of distress. See, e.g., Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65, 71-72 (1985) (citing epidemiological findings). Shanfield, a professor of psychiatry, and Benjamin, a clinical psychologist, conclude from a comparison between their own survey of medical students and their investigation of law student distress at the University of Arizona that the high levels of distress they observed in women law students "are not an inevitable part of professional training." *Id.* at 72.

<sup>122</sup> Laced throughout the interviews with both white women and, to a greater degree, women of color, we hear the desire to reinsert culture, race, politics, and "emotions" back into legal interpretations. Many students explain that the law is structured in ways that value only individuals, not communities:

between some women's concerns for community and the Law School's emphasis on individualism creates a dissonance for these students that results, at best, in a bicultural consciousness.<sup>123</sup>

With remarkable consistency, students indicate that law school taught them to be "less emotional," "more objective," and to "put away . . . passions."<sup>124</sup> For some, this ability to suppress feelings

First-Year Black Woman:

I changed since I wanted to come here to get into the corporate law stream. After I have seen the injustices, I have decided to change my career goals. My people need representation. . . . I want to help those people who have helped me to get to where I am.

These students want to be able to move from the perspective of the elite to that of the victim, to pivot their vantage and interpretations in ways that might disrupt precedent, rather than merely accept the "logic" of what has "neutrally" been decided before.

Third-Year White Woman:

I feel that [compassion] is something that is eradicated in law school. This notion that we can present things as though, like the law, it's a self-contained unit, it's a sphere that we can look down upon as though we were astronauts that can look down on the earth. The whole idea that these things are neutral and that a neutral outcome results just eliminates any notion of compassion because professors sort of play on that, "Oh, you feel sorry for these people. Oh, well that's too bad. Oh, well the law says, X." We are really taught that compassion is a bad thing.

Third-Year White Woman (responding to above comment):

I think that what you just said is so accurate, this notion that there is a neutral presentation of the law and that any concerns that may affect the real world are therefore not neutral. As though not mentioning these concerns is neutral as opposed to a political choice.

<sup>123</sup> Indeed, some argue that women in law school learn to be actively *bicultural*, displaying attitudes, preferences, and behaviors that typify men, but retaining attitudes, preferences, and behaviors of feminist resistance. See Matsuda, *supra* note 47, at 8 (referring to a woman of color's "bifurcated thinking"); see also Shauna Van Praagh, *Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education*, 2 COLUM. J. GENDER & L. 111, 141 (1992) (describing the same phenomenon as "bilingualism"). At worst, those who float between two intellectual/political cultures—progressive feminism and corporate maleness—with little institutional support for the former and much for the latter, become confused and disappointed. See EXECUTIVE SUMMARY, *supra* note 13, at 5 (in a study of nine Ohio law schools, only 16.6% of males, but 41% of females agreed with the statement, "Before law school I thought of myself as intelligent and articulate but I don't feel that way about myself now."); see also Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413, 420-26 (arguing that conservatism emphasizes individualism as opposed to community).

<sup>124</sup> Second-Year Woman:

Although I think that I've become much more objective, and I'm not, I guess I'm less likely to let my emotions dictate especially just, I guess in all situations how um, how, how I think, what the end result of something

considered an enormous accomplishment; for others, it is considered a defeat.<sup>125</sup> Second only to the skills of "objectivity," students report that over time they have learned to stop caring about others<sup>126</sup> and have become more conservative.<sup>127</sup> Some men

should be. Whether that's good or not, I don't know. I'm definitely a different person from when I entered law school. I find that um, um, I'm worried more with trying to be tough. Like, to be, I'm more willing to be rude, to cut people off in conversations.

Third-Year Woman:

Um, I guess the other thing was before I came to law school I think I was more concerned about, um, other people's opinions, not only about me, but also about understanding the positions of other people, and you know, really trying to put myself in other people[s] shoes. But as I've been here I, I found that nobody else really is willing to do that and I think that I tend to dismiss other people's opinions now more than I would in the past because I just think that sometimes your opinions are just irreconcilable, and that, there are just so many people that I've met here who I don't even want to bother to think the way that they think.

Cf. C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education*, 26 MICH. J.L. REFORM 69, 77 (1992) (describing legal education as training students to ask rude questions, and noting that, although most people ask questions to get information, lawyers are trained not to ask questions unless they already know the answers).

<sup>125</sup> Although one man indicates that the point of law school is to "play the game," another worries that the press for objectivity in his three years of law school has forced him to remove his mind from his Latino body and emotions:

[T]he one thing bad about the way I argue now is that I think it's a little bit less passionately. I've been taught [here] that emotion in an argument is a minus and in my culture emotion in an argument is a plus. And here whenever you present an emotional side of an argument, which I think is just as valid as many other arguments, you know about the abortion issue. You know, how a woman feels about having to have a baby and I mean why isn't that any more legitimate than endless arguments about the constitutional right to privacy. I don't think one really should take precedence over the other. And I think it's instilled in you that if you make an emotional argument then it's wrong.

<sup>126</sup> Third-Year Woman:

I changed so much. I used to be a much more compassionate person, much more tolerant of different choices, in terms of lifestyle, in terms of personality. I just feel like law school has put huge blinders on my eyes.

Third-Year Woman:

I came in here a very bright person, we all came in here very bright people, but what I lost while I was here, I lost the ability and the interest to really think about things, to think critically, to explore all of the avenues that were around.

<sup>127</sup> Third-Year Woman:

Law school has made me more conservative. I feel more ambivalent now

indicate they have grown more aggressive and abrasive over their three years in law school; some women see themselves as more "humble" and "nitpicking." One woman concluded her interview by saying, "Here [at the Law School], it's okay to be intolerant."

The competitive, hierarchical format of the Law School's dominant pedagogy is also used by peers to put down some women. Many women who complained that their voices are pushed back and down, suffocated early on by hostile first-year classrooms, described how those women who spoke out felt humiliated by male, and some female, contemporaries who silenced those who publicly dared to "act like gentlemen." Ideas about women's sexuality, for example, became a basis for ridiculing individual women, especially those who spoke out in class.<sup>128</sup> These putdowns may occur in informal

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about what constitutes sexism. I am more willing to tolerate sexist comments or to assume they are jokes rather than offenses.

<sup>128</sup> One woman student reported hearing negative comments about her frequent class participation while in a stall in the women's bathroom. Although married, she was decried as a "man-hating lesbian." She reports that she almost dropped out of law school that day. Another woman reported that she was called a "feminazi dyke" for her frequent comments in first-year classes. This student, who is Jewish, immediately stopped speaking in all her first-year classes. Still another woman said she felt "like wherever I went [the hissing] would follow me. It really shut me up."

These comments may simply reflect a general hostility towards those who speak regularly in class. In private conversations with Professor Guinier, students described a game of "asshole bingo" in which the object is to identify those "assholes" who talk in class. Students playing the game agree in advance of class upon a code word, a word that they can incorporate into an oral question or answer to a professor's inquiry that indicates to fellow students when they "score." Scoring requires predicting a pattern, like a tic-tac-toe board, of who will speak in class. Female and male students who talk in class are the "assholes" on the "bingo board."

The students report that male "assholes," however, are referred to as "nerds"; women "assholes" are referred to as "man-hating lesbians." The difference suggests a gendered nature to the opprobrium. By participating in class, these women become legitimate targets for their colleagues' resentment and fear. Cf. SCHWARTZ, *supra* note 16, at 89 (describing a situation in which a female Wall Street lawyer's success was attributed to her use of sexuality to gain an unfair advantage, leading her father to explain that: "They're afraid of you. In business, if a man beats you in your own field, he's an SOB. If a woman does it, she's a whore.").

Admittedly, "asshole bingo" may manifest more anti-intellectual camaraderie than antiwoman bias. Our claim is simply that women "assholes" are disparaged on the basis of sexuality, negative views toward certain sexual orientations, and assumptions about assertive women's attitudes toward men. This same phenomenon occurs when students speculate about how some female professors obtained their jobs. Successful women are apparently more threatening than successful men, at least to the two first-year men in our focus groups who mentioned their suspicions regarding female professors' qualifications. Cf. JEAN O. HUGHES & BERNICE R. SANDLER, ASSOCIATION OF AMERICAN COLLEGES' PROJECT ON THE STATUS AND EDUCATION OF WOMEN PEER

networks that exist outside the classroom, but they are normalized by and may reproduce behavior that is performed within the classroom.

**Female Student:**

Women's sexuality becomes the focus for keeping us in our place. If someone was rumored to be a woman who speaks too much, she was a lesbian.<sup>129</sup> That is, women don't speak partially because our sexuality becomes implicated as soon as we act "too much like men" for their liking. . . . Now, I'm in a room with 120 frat boys, a mass of faces that say nothing when you speak. No feedback from professors. No one cares what you did, and who you were, people hiss, laugh and there is rarely an interruption of that from other students or professors. We need to change class size and how classes are taught so that men and women can speak publicly, and not self-consciously, in front of others . . . .

**Another Female Student:**

After I discovered I was being called a feminazi dyke, I never spoke in class again.

The classroom pecking order is observed outside the formal classroom setting. Women indicate that "student organizations and activities" are significantly more important to them, relative to men. They report that they spend more time with law students who are female, and they are more likely to study with peers. Nevertheless, although women appear to participate in social groups and student groups more than men, women are not perceived as holding leadership positions at equivalent rates.<sup>130</sup> The data suggest that a

HARASSMENT: HASSLES FOR WOMEN ON CAMPUS 6 (1988) (finding that male students often call women "lesbians" as a way of intimidating or silencing them); *see also infra* text preceding note 224 (observing that "asshole" is a neutral slur and "man-hating lesbian" a personal identity slur; the former targets behavior whereas the latter imputes membership in a despised, invisible minority group). Calling a woman a "feminazi dyke" or "man-hating lesbian" tars the individual personally, and permanently, as holding unpopular beliefs or exhibiting personal qualities, either of which marginalizes the individual in the particular culture of the law school.

<sup>129</sup> "My experience has been different . . . . I came from graduate school, and I have done well here. But in my section [because I spoke out in class] I was the man-hating lesbian." *See also supra* note 128 (describing experience of several other women labeled as lesbians for speaking out in class). In his narrative response to the Bartow Survey, a third-year male noticed this tendency among his male colleagues:

Whenever men at the Law School open their mouths, something horrendous about women seems to come out. There are so many such incidents that to try and list them would be futile. Disparaging remarks about women's bodies, menstrual cycles, sexual orientation, etc. are the rule.

<sup>130</sup>  $p < .001$  for all items. In the 1990 Bartow Survey, respondents were asked: "In

plurality of students see an equal distribution of leadership positions but more than one-third of women students perceive men as holding a disproportionate share of those leadership positions.

Many men attempt to "explain away" the gender and institutional aspects of the data. These men, who include students and faculty, often resort to alternative explanations, all of which identify a source unrelated to the Law School for the differences we found.<sup>131</sup> For example, they proffered age, undergraduate major, and even participation in varsity sports in college as possible explanations for the differential between women's and men's performances as measured by grades in law school. We found no

your opinion, do students of one sex hold leadership positions in student organizations in proportionally greater numbers than students of the other sex?"

TABLE XIII

## PERCEPTION OF GENDER DOMINATION OF STUDENT LEADERSHIP POSITIONS

(percentage of group)

|                       | 1L<br>Women | 1L<br>Men | 3L<br>Women | 3L<br>Men |
|-----------------------|-------------|-----------|-------------|-----------|
| More Male Leaders     | 33          | 24        | 38          | 15        |
| Equal Male and Female | 33          | 31        | 40          | 45        |
| More Female Leaders   | 0           | 4         | 4           | 7         |

Examples of "student organizations" provided in the survey were "Council of Student Representatives, Environmental Law Society, Asian and Pacific American Law Students Association, etc." Thus, these results do not reflect the male dominance only of the law journals and moot court. See *supra* Table VI; *supra* notes 78, 81-83 and accompanying text. Although the 1994-1995 academic year falls outside the scope of our research, we note that all three student of color organizations are headed by women this year.

<sup>131</sup> This phenomenon was particularly acute among male faculty members. When Professor Guinier presented this information to an ad hoc faculty session attended by about 50% of the full-time faculty, including four women professors, with two exceptions the male faculty attempted to attribute the data to experiences before law school (for example, men may participate in varsity sports in college which divert their attention, but when they get to law school they then channel *all* their energies into their studies), to the failure of women to behave like "good lawyers" (for example, defining a good lawyer as a change agent and then blaming the female law students who fail to change their sexist male peers), or to speculations about the anticipated effect of post-law-school experience either in law firm jobs or in the way that women learn the "market forces" that change their career expectations when they discover the dearth of public interest jobs. There is some support in the literature for this last hypothesis. See *supra* note 104.

statistically significant difference between women and men in these categories. Women and men at Penn Law School are roughly the same age and have majored in similar fields as undergraduates.<sup>132</sup> The point, however, is not whether these alternative explanations are worth pursuing.<sup>133</sup> The point is that many men immediately gravitate toward hypotheses that locate the problem outside of gender and outside of the Law School.<sup>134</sup> The men who spoke to

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TABLE XIV  
UNDERGRADUATE MAJORS OF INCOMING LAW STUDENTS  
CLASSES OF 1990, 1991, AND 1992

(percentage of group)

|       | Natural<br>Sci. | Econ. | Eng'g | Social<br>Sci. | Arts<br>&<br>Hum. | Fin./<br>Acct. | Other |
|-------|-----------------|-------|-------|----------------|-------------------|----------------|-------|
| Men   | 3               | 15    | 3     | 41             | 18                | 10             | 10    |
| Women | 5               | 10    | 2     | 43             | 24                | 10             | 6     |

<sup>133</sup> We did not explore the gender differential for undergraduate participation in varsity sports; we do note evidence of similar concerns that gendered rates of participation in varsity sports might inhibit women from breaking the glass ceiling in academia. See Molly O'Neill, *In an Ivy League of Her Own*, N.Y. TIMES, Oct. 20, 1994, at C1, C4 (quoting Donna Shalala, Secretary of Health and Human Services, arguing that the reason only four of 45 top universities have female presidents boils down to intercollegiate athletics and "the lingering question: Can she manage the football coach?").

<sup>134</sup> We found this response consistent with other studies on the causes of performance gaps among minorities. For example, in Uri Treisman's work on the performance of African-American and Latino students in calculus classes at the University of California at Berkeley, he and his colleagues assumed that a variety of factors not related to the school itself created the problem. See Uri Treisman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23 C. MATHEMATICS J. 362, 364-65 (1992). He conducted a survey of his fellow mathematics professors across the country and found that they shared his assumptions about these students' poor performance, namely: low income, low motivation, poor academic preparation, and lack of family support. See *id.* at 365. When Treisman began researching the study habits and backgrounds of his students in an attempt to design an appropriate tutoring program, he found all four of those assumptions to be incorrect. See *id.* Thus, Treisman discovered that the faculty most concerned with minority student performance had very little understanding of why these students did not do well, and their incorrect assumptions tended to place the causes of failure outside of the institution. See *id.* at 364-65.

Some Law School faculty were ultimately willing to concede that there is a gendered story to tell. But then some of them were not so alarmed. The point of law school, they would contend, is to produce, shape, and promote a particular type of legal thinker who is competitive, adversarial, and ruthless. [S]he privileges logic over emotion and neutrality over commitments; [s]he supports individual rights over

us are reluctant to see gender as explanatory, as shown in the following statements:

Male Student:

I think that the women are saying it is a problem because they are straight from undergraduate school. I came to school when I was experienced, had a family, and school wasn't all that I was living for. Probably you should check for an age or experience comparison.<sup>135</sup>

Male Professor:

Men students probably come from the "hard sciences" which better prepare them for the rigors of law school.<sup>136</sup>

We explored these intuitions and found that, when controlled for incoming demographics, gender alone predicted third-year law school class rank.<sup>137</sup>

Many men (and some women) are simply uncomfortable with the attention paid to gender,<sup>138</sup> as is evident in the responses to

community interests.

To these faculty members who are not troubled by our data, it confirms *who* is likely to be the best and the brightest, who is the most able "product" for law firms—which are, of course, the law school's "client."

<sup>135</sup> The results of our age and experience comparison show that there was no significant gender difference for ages or years between undergraduate and law school. *But cf.* Banks, *supra* note 32, at 141 (finding class participation differences among differently aged women).

<sup>136</sup> Several male colleagues, upon hearing of these gender differences, also sought to explain them in "power neutral" terms, such as differences in undergraduate majors. One male colleague suggested that the equivalence of undergraduate GPAs "might be deceptive." We explored this hypothesis and found no statistically significant gender differences in undergraduate majors, at least when using blunt measures such as social or natural sciences to aggregate more specialized areas of study. *See supra* note 132.

<sup>137</sup> *See supra* text accompanying note 132. In addition, the women's slightly higher undergraduate GPA suggests that the Law School gendered academic performance differential is not merely derivative of a previously documented differential. *See supra* note 4. Indeed, studies of college women find that they exceed their male counterparts in terms of grades. *See, e.g.,* Helen M. Berg & Marianne A. Ferber, *Men and Women Graduate Students: Who Succeeds and Why?*, 54 J. HIGHER EDUC. 629, 632 (1983) ("[T]hese factors may be expected to influence the careers of these able women who, in terms of grades, had been better students than their male colleagues up to the time they began graduate work.").

<sup>138</sup> This is not surprising if these men construe gender variables as a source of individualizing "blame" for the performance differentials we found. Our hypothesis, however, is that the problem is not individual men or women but a hierarchical, ruthlessly competitive, and aloof institutional design. *Cf.* Granfield, *supra* note 32, at 20 ("[M]any women support the dominant discourse within law schools."); *infra* note 149 and accompanying text.



the 1990 open-ended survey question.

TABLE XV<sup>139</sup>  
DISTRIBUTION OF NARRATIVE RESPONSES

|   | 1L<br>Women | 2L<br>Women | 3L<br>Women | 1L<br>Men | 2L<br>Men | 3L<br>Men |
|---|-------------|-------------|-------------|-----------|-----------|-----------|
| Survey Biased                                 | 0           | 1           | 0           | 2         | 2         | 0         |
| Gender Tensions                               | 18          | 19          | 5           | 4         | 5         | 3         |
| No Bias Here                                  | 0           | 0           | 0           | 1         | 2         | 0         |
| Women are<br>Paranoid                         | 2           | 0           | 1           | 7         | 4         | 6         |
| Reverse<br>Discrimination<br>by Women Faculty | 0           | 0           | 0           | 2         | 3         | 6         |
| Sensitive Profs<br>& Peers                    | 1           | 0           | 4           | 2         | 1         | 0         |
| Other   | 0           | 0           | 1           | 2         | 0         | 0         |
| Total Responses                               | 21          | 20          | 11          | 20        | 17        | 15        |

As with the academic performance data, the survey narratives reveal a distinct gender effect that continues through each year of law school. First-, second-, and third-year men, in their responses

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<sup>139</sup> A thematic analysis of the narratives enabled us to code the responses to the following open-ended narrative question:

Please use this space to describe any acts or comments made by a professor or fellow student you have witnessed or experienced at the law school that made you uncomfortable for gender-based reasons. Please be as specific as you can, but do not feel compelled to identify anyone by name. As with the rest of the survey your response will be kept confidential.

Seven codes were generated to label and categorize each response. The codes included:

- Survey was biased so as to uncover gender tensions
- Gender tensions exist at the Law School among/between students and faculty
- I haven't noticed any bias
- No answer/not applicable
- Women students are too sensitive/paranoid
- There is evidence of reverse discrimination against men/white men
- Professors and peers are sensitive to gender issues

to our open-ended questions, describe women students as "paranoid," "overly sensitive," and "intimidat[ed by] conversation."

Men of all classes frequently criticized the survey methods,<sup>140</sup> feminist students,<sup>141</sup> and women faculty, and even reported reverse discrimination.<sup>142</sup> As one young man graphically stated his position:

There have been many instances of women professors alienating male law students by showing clear favoritism to women law students. Many would argue that this treatment is necessary to *bend*

<sup>140</sup> An illustrative response given by a few men, but no women, was:

I think this survey is the most gender biased thing I have seen here at law school.

<sup>141</sup> First-Year Male Student:

I feel that some female students at this Law School have a specific agenda with regard to feminist issues. As a result, every action by a professor seems to be closely scrutinized and skewed to relate to this agenda. Any classroom conversation even remotely related to a gender issue becomes a debate point, and the entire subject being discussed is interrupted so as to raise this agenda, which is only important to a small percentage of the class.

One-third of first-year men responding to the open-ended survey question gave responses similar to this one.

<sup>142</sup> Almost half of the third-year men who responded, but only one of the third-year women, used the open-ended narrative space to voice a concern similar to this one:

One female professor seemed to favor women and seemed to have specific bias against men in the class. This was not only a suspicion, but was obvious to both me and women in the class.

Three separate women faculty were identified by name as practicing "reverse discrimination" and were held responsible for the "intimidating environment" created by women who are concerned with feminist issues.

We do not mean to discount these observations of the students. Their perceptions are an important ingredient in the school's environment. Their claims, however, whatever their basis, apparently do not affect their academic performance levels or alienation in the aggregate. Even if women faculty practice "reverse discrimination," neither women's nor men's academic performance apparently suffers.

In addition, the research of scholars like Catherine Krupnick offers an alternative explanation to the "reverse discrimination" that men perceive. Her studies indicate that when women participate in proportion to their numbers in a class, both women and men perceive them to be "over-participating." Telephone Interview with Catherine G. Krupnick, *supra* note 86. *But see also infra* note 160 (discussing Krupnick's findings regarding undergraduates at Harvard College). Thus, because they are expected to participate less, women may appear to be dominating a classroom when they are merely participating as much as their male peers. On the other hand, some female students do criticize female faculty. One first-year woman perceived bias toward men among female faculty, one of whom was "flirting with male law students in the first row by making physical contact." A second-year woman found a female professor annoying both men and women "with her feministic pronouns."

*the stick to the center* based on perceived sexism in the schools, whether institutional or otherwise.

In contrast, women students were more likely to use the open-ended space to express concerns with sexist language and assumptions of professors and peers, especially peers.<sup>143</sup> Several women, but only one man, worried about the trivialization of women as victims.<sup>144</sup> Women, but no men, reported that they felt ignored or opposed by faculty<sup>145</sup> and peers in class. Further, several women, but again no men, reported moderate to severe forms of harassment from male students.<sup>146</sup> These women were distressed that many of their peers claimed that discrimination is a "thing of the past."<sup>147</sup>

<sup>143</sup> All but two of 21 second-year women who responded to the open-ended question commented on gender tensions in some version of the following:

In general in the classroom, some men tend to be somewhat condescending and didactic when they volunteer answers.

Another woman noted:

I think that the comments that women make in class are not always taken seriously before the point is even made because people make the assumption that the women may be taking the liberal, "sensitive" position—and these positions are not always given the credit and attention that they deserve.

Many agreed that "[m]ostly fellow students are the problem." One second-year woman quoted a first-year man who admitted he tunes out "whenever a female speaks in class because she probably won't have anything worthwhile to say, especially if she's good looking."

<sup>144</sup> The first-year man stated in his narrative response to the Bartow Survey:

I was shocked and amazed at the level of discussion concerning rape in our Criminal Law class. . . . To be one of the few individuals who felt the issue was being trivialized was surprising.

This concern was echoed in group interviews. One-third of the women in our focus groups reported comments such as the following: "In our first-year crim course everything was a rape hypo." "Discussions about rape are offensive." No men in the focus groups initiated discussion of similar concerns. Several women remarked that the treatment of rape in the first-year Criminal Law class focused solely on the perspective of the rapist rather than that of the victim. Others were concerned that professors did not seem to acknowledge, in their treatment of the subject, the possibility that some students in the class had been raped or sexually assaulted. None of the three professors who taught first-year Criminal Law at Penn between 1990 and 1992 was a woman.

<sup>145</sup> "[One professor] has a 'me against the class' game going on over gender issues. He defends sexist statutes and then belittles the class for disagreeing with him."

<sup>146</sup> "A male student slapped a female student on the ass in greeting her." Several men did acknowledge harassment of women by male students. *See supra* notes 129, 144. Even more frequently, men reported sexism or "reverse discrimination" from female faculty and students.

<sup>147</sup> "The men and a lot of women in my section generally have no idea that women

First-year women students report the most discomfort. They describe gender tensions, hostilities, and male faculty and/or students "not taking women very seriously." Nevertheless, although a full 78% of first-year women report sexist incidents in their comments section, only 41% of third-year women do the same. By year three, another 33% of women students consider professors and peers at the Law School "quite sensitive" to issues of gender. As one second-year woman observed, "Not all women are feminists and not all women agree. . . . It is very uncomfortable for me that sex is such a big issue in the classroom and the law school community." A few second- and third-year women students express similar resentment "when other women make a big deal about sex related issues in class." Third-year women report an increased tolerance and decreased awareness of gender bias, while the responses of the men remain stable from their first to third years. By their third year, women are far less concerned with gender tensions and more likely to report that faculty and peers are "sensitive" to issues of gender.<sup>148</sup>

### III. ANALYSIS AND RECOMMENDATIONS

From our data, we conclude that the University of Pennsylvania Law School is a hostile learning environment for a disproportionate number of its female students. Our data document that the women at this law school graduate with weaker academic credentials than do the men. The disparate quality of their accumulated credentials interacts with higher levels of alienation and lower self-esteem for many women, even those who do well academically.

We reiterate, however, two important, limiting caveats to the claim that women at this law school are experiencing legal education in a different and disproportionately adverse way. First, our research does not suggest that every female law student feels alienated, fails to succeed academically, or imports a social justice critique to legal education. Many University of Pennsylvania women do "become gentlemen" at least to the extent that they "aspire to ascend the status hierarchy without necessarily confronting its

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are discriminated against, especially in white collar settings. This isn't specific, I know, but it's uncomfortable."

<sup>148</sup> We acknowledge that these same data could suggest that male law students become more sensitive to gender-related issues over the course of their three years in law school. There is some support for this view. See *supra* Table X (suggesting that men increasingly use gender-neutral language).

normative condition along the way."<sup>149</sup> Our findings, therefore, do not claim to describe the experience of each and every woman attending the University of Pennsylvania Law School. Nor does our research suggest that all men do well or that no men feel alienated.

Second, the problems many women experience at the University of Pennsylvania Law School are not unique to this school.<sup>150</sup> We identify problems at the site of our research, but we do not claim those problems are peculiar to—or completely defined by—this institution, its faculty, or its administration.<sup>151</sup> Indeed, we have been actively encouraged by the administration, and in particular by Dean Diver, to pursue this research. In addition, we do not deny that the sources of responsibility for many gendered differences may be outside of this law school. We recognize that "the Law School" does not exist independent of national norms and long-

<sup>149</sup> GRANFIELD, *supra* note 2, at 108. Granfield's analysis draws from much of the literature about other law schools, although his study is based on his doctoral dissertation about Harvard Law School. Although Granfield acknowledges that "gender may serve as a basis for resistance," he emphasizes the voices of other women who, because of the expansion of opportunities (real or perceived), support the dominant value system of legal education. Granfield distinguishes between "social feminists" and other women. *See id.* at 107-08. We also identify different groups of women at Penn Law. *See supra* note 138 and accompanying text; *infra* text preceding note 223; *infra* notes 223-24 and accompanying text.

<sup>150</sup> *See supra* note 2. The fact that this research has been conducted about (and at) an Ivy League law school may be quite relevant. The coupling of patriarchy and elitism at Ivy League institutions may be quite distinct from other schools with different histories and traditions. The Ivy League traditions may themselves have fostered a particular culture of legal education. *See* Anthony DePalma, *Rare in Ivy League: Women Who Work as Full Professors*, N.Y. TIMES, Jan. 24, 1993, at A1, A23 (explaining that Ivy League schools have changed slowly, refusing to accept female students or show concern for hiring female professors until the late 1960s and early 1970s; and suggesting that women faculty are often driven from Ivy League campuses to more congenial settings, exacerbating the paucity of female faculty, because the stakes are so high and the pressures to perform, publish, and win research grants are so great at Ivy League schools).

<sup>151</sup> For example, Professor Lewis A. Kornhauser of the New York University School of Law conducted his own analysis of N.Y.U.'s selection for the Order of the Coif from 1980 to 1993 and found that women made up on average 45.53% of the classes, yet they only received 35.65% of the awards. In the thirteen years that he studied, there were only three years in which the percentage of women receiving awards came close to their percentages in the class. In most years, women lagged by 5%, and in some by as much as 30%. *See* Letter from Lewis A. Kornhauser, Professor of Law, New York University, to Lani Guinier, Professor of Law, University of Pennsylvania 1, 3 (July 14, 1994) (on file with author). Kornhauser interprets these statistics to mean that the grade distribution for men and women "do[es] not reject the hypotheses of identity of the means or of equality of the distributions. Indeed the percentage of women in the top 10% of the class in each of these years is roughly equal to the percentage of women in the class." *Id.* at 1-2.

standing traditions governing legal education and legal practice. The faculty and administration of this law school strive to conform to their perception of the norms and conventions of peer institutions.<sup>152</sup>

In sum, references to women mean a disproportionate number of women relative to their absolute numbers and to the responses of comparable numbers of men. References to the University of Pennsylvania Law School reflect the fact that this law school is the focus of our study, yet it may not be the sole structural "source" or locus of the problem. With these important limitations, we propose three hypotheses to link and possibly explain our findings. In our view, each of these claims deserves further study as part of a serious reevaluation of the formal and informal organization of law school education.

*A. Alienation and Academic Performance Within the Formal  
Structure of the Institution*

"Becoming gentlemen" appears to exact an academic cost for many women. Women's enfeebled participation within the formal structure of legal education occurs simultaneously with their less successful performance on the anonymously-graded examinations from which law school grades are derived. In other words, low levels of class participation in the formal, structured pedagogy correlate with weak performance on the formal, structured evaluation system.<sup>153</sup>

There is also a psychological dimension to women's relatively

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<sup>152</sup> See, e.g., Memorandum from Colin S. Diver, Dean of the Law School, University of Pennsylvania, to Robert A. Gorman, Associate Dean of the Law School, University of Pennsylvania 1 (Jan. 18, 1993) (on file with author) (describing a "very powerful and uniform allegiance" among American law schools to the prevailing pedagogy and approach to curricular design; recognizing, in view of "the strength and pervasiveness" of prevailing ethos, that change "would take a huge effort for any one law school," especially if it intended to "sustain such an approach over the long haul").

Accordingly, we believe it likely that we have identified problems associated with the structure of legal education, at least as it functions in elite, hierarchical, male dominated institutions. In fact, other studies document similar or related phenomenon at other elite schools. See GRANFIELD, *supra* note 2, at 107 (describing the experience of a significant group of women at Harvard Law School); see also John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 157 (1993) (discussing the MacCrate Report's embracement of a practitioner-oriented concept of legal education); *supra* part I.B (describing research at Harvard, Boalt Hall, Stanford, and Yale Law Schools).

<sup>153</sup> See *supra* note 11 (describing the Socratic method).

weak academic performance. Along with a formal link between classroom participation and examination success, we suspect that there exists a psychological link between self-confidence, alienation, and academic performance. Students who are alienated by the formal classroom methodology, hierarchy, and size are arguably not psychologically prepared to succeed on the formal examinations.<sup>154</sup> Those who doubt themselves or doubt whether they belong in the Law School do not perform as well.<sup>155</sup>

Many students, especially many women, have simply not been socialized to thrive in the type of ritualized combat that comprises much of the legal educational method.<sup>156</sup> The theory of legal

<sup>154</sup> See, e.g., Alice K. Ducker, *Diversity and Learning: Imagining a Pedagogy of Difference*, 19 N.Y.U. REV. L. & SOC. CHANGE 101, 105 (1991-92) (stating that psychological preparation is a necessary part of academic success).

<sup>155</sup> We base this linkage theory on the psychosociological literature that finds that students do best if they have high self-esteem. In other words, where the formal teaching methodology leads to alienation and self-doubt, those self-doubts adversely affect student performance. See Berg & Ferber, *supra* note 137, at 631, 638 (noting a difference in academic self-confidence of men and women); Kanter, *supra* note 16, at 9 (asserting that self-confidence plays a large part in success in the legal profession, and that limited opportunity tends to depress aspirations and self-esteem); see also EXECUTIVE SUMMARY, *supra* note 13, at 5 (finding that 11% fewer women than men feel as competent as other law students); Terence J. Tracey & William E. Sedlacek, *A Comparison of White and Black Student Academic Success Using Noncognitive Variables*, 27 RES. HIGHER EDUC. 333, 344-45 (1987) (claiming that white students' success in college is partially linked to academic ability, whereas black students' collegiate success is linked to positive self-concept, a realistic self-appraisal, a preference for long-range goals, and leadership experience). For our purposes, this study is useful because it indicates that other nonacademic factors may affect the ways in which certain groups of students perform.

<sup>156</sup> In this sense, gendered participation rates in undergraduate varsity sports may be relevant:

[Studies suggest that] women and men think differently about aggression and . . . that these differing beliefs are important mediators of sex differences in aggressive behavior. Women reported more guilt and anxiety as a consequence of aggression, more vigilance about the harm that aggression causes its victims, and more concern about the danger that their aggression might bring to themselves.

ALICE H. EAGLY, *SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL-ROLE INTERPRETATION* 94 (1987). Deborah Tannen has observed that boys, but not girls, may engage in mock fights or arguments to ascertain whether or not other boys want to initiate friendships. This implies that combative styles are more familiar to boys than to girls, and that therefore men might find the aggressive atmosphere of the Socratic classroom more comfortable than women do. See DEBORAH TANNEN, *GENDER AND DISCOURSE* 42-44 (1994).

Some argue that this gendered difference makes women less effective lawyers. See *infra* notes 220-22 and accompanying text; see also Nancy E. Betz, *Implications of the Null Environment Hypothesis for Women's Career Development and for Counseling*

education assumes that learning is induced by self-teaching and that a certain level of stress or anxiety is a necessary precondition to initiate the learning process.<sup>157</sup> But many women claim that neither their initiative nor their problem-solving ability is engaged in an intimidating learning environment.<sup>158</sup> The performance aspect of a large Socratic classroom disables some women from performing up to their potential. Socratic teaching, if designed to intimidate, adds more women to this category. If no comparably significant formal learning experiences, other than large classroom Socratic teaching, are provided, first-year women in particular are most likely to be affected. These phenomena also adversely affect some men. Indeed, elite law schools, such as the University of Pennsylvania, may prepare their top male students "to become law professors but fail to prepare the rest of their students to become practicing lawyers."<sup>159</sup>

From the reactions of their professors and the responses to their performance in all areas of the institution, some female students learn that they cannot thrive within the law school environment. For example, the perception is widespread that within the classroom, white men, more than women of all colors, are encouraged and allowed to speak more often, for longer periods of time, and

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*Psychology*, 17 COUNSELING PSYCHOLOGIST 136, 137, 141-42 (1989) (arguing that women who enter male-dominated professions require greater encouragement, and if neither male nor female students are encouraged, the effect actually discriminates against the women).

<sup>157</sup> See Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 473 (1987); see also H. Russell Cort & Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397, 415-18 (1980) (stating that law students' legal analysis skills are evaluated based on "unarticulated" and "idiosyncratic" models created by individual professors).

<sup>158</sup> Our research confirms that some women do not learn when intimidated. See *supra* notes 114-20 and accompanying text. As a result, they may fail to master the equally important skills of "organization, analysis, writing style, persuasion and synthesis." Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L.J. 723, 725 (1986).

<sup>159</sup> Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1252 (1991) (arguing that "[e]lite law school education contrasts starkly with the reality of practice, and students suffer as a result"). It may be that the theory of legal education, which assumes that stress is necessary to motivate self-learning, is based on empirical studies done with primarily male subjects. Or, alternatively, the level of stress in a large Socratic classroom may be calibrated correctly for students whose goal it is to be litigators or law professors, but not for law students in the aggregate. For many in the latter group, a disproportionate number of whom are women, the level of stress may be so high as to create a dysfunctional learning environment.



with greater positive feedback from the professor and peers.<sup>160</sup> When women fail to receive the same level of positive response from faculty, many experience a blow to their self-esteem. Our data suggest that some women internalize the absence of positive feedback, even when the professor's aloofness reaches across gender lines.<sup>161</sup> As a result, some women come to believe that they have

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<sup>160</sup> See *supra* notes 112-17 and accompanying text. Other studies have also documented this phenomenon. See Catherine G. Krupnick, *Women and Men in the Classroom: Inequality and Its Remedies*, ON TEACHING & LEARNING: J. HARV. DANFORTH CENTER, May 1985, at 18, 18-19, 22 (finding that males dominate classroom discussion at Harvard College); Sarah H. Sternglanz & Shirley Lyberger-Ficek, *Sex Differences in Student-Teacher Interactions in the College Classroom*, 3 SEX ROLES 345, 349 (1977) (observing that college male students dominate classroom interactions whether they are in the minority or majority); Weiss & Melling, *supra* note 32, at 1364-69 (presenting tables of male/female participation ratios in law school classes); Elizabeth Mertz, Research Fellow, American Bar Foundation, in Philadelphia, Pa. (May 30, 1992) (describing research by anthropological linguists who measured the number of times and the length of time students spoke in law school contracts classes, and noting that preliminary findings suggest men speak not only more often, but also for longer periods). Other studies document this same phenomenon of differential participation and feedback for girls and boys beginning in elementary school and continuing through secondary school. See, e.g., MYRA & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* 1, 42-44, 269 (1994) (cataloguing subtle ways that girls, who outperform boys based on grades in elementary and secondary school, are silenced in the classroom). In the Sadkers' study, trained raters observed more than one hundred classrooms of fourth, sixth, and eighth graders in four Eastern states and the District of Columbia and also collected additional data at the college level. See *id.* at x. Their observations and data reveal that teachers respond to boys more than girls and that white males receive the most teacher attention. See *id.* at 50.

<sup>161</sup> See Bernice R. Sandler, *The Classroom Climate: Still a Chilly One for Women*, in EDUCATING MEN AND WOMEN TOGETHER: COEDUCATION IN A CHANGING WORLD 113 (Carol Lasser ed., 1987) (concluding that the devaluation of "female" characteristics and values results in subtle and sometimes inadvertent differential behavior by professors that "chills" women's participation, interferes with their education, and lowers their self-esteem more than men); *supra* note 113 (discussing female law students' reports of the loss of their self-esteem). Others suggest it is women's internal assessment of their own abilities that serves to erode their self-esteem. Therefore, even those women with stellar credentials may have low self-esteem if their inner conception of self does not match their actual performance. See MAGGIE MULQUEEN, ON OUR OWN TERMS: REDEFINING COMPETENCE AND FEMININITY 6-7 (1992) (stating that a sense of competence and actual competence are not always identical, and that women often receive mixed signals about their competence); see also Grace K. Baruch, *The Traditional Feminine Role: Some Negative Effects*, 21 SCH. COUNS. 285, 286 (1974) ("Competence is apparently viewed as a masculine trait, but our society values achievement and competence highly. Thus, women are caught in a double bind: If they develop their competence, they are 'masculine'; if they do not, they are not socially valued and learn to devalue themselves."); Kimberly A. Daubman et al., *Gender and the Self-Presentation of Academic Achievement*, 27 SEX ROLES 187, 197-98 (1992) (finding that women in public settings tend to provide lower estimates of

nothing worthwhile to contribute, becoming further alienated from the Law School and the process of legal education. Often, these women refuse to engage in discussion and opt for a strong stance of silence.<sup>162</sup> In other words, some women are disengaged from law school because they find its adversarial nature, its focus on argumentation, and its emphasis on abstract as opposed to contextual reasoning to be unappealing and disengaging.<sup>163</sup>

It is important to recognize that peer relations reinforce women's silence via "hazing" imposed on women by white males. Students describe hazing as taking the form of "laughing at what I said" or "lesbian-baiting."<sup>164</sup> Apparently, merely being called a "feminist"<sup>165</sup> is sometimes considered sufficiently insulting to silence women who try to challenge prevailing interpretations of legal texts.<sup>166</sup>

Many women thus complain that their male peers discourage women's participation by linking it inversely to female sexuality or by making disparaging comments; women further express concern that faculty do not intervene.<sup>167</sup> Whether self-esteem suffers from direct or indirect comparisons, the psychological literature suggests that low self-esteem adversely affects academic performance,<sup>168</sup>

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their performance or ability than do men, who tend towards boastfulness and exaggeration); *infra* note 239 and preceding text.

<sup>162</sup> This is the conclusion of the Berkeley study, which posits that silence represents resistance or a pragmatic coping mechanism. See Homer & Schwartz, *supra* note 32, at 37-38. Yet, "opting out" of the educational process does not enhance students' learning experiences. In other words, silence, even when powerful and political, is not without costs in terms of self-esteem, alienation, and professional achievement.

<sup>163</sup> See *supra* notes 116-19 and accompanying text.

<sup>164</sup> See *supra* notes 128-29 and accompanying text.

<sup>165</sup> A study that examined predictors of feminist self-labeling confirmed previous studies suggesting that many women, although attitudinally feminist, are unwilling to define themselves as such because of negative perceptions of feminists or feminism. See Gloria Cowan et al., *Predictors of Feminist Self-Labeling*, 27 SEX ROLES 321, 321-22 (1992).

<sup>166</sup> See *supra* notes 128-29 and accompanying text.

<sup>167</sup> See *supra* notes 128-29 and accompanying text; see also HUGHES & SANDLER, *supra* note 128, at 5 (discussing the "academic harassment" of female students by their male peers and noting that the failure of faculty to intervene reinforces the idea that such harassment is acceptable); cf. Philip Brickman & Ronnie J. Bulman, *Pleasure and Pain in Social Comparison*, in SOCIAL COMPARISON PROCESSES: THEORETICAL AND EMPIRICAL PERSPECTIVES 149, 158, 166-67 (Jerry M. Suls & Richard L. Miller eds., 1977) (citing studies supporting proposition that those with higher status tend to disparage those with lower status).

<sup>168</sup> See *supra* note 155; see also Phyllis W. Beck & David Burns, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 J. LEGAL EDUC. 270, 287 (1979) (noting that many law students' success in prior academic settings leads them to

usually where negative stereotypes of women are created and reinforced by men—as Bartow’s “Q” quotient anecdote displays.<sup>169</sup>

For those whose reaction is not to “fight back,” their first contact with the law school environment is one of failure. If they have accepted the norms of the institution, these students come to believe that their place within the hierarchy should be toward the bottom. We believe that this element of socialization to one’s “place” in the hierarchy helps to ensure the success of male students at the expense of women. The student culture itself reinforces the low status of many women who fear they cannot measure up because they are just not as good at “playing the game” as their male peers. For these women, the moment they speak out to challenge what they perceive as sexist assumptions or offensive language, they diminish the level at which they are taken seriously. To retain status they must feign indifference and, as one woman reported, feel complimented when rewarded by male peers for being “such a guy.” In other words, women cannot discuss issues of concern to “women” without feeling stigmatized and diminished.<sup>170</sup>

develop “a belief system which equates self-worth with achievement” and that the “law school experience [of heavy work loads and confrontational instruction techniques such as the Socratic method] may be damaging to an individual whose self-esteem depends on continual demonstrations of success”); Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982) (remarking that first-year grades control the “distribution of goodies” such as “honors, law review, job placement, and, because of the importance placed on these matters by the law-school culture, even the student’s sense of personal worth”).

<sup>169</sup> See *supra* text accompanying note 84.

<sup>170</sup> This tracks the experience reported by students of color when issues of race permeate class discussions and they are called upon to “testify” as experts. See *supra* text accompanying note 117; see also Crenshaw, *supra* note 117, at 6-7 (describing the pressure and stigmatization experienced by black students “put on the spot” to “testify” about their personal experience and to incorporate their racial identity into their answers, and noting that such remarks are considered “special testimony” and disregarded as “biased, self-interested or subjective”). Consider as well the comments of the following students:

Third-Year White Woman:

The white majority is kind of [an] arbiter and the minorities are supposed to report [minority] views and convince the white majority of the legitimacy of them or of a particular view.

First-Year Latino Student:

It’s one of the . . . the pressures, the initial pressures, of being in the very social environment like law school . . . feeling that what you contribute is not being weighed as much as everyone else’s contribution because someone is attaching something to what you’re saying. [T]hat’s very disconcerting for me and it makes me kind of zone out from the whole process and see it as

For many women, therefore, the first year of law school is experienced as the construction of the law school hierarchy; for them it is the most emotionally draining and intellectually debilitating year. The quantitative data suggest that gendered academic differentials are cemented in the first year, and sustained over time. Within one year, white men rise to the top, but women scatter downward. Although this stratification begins in the first year, it continues throughout the next two years. Even when LSAT score, undergraduate GPA, and undergraduate class rank are held constant, gender and race interact to play a significant role in predicting third-year class rank in law school.

One's place in the Law School hierarchy is orchestrated by a mandatory grading curve, large Socratic classrooms, skewed presentations of professional identity,<sup>171</sup> and fierce competition.<sup>172</sup>

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a spectator which I think really harms me in the final analysis. . . . Like right now I feel I have to break the barriers first and then see people as individuals second which is something that I don't feel Whites have to do among each other. They already understand each other and they don't have those pre-conceived notions and I think that affects me and I'm sure it affects a lot of other people.

**First-Year Black Male:**

Whenever a minority issue comes up one is expected to say something and if you don't say something it's almost as if you're shunning your race. So you're battling with both sides of the coin . . . . [W]hen you do come forth, . . . feeling like this was your day to say some statement, you get a response like, "Wow, you know I am really impressed that you made that statement. That was really an intelligent comment." As if that was the first time that person saw you in class and had no idea that you ever acquired an education before law school. I find that very disturbing at times and you learn to deal with it and go along with the rest of the law school. . . . I think that is just part of the, once again, the situation we are in.

<sup>171</sup> See *supra* note 16 (describing the role of the "gentleman" in the law). While it is entirely appropriate for the Law School to enable students to adopt a professional demeanor, the "gentleman" model presented by the school is presumptively that of a white male. The Law School's ideal lawyer is based on the role and techniques of lawyering developed at a time when no women or people of color were part of the profession.

Recent work suggests that the presentation of the model lawyer as an idealized man has its roots in the broader culture in which competence (professional and otherwise) is associated with masculinity. For women, the conflict between the desire to be competent and the desire to be feminine may lead to a negative assessment of their own competence which in turn leads to a lowered sense of self-esteem. See MULQUEEN, *supra* note 161, at 1 (stating that "[w]omen face the 'choice' of being perceived as either competent or feminine").

<sup>172</sup> A significant aspect of the Socratic classroom is the competition among students. Law students are accustomed to doing well in school and receiving

The Socratic classroom becomes the idealized representation of legal education in which there are few winners and many losers.<sup>173</sup>

Those most comfortable at the top of the hierarchy secure virtual monopoly access to good grades and high rank. Women who do not participate in large Socratic classes may suffer directly if examinations test the enhanced learning that participation presumably produces. In part because social comparison is an important part of self-esteem, women's self-esteem may also suffer indirectly if they internalize their alienation or are intimidated into silence.<sup>174</sup> Such silence becomes evidence to these women that they are not as smart as their more vocal male peers.<sup>175</sup>

Although some justify hierarchy as separating "the men from the

accolades from professors. Indeed, in light of Penn's entry-level standards, being an academic high-achiever is probably a part of most students' identities. In addition, it is quite likely that individuals who have such a personal stake in academic achievement are somewhat competitive about their achievements in this area. Cf. Michael E. Carney, *Narcissistic Concerns in the Educational Experience of Law Students*, 18 J. PSYCHIATRY & L. 9, 16 (1990) (positing that students who are "accustomed to academic successes" see it "as an affront when they do not reach the top stratum of their law school").

<sup>173</sup> We posit several tentative explanations for the powerful effect of the first-year pedagogy. First, the exposure to the Socratic method during the first year is magnified due to the fact that the heavy workload of the first year leaves students little time to pursue extracurricular activities or reflect upon their classroom experiences. Therefore, first-year students' predominant connection to the institution is through their professors and classroom experiences. Examining the first-year experience at Penn has particular salience due to the forced grading curve that professors must follow.

Second, the Socratic method is distinctly identified with law school and law teaching. It is a pedagogic method that was created with the specific intent of teaching and conveying a particular approach to law.

Finally, the Law School presents the Socratic method to students as the unique format of legal education. At Penn, for example, first-years are introduced to the Socratic classroom during a mock session prior to the start of classes. From this special preparation, the Law School sends the message to incoming students that the Socratic method is a specialized technique that must be mastered if one is to have a successful law school and legal career. At least one third-year student describes her memory of this session—the mixed fear and excitement of being called on—as the most vivid memory of her entire first year.

<sup>174</sup> See, e.g., Jerry M. Suls, *Social Comparison Theory and Research: An Overview from 1954*, in *SOCIAL COMPARISON PROCESSES*, *supra* note 167, at 1 (stating that "one's self-concept is based in part on how one compares to other individuals with regard to traits, opinions, and abilities"); see also *supra* note 161 and accompanying text (describing the effect of the absence of positive feedback from faculty on the self-esteem of female law students).

<sup>175</sup> Cf. Richard H. Smith et al., *The Roles of Outcome Satisfaction and Comparison Alternatives in Envy*, 29 BRIT. J. SOC. PSYCHOL. 247, 254 (1990) ("[A] person's self-esteem is greatly affected by how he or she differs from others on valued attributes.").

boys,"<sup>176</sup> many of our respondents perceive the process as legitimating the separation of "the white men from the white women and people of color." Some might suggest that the Law School "merely 'reproduce[s]' gender hierarchies through the transmission of male-oriented values."<sup>177</sup> We suggest, instead or in addition, that the Law School provides "a context through which gender identity and experience is 'constituted' in relation to a student's biography and interactions within school."<sup>178</sup> We believe that on some level the Law School creates the categories that the school then presumes to be sifting. We call this the process of "legitimation."<sup>179</sup> Those who identify with the norms and goals of the institution and perform accordingly are legitimated through institutional rewards. In turn, the institution is legitimated in its selection criteria by the very fact that there are always those who meet these criteria.

The legitimating process affects students in two ways. First, the institution attempts to legitimate its structural organization and values by formally presenting them to the student as intrinsic components of "thinking like a lawyer." Thus, the law school transmits the formal structure of the institution by preparing the student for hierarchical relationships (teacher-student is equated with partner-associate, judge-counsel, and lawyer-client) as well as by telling the student that acceptance of these relationships is necessary for effective lawyering.

Second, the student reciprocates in the process of legitimation by accepting the law school on its terms, including accepting as legitimate the system by which the law school evaluates and ranks

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<sup>176</sup> See Harrop A. Freeman, *Law Students and Law Examinations*, 4 *STUDENT LAW*, Apr. 1959, at 11, 12 (arguing that exam questions should span a range of difficulty to "separate the men from the boys").

<sup>177</sup> GRANFIELD, *supra* note 2, at 100.

<sup>178</sup> *Id.*

<sup>179</sup> Institutional identification functions as a form of institutional legitimation, a process by which the institution infuses institutional values into the value systems of its members. See LAURIE DAVIDSON & LAURA K. GORDON, *THE SOCIOLOGY OF GENDER* 11 (1979) ("Internalization of the values of a system through the socialization process is a powerful way to perpetuate that system.").

One of the most pervasive values of the law school is the belief in individuation through hierarchy or stratification. More specifically, the law school perceives inherent value in rigidly rating students by ranking them against each other and in the hierarchy of station (teacher above student, dean above teacher, upper-level student above lower-level student, etc.) within the law school. See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38, 50-58 (David Kairys ed., rev. ed. 1990) (discussing hierarchical relationships developed in law school and student response).

its students.<sup>180</sup> Implicitly, then, the student recognizes that the law school has the right to rank students, that the ranking must be correct and that the ranking represents the student's true ability to be a lawyer (at least in relation to the others in the class).<sup>181</sup> At the University of Pennsylvania, this process takes hold powerfully in the first year of law school.

In first-year classrooms, a gender system is established, legitimated, and subtly internalized. As one third-year student described:

I think I am definitely more subdued . . . . I wonder how much [of] that is . . . getting older or maturing and how much [is] law school, specifically. I think law school makes you very risk averse or at least that is the effect that it has on me.

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<sup>180</sup> See Stephen C. Halpern, *On the Politics and Pathology of Legal Education*, 32 J. LEGAL EDUC. 383, 383 (1982) ("The first-year experience serves to socialize the student to law school culture and to the norms of the profession."); see also David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students*, 44 J. LEGAL EDUC. 175, 175 & n.1 (1994) (arguing that in law school the interaction among students is often experienced as a zero-sum game with professors acting as neutral third-party arbiters, in which status or success for one comes at another's expense, and suggesting that students are socialized by "intense competition for scarce commodities" into viewing everything in terms of one winner and multiple losers); *supra* note 173 and accompanying text (discussing the Socratic classroom and its effects on the connections that first-year students make with the institution of law school).

<sup>181</sup> To a certain extent, we argue that success within the institution is predicated on the student's degree of self-identification with the institution. That is, the student must accept at least some of the norms of the institution in order to be acknowledged as successful. The student must sufficiently identify with the institutional definition of smartness to want to prove her own smartness. In this way, even students otherwise alienated by the Law School have been able to do well precisely due to their spirit of gamesmanship. That is, they view success in law school as a game while keeping their core values untouched by the institution. This phenomenon seems to bear out Matsuda's outsider perspective. See Matsuda, *supra* note 47, at 8-9 (noting that people who are "outsiders," including women and people of color, embrace bifurcated thinking by adopting standard legal discourse for the classroom and reserving their race- or gender-consciousness for themselves and their support groups); see also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 89 (1991) (describing her sister's attempts as a black schoolgirl to deal with her "outsider" status); Van Praagh, *supra* note 123, at 141 (advocating cultural "bilingualism" as a means of mediating between traditional legal reasoning and the more emotionally meaningful technique of storytelling). It is the fact that their source of values and beliefs is outside of the institution that enables them to engage with and take risks within the Law School.

Yet very few students enter the Law School with such highly developed political beliefs, coping strategies, or a consciousness about the process of socialization into which they have entered. The majority of those who find little with which to identify must either mimic, in both form and content, what they believe they are expected to say or be satisfied with poor grades (or both). Evidence from the Bartow Survey suggests that both situations occur with some frequency.

Students learn their place in the gender hierarchy. All women have finally been welcomed into the Law School's hierarchy, but it seems that a significant number are welcome to stay at the bottom. The combination of highly visible, competitive pedagogical strategies in large first-year classrooms, peer hazing, and an institutionalized emphasis on replacing "emotions" with "logic" and "commitments" with "neutrality" may be sufficient to socialize many students into their "place," even those who are trying to resist.<sup>182</sup>

B. *The Alienation and Exclusion of Women from  
Informal Learning Networks*

Second, we posit that in addition to feeling alienated from the manifest structure of the educational environment, many women are, in fact, excluded from the latent learning structure. Whereas our first hypothesis is that alienation, class participation, and academic performance are interrelated variables within the *formal* learning environment, our second hypothesis looks at the way women function within the Law School's *informal* learning structure.

We argue that at least some of the learning in law school takes place outside the classroom.<sup>183</sup> Yet, according to the Bartow

<sup>182</sup> First-Year Black Student:

I just started to realize how important it is to hold on to what you believe in and how people can actually do that.

First-Year Black Male:

I think I have changed too because I have become much more pessimistic about what people's values are and what people in law school are trying to do. I think that many of them are just trying to get degrees to make more money and care nothing about changing the world [pause] have a good job and hopefully make a decent living. I hope, I know, in fact, I am not adopting the values that I see here.

<sup>183</sup> Given the high student-faculty ratio and the large classroom format, at least some of the learning that goes on in legal education must take place within informal faculty mentoring relationships or in peer-to-peer contacts. Large lectures alone cannot provide for the needs of students. In addition, these informal settings allow for more interaction and thus cater to a different kind of learning. Small study groups or one-on-one discussions with faculty members force students to engage material more fully. To put it another way, small group learning encourages active rather than passive learning. Cf. *infra* notes 194-205 and accompanying text (discussing the development of mentoring relationships between faculty and students, as well as the effects of the presence or absence of such relationships); see also Dominguez, *supra* note 180, at 175 n.1 (positing that informal negotiation among students mimics the zero-sum model of the formal classroom, and that students "engage in direct zero-sum negotiation among themselves . . . each trying to get as much help



Survey, women report feeling less comfortable than men students approaching faculty outside of class, and many women report that they feel objectified by their male peers. For these reasons, many women do not enjoy equal access to important educational relationships.<sup>184</sup>

Our data suggest that women law students are less comfortable, in the aggregate, than men within the Law School's informal structure. Female students are less likely than their male peers to interact with faculty outside of class.<sup>185</sup> Whereas male students report that they are comfortable approaching faculty of either gender, female students apparently require friendliness "cues" before they seek out faculty after class.<sup>186</sup> In addition, many female students believe male professors favor male students.<sup>187</sup> These women also complain that the hazing by their male peers both inside and outside of class forces them to retreat to all-women support groups or to form pacts with other women in order to support women participants in class.<sup>188</sup>

Some women law students are also less successful at negotiating barriers to informal faculty/student interactions. These barriers to informal contact, whether self-imposed or institutionally constructed, in turn adversely affect the ability of these female students to

as possible without giving away too much in return").

<sup>184</sup> Thus, in addition to our hypothesis that there exists either a formal or psychological link between class participation and academic performance, we theorize that women's alienation from informal academic networks also affects their academic performance. This latter hypothesis derives from the plaintiffs' claims that the Supreme Court endorsed in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (stating that effective legal education requires "the interplay of ideas and the exchange of views"), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950) (holding that the separation of the black law student from the white law student, even where formal education opportunity is provided to both, "impair[s] and inhibit[s] the ability [of the black student] to study, to engage in discussions and to exchange views with other students, and, in general, to learn his profession").

<sup>185</sup> This is consistent with a study of graduate students, including law students, at the University of Illinois. See Berg & Ferber, *supra* note 137, at 638. The study found significant differences between men and women graduate students in their interaction with men and women faculty. For example, 78% of male respondents and 54% of female respondents reported they knew one or more male faculty members "quite well" in the course of their graduate studies. *Id.*

<sup>186</sup> See *supra* notes 91-94 and accompanying text. Women emphasize the importance of faculty openness to questions outside of class and faculty who are friendly with and respectful of students. See *supra* text accompanying note 90; cf. *supra* note 88 and accompanying text (making a similar point regarding the higher value female students place on "treating students with respect").

<sup>187</sup> See *supra* note 87.

<sup>188</sup> See *supra* note 112 and accompanying text.

thrive in the Law School's environment.<sup>189</sup> For example, although participation in student organizations is more important to female survey respondents than their male counterparts, these women are less likely to perceive themselves or other women as leaders in these organizations.<sup>190</sup> If status positions are not achieved by women in numbers equal or proportionate to their presence in the student body, this then appears to reduce the respect women are granted within the Law School community.<sup>191</sup>

Similarly, we found that the predominantly male faculty bestows a disproportionate number of graduation awards upon male students.<sup>192</sup> This may reflect the first-year academic performance differential that is sustained over the next two years in law school. Alternatively, it may reflect the fact that women also suffer when subjective criteria, such as "best student in X" or "most promising student in Y," govern. Or, it may reflect the fact that male professors are more likely to mentor male students.<sup>193</sup>

For example, finding a mentoring relationship positively correlates with institutional success.<sup>194</sup> Yet, relatively few female students are apparently mentored by the faculty.<sup>195</sup> There are

<sup>189</sup> See *supra* note 184.

<sup>190</sup> See *supra* note 130 and accompanying text.

<sup>191</sup> See *infra* notes 206-13 and accompanying text (discussing the concept of virtual tokenism); see also *supra* note 174 (positing social comparison as a source of status).

<sup>192</sup> See *supra* Table VI.

<sup>193</sup> See *infra* notes 194-99 and accompanying text.

<sup>194</sup> See AGNES K. MISSIRIAN, *THE CORPORATE CONNECTION: WHY EXECUTIVE WOMEN NEED MENTORS TO REACH THE TOP 50-58* (1982) (suggesting that a mentor relationship can increase adjustment to and satisfaction with the mentee's environment); Berg & Ferber, *supra* note 137, at 638-39, 641, 643 (defining success as earning a graduate degree and finding a positive correlation among male students between success and being mentored); Cheryl Richey et al., *Mentor Relationships Among Women in Academe*, 3 *AFFILIA* 34, 37 (1988) (finding that a mentor provides a protégé with encouragement, advocacy, advice and resources).

By "mentor" we refer to the one-on-one personal contact between an experienced or more powerful person within an institution and a novice learning the ropes. A mentor is a teacher in an interpersonal relationship. A mentor is a person of relatively high status, or simply a more accomplished person in terms of knowledge of the institutional mores who is willing to share that knowledge in guiding others. Unlike a role model, who simply demonstrates the possibilities of opportunities, the mentor actively engages in guiding, supporting, training, and educating others. See Guinier, *supra* note 16, at 103.

<sup>195</sup> We draw this conclusion from the Bartow Survey data, the group interview data, and the graduation awards given by faculty. Data from other studies suggest that male faculty are more likely to mentor male students. See, e.g., Berg & Ferber, *supra* note 137, at 631 (noting that men and women faculty tend to be more supportive of students of their own gender); M. Elizabeth Tidball, *Of Men and Research: The*

several possible reasons. First, male students are more willing to approach male faculty than female students because male students perceive male faculty to be generally respectful and friendly.<sup>196</sup> Second, mentoring relationships more often form between people who share similar values, attitudes, or backgrounds, including gender.<sup>197</sup> Third, many faculty do not view mentoring as part of their job.<sup>198</sup> As a result, they mentor only selected students and

*Dominant Themes in American Higher Education Include Neither Teaching Nor Women*, 47 J. HIGHER EDUC. 373, 383 (1976) (same); cf. EXECUTIVE SUMMARY, *supra* note 13, at 9 (reporting that 41% of women professors do not believe mentors are as available to them as to male faculty).

<sup>196</sup> See *supra* notes 88, 90-94 and accompanying text (discussing data that show men to be more comfortable than women in speaking with male faculty, and noting that women perceive faculty to be aloof).

<sup>197</sup> See TANYA POTEET & MICHELLE FONDELL, JOINT TASK FORCE ON GENDER FAIRNESS OF THE OHIO SUPREME COURT & THE OHIO STATE BAR ASS'N, SURVEY OF OHIO LAW SCHOOL FACULTY 11 (noting that mentors choose protégés who are of similar background, gender, race, and social class); Kathryn M. Moore, *The Role of Mentors in Developing Leaders for Academe*, 63 EDUC. REC. 23, 25 (1982) (explaining that, in the academic setting, mentors select protégés on the basis of "similarity of attitudes and behaviors as well as similarity of sex, ethnic origin, and religion"); see also Berg & Ferber, *supra* note 137, at 631 (noting that men and women faculty tend to be more supportive of students of their own gender); Tidball, *supra* note 195, at 383 (same); *infra* notes 203-05 and accompanying text (describing the difficulty people have penetrating informal networks).

<sup>198</sup> One reason that faculty give for declining to mentor students is that Socratic-style instruction in the large classroom is efficient, whereas mentoring is very time-consuming. See Costonis, *supra* note 152, at 160-61 (describing efficiency as one reason law schools employ large classroom instruction). Another justification proffered by a male colleague at the Law School is that mentoring is similar to "spoon-feeding," which is antithetical to traditionally valued notions of rigorous analytic work, whose lessons are best learned in isolated, intimidating, or stressful circumstances. Likewise, faculty may believe that student initiative is necessary in order to justify the time commitment involved in mentoring. Even more, they may disparage colleagues who approach teaching as a cooperative learning project on the grounds that teaching rigorous analytic thinking requires toughness on the parts of both the instructor and the student. Indeed, "the better a student's answer, the more [a good teacher] is personally challenged to find something wrong with it." D'Amato, *supra* note 157, at 473. D'Amato contrasts a hypothetical Professor Smith (the good teacher) who is confrontational, "combative," relentless, and makes his students feel insecure, with a hypothetical Professor Jones (the poor teacher) who is attractive, "nice," and well-liked because he "accommodates" his students' entrenched and "sloppy" thinking patterns. *Id.* at 467-79. Although D'Amato's examples are of two male professors, his use of gender-laden language is quite impressive. "Aggressor" and "relentless" are terms that often describe men, whereas "patient[,]," "attractive," and "accommodating" often describe women. *Id.* at 472-74. This may not be his intention, but it does highlight the ways in which certain kinds of teaching are perceived to be gendered, and thus perhaps the ways in which some men and women respond to different kinds of teaching. Cf. *id.* at 481 n.38.

As an example of instructional intimidation observed by the authors, one senior

only those students who initiate the relationship. Although the faculty may be treating both male and female students alike in this regard, the failure to initiate mentoring relationships disproportionately discourages female students. In the absence of overt friendliness cues, female students often do not seek out mentors in a male-dominated faculty.<sup>199</sup>

The informal barriers we describe may be so "imbedded in our ways of interacting with each other as men and women" that they are invisible to many students and faculty.<sup>200</sup> They may reflect the unconscious imposition of male norms<sup>201</sup> on ways of learning or mentoring that have a gender-based effect.<sup>202</sup> Alternatively, these

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male professor has counseled more junior colleagues to follow up student comments in class aggressively. According to the male professor, where there are very good students and terrible students in a class, the role of the teacher is to identify for the students who falls into which category. In addition, this male professor's teaching philosophy holds that an intimidating atmosphere is necessary for learning. In his view, students will not listen to each other unless the professor turns up the discomfort level so that students worry about and identify with the way their peers are being grilled.

Our point is not to argue that one teaching style works better in all cases for all students. It is to identify the costs of an intimidating pedagogy within and without the classroom for educating certain students, a disproportionate number of whom are women. Cf. Dominguez, *supra* note 180, at 175 (describing a harsh reality for losers at law schools where reigning dynamics work against their self-esteem and confidence).

<sup>199</sup> See *supra* notes 91-94 and accompanying text (describing women's relative reluctance to approach faculty outside of class); cf. Banks, *supra* note 32, at 146 (questioning whether women and men "receive truly equal education" in law school, in light of findings that the law school environment tends to exclude women and discourage them from class participation); Betz, *supra* note 156, at 137 (stating that in an academic situation women are more negatively affected by a lack of encouragement than men).

<sup>200</sup> Roberta M. Hall & Bernice R. Sandler, *A Chilly Climate in the Classroom*, in *BEYOND SEX ROLES* 503, 503 (Alice G. Sargent ed., 2d ed. 1985). As an example of the invisibility of these informal barriers, one male colleague at the Law School invited all the students in his upper-level class to his home in the spring of 1992. Approximately 30 students were enrolled in the class; only 15 accepted the invitation and attended the party. Of those who attended, none were women. The colleague reported this fact to Professor Guinier with some concern because he did not believe that he was conducting himself in a manner that overtly discouraged or disparaged his female students.

<sup>201</sup> See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 40 (1985) ("Since our knowledge of how lawyers behave and of how the legal system functions is based almost exclusively on male subjects of study, our understanding of what it means to be and act like a lawyer may be misleadingly based on a male norm." (footnote omitted)); see also POTEET & FONDELL, *supra* note 197, at 8 (finding legal education to be a "male-dominated profession").

<sup>202</sup> See *infra* notes 214-15 and accompanying text (discussing the possibility that

women may simply be excluded from informal settings in which people who are perceived to be different are invisible or made to feel unwelcome.

In fact, others have found that homogeneity promotes greater familiarity, which minimizes the need for formal rules, thus permitting communication shortcuts among socially-similar peers.<sup>203</sup> Consequently, in informal settings students and faculty of the same sex often interact most comfortably.<sup>204</sup> This is consistent with the social science findings that members of minority groups experience informality as a barrier; they are more likely to feel excluded in less rule-bound, informal settings.<sup>205</sup>

In addition, the informal barriers may exist in response to the proportional scarcity of women in the upper levels of the institution's hierarchy. As law students, the number of women exceeds the numerical threshold for true "tokens."<sup>206</sup> Neverthe-

treating all students equally may affect women differently).

<sup>203</sup> Kanter, *supra* note 16, at 8 (noting male lawyers' "preference for keeping power within a closed circle of socially homogeneous peers").

<sup>204</sup> See Berg & Ferber, *supra* note 137, at 638-39 (studying graduate students' comfort in approaching faculty); cf. Kanter, *supra* note 16, at 7-8 (noting a similar phenomenon of homogeneity in law firms, particularly the more prestigious firms).

<sup>205</sup> See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 314-16 (1987) (asserting that highly structured, rule-bound environments are more likely to give minorities relief from racism); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-89 (explaining why formal dispute resolution settings are more conducive to overcoming prejudice); Allan Lind et al., *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271, 282-83 (1976) (finding adversarial proceedings a more successful means of overcoming preexisting bias than inquisitorial proceedings); see also Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 341 n.100 (1987) (providing examples of informal situations in which racial comments were made unintentionally).

<sup>206</sup> Our ethnographic survey and archival study of women's experiences at this law school prompt us to review certain assumptions about assimilation based on theories of "critical mass." Women now represent more than 40% of the law student population—a critical mass of law students. See ROSABETH M. KANTER, *MEN AND WOMEN OF THE CORPORATION* 208-09 (1977) (hypothesizing that a numerically strong "outgroup" of 15% will constitute a "critical mass" that will succeed in countering demeaning stereotypes and in changing an institutional environment to make it more conducive to the outgroup's success); Kanter, *supra* note 16, at 10-11 (defining threshold for dynamics of tokenism as 20%); Rosabeth M. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966 (1977) (identifying the threshold for tokenism at around 15%). Despite the predictions of Kanter's critical mass theory, women at Penn Law are still relatively scarce in high-status positions, the positions which set and maintain the Law School agenda. See *supra* Table VI and accompanying text (documenting women's

less, many women function as if they were tokens, in part because they are proportionally scarce in the institution's leadership or influential roles. For example, women are proportionately underrepresented as full-time tenure-track faculty,<sup>207</sup> on the law journals, as leaders in student organizations, and as recipients of faculty-initiated graduation awards.<sup>208</sup>

We posit that women law students are at a disadvantage because their rising proportion in the student body has not been accompanied by a comparable increase in the number or proportion of female faculty. We suggest that the difficulties of being women students in an institution with a high proportion of male faculty adversely affect women's access to informal education networks. Based on findings at other institutions,<sup>209</sup> as well as our own data, we hypothesize that women faculty are more likely to mentor women students, that women students are more likely to perceive women faculty as approachable, and that being able to approach faculty is as critical to students' self-perception of their role in the institution as it is to the substantive learning that takes place in

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proportionate underrepresentation with respect to honorary awards and activities at Penn Law, such as Order of the Coif, *Law Review* Member, *Law Review* Board, Moot Court Competitor, Moot Court Board, and Faculty-Chosen Graduation Awards). As a result, women students—despite their numbers—remain a somewhat marginalized “outgroup” who are expected to succeed, to the extent they can, within the male-dominated hierarchy.

<sup>207</sup> During the period of our study (1990-92), at least four white men joined the full-time faculty as either lateral or entry-level professors. Not a single tenure-track female professor joined the faculty during the same period. At the time, women faculty comprised seven of the approximately 35 full-time faculty. This number includes senior fellows and emeritus professors who teach first-year courses as full-time faculty members. It does not include visiting professors, adjuncts, or clinical instructors.

Five of the seven women were tenured; three of the seven regularly taught in the first-year curriculum; one of the seven was the Law School's librarian, who does not teach a substantive law course. During the period of 1990-1992, a minimum of one and as many as three of the women were on leave or visiting at other schools in a given semester.

<sup>208</sup> See *supra* Table VI; *supra* note 80 and accompanying text.

<sup>209</sup> See EXECUTIVE SUMMARY, *supra* note 13, at 2-10 (reporting on findings from study of nine Ohio law schools); Berg & Ferber, *supra* note 137, at 631 (finding that women are more successful at earning graduate degrees in departments with more women faculty and suggesting that the “positive effect of women faculty on women students might be stronger if women faculty were . . . of higher rank and perceived as more successful”); see also M. Elizabeth Tidball, *Perspective on Academic Women and Affirmative Action*, 54 EDUC. REC. 130, 133 (1973) (finding that women students who study in departments with a relatively higher proportion of women faculty are more likely to go on to enjoy successful careers).

these informal settings.

Our claim is that the proportional scarcity of "elite women" sets up a dynamic of virtual tokenism, in which the more numerically significant women students are nevertheless treated as, or self-identify as, "tokens."<sup>210</sup> This dynamic exists in both the manifest and latent structure of the Law School, as well as in both the actual treatment of female students and their perception of their treatment by male students and faculty.<sup>211</sup> As with true tokens, the dynamic of virtual tokenism reinforces limitations on the opportunity for success of women law students.<sup>212</sup> Also similar to true tokens, many female students at the Law School enter the institution with identical credentials and then differentiate significantly from their male peers in terms of academic achievement, voluntary class participation, and interaction with faculty.<sup>213</sup> Moreover, even if

<sup>210</sup> See Kanter, *supra* note 16, at 11 (defining tokenism in terms of proportional scarcity). Although Kanter hypothesized in this 1978 article that constructive or virtual tokenism could not exist if women constituted over 20% of an institution's population, our findings suggest that virtual tokenism was alive and well at Penn Law in the early 1990s and may continue to affect women in law school in the future.

<sup>211</sup> Under this formulation, sexism is a societal and not merely a personal matter. Consequently, gender equality requires the transformation of a hostile learning environment, not simply the repopulation of the same environment with women struggling to become "honorary men." See, e.g., Rhoda K. Unger, *The Personal Is Paradoxical: Feminists Construct Psychology*, 3 FEMINISM & PSYCHOL. 211, 211 (1993) (noting that tokens are the recipients of conflicting social demands to act both feminine and masculine; tokens may become "honorary men" by "identify[ing] with the aggressor," or they may choose to challenge the system to live up to its stated claims of genuine meritocracy); see also Judith L. Laws, *The Psychology of Tokenism: An Analysis*, 1 SEX ROLES 51, *passim* (1975) (examining tokenism in the academic profession, within the context of a gender/class system).

<sup>212</sup> See Eve Spangler et al., *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 AM. J. SOC. 160, 163-67 (1978) (finding that women who are tokens differ more significantly in performance than women who are proportionately represented, and that this performance differential affects academic achievement, voluntary class participation, and interaction with faculty); cf. Homer & Schwartz, *supra* note 32, at 39-40 (speculating that a lack of female faculty in part results in poorer grades for women).

<sup>213</sup> This finding is consistent with a study done by Professor Catherine Krupnick of Harvard undergraduates in which she studied videotapes of student/faculty classroom interactions involving 24 different instructors (12 female and 12 male). Female students participated in a manner proportionate to their numbers only in classes that did not represent "the predominant classroom circumstance . . . in which the instructor is male and the majority of students are male." Krupnick, *supra* note 160, at 18-19 (finding that female students at Harvard College "spoke almost three times longer" in classes with female instructors than in classes with male instructors). Perhaps not surprisingly, in these cases the perception among the male students was that the female teacher favored the female students. See Telephone Interview with Catherine G. Krupnick, *supra* note 86.

they are treated no differently than male students, many female students experience the institutional norms in a way that adversely affects their performance. Some women may simply need more encouragement to do well or to approach faculty in a male-dominated school where "merit" is arguably still measured by attributes associated with maleness.<sup>214</sup> Or, these women may need mentors more than men to counterbalance the impersonality of the large Socratic classroom.<sup>215</sup>

We do not argue that male faculty cannot or do not ever mentor female students.<sup>216</sup> We do believe, however, that the mentoring dynamic adversely affects those female students who are not successful in establishing such relationships and whose need for such informal reinforcement may be even greater than some of their male peers.

This is not an argument for more women role models.<sup>217</sup> We

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A study of law students at Boalt Hall revealed that women law students voluntarily participated in class less frequently than men and had lower grades. See Homer & Schwartz, *supra* note 32, at 37-41. The authors of the study recommended increased female faculty hiring as one way to address these discrepancies. See *id.*

<sup>214</sup> See *supra* notes 156, 160, 171 (identifying male traits prized by legal education); see also Betz, *supra* note 156, at 137 (noting that even if neither males nor females are given encouragement to do well, the absence of encouragement is likely to affect females disproportionately); cf. EXECUTIVE SUMMARY, *supra* note 13, at 9 (finding that although a majority of both male and female faculty recognize the importance of mentoring, nearly one-fourth of women faculty believed that a mentor is more important for new female faculty than new male faculty).

<sup>215</sup> See *supra* notes 198-99 and accompanying text. Because women students disproportionately reported their disengagement with an adversarial learning style of the large classroom, even a gender-neutral teaching style may have a profoundly gendered impact. In this sense, women who are focused on relational thinking or contextual analysis may thrive in more intimate tutorial settings. Cf. TANNEN, *supra* note 156, at 42-44 (noting that young boys use aggressiveness as a way to invite participation and friendship); Jane Gross, *To Help Girls Keep up: Math Class Without Boys*, N.Y. TIMES, Nov. 24, 1993, at A1, B8 (identifying different "learning styles" of boys and girls).

<sup>216</sup> Berg and Ferber's study found a positive correlation between having at least one male faculty mentor and success in graduate school. See Berg & Ferber, *supra* note 137, at 643-45. Since the graduate schools studied had 44% female populations but few female professors, many of the female students were mentored by male professors. See *id.* at 644.

<sup>217</sup> Cf. *supra* note 194 (contrasting role models from mentors). Elsewhere Professor Guinier and others have expressed reservations about the role model hypothesis, in part because of its relationship to the dynamics of tokenism. See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 574-76 (arguing that minority role models are not a substitute for a change in "material conditions"); Guinier, *supra* note 16, at 99-103 (describing why a more active minority mentor is preferable to a role model).



argue that women students need faculty and student *mentors*, meaning teachers, guides, or more accomplished peers who share their knowledge or experience within the context of an interpersonal relationship. We posit, based on our data, that a disproportionately male faculty and student body—for whatever reason—fail to function in informal settings with female students to the same degree as with male students.

C. *Women Who Do Not Become Gentlemen Are Less Valued  
Members of the Law School Community*

There is also a third hypothesis that others have urged us to consider. The third explanation of women's different law school experience is that women are simply different. There is a tension in the difference hypothesis. On the one hand, women entering law school are different from men in many ways, including their initial interest in public interest law, their expressions of alienation from and nonparticipation in the formal educational pedagogy, and their self-reported needs for more friendliness cues for informal faculty interaction. On the other hand, it is important to remember that, using standard predictors of academic success, women entering law school are fundamentally the same as men entering law school (as a group). We interpret this tension to mean that "difference" as a disadvantage is created at law school over time.

According to the difference hypothesis, women's difference makes them less equipped for law school.<sup>218</sup> The way things are done in law school (the Socratic method, issue-spotting exams, large classrooms, unpatrolled and informal networks) devalues and distorts those characteristics traditionally associated with women such as empathy, relational logic, and nonaggressive behavior. In this understanding, law school unintentionally uses a male-oriented baseline to measure male/female differences.<sup>219</sup>

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<sup>218</sup> We do not take a position as to whether women's gender identity is nature- or nurture-based. See *infra* note 222 and accompanying text.

<sup>219</sup> The term "unintentionally" suggests that the reasons for implementing the present system may not have been the conscious exclusion of women; although in using a male-oriented baseline, men enshrined their own values in both the law and legal education. We do not argue that the gendered nature of legal education results from an original self-conscious bias or intent. We do note, however, that our research provides valid evidence, albeit anecdotal, that some male students intentionally devalue women who step beyond traditional gender roles. See *supra* text accompanying note 110; *supra* note 128 and accompanying text (describing ways in which women who speak in class are ridiculed by their peers for transgressing sexual

Although aspects of the third explanation permeate the other two hypotheses, this third explanation invariably conceals a troublesome assumption—that it is women, not law school, who must change. Because of this assumption, the third explanation invites the response that, despite identical entry level credentials, the *wrong* women are being admitted to law school.<sup>220</sup> In other words, many women simply should not be trained as lawyers.<sup>221</sup>

Despite the predictable response, we do not take a position in this paper on the immutable gender differences theory. In our view, it does not matter why women function “differently” in law school. Our research is limited to identifying the experience of hierarchy and of exclusion masked as difference, and to theorizing about ways that legal education creates or enhances “difference” and converts it into a disadvantage.<sup>222</sup> Even if important pre-institutional gender differences exist, the source of those differences is not the point. Even if we assume that women who enter law school are actually less prepared to be good lawyers—a difference hard to imagine given identical entry credentials—the institution’s pedagogy, hierarchy, and male-dominated faculty exacerbate that difference.

boundaries).

<sup>220</sup> Indeed, a few members of the Law School faculty proffered this theory in response to a presentation of our data in May of 1992. See *supra* note 25 (describing context of that meeting). In the alternative, this response is an argument for the selection of only those women who are social males. See Littleton, *supra* note 14, at 1280-81 (noting that social males are those in whom cultural maleness has been layered on to biological gender identity).

<sup>221</sup> Other versions of this response are that “lawyers are assholes and maybe women just don’t want to be assholes,” see Interview with Dr. Joseph Torg, Director of the University of Pennsylvania Sports Medicine Clinic, in Philadelphia, Pa. (Feb. 16, 1993), or that women opt out of the ranking for other professional and nonprofessional reasons (their social life is more important; they are multidimensioned people unlike their male counterparts; they sought a legal career to help people and then got turned off when public interest jobs were not available); see also Eccles, *supra* note 104, at 151 (finding that women place more importance on family than men do); Robert Fiorentine, *Increasing Similarity in the Values and Life Plans of Male and Female College Students? Evidence and Implications*, 18 SEX ROLES 143, 148 (1988) (finding that college women value domestic and nurturing activities even as they pursue career goals similar to men). But cf. Joan Z. Spade & Carole A. Reese, *We’ve Come a Long Way, Maybe: College Students’ Plans for Work and Family*, 24 SEX ROLES 309, 318 (1991) (finding that college males and females have equally strong commitments to family and work).

<sup>222</sup> We follow the lead of Professor Christine Littleton in attempting to address the consequences of gendered differences, and not its sources. See Littleton, *supra* note 14, at 1297 (“It is the consequences of gendered differences, and not its sources, that equal acceptance addresses.”).

Most of this paper is about a group of women at the Law School who cannot or do not want to "become gentlemen." It is important to recognize, however, that even within this group of females, "women" is not a monolithic category. We have sought to identify the fact that some women who are alienated nevertheless do well academically; these women successfully function in the hierarchy and norms of the Law School. Accordingly, we identify two distinct "groups" of women. The first group of women fails academically as well as personally. The second group of women succeeds academically. These are women who do "become gentlemen." Within this category of successful women, there is also a subset who do well but feel alienated. This subset of women resents the sacrifices of self that law school requires them to make. These women perceive that law school is a "game." These women learn the rules in order to play the game, but they are acutely aware of the price they are paying. These women are those who have been described in some of our secondary literature as "bicultural" or "bilingual." They can act both as "women" and as "gentlemen" and they are acutely aware of the difference.

For this alienated subset within the second group of successful women, their alienation does not seem to hurt them academically. As our discussion of "asshole bingo" concludes, however, some of these women report being punished in class, primarily by their male peers, for class participation.<sup>223</sup> Theoretically, the game of "asshole bingo" treats assertive men and women similarly. On some level, it reflects a gender-neutral anti-intellectual or anti-achievement bias. Yet women "assholes" are somehow transformed into "man-hating lesbians." Within the environment of the Law School, being called an "asshole" is different from, and probably better than, being called a "man-hating lesbian" or "feminazi dyke." The former is a "neutral" slur describing behavior; the latter imputes membership in a despised, and often invisible, minority group or suggests an abhorrent belief system associated with members of such a group. In this way, women who initially succeed may be forced into the group of weak performers because of the intensive peer policing on the part of their colleagues. Moreover, such peer policing further intimidates those women in the first group (for whom

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<sup>223</sup> For our discussion of "asshole bingo," and a description of the role that attitudes about sexual orientation play in policing women's behavior, see *supra* note 128; cf. Granfield, *supra* note 32, at 11, 23 n.11 (describing a similar game at Harvard Law School called "turkey bingo").

becoming gentlemen is not an option) who witness it.

The two different groups of women are thus related. For example, as the first group of women grapple with the law, legal education, and their personal and professional identities, they may be joined by female gentlemen. In this way, the classroom environment both creates and maintains the first group of women, despite, or perhaps because of, the second group. Female token performers are used against all women.

Among those women who succeed academically, some are "bicultural"; they learn to function as "social males" and on some level they become "gentlemen."<sup>224</sup> Nevertheless, even their attempted gender transformation does not equalize these women's chances of excelling within the institution's social and academic hierarchy. For these women, their gender continues to disadvantage them, even though they resist traditional "female"-associated traits.

Moreover, implicit in this critique of "women as lawyers" is an argument questioning the predictive value of the Law School's admissions criteria.<sup>225</sup> We suggest that those who rely on a difference axis to justify the status quo are really defending a tautological universe.<sup>226</sup> The men make the rules and then develop predictors of performance under those rules. When women do

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<sup>224</sup> See *supra* note 16 (describing role of "gentlemen of the bar"). This transformation might explain the difference in survey responses between first- and third-year women regarding criticism of bias within the institution itself and regarding career aspirations. See *supra* notes 87, 103-04 and accompanying text (illustrating that third-year women perceive less gender bias than do first-year women, and that, whereas over one-fourth of first-year female students aspire to public interest jobs, only around one-tenth of third-year female law students share that goal, preferring work in private law firms by a wide margin). Of course, some view this same information differently. See *supra* note 148 and accompanying text (suggesting, as alternative interpretations of these data, that bias might diminish over the course of three years among male students; that bias might be less prevalent among upper-level, as opposed to first-year, instructors; or that women who can choose their upper-level courses simply might avoid those instructors who are more openly biased).

<sup>225</sup> According to the criteria on which the Law School presently relies, including the LSAT, GPA, and the other so-called objective indicia of law school performance, women should do as well as men. See *supra* notes 68-74 and accompanying text. Maybe, the argument goes, these criteria simply overpredict women's future success. Cf. Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 127 n.34 (1993) (citing a Law School Admission Council claim that LSAT scores predict academic success in the first year of law school).

<sup>226</sup> We are not condemning all alternative explanations of our data. Indeed, we have investigated several different hypotheses before drawing these conclusions. The point is simply that women's difference—whatever its source and whatever its effect—should not be used to justify the status quo in which the existing relationships inevitably leave women at the bottom of the hierarchy.

not achieve predicted rates of performance, the men question the women, rather than question the rules.

In our view, the presence of genuine gender differences does not undermine the important message that some change must come from the Law School, not simply from the women. Even assuming that the women who are admitted possess misleading entry credentials, once they are at the Law School these women are the institution's "clients." Even those most comfortable with the status quo might nevertheless entertain some concern when so many of the Law School's "clients" feel dissatisfied and ill-served.

To accept the theory that women are not well suited to law school is also to accept the premise that legal education as it currently exists is the only and best formulation of how law schools should operate. Our response is that the quantitative and qualitative data suggest that women import competent credentials and are quite capable of meeting standards of academic rigor. In their reactions to the law school experience, women voice important critiques and creative visions for what law school could be for both men and women.

Our view is that the needs of many female law students present an occasion to reexamine traditional assumptions about lawyering. This reexamination is timely in light of the changing character of the legal profession. Such a reassessment presents an opportunity to reconsider the value of the dominant pedagogy and the accompanying emphasis on adversarialism that presently permeates legal education.<sup>227</sup> For example, our data indicate that certain educational techniques work for some, but not all, people.

Some might use our data as a window into an educational methodology that attempts to test "merit" by testing analytical thinking exclusively in the abstract. Critics of legal education often argue that although the ability to perform rigorous legal analysis is important, it is not the only skill necessary for practicing law successfully. Furthermore, the argument usually proceeds, abstract

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<sup>227</sup> See Cort & Sammons, *supra* note 157, at 400 ("[T]he objective of legal education is the preparation of lawyers for lawyering. The problem which underlies the debate [often defined as whether law schools should teach law or lawyering] . . . is defining good lawyering and testing means of producing it." (footnotes omitted)); see also Barbara B. Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977, 1978 (1993) (expressing "concern about the health of legal education" and proposing potential solutions). See generally MacCrate Report, *supra* note 2, at 327 (making "recommendations for improving and integrating the process by which lawyers acquire their skills and values").

reasoning is not the only prototype for legal reasoning. Appellate advocates or law professors may need to develop this skill more than trial lawyers or in-house corporate counsel.<sup>228</sup>

Another argument for changing legal education is that it currently overemphasizes the adversarial nature of lawyering.<sup>229</sup> Legal education may be inadequate where it focuses on legal issues exclusively or primarily in the context of resolving disputes through litigation.<sup>230</sup> The law school's definition of lawyering potential—as measured by a single evaluative methodology<sup>231</sup> and a dominant

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<sup>228</sup> One study analyzed the academic credentials of candidates for the North Dakota bar in the years 1902 to 1913, inclusive, to determine whether or not law school grades were an adequate means of predicting success in the practice of law. See Lauriz Vold, *Legal Preparation Tested by Success in Practice*, 33 HARV. L. REV. 168, 169 (1919). Generally, those with high marks in law school did well in actual practice (focusing on litigation practice), but those with the top law school grades (those in the top decile) did not do as well in practice as those whose grades were in the next highest group:

Grinds [scores over 90th percentile] have been more successful than the next scholarship group in handling Supreme Court litigation, where the issues depend largely on intellectual power; but they have been surpassed by the next scholarship group in the matter of securing cases, and in the matter of winning in the trial courts, instances where the so-called human qualities as opposed to mere intellectual power come more largely into play.

*Id.* at 175.

<sup>229</sup> This problem is not just with the case-study method, but rather with the Law School's overall approach to teaching students about what lawyers do. See, e.g., MacCrate Report, *supra* note 2, at 330-34 (suggesting steps to enhance professional development during law school); Gerald Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 N.Y.L. SCH. L. REV. 621, 622-23 (1985) (arguing that the greatest failing of current legal education is its focus, through the case-study method and clinics, on appellate cases and adversarial law, ignoring nonlitigation activities that often consist of attempts to find common ground). Of course, the focus on the case method does not necessarily mean the law school is preoccupied with developing adversarial skills. Law schools could use this method to sharpen analytical skills rather than to reinforce the sense of "ritualized combat." Nevertheless, the choice of method in the context of large classes with high student-to-faculty ratios implicitly endorses an adversarial approach, which is often internalized by students.

<sup>230</sup> First, "students are given the impression that trial and appellate work is the bulk of what attorneys *actually* do and what they *should* be doing." Korngold, *supra* note 229, at 622. Second, the case method of instruction teaches students to analyze and respond in the adversarial context. See *id.* Third, the appellate focus of the curriculum leads students to the conclusion that a third party will ultimately resolve all disputes. See *id.* at 622-23. Korngold further notes that even law school clinical work focuses on litigation experience. See *id.* at 623; see also Dominguez, *supra* note 180, at 196-97 (suggesting that a nontraditional "negotiable" learning experience for law students would force them to learn how to "work through . . . racism, sexism, and other forms of bigotry").

<sup>231</sup> See, e.g., Steve H. Nickles, *Examining and Grading in American Law Schools*, 30

pedagogy—may simply be outmoded in light of contemporary professional developments, which include alternative dispute resolution,<sup>232</sup> emphasis on negotiation rather than litigation,<sup>233</sup> and client counseling.<sup>234</sup> Moreover, few Penn Law School graduates enter the profession at a level in which highly developed abstract reasoning is the most important variable for success.<sup>235</sup> To lawyer effectively, a contemporary attorney may need more than the ability to spot issues or engage in quick-response timed legal

ARK. L. REV. 411, 412 (1977) (“[L]egal education has paid insufficient attention to the problems and issues of student evaluation [and has relied upon] procedures and techniques which have been discredited by research in education and psychology.”). In its “Statement of Fundamental Lawyering Skills and Professional Values,” the MacCrate Report identified two analytical skills that form the conceptual foundations for almost all legal practice: problem solving and legal analysis. See MacCrate Report, *supra* note 2, at 135. The Report also identified five skills that are essential for a wide range of legal specialties: legal research, factual investigation, communication, counseling, and negotiation. See *id.*

In addition, many critics of legal education such as Judge Harry T. Edwards of the Federal Appeals Court of the District of Columbia Circuit assert that law schools do not provide enough practical training for their students and do not perform cost/benefit analyses to determine useful educational tools. Instead, law schools rely on the desires of the faculty to determine the shape and function of the curriculum. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35-36 (1992).

<sup>232</sup> See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2172-74 (1993) (describing the increased use of alternative dispute resolution as either a precondition to, or substitute for, judicial resolution of federal and state litigation).

<sup>233</sup> See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1212-13 (1992) (stating that more than 90% of lawsuits filed result in negotiated settlements prior to trial).

<sup>234</sup> See Robert Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203, 215-17 (1981) (recognizing that traditional law school education emphasizes legal analytic skills rather than communication and learning skills); cf. TANNEN, *supra* note 156, at 132 n.6 (stating that women initially perform better as psychotherapists because women possess the interactive skills essential to the practice of the profession; once men acquire these skills, the difference in their performance levels off); Stacey Burling, *Study Finds Gender Gap Among Doctors*, PHILA. INQUIRER, Oct. 17, 1994, at A2 (reporting the findings that female doctors spend more time with their patients; that patients of both sexes talked more to female doctors and asked them more questions; and that women’s communication techniques are associated with better patient compliance and understanding).

<sup>235</sup> For example, only 47 members of the graduating class of 1992, 18 of whom were women and 29 of whom were men, obtained judicial clerkships, and only 29 of these clerkships were at the federal level (10 by women, 19 by men). See University of Pennsylvania NALP Report for Graduating Class of 1992. Similarly, only 42 members of the class of 1993 took judicial clerkships—19 women and 23 men—and only 26 of these were with federal judges (11 women and 15 men). See University of Pennsylvania NALP Report for Graduating Class of 1993.

analysis, as measured by blind-graded examinations.<sup>236</sup>

By relying on the norm of abstract, analytic performance to test "merit" in this manner, the institution arguably fails to consider whether those practicing law need training in multiple rather than unidimensional skills,<sup>237</sup> or whether on-the-job training is equally important to one's career development.<sup>238</sup> In either case, the Law School limits opportunities for women to learn their chosen profession by emphasizing the ranking of students, often to the detriment of educating them. The evaluation system ranks women and men based on a partial picture of their ability to perform as lawyers. Their ranking then defines student status within the Law School and the legal community. Those men who do not fare well on this partial picture, but whose conditioning is to see law school as a game, may "fight back." Many women, however, internalize a relatively weak performance on a single exam as evidence of personal failure. Rather than assuming the initiative to self-teach as a means of fighting back, these women feel overwhelmed and defeated. Yet their capacity to self-teach in a less stressful or competitive environment is neither engaged nor fully tested. In these ways, the institution arguably treats many of its women students unfairly and in ways that some might deem professionally

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<sup>236</sup> From the institutional perspective of the law school, the purposes of evaluating students through examinations are to monitor the effectiveness of the institution in meeting its educational objectives, provide a feedback mechanism for professors on their own teaching, and enable the institution to keep track of students as they progress towards a degree. See Nickles, *supra* note 231, at 419-20.

Other catalogues of the functions of law examinations include the measurement of "learning and/or competence of the examinees," motivation and feedback, assessment, feedback to professors, bar preparation, and teaching lawyering skills. Motley, *supra* note 158, at 725. Philip Kissam notes that law school exams also have the more pragmatic function of preparing students to take (and pass) the bar. See Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 463 (1989) (discussing "the practical consequences of exams and grades").

Although we do not have data documenting the structure of law school examinations or their relationship to the dominant pedagogy, the issue deserves more serious attention.

<sup>237</sup> Instead, the law schools may simply be operating as "gatekeepers to the profession." Cramton, *supra* note 168, at 323 (noting that law schools should pay more attention to the different ways in which legal skills can be developed); see also Costonis, *supra* note 152, at 174 (noting that law school programs employ a pedagogy that inadequately addresses the full range of skills and values needed for legal competence).

<sup>238</sup> See Costonis, *supra* note 152, at 174-77 (describing role of experiential skills training in lawyer competence); see also *infra* notes 245, 250 and accompanying text (describing the traditional assumption that law schools train legal minds, but law firms train lawyers).



irresponsible.<sup>239</sup>

For these reasons, we believe that the institution has an obligation to minimize the gendered differences in academic performance, whatever their source. The institution has a professional and educational obligation to meet the needs of its "clients." It cannot simply ignore the gendered academic performance differential.<sup>240</sup> It seems to matter to the women themselves, who appear to internalize their academic weaknesses in the form of greater mental health distress, low self-esteem, and anger. It may also matter to members of the profession who worry that the general public views the bar with increasing skepticism.<sup>241</sup> Furthermore, the Law School must assume some responsibility because it publishes this academic performance differential when it provides transcripts to prospective employers.<sup>242</sup>

<sup>239</sup> In other words, women are ranked by an evaluative methodology that ignores their ability to learn, practice, and apply the law in areas other than traditional academia or appellate advocacy. Moreover, the ranking system may disable women from participating in the formal educational pedagogy, or from learning the skills that are not being taught in law school but may be necessary to the practice of law. See, e.g., Keeton, *supra* note 234, at 215-17 (acknowledging that law schools traditionally emphasize analytic skills over communication and learning skills).

By "educated," we therefore mean two things. First, if the Socratic dialogue is the primary educative tool, it does not engage a substantial and identifiable group of students when it is practiced in an intimidating environment. By their in-class silence and relatively weak exam performance, these students are disengaged from the "training" or educational methodology. They presumably are not being "trained" as effectively as their more vocal colleagues. Second, the law school, even to the extent it attempts to train legal minds, is not necessarily preparing students for the different kinds of skills they may need in the workplace. As Professor Nickles has observed:

The law school examination is given with the intent of deriving a grade, and thus any distinct purposes of the examining process in law school are subsumed within the larger functions served by the grading system. Especially within the context of legal education, the objectives of examining logically cannot be separated and analyzed apart from those of grading.

Nickles, *supra* note 231, at 415.

<sup>240</sup> Although the differences in academic performance data are statistically significant, these differences may appear minimal to some observers. Even small differences, however, become important when women are denied the opportunity to receive the on-the-job training they need to become lawyers. Many employers use this information to determine who among Penn graduates gets the opportunity to learn the practice of law. See Johnson, *supra* note 159, at 1246 (noting that law firms "depend on the sorting process of elite law schools' admissions decisions," a sorting process that values a uniform first-year curriculum and grading policy and analytical thinking); see also *supra* note 159 and accompanying text (suggesting that elite law schools fail to prepare their students in the aggregate for actual legal practice).

<sup>241</sup> See Lepow, *supra* note 124, at 70 (noting that society views lawyers as being less influential than in the past and that many people perceive the work of lawyers as a "destructive force").

<sup>242</sup> Cf. Michael Winerip, *Merit Scholarship Program Faces Sex Bias Complaint*, N.Y.

From the three tentative conclusions drawn from our data, we derive two related propositions. First, the institution's examination and educational structure has a disparate psychological and academic impact on an identifiable class of its graduates. At least one identifiable group of law students suffers from being ranked, rather than well-educated.<sup>243</sup> Second, analogous to the principles behind disparate impact employment discrimination cases and consistent with the institution's professional and pedagogic responsibilities, the institution should seriously reexamine its teaching and examination methodology.<sup>244</sup>

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TIMES, Feb. 16, 1994, at A18 (describing a complaint against the Educational Testing Service and the College Board, who developed and administer the Preliminary Scholastic Aptitude Test (PSAT), charging gender discrimination in awarding National Merit scholarships because it *provides test scores* to the scholarship organization, making "a significant assist in discrimination against females," in violation of Title IX).

<sup>243</sup> For some law students, the hierarchy of the Socratic classroom and the grading system creates a dysfunctional level of stress. See *supra* note 159 and accompanying text; see also *supra* notes 111, 121 and accompanying text (noting a gendered psychological distress among law students that is absent in studies of medical students); *supra* note 231 (discussing the possibility that the dominant methodology in legal education has outlived its usefulness); *supra* note 240 (noting that even small differences in grades can have a great impact on future career prospects). Professor Nickles explains:

Examinations typically mean grades, and grades mean everything. In American law schools grades have become negotiable. They will purchase more than the expected individual pride in accomplishment which reinforces confidence and initiative. Grades will buy a spot on the dean's list, membership in honor fraternities, enrollment in specialized classes and programs, and a place on the law journal staff. Upon graduation these prizes can be exchanged for associations with the better law firms, clerkships with prestigious courts, or acceptance by the elite graduate schools. The snowball continues to roll, and these initial professional ties become cherished springboards to others that are still bigger and better.

Nickles, *supra* note 231, at 411-12; see also Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 141 (1990) ("The grading policy . . . is dictated by big law firms . . . [A] partner in a big east coast firm . . . characterized the first year as The Race. To do well in the first year is to win The Race, and to secure your success in law firm practice forever.").

<sup>244</sup> By suggesting an analogy to employment discrimination, we neither urge litigation to resolve the problems we identify, nor contend that doctrinal approaches easily comprehend the complex relationship of the relevant variables. Our reference is triggered by the apparent relevance of principles of validation. Compare Civil Rights Act of 1991 § 703(k), 42 U.S.C. § 2000e-2(k), as amended by Pub. L. 102-166, 105 Stat. 1074(k) (Supp. IV 1992) (detailing business necessity and job relatedness defenses) with Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a) (1988) (providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

In conjunction with prospective employers with whom the Law School shares student transcripts, the Law School might discharge its professional obligations by demonstrating that its examinations, despite their disparate gendered impact, are reasonably predictive of success as a lawyer.<sup>245</sup> The Law School could show that its

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assistance" (exceptions omitted)). For analogous case law, compare *Dothard v. Rawlinson*, 433 U.S. 321, 331-37 (1977) (describing the business necessity defense) and *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (same) with *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 361-62 (S.D.N.Y. 1989) (describing the educational necessity defense).

<sup>245</sup> Law school exams have several functions. See Nickles, *supra* note 231, at 422 (discussing a survey of evaluation methods of every law school in the United States as of 1973, such surveys having been sent to the deans and student bar association presidents as well as the editors-in-chief of all law journals listed in the foreword to the Index to Legal Periodicals (1975)). The cultural and societal functions of exams are certification (the law degree functions as a standard of qualification), selection (the law graduate is worthy of representing the profession), and prediction (of competency in field). See *id.* at 416-17. "Students who received better grades readily are assumed to know better how to think like lawyers and therefore to be better lawyers in practice." *Id.* at 417-18. This same assumption is held by law professors. In fact, 68% of faculty surveyed by Nickles agreed that there was a significant correlation between academic success and success as a practitioner, whereas only 36% of law review editors and 14% of student bar association presidents believed this to be the case. See *id.* at 429 n.52. As Janet Motley points out, "[w]hether or not student perception is accurate, it does give us some information about the credibility of our evaluation method in [the eyes of students]. It certainly should tell us that the motivation which is engendered by the examination process is not related to desire to become a successful practitioner . . ." Motley, *supra* note 158, at 730 n.11 (commenting on the statistics cited by Nickles). The student-related purposes of examinations are to gauge learning and to establish a mechanism for competition for top grades. See Nickles, *supra* note 231, at 418-19. It is an open question whether traditional examinations test or predict performance as a lawyer. For example, some within legal education might argue that it is not part of the law school's mission to train law students to be lawyers. They defend the law school curriculum and examination methodology on the grounds that anonymously graded, issue-spotting examinations test—to the extent the examinations are solid evaluative mechanisms—abstract analytic ability. To put it somewhat crudely, law school trains legal minds; law firms train lawyers. It is after graduation that law school students arguably learn to be lawyers through on-the-job training.

Training law students to "be lawyers" does not occur until the students are on the job. After all, Penn Law School is not a trade school or even a mere professional school. This, some might say, is the last opportunity for most law students to get a "liberal education." Yet, even those who defend law school—as the last opportunity to "train legal minds"—acknowledge that at least some part of the Law School's responsibility is to place its students on the job market.

Moreover, even if law school simply trains students to "think like a lawyer," this thinking skill is presumably correlated with success in the profession. Yet, academic performance on blind-graded examinations may not, in fact, measure accurately what it takes to be a lawyer. Given the multidimensioned kinds of law practice and the vast range of skills employed even by Penn graduates who are hired by large corporate law firms, it no longer seems possible that one type of examination methodology

examinations are valid, reliable, and fair.<sup>246</sup> Without assuming that a doctrinal approach satisfactorily resolves this issue, it is worth noting that the failure of an examination to test for other relevant, job-related skills is a basis in employment discrimination cases for demonstrating the invalidity of selection criteria.<sup>247</sup> Even in the face of a valid test, the existence of less discriminatory alternatives is relevant.<sup>248</sup>

We have not gathered data on the professional experience of women law school graduates, or on the skills needed to succeed as an attorney.<sup>249</sup> The traditional assumption is that law school examinations test students' ability to "think like" an appellate lawyer or law professor, rather than to be a lawyer.<sup>250</sup> Consequently, we

accurately predicts success in a multi-faceted profession. As a result, some posit that law school "socializes" rather than educates lawyers. In this hypothesis, differential examination performance is used to distribute the real opportunities to learn to become lawyers; students who do well are then hired by law firms whose mission is actually to train lawyers "on the job." As Professor Coutts remarked:

There are those who have tried to show statistically that "success in practice has been, on the average, roughly in proportion to the scholarship shown in preparation"; but such statistics can be explained by the fact that the best law firms take, and give the best opportunities to, those with the highest honours degrees.

J.A. Coutts, *Examinations for Law Degrees*, 9 J. SOC'Y PUB. TCHRS. L. 399, 401 (1967). Finally, issue-spotting skills are not the same as analytic or reasoning ability. "[Issue spotting] often does not involve the demonstration of the ability to prioritize issues, nor the discussion of problems of proof, practicality of remedies, nor the numerous other skills which practicing attorneys must use in resolving real-life problems." Motley, *supra* note 158, at 737.

<sup>246</sup> See 1 MICHAEL JOSEPHSON, *LEARNING AND EVALUATION IN LAW SCHOOL* 5-6 (1984) (discussing the characteristics of a "good test").

<sup>247</sup> In other words, an evaluative methodology should ensure that all important aspects of a job are encompassed in its assessment mechanism. In addition, even if the school can show that its methodology is valid, there may be room to show that there exists a less prejudicial educational and evaluative methodology alternative. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-26 (1975) (demanding significant correlation between challenged practice and important elements of job).

<sup>248</sup> See *Dothard*, 433 U.S. at 329 (concluding that plaintiffs may only show the existence of less discriminatory alternatives if the employer proves that challenged requirements are job related).

<sup>249</sup> A new American Bar Association report has, however, articulated such a list. See MacCrane Report, *supra* note 2, at 135-221 (enumerating 10 fundamental lawyering skills and four professional values). In articulating this list of fundamental skills, the Task Force suggests that law schools may put this list to use "as a focus for examining proposals to modify their curricula to teach skills and values more extensively or differently than they now do." *Id.* at 128. Concurrently, the list could be used to develop criterion-referenced exams.

<sup>250</sup> See M. Ray Doubles, *Law School Examinations*, 8 AM. L. SCH. REV. 254, 254 (1935) ("[The] law school examination should be both prepared and graded with the

can only speculate about the results of such an attempt to validate law school examinations.<sup>251</sup>

Whatever the outcome of a validation study, however, we believe that the law school is a resilient institution, capable not only of responding to critique but also of profound change. We urge this specific institution and others like it to take seriously the transformative potential of this research. We hope our preliminary findings prompt others to investigate further the institutional, pedagogic, and evaluative problems we identify.

#### D. *Recommendations*

We do not underestimate the difficulty of institutional reform. As we stated earlier, the problems we identify are probably not specific to this one institution. The University of Pennsylvania Law School does not operate in a vacuum; it functions in response to a set of widely shared values that determine its comparative ranking, its ability to attract distinguished faculty and outstanding students, the marketability of its graduates, and its capacity to raise money from its alumni.

In addition, we do not purport to have definitive answers to the problem of gender and legal education. Nor would we claim unilateral wisdom or power to impose a solution. Indeed, the solution must emerge from a dialogue in which the perspectives of all those affected by legal education—including faculty, students, practitioners, and consumers of legal advice—are represented.

This Article represents an invitation to initiate that conversation. What we propose are examples of the types of concrete changes that could eventually make the learning process more accessible to, and more respectful of, female students. Restructuring legal education to benefit these women may also improve the experience for all students. The process of reform, or at least of reexamination, could also have a beneficial effect on the practice of law.<sup>252</sup>

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object of testing and ascertaining whether the student can 'think straight' on legal problems."). J.A. Coutts, a British law teacher, remarked that "[a] typical American claim is that examinations should show whether the candidates have acquired legal information and have learnt to 'think like lawyers,' to analyse facts and to apply legal principles." Coutts, *supra* note 245, at 401 (1968); see also Keeton, *supra* note 234, at 219-22 (stating that law school exams are "aimed at testing the skill of legal analysis as well as a body of doctrine").

<sup>251</sup> Law schools, it seems, simply inherited this methodology. See Nickles, *supra* note 231, at 446 (noting that essay examinations were seen as a complementary form of evaluation to the case-study method).

<sup>252</sup> For example, practicing law in an increasingly adversarial and competitive way

We have three specific recommendations for further research. First, we suggest that the University of Pennsylvania Law School explore conventional assumptions that the large Socratic classroom should dominate first-year instruction.<sup>253</sup> This should be an effort to promote a genuine diversity of constructive teaching styles, including, of course, rigorous Socratic teaching. As one second-year woman reflected on her law school experience, "Being intellectually stimulated is the best thing that could happen to you in law school, as long as you are not alienated."

There have been efforts at other law schools to explore a more pluralistic approach to the format of first-year classroom instruction.<sup>254</sup> Even at the University of Pennsylvania Law School, one

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may contribute to minimization of ethical obligations, client dissatisfaction, and general public distrust. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1301 (1992) ("Litigant discontent is pervasive and notably independent of outcome; 'winners' are as critical as 'losers.'"); see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) ("[I]n evaluating the justice of their experiences [people] consider factors unrelated to outcome, such as whether they have had a chance to state their case and [have] been treated with dignity and respect."); Tom R. Tyler, *Client Perceptions of Litigation; What Counts: Process or Result?*, TRIAL, July 1988, at 40, 41-42 (discussing concerns about the "fairness of the process").

<sup>253</sup> We recognize, of course, that this proposal may require some faculty members to reevaluate their attitudes toward mentoring. In addition, the material costs of altering or eliminating the Socratic method of teaching may prove prohibitive. Large lectures which depend on using examples of dialogue between the faculty member and one student to teach a particular principle to the entire class are considerably cheaper than smaller classes that give all of the students some individual attention. See Costonis, *supra* note 152, at 160 (suggesting that the Langdell law school of high student/faculty ratios, large classes, low per-student expenditures, and tuition-driven financing may rely on the case method as an "economic" rather than "pedagogical" phenomenon).

<sup>254</sup> See, e.g., Cort & Sammons, *supra* note 157, at 397 (discussing Antioch School of Law program designed to produce better "lawyering" by teaching, testing, and evaluating competencies identified as crucial to being a good lawyer); Dueker, *supra* note 154, at 120 (advocating "connected teaching," which begins with what the students already know and employs a "building," rather than a "banking," process); Steven Hartwell & Sherry L. Hartwell, *Teaching Law: Some Things Socrates Did Not Try*, 40 J. LEGAL EDUC. 509, 511-14, 519 (1990) (describing experimental study formats taught in conjunction with a typical, large-section class, but finding that exam grades did not differ according to the learning format); Kissam, *supra* note 236, at 493-502 (suggesting reform of the law school examination process); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 277-97 (1989) (proposing application of various learning theories to the method of legal instruction to improve student comprehension); Motley, *supra* note 158, at 749-60 (suggesting reform of the law school examination process); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167, 181 (1989) (arguing that the primary method of study in law school should be problem-solving exercises, since the ability to solve

professor reports great success in randomly assigning first-year students to "working groups" in which each student must pull his or her own weight for the group to function.<sup>255</sup> By success, this professor means that "race and gender are simply not as relevant in groups of six or seven, even as they may have been in a class of thirty-six."<sup>256</sup> This format can be especially empowering for students who perceive their participation in a large Socratic class as an unpleasant "performance" and, in particular, a performance as a spokesperson for their racial or gender identity.

These less hierarchical alternatives (and others may exist)<sup>257</sup> minimize the alienation of some students, encourage broad-based participation from those who feel disinclined to "perform" when they speak but nevertheless have something to contribute, and supplement the informal, exclusionary mentoring that presently aids only some students.<sup>258</sup> These alternatives also track ideas consid-

problems is the most important skill a lawyer possesses); Nickles, *supra* note 231, at 460-79 (arguing that the traditional methods of evaluating law school performance rely upon theories which have been discredited by education and psychology research); Thomas L. Shaffer & Robert S. Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190, 190-201 (1976) (examining the influence of classroom environment on learning); Van Praagh, *supra* note 123, at 113 (discussing method of legal instruction that takes into account emotion and personal perspective); see also MacCrate Report, *supra* note 2, at 128 (proposing modifications of traditional legal curricula to emphasize the development of professional skills and values); Dominguez, *supra* note 180, at 177 (proposing a format of "dynamic multicultural negotiation between small groups of students modeled after integrative bargaining in the commercial context").

<sup>255</sup> Interview with Ralph R. Smith, Associate Professor of Law, University of Pennsylvania, in Philadelphia, Pa. (Apr. 7, 1993).

<sup>256</sup> *Id.*

<sup>257</sup> An intriguing alternative has been tried in a Japanese middle school where, to minimize the agenda control of those who raise their hands first, the teacher waits until at least 75% of the students raise their hands before she calls on anyone. By teaching the students different ways of raising their hands, the teacher also invites students to signal the nature of their comment. For example, a flat palm held away from the body would indicate a different type of response than a clenched fist would signify. This approach allows participation from the girls in the class who take time to think before they speak. See Telephone Interview with Catherine Krupnick, *supra* note 86 (describing the ability of boys to dominate classes by being quicker than girls to raise their hands: once called on, boys then take longer to speak because they think through their comments as they are talking; girls, on the other hand, tend to edit in their minds their remarks before raising their hands).

<sup>258</sup> The success of these educational alternatives is suggested by the experience of the University of Oregon Law School. See Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55, 63-70 (1989). In Finke's study, groups of 12 first-year students participated in weekly meetings conducted by trained third-year students. See *id.* at 63-64. These first-year students also participated in monthly meetings in groups of three. See *id.* The groups discussed all first-year

ered by traditional consumers and watchdogs of legal education, such as the American Bar Association.<sup>259</sup>

Second, we suggest that the Law School further investigate the limitations of the adversarial model of problem-solving, at least in this model's role as the universal, exclusive norm for legal education.<sup>260</sup> We have documented how assumptions about the usefulness of competitive hierarchy and binary results exclude a significant proportion of the present student body.<sup>261</sup> We have noted that those assumptions may reinforce competitive, even harassing behavior among male students that disproportionately alienates and ridicules some women.<sup>262</sup> We also suggest that those assumptions may not be realistic in the contemporary legal market in which lawyers do many things other than argue in a highly stylized courtroom setting. We do not advocate abandoning an adversarial approach to problem-solving. We do advocate exploring whether that approach is the most, or the only, effective pedagogical methodology for educating students about the full range of skills

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substantive courses. *See id.* at 63. Students in these groups outperformed many of their nonparticipating peers, even though those participating students had weaker entry-level credentials. *See id.* at 66-70.

Finke's success may reflect evidence that retention of learned material drops precipitously after two weeks, from approximately 60% to 17%. *See* Interview with Lawrence D. Salmony, Legal Education Consultant, in Philadelphia, Pa. (Mar. 30, 1993).

<sup>259</sup> *See supra* note 2 (describing findings of the MacCrate Report).

<sup>260</sup> The notion that all disputes are best resolved by disinterested advocacy in a hierarchical, competitive, win/lose approach is under challenge from activists and scholars who value a more collaborative environment. *See* Dominguez, *supra* note 180, at 177 (advocating an approach in which each party looks to build relationships and to improve "its ability to anticipate and make adjustments for long-term challenges"). Many now question traditional notions of a competitive, meritocracy in which "the cream rises to the top." For example, branches of Eastman Kodak, General Motors, and AT&T are seeking more egalitarian approaches based on teamwork. *See* Claudia H. Deutsch, *Less Is Becoming More at A.T.& T.*, N.Y. TIMES, June 3, 1990, at F25 (stating that teamwork is becoming the norm for the 1990s employee); Andrea Gabor, *Take This Job and Love It*, N.Y. TIMES, Jan. 26, 1992, at F1 (noting that some managers believe a merit system "nourishes short-term performance," rivalry, and politics instead of long-term planning, teamwork, and the search for quality and solutions). Some companies now claim that rewarding a handful of winners may be consistent with the ingrained culture of American individualism, but it discourages cooperation and may damage morale. *See id.* Even those preaching entrepreneurial government emphasize the importance of encouraging responsive results rather than "hierarchical" process. *See, e.g.,* DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 138 (1992) (advocating a "result-oriented" government).

<sup>261</sup> *See supra* notes 73-83, 227-39 and accompanying text.

<sup>262</sup> *See supra* notes 110, 114-23, 128-29 and accompanying text.



that contemporary lawyers need.

Indeed, cooperative approaches to negotiation not only are common in forums that emphasize mediation and alternative dispute resolution, but also are associated with traditional advocacy. For example, in a Professional Responsibility class simulation at the Law School, those students who achieved the "best results," according to the professor, were those who put all their cards on the table and attempted to resolve the problem cooperatively.<sup>263</sup> Similarly, in client-centered litigation, the ability to listen and to empathize is extremely valuable.<sup>264</sup>

We recognize that small class size may be a necessary precondition to learning for some law students, but changing the size of the formal classroom environment alone is not sufficient.<sup>265</sup> Even in a seminar-style class, a few men may dominate the discussion,<sup>266</sup> and a professor intent on intimidating students still can deter a more participatory format.<sup>267</sup> Nor should we overemphasize the role of the professor as the single authority figure in a class of any size. Our data suggest that peer policing of student participation acts to

<sup>263</sup> Interview with Judge Edmund B. Spaeth, Jr., Lecturer, University of Pennsylvania Law School, in Philadelphia, Pa. (Spring 1993).

<sup>264</sup> See, e.g., Cunningham, *supra* note 252, at 1301 (suggesting that client satisfaction would improve if attorneys developed better listening and communication skills); Menkel-Meadow, *supra* note 201, at 57 (suggesting that a greater sense of empathy is vital to serving client needs and objectives satisfactorily); cf. Burling, *supra* note 234, at A2 (describing women doctors' superior communication skills).

<sup>265</sup> Professor Krupnick found that the men in one college class occupied classroom space much differently from the women. See Catherine G. Krupnick, *Meadows College Prepares for Men*, in GENDER AND PUBLIC POLICY: CASES AND COMMENTS 137, 147 (Kenneth Winston & Mary J. Bane eds., 1993) (quoting one instructor who noted that when students gave oral presentations "all of the women stayed at their seats," but "each of the men got up, walked to the front of the room, used the [black]board, used the map, and moved me out of the way"); see also *supra* note 257 (discussing an attempt to compensate for the classroom tendencies of male and female students). Deborah Tannen suggests that men and boys feel more comfortable talking at angles to each other, whereas women and girls face each other directly and sit much closer together. See TANNEN, *supra* note 156, at 89-99. This supports the assertions of Krupnick and others that the physical layout of a classroom—the way people and space are organized—can affect the way the class proceeds, who participates, and how they participate.

<sup>266</sup> See Krupnick, *supra* note 265, at 143-47 (discussing the semester-long evaluation of four college classes, consisting of 2 men and 15 women, 4 men and 11 women, 2 men and 16 women, and 4 men and 14 women, respectively, in which the men participated at disproportionately high rates).

<sup>267</sup> See Telephone Interview with Catherine G. Krupnick, *supra* note 86; see also Krupnick, *supra* note 265 (describing male domination of seminar classes in which the professor follows a hierarchical structure).

deter some women from engaging effectively in legal education as presently constituted. Similarly, the informal learning environment may be as significant a factor in alienating women as is the formal, Socratic classroom of one hundred or more students.

The Law School, therefore, might choose to investigate further the ways in which its students best learn.<sup>268</sup> There are other styles of teaching that might work better for some, if not all, law students. For some law students, certainly, collaborative or interactive learning is necessary, not just preferred.<sup>269</sup> Yet, to address this problem, the Law School might choose not to reconfigure its large, Socratic classroom. Instead, the Law School may want to: (a) set aside time for formal faculty mentoring (such as sponsoring Friday afternoon receptions); (b) arrange study groups in informal settings pairing first-year and third-year students or weaker and stronger students; or (c) institutionalize sessions to teach students not just how to study for exams, but also how to prepare for daily classroom exchanges. These types of intervention have had some success at other institutions.<sup>270</sup> In other words, we urge the Law School to

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<sup>268</sup> Uri Treisman's work on why African-American and Latino students do not perform well in university-level calculus classes makes poignantly clear the need for further study of the ways students learn. See Treisman, *infra* note 134, 372. Treisman conducted a survey of his colleagues' beliefs about why students failed to perform well in their mathematics classes; he found that most of the profession held similar beliefs (low income, low motivation, poor academic preparation, and lack of family support), but that all of those beliefs proved to be false. See *id.* at 364-67.

Had Treisman designed a tutoring program based on the incorrect assumptions about learning held by concerned and well-informed professors in the field, he would have created a program that attempted to correct for problems that did not exist. Instead, Treisman looked at why Asian students did well and African-American and Latino students did not. This process uncovered the different ways in which these groups of students studied, disproved early assumptions about failure, and led to the designing of a program encouraging peer group study sessions that dramatically improved the performance of African-American and Latino students in calculus. See *id.* at 366-69. The Law School must understand how its students learn, formally and informally, before it attempts to design programs to help their learning.

<sup>269</sup> Indeed, all law students might benefit from a greater emphasis on studying law as problem solving. See, e.g., D'Amato, *supra* note 157, at 465 n.8 (advocating the study of mathematics as the ideal problem-solving model for studying law). Students might also benefit from experiments with cooperative learning. See, e.g., Vernellia R. Randall, *Comparative Learning: Practical Advice*, LAW TCHR., Fall 1994, at 6-7 (describing cooperative learning as legal training "in which small groups of students work together on an academic task" using structures that "ensure student-student independence").

<sup>270</sup> See Robert E. Fullilove & Philip U. Treisman, *Mathematics Achievement Among African American Undergraduates at the University of California, Berkeley*, 59 J. NEGRO EDUC. 463, 463-78 (1990). In examining why Asian students did better in math than African-American students, the authors found significant differences in the way they

assume more responsibility for structuring the informal learning networks on which the Law School currently depends.

In sum, we do not propose simple recommendations for cleaning up the top of the hierarchy to appear more "diverse"; we believe our data offer an opportunity to consider dismantling the hierarchy itself. For us, this project presents an incentive to create an intellectual environment in which the theoretical, practical, and ethical notions of justice and injustice are discussed, critiqued, and reimagined in ways that meet the changing needs of many women students in particular and contemporary society in general.

### CONCLUSION<sup>271</sup>

The data we have collected tell a poignant story about the insidious effects of gendered stratification in law school "socialization." We have argued that the educational strategies of the Law School sustain hierarchy, legitimate inequity in the name of merit, and yield serious, adverse consequence for many women. Yet, the Law School maintains these practices as gender-neutral.

Unlike earlier studies of female law students that focused

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studied. *See id.* at 466-67. When the University introduced a tutoring program that integrated the studying styles of the successful Asian students, the African-American students did much better. *See id.* at 472-75. Kristine Knaplund and Richard Sander, in their evaluation of different kinds of tutoring and academic support programs at the UCLA Law School, found that some kinds of intensive small group instruction worked better than other support methods. *See* Kristine Knaplund & Richard Sander, *The Art and Science of Academic Support*, at 57 (Jan. 1994) (unpublished paper, on file with authors) They found that relying on traditional methods of academic support, such as tutoring and exam workshops, only worked in certain ways and under certain circumstances. *See id.* at 32-37. Their study could help the Law School design programs that work by showing what has not worked in the past at other institutions. Both studies indicate that the Law School can and perhaps should intervene in how the students are studying, with an eye towards teaching them new and more successful studying strategies and styles. *See also* Shanfield & Benjamin, *supra* note 121, at 73 (advocating "sanctioned peer support groups" and other support groups directed by outside leaders to help students "anticipate and master" law school problems).

<sup>271</sup> The language of our Conclusion differs from the more balanced tone of the body of this piece. We have attempted to let our statistics speak for themselves up until now. Indeed, those of us trained as lawyers would refrain, even in conclusion, from changing voice. We would employ different language to describe the weaker academic performance and lower social status of women at the law school. We are, however, an interdisciplinary team of researchers. We recognize that the social scientists among us consciously choose to express institutional dynamics in more metaphorical rhetoric. We have let their voice come through here because their language evokes the language employed by the women we studied.

primarily on women's silence as a site of resistance, our research identifies women's silence in the classroom as only one aspect of a systematically alienating, three-year educational experience. From this, we question whether all women truly have access to law schools, and whether mere access, even where women students constitute a critical mass, suffices to ensure gender equality.

We believe that our research raises the second-generation diversity issue. If the first generation of women was challenged to demonstrate the need for access into existing, previously all-male institutions, the current (second) generation is challenged to demonstrate that mere access, especially in comparatively low status positions, is inadequate. As now designed, law school fails to equalize the experience and outcomes for all law students across gender. Whether because of difference or domination, legal education at an Ivy League institution exacts a disproportionate toll on almost half the law student population.

Formerly all-male educational institutions cannot incorporate and take advantage of difference without changing from within.<sup>272</sup> Yet, the institution we studied has admitted more women students without adequately transforming itself. The major changes we observed occurred within the women who attend the school, not within or by the institution.

Second-generation diversity, however, requires some institutional transformation as a precondition for genuine inclusion. We argue that the purpose of legal education should be reconsidered critically. The problem is not simply "difference" or gendered domination—both of which play a role in the stories we have told. Nor is the problem simply that women are outsiders who opt for a powerful, stony silence. The problem lies in the system of evaluation in law schools, which functions to rank students on a hierarchy that prospective employers then use to choose who they will actually train to be a lawyer. In addition to ensuring selectivity, the law school's pedagogy socializes students to a certain adversarial practice of law. In these complementary ways, law schools perpetuate a vision of legal practice that has contributed to a crisis in the public trust of lawyers.<sup>273</sup>

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<sup>272</sup> What our data highlight is that simply adding women's bathrooms is not enough. Christine Littleton has called this the "add women and stir" phenomenon. See Littleton, *supra* note 14, at 1280. The problems with the institution are structural, not facial.

<sup>273</sup> The data produced by our study prompted one of the co-authors, Professor

In its most simple terms, our Article calls for a profound rethinking of "equal access." In these days, when a retreat from equal access seems all too facile, we seek to up the ante. Law schools, such as the University of Pennsylvania Law School, not only reproduce larger sets of social stratifications, but they create and legitimate them. If we, as a community of interdisciplinary scholars, are serious about inclusion, we must work well beyond "entry" and into the profound transformation of the very institutions into which historic outsiders are being invited.

Changing the number of women faculty, ensuring a critical mass of women students, or even institutionalizing gender-neutral language may help some women achieve their true potential as productive lawyers. But it is not enough just to add women and stir. These data plead instead for a reinvention of law school, and a fundamental change in its teaching practices, institutional policies, and social organization.

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Michelle Fine, to observe:

If law school is "boot camp" to train recruits for equally ruthless law firms, then the success of this institution is brilliant. Silence makes sense, difference has no place, and domination and alienation are the point. Alternatively, if law school is an attempt to engage and educate diverse students democratically and critically about the practices and possibilities of law for all people, then the failure of the institution is alarming. In the meantime, the price borne by women across colors is far too high and their critique far too powerful to dismiss. The question is not about women; it is about the political project of law schools, and the price women have to pay to become gentlemen.

## APPENDIX A

The Bartow Survey questions follow<sup>274</sup>:

- Question 1: How often do you ask questions in class?
- Question 2: How often do you volunteer answers in class?
- Question 3: Are you comfortable with your level of voluntary participation in class?
- Question 4: Do you think that students of one sex ask more questions than students of the other sex?
- Question 5: Do you think that students of one sex volunteer more answers than students of the other sex?
- Question 6: Are students more tolerant of in-class comments made by students of one sex than of in-class comments made by students of the other sex?
- Question 7: Do you think that students of one sex who have asked questions or volunteered answers are given more class time than students of the other sex who have asked questions or volunteered answers?
- Question 8: How many times are you called on in class involuntarily (e.g. without raising your hand)?
- Question 9: Are you comfortable with the number of times you are called on involuntarily (e.g. without raising your hand) in class?

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<sup>274</sup> The Bartow Survey questions reproduced in this Appendix were presented as multiple-choice questions, with a variety of answers provided. Generally, these answers represented ranges of frequency, such as "never," "only occasionally," "at least once a month," "at least once a week," "at least once a day," and "no opinion." Answers to other questions represented ranges of attitude, such as "always affected" (or "very satisfied"), "sometimes," "never," and "no opinion." Another subset of responses represented perceptions of the equality of treatment of male and female students, with answers such as "men more often," "equally," "women more often," and "no opinion." Yet another subset offered respondents an unrestricted number of choices from a list of answers; the various answer choices to these questions are reproduced in their entirety alongside the accompanying question in order to show more clearly the range of available responses.

- Question 10:    Do you think that students of one sex are called on more frequently than students of the other sex?
- Question 11:    Do you think that students of one sex who have been called on are given more class time than students of the other sex who have been called on?
- Question 12:    Do you think that students of one sex are asked questions that are more difficult than those posed to students of the other sex?
- Question 13:    Do you think that students of one sex receive "follow up" questions more often than students of the other sex?
- Question 14:    Do you think that the nature or content of classroom interactions between professors and students are affected by the sex of the student?
- Question 15:    Do you think that the nature or content of classroom interactions between professors and students are affected by the sex of the professor?
- Question 16:    Do you habitually use gender neutral language outside of the law school setting?
- Question 17:    Does your language usage change when you are in a law school setting?
- Question 18:    How often do your professors use gender neutral language in class?
- Question 19:    How often do your professors use gender neutral language outside of class?
- Question 20:    How often do your textbooks use gender neutral language?
- Question 21:    How important is the use of gender neutral language to you?
- Question 22:    How receptive are your professors to contact with students outside of class?
- Question 23:    How often do you approach your professors after class or in their offices?

- Question 24: How comfortable are you in interactions occurring outside of class with professors of the opposite sex?
- Question 25: Outside of class, are your professors more receptive to contact with students of a particular sex?
- Question 26: How comfortable are you in interactions occurring outside of class with professors of the same sex?
- Question 27: Do you think that your professors can determine your gender based on your handwriting?
- Question 28: How concerned are you that knowledge of your gender (based on your handwriting) may consciously or unconsciously influence the way that a professor grades your exam?
- Question 29: Have you ever felt, in any context, that a professor treated you inappropriately based on your gender?
- Question 30: Given your day-to-day observations of life at Penn Law School, please check all that apply:

I think that male professors favor male students

I think that female professors favor female students

I think that male professors favor female students

I think that female professors favor male students

I think that male professors treat male and female students equally

I think that female professors treat male and female students equally

No opinion

- Question 31: What qualities do you most admire in a law school professor? (Please check all that apply)

knowledge of subject matter

knowledge of theories and policies behind law



openness to questions in class

openness to questions outside of class

enthusiasm for teaching

asks challenging questions in class

friendly with students

available to help students with personal matters

expresses ideas clearly

professional reputation

experience

good at socratic dialogue

open to discussing exams and exam results

forces you to learn

treats students with respect

other

no opinion

Question 32:    Are you or have you been a member of any student organization here at Penn Law (e.g. Council of Student Representatives, Environmental Law Society, Asian and Pacific American Law Students Association, etc.)

Question 33:    How important are student organizations and activities to you?

Question 34:    In your opinion, do students of one sex participate in the activities of student organizations in proportionally greater numbers than students of the other sex?

Question 35:    In your opinion, do students of one sex hold leadership positions in student organizations in proportionally greater numbers than students of the opposite sex?

- Question 36: Do you think that a majority of the activities of student organizations are more appealing to students of one gender?
- Question 37: How often do you interact socially with other law students?
- Question 38: How satisfied are you with this level of social interaction?
- Question 39: Do you spend more time with law students of one gender?
- Question 40: Is your group of friends here within the law school demographically different from your group of friends from elsewhere? Please check all that apply.

My friends here are older

My friends here are younger

My friends here are the same age as my friends from elsewhere

My friends here are more racially diverse

My friends here are less racially diverse

My friends here are equally as racially diverse as my friends from elsewhere

My friends here are more sexually diverse

My friends here are less sexually diverse

My friends here are equally as sexually diverse as my friends from elsewhere

No opinion

- Question 41: How often do you study with your peers?
- Question 42: How competitive are the students in this law school?
- Question 43: Are students of one sex more competitive than students of the other sex?

- Question 44:    How sensitive to gender issues are most Penn Law students?
- Question 45:    Are sexist comments and actions by students permitted under the informal "house rules" of this law school?
- Question 46:    Have you had at least one interview for a law-related job since enrolling in law school?
- Question 47:    During the course of a job interview, have you ever been asked questions about your marital or family status that you considered inappropriate?
- Question 48:    Have you ever been approached socially during a job interview in a way that made you uncomfortable?
- Question 49:    If an interviewer asked you an inappropriate gender-related question, or made an offensive gender-related comment, how likely is it that you would report the incident to the Placement Office?
- Question 50:    What impact do you believe your gender will have on your legal career?
- Question 51:    What were your reasons for going to law school? (Please check all that apply)

influence of family, teachers or friends

intellectual stimulation and training

like to argue and debate

prestige of profession

opportunity to be of service to society

desire for varied work

desire to go into politics

desire to go into business

desire to teach law

desire to go into government service

desire to earn a lot of money

unable to find satisfactory job without graduate degree

other

no opinion

**Question 52:** What factors are highly important to you in a law-related job? (Please check all that apply)

intellectual stimulation

adversarial nature of work

independence

opportunity to work with a team of people

ability to earn a high income

wide variety of work

ability to balance career and family

ability to have influence in the community

opportunity to participate in politics

high prestige of position

opportunity for leadership

ability to handle important tasks

opportunity to be of service to the society

utilization of speaking and writing skills

other

**Question 53:** What kind of job do you expect to have after law school? (please check all that apply)

sole practitioner

law firm/partnership

government

academic

legal counsel of corporation

non-legal corporate position (e.g. investment banking)

legal counsel of foundation or university

public interest/nonprofit association

other law-related job

job unrelated to law

other

Question 54: What kind of law do you expect to practice? (Please check all areas you expect to spend 25% or more of your time practicing)

administrative law

corporate law

criminal law

family law

labor law

litigation

personal injury

public interest

real estate

tax

bankruptcy

trusts and estates

other

no opinion

- Question 55: How long do you expect to stay at your first job after law school?
- Question 56: On average, how many hours do you expect to work per week after law school?
- Question 57: During law school, how often do you drink alcoholic beverages?
- Question 58: During law school, how often do you take tranquilizers, sleeping pills, or other prescription or nonprescription depressant drugs?
- Question 59: During law school, how often do you take amphetamines, cocaine, or other prescription or nonprescription stimulant drugs?
- Question 60: During law school, how often do you overeat or undereat?
- Question 61: During law school, how often do you fight, break things, become physically violent?
- Question 62: During law school, how often do you cry?
- Question 63: During law school, how often do you have difficulty sleeping?
- Question 64: During law school, how often do you experience depression or anxiety?
- Question 65: Have you sought counseling or psychiatric care for law school related concerns?
- Question 66: Did you come to law school directly after college?
- Question 67: What is your sex?

**Question 68:** What is your race?

**Question 69:** What year of law school are you in?

Question 70: What is the highest educational level attained by your parents?

## APPENDIX B

The Bartow Survey's open-ended question follows:

Please use this space to describe any acts or comments made by a professor or fellow student you have witnessed or experienced at the law school that made you uncomfortable for gender-based reasons. Please be as specific as you can, but do not feel compelled to identify anyone by name. As with the rest of the survey your response will be kept confidential.