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ARTICLE: LESSONS AND CHALLENGES OF BECOMING GENTLEMEN

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SUMMARY:

... There are many lessons to be learned from the experience of those women law students for whom law school is a hostile learning environment. ... Within these lessons is also a challenge to all consumers and producers of legal education: can we use the negative experience of some women in law school to initiate fundamental changes in legal education generally? Our study of the academic performance and quality of life for women at this one law school reveals many institutional failings that actually affect everyone. ... Not all women experience law school as a hostile learning environment. ... The initial impulse for this larger critique of legal education stems, in part, from my own law school experience. ... To give perspective to both the survey and the academic performance data, we arranged focus groups in which we asked people to talk informally about their experience at the Law School. ... Agenda setting is critical not only in law school, but obviously in politics as well. ... Moreover, the same kinds of techniques that are rewarded in the one-size-fits-all Socratic classroom are further rewarded by the predominant mode of law school testing, i.e., the single, time-pressured essay examination at the end of the semester. ... Men and women entered the Law School with quite comparable records. ...

TEXT:

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There are many lessons to be learned from the experience of those women law students for whom law school is a hostile learning environment. These are lessons that men as well as women, law students as well as lawyers, might take from the study Michelle Fine, Jane Balin, and I conducted at the University of Pennsylvania Law School.¹ Within these lessons is also a challenge to all consumers and producers of legal education: can we use the negative experience of some women in law school to initiate fundamental changes in legal education generally?

Our study of the academic performance and quality of life for women at this one law school reveals many institutional failings that actually affect everyone. Many

of the problems we identify reflect the shortcomings of a one-size-fits-all approach to pedagogy and the correspondingly single-minded focus on adversariness as the dominant professional norm of good lawyering. These problems, which suggest troubling deficiencies in the educational enterprise, became visible as they converged around a particular group. The experience of women in law school, in other words, is not necessarily about gender per se. Not all women experience law school as a hostile learning environment. Moreover, some men do. Gender may mask bureaucratic choices and organizational inertia that adversely affect the learning experience of many consumers of legal education. At stake is not only how we educate women. We need to rethink how we admit, train, and acculturate all lawyers to the demands of a changing profession.

The initial impulse for this larger critique of legal education stems, in part, from my own law school experience. To put the matter in context, I would like to share a passage from *Becoming Gentlemen*,² in which I reflect on that experience:

[*2]

In 1984, I returned to Yale Law School to participate on a panel of mainly black alumni reminiscing about the thirty years since *Brown v. Board of Education*. It was a panel sponsored by the current black law students who were eager to hear the voices of those who had come before them. Each of us on the panel spoke for ten minutes in a room adorned by the traditional larger-than-life portraits of white men. It was the same classroom in which, ten years earlier, I had sat for "Business Units 1" (corporations) with a white male professor who addressed all of us, male and female, as gentlemen.

Every morning, at ten minutes after the hour, he would enter the classroom and greet our upturned faces: "Good morning, gentlemen." He explained this ritual the first day. He had been teaching for many years; he was a creature of habit. He readily acknowledged the presence of the few "ladies" by then in attendance, but admonished those of us born into that other gender not to feel excluded by his greeting. We too, in his mind, were "gentlemen."

In his view, this was an asexual term, one reserved for those who shared a certain civilized view of the world and who exhibited a similarly civilized demeanor. While the term primarily referred to men, and in particular men of good breeding, it assumed "men" who possess neither a race nor a gender. If we were not already members of this group, law school would certainly teach us how to be like them. That lesson was at the heart of becoming a professional. By this professor's lights, the greeting was a form of honorific. It evoked the traditional values of legal education: to train detached, "neutral" problem solvers, unemotional advocates for their clients' interests. It anticipated the perception, if not the reality, of our all becoming gentlemen.

Now, seated at the podium back in the familiar classroom preparing to address a

race and gender-mixed audience, I felt the weight of the presence of those stern portraits. For me, this was still not a safe place.

Yet, all the men on the panel reminded us how they felt to return "home," fondly revealing stories about their three years in law school. Anecdotes about their time as students, mostly funny and a touch self-congratulatory, abounded. The three black men may not have felt safe either, but they each introduced their talks with brief yet loving recollections of their law school experiences. Even the one so-called black radical among us waxed nostalgic and personal, with proud detail about his adventures as the law school troublemaker.

[*3] It was my turn. No empowering memories came to me. I had no personal anecdotes for the profound senses of alienation and isolation that caught in my throat every time I opened my mouth. Nothing resonated there for a black woman, even after my ten years as an impassioned civil rights attorney. Instead I promptly began my formal remarks, trying as hard as I could to find my voice in a room in which those portraits seemed to speak louder than I ever could. I spoke slowly, carefully, and never once admitted, except by my presence on the podium, that I had ever been at this school or in this room before. I summoned as much authority as I could in order to be heard over the sounds of silence erupting from those giant images of gentlemen hanging on the wall and from my own ever-present memory of slowly disappearing each morning and becoming one of the gentlemen of "Business Units 1."

As a law student, I accepted my own silencing. It was only later that I saw the connections between my experience and a more widespread phenomenon. Over time, for example, I also observed that problems associated with women and legal education may actually mask a larger crisis in contemporary legal education. Thus, this essay has two important points of reference. One is the voice of the women whose alienation alerted researchers other than myself to the fact that there is a problem in the first place. Second, many of the problems we subsequently identified are not located inside the women, but inside the model of lawyering that animates some aspects of contemporary legal education.

An understanding of these larger implications was sparked in January 1990, when Ann Bartow, then a third-year student at the University of Pennsylvania Law School, approached me to supervise an independent study project. She wanted to shoot a videotape in which she reversed by gender all the roles of professors and students. Ann had watched a video parodying the experience of medical students, one in which all the professors and all the more vocal students were female. This medical school videotape, entitled *Turning Around*, includes several pointed role reversal vignettes. The typical body examined by the students is female, and the diseases are studied based on what happens when women suffer from them. In one scene, a male student raises his hand tentatively to ask, "What happens when a

male develops this disease?" The female professor turns on her heels, looks him straight in the eye, and retorts dismissively, "You're smart. Extrapolate. Figure it out."

Although I was unfamiliar with video at the time, I was intrigued by Ann's idea, and I suggested that she first draft a script. In reviewing the script, I was concerned that Ann's experiences might not represent those of others. I urged her to determine whether her descriptions were typical. She drafted a seventy-question survey which she placed in the mail folders [*4] of all students then enrolled at the Law School. Over half the student body responded. We were delighted until we read the results.

The survey suggested that many, though not all, women felt alienated. For instance, many of the women respondents had entered law school full of self-confidence, one-third of them eager to practice public interest law after graduation; by contrast, only 8 percent of their first-year male counterparts intended to practice in public interest.³ Yet, only 10 percent of the third-year women and 5 percent of the third-year men reported that they still expected to practice public interest law.⁴ Something seemed to happen between the first and the third year that affected only the women. The men entered the Law School with particular ambitions and held onto them, while the women matriculated with aspirations that they relinquished over time.

We also detected a gender difference in rates of participation. In comparison with the men who responded to our survey, women law students were significantly more likely to report that they "never" or "only occasionally" asked questions or volunteered answers in class. Even more alarming than the gender disparity, however, was the fact that only the first-year women expressed discomfort with their low rate of participation - the third-year women were no longer distressed by their virtually unchanged level of class participation.⁵

We soon discovered that our findings were replicated by other researchers. A recent study of law school teaching at eight different law schools across the country found that male students speak disproportionately more in all classes taught by men, and that gender disparities are more apparent in elite schools regardless of the gender of the professor.⁶ As Catherine Krupnick found in her study of Harvard undergraduate classrooms, professors allowed those with the quickest response time to dominate classroom discussion; even with a female instructor, men still participated more than women.⁷

[*5] The women who reported that they did not speak in class also did not feel comfortable initiating conversation with professors after class; they were waiting for friendliness cues. In contrast, the men did not express such hesitation in approaching professors.⁸ This was true whether the professors were women or men.⁹

The survey revealed another disparity in the qualities students reported to most

admire in a law school professor. Although both women and men identified "knowledge of subject matter" and "enthusiasm for teaching" as their top-two selections, for their third most-valued quality, the men chose "expresses ideas clearly," whereas 93 percent of the women specified "treats students with respect."¹⁰ After inspecting this survey data, we asked seminar students if they could explain this difference; they responded that men already feel respected and therefore do not esteem that quality as much.¹¹

To gauge the impact of these gendered dynamics on women's grades as well as on their attitudes, we looked at the academic performance of 981 law students at the University of Pennsylvania over a period of three years. We found that men and women entered with virtually identical credentials: same LSAT, same GPA, same rank in class.¹² But, by the end of the first [*6] year, men rose to the top of the class, and women sank to the bottom. In the aggregate, men students were almost three times more likely in the first year and two times more likely in the second and third years to be in the top tenth percentile than women.¹³ In addition, they were one-half times more likely to be in the top fiftieth percentile than women; this difference was sustained over the course of three years.¹⁴

To give perspective to both the survey and the academic performance data, we arranged focus groups in which we asked people to talk informally about their experience at the Law School. We concluded that the women's experience was not simply a complaint that law school was too hard or too tough. They were vocalizing a fundamental critique about the way in which those of us committed to legal education perform our jobs. They were signaling a problem with law school as a learning institution that was potentially affecting everyone.¹⁵

As my colleague Susan Sturm explains in her article "From Gladiators to Problem-Solvers," legal education is modeled after the notion that lawyers are gladiators.¹⁶ To deal with a legal problem, a conflict, or any controversy in this model, one fights to win. Thus, legal education is premised on the idea that lawyers are adversaries who must be trained how to be tough to win.¹⁷ Students who do well often do so because they see the most aggressive version of the Socratic method as a game or contest in which they play to win by fighting quickly and aggressively.

Many men told us that they view law school participation as an exchange of verbal retorts. You win when you silence your opponent or when you are the first to raise your hand. So some students, disproportionately men, raise their hands to ask questions without yet organizing their ideas, taking up much "air time" as they think aloud. This teaches them the important skill of presenting ideas to an audience to hold their attention. Being first is winning in this particular environment. I observe this priority to be first when my nine-year-old son comes home and reports to [*7] me, "Mom, I was the first one to finish math today." I reply, "That's great, but what did you learn in math? You finished it, but what did you learn?"

By being first, one helps set the agenda. Consider the case of Theresa Gutierrez.¹⁸ Within a few weeks of her election as the first Hispanic on a small Texas county school board, the policy for placing issues on the meeting agenda was changed. Mrs. Gutierrez complained under the Voting Rights Act that the power of her position was diminished because under the new policy, she could not place an item on the agenda unless she first persuaded another representative to join her side prior to the meeting. She was denied any chance to influence the debate once the meeting convened. Agenda setting is critical not only in law school, but obviously in politics as well. Yet, arbitrary rules - both those that require a second before even placing an item on the agenda and those that reward students who speak first without encouraging them to articulate a thoughtful response - can distort the subsequent conversation to our mutual detriment.

Many of the women who responded to Ann Bartow's survey reported that they wanted to participate or volunteer answers but only if these seemed truly relevant. Not worrying about being the first to raise their hands in class, the women didn't want to speak unless they were certain they had something to contribute. They wanted to participate in a way that built on or connected to what someone else was saying. They perceive the Socratic classroom not as a game to win, but rather as a conversation to synthesize information.

In my experience, such women students are eager to learn by first listening to other students. As they listen, they often edit their notes before raising their hands. Some spend so much time outlining what they want to say that by the time they participate, the class may have moved onto another topic. Yet, their comments might encompass brilliant remarks that could help all students better understand the material. For example, when I visited Harvard Law School last year, a female student volunteered by reading a haiku poem which she had written in response to a problem we had been discussing for the previous hour. Her poem aptly summarized the lengthier class discussion. But, she waited to speak until it was almost too late. Sometimes it is too late. When this happens, and the class has moved on, many women and their ideas are left behind.

Women's low participation rates are problematic to the extent that participation both influences and models appropriate performance. Those students who actively engage in the educational enterprise are more apt to do well. Moreover, the same kinds of techniques that are rewarded in the one-size-fits-all Socratic classroom are further rewarded by the predominant mode of law school testing, i.e., the single, time-pressured essay examination at the end of the semester. Through my informal discussion with [*8] various professors, the observation has been made that many women perform better on take-home exams and research assignments that give them ample opportunity to think and reflect.¹⁹

This suggests that both the pedagogy and the timed exams emphasize quick thinking and strategic guessing - the ability to figure out what the person who asks the question wants rather than taking time for reflection, research, and synthesis to

determine the best answer to the question itself. The process of arriving at solutions to problems is important, but when speed and finishing first are set forth as goals, those who carefully work through problems before responding are penalized. This helps to explain the weaker performance on the math portion of the SAT by female students who then achieve as good or better grades in college than the same males who outperformed them on that test.²⁰

Moreover, the use of one cumulative examination at the end of a semester may predispose some students to disengage from the educational process and simply cram. Similarly, cold-calling or hostile questioning may stimulate some students' preparation but ultimately discourage others from the intellectual enterprise.²¹ For these reasons, some commentators urge [*9] professors to employ periodic feedback techniques, such as midterm examinations and frequent positive reinforcement of participation.²²

Those who defend the emphasis on speed and aggressive interventions rely on conventional assumptions about what constitutes good lawyering. A common contention is that women are in law school to become lawyers - professionals whose job it is to make money for their clients and who are not particularly nice, friendly, or empathetic. One law school professor has described the stereotypical Socratic approach at its worst as learning how to ask rude questions. Most people ask a question because they would like to know the answer; lawyers are trained never to ask a question unless they already know the answer. Questions are asked to put someone on the spot; to demonstrate how little that person knows; to extract outside information; and to use others as examples of a particular policy or its implications. There is a sense that the conversation contains a covert agenda. My students often say, "Well, I think what you're trying to get at is..." instead of "What I think is..." The requirement to perform in a particular way in law school encourages some students to parrot rather than to think. It is also particularly alienating to those intending to pursue careers in government or public service, whose mission is not just to learn to think like a lawyer but to do "justice."²³

Beyond socializing students to a single, hierarchical view of lawyering and dominating first-year classes to the exclusion of other constructive pedagogy,²⁴ the use of the Socratic method in the large traditional law school classroom may obstruct the formation of a "learning community" for all those students (not just women) who learn better through collaborative and non-adversarial methods. Interestingly, the preference of some women students for cooperative (rather than competitive) styles of learning parallels their classroom-participation dynamics. They often learn better in informal peer groups that integrate social and academic experiences, not only in terms of learning information, but also in terms of developing leadership skills.²⁵

[*10] If individualized combat were essential to lawyering, then the concerns or preferences of some women for collaborative learning environments would easily be dismissed. However, many researchers are finding that the skills involved in

lawyering are complex and are not captured in a one-size-fits-all pedagogical method that presents lawyering as a contest. Many suggest that the litigious mode of pedagogy is outdated, since many lawyers do not litigate.²⁶ In fact, most lawyers now do not go to court.²⁷ Most lawyers do not even work at large firms.²⁸ For those who are employed as in-house counsel or are engaged in transactional lawyering, negotiation contrasts starkly to the classic notion propagated by the Socratic method of advocating one side of a dispute before an appellate court.²⁹

Moreover, collaboration and teamwork are increasingly valued within the profession. Those who are good collaborators use crucial lawyerly traits of compromise, role flexibility, proffering questions as well as criticisms, and group problem-solving.³⁰ Problem-solving is listed by the American Bar Association's MacCrate Report task force as the "fundamental lawyering skill."³¹ Professional schools in business and in medicine utilize the problem method of instruction to achieve training for the actual [*11] situations their graduates will tackle; indeed, the Wharton School at Penn has re-arranged its classrooms to emphasize group-based problem-solving as integral to its instruction.³²

Viewed from the perspective of training students to become lawyers in the settings where they will be practicing, conventional pedagogy may not be up to the task. Similarly, we may find that conventional assessment techniques are not predicative of the kinds of work lawyers actually do. Measures of qualifications such as the LSAT or a single, timed, issue-spotting examination are efficient and purportedly objective, but this does not mean that they are fair or functional for the purposes that they are used. Applying these very domain-specific measurements in contexts for which they never were intended undermines their validity.

For example, we examined criteria used in Penn's admissions process: undergraduate GPA and class rank; LSAT; Lonsdorf index (which is computed by a formula weighing LSAT score, median LSAT score at undergraduate institution, and undergraduate GPA), and the undergraduate institution.³³ Men and women entered the Law School with quite comparable records. For example, women's LSAT scores were not statistically different from men's, and their undergraduate GPA's were slightly higher than those of males.³⁴

Then, we investigated whether there was a correlation between selection criteria and performance in the Law School. Various explanations were proffered to justify women's under-performance in grades. A few colleagues reasoned that we were admitting the wrong women. One even suggested that men's collegiate GPA's were stifled due to their varsity sports participation (a variable which law school eliminated). Others thought that women's under-performance was related to majoring in less challenging undergraduate areas. We found that there was no statistically-significant difference between the undergraduate majors of the men and the women students.³⁵ Finally, we found that the LSAT is a very weak predictor of [*12] performance at Penn for both men and women, with virtually no correlation to first-year grades for scores falling anywhere in the uppermost

quartile.³⁶

Rather than finding that the Law School was admitting "the wrong women," we found that the wrong credentials are being used to surmise who will do well in law school and what is expected of those students once they become lawyers. We discovered that our admissions' criteria and our Socratic pedagogy have been functioning as efficient quantitative measures to ease the burden of processing admissions' files, but that those same measures function independently of the real goal of legal education: to prepare students to do the multifaceted work of lawyers.

Consider the results of a study conducted by a large New York law firm of all the lawyers it hired over a thirty-year period.³⁷ This firm found that those who were superstars in law school were also likely to be outstanding lawyers and to become partners in the firm. But, below the top 1 or 2 percent of law school performers, there was little to no correlation between law school grades and the work performance of those who attained partnership. Similar results are available from other legal educators and researchers who have followed students after graduation.³⁸

This was certainly my experience supervising law student interns at the NAACP Legal Defense and Educational Fund, Inc. where I headed the voting rights litigation program during the 1980s. Students would often complain, "there is no case directly on point" in response to an assignment. "Of course," I would answer. "Since this is my area of expertise, I would know such a case and would not need you to find it. This is not simply an exercise to test how well you can fit our facts into a formulaic approach." What I needed from the students was apparently something they had not yet learned no matter how prestigious their academic record or institutional affiliations. I needed them to approach the problem creatively and synthetically - to help me think through the facts of the case on which we were working in conjunction with other similar cases and existing legal doctrine. I was less interested in students who were certain and much more impressed by students who were genuinely curious.

[*13] Especially at elite law schools, cutoffs often arbitrarily slice relatively-equal performances among a pool of the brightest percentage of the population.³⁹ With essay examinations, reliability problems abound.⁴⁰ Moreover, workplaces thrive on peer cooperation, a value inconsistent with the negative effects of grading systems that emphasize minute differentials.⁴¹

Problem-solving in the twenty-first century may require the input of diverse perspectives and skills, including the ability to listen as well as speak, to synthesize as well as categorize, and to think hard about nuance and context even when that slows down the decision-making process; insight, especially in team contexts, benefits from the integration of mainstream and marginal viewpoints. If law schools promote an environment in which alternative perspectives and approaches to learning are not supported, they may be denying the legal profession and its

clients the advantages of creative tension, of innovative ideas, and of solving problems by merging information from diverse sources. Just as business schools are rethinking how they teach, business corporations may also be growing in ways that require new approaches to lawyering.

Recently, I read about the importance of collaborative problem-solving to businesses in a Wall Street Journal article highlighting the experience of Bovis General Contractors.⁴² Before beginning construction, but after the contracts were formally negotiated by the lawyers, a team from Bovis arranged a meeting attended by the owners of the building, the architects, the engineers, and those who would be using the building. The Bovis team encouraged those present to identify important issues at the outset. Everyone agreed they wanted the project to come in on time and under budget; to meet the needs of the building's users; and to lead to long-term relationships with each of the other parties.

Most poignant is that these business people did not invite lawyers to their meeting. The lawyers negotiated the contract under which everyone [*14] was operating, but the participants negotiated duties without ever referring to or consulting the contract signed in a different place by different people. It is here at this human level where the real warranties are made. The lawyers' approach, which is understandably based on avoiding client exposure in the event that things go awry, often forecloses the human interaction - the pleasant exchanges and gestures - which assure that things go right. Indeed, Bovis boasts that it has never had a lawsuit filed when it leaves lawyers out-of-the-room and negotiates interpersonal agreements among the participants themselves.

There are many other examples of how businesses are moving to a different model of problem-solving to improve productivity. For example, branches of Eastman Kodak, General Motors, and AT&T are seeking more egalitarian approaches based on teamwork.⁴³ Recently, when I spoke to a German corporation that manufactures magnetic recording media, its chief executive officer revealed that after coming to the United States from Germany, he was greatly alarmed by our adversarial culture and, in particular, by the lawyers who worked for his corporation. His concern arose from house counsel's approach to a dispute with a union in Louisiana in which his company took a very hard stance; this dispute reached the National Labor Relations Board. After eight months, the NLRB ruled that the corporation had done nothing illegal. The lawyers celebrated their victory because they achieved their goal of fighting to win.

The next day, this chief executive officer telephoned the union representatives in Louisiana to ask them what they want. He explained, "These people work for me; I want to make sure they are invested in the long-term health of this company. I want to know what it is they want, and then I want to work with them to work it out. I'm glad we won at the NLRB so that technically we won, but now I want to win in a different way - I want to be productive!" The lawyers were furious at him for this, claiming that he had undermined their victory. Just like Bovis, he then had the

lawyers leave the room. Had their lawyers been more oriented to a collaborative approach, these clients would have been more likely to include lawyers [*15] throughout the process and not resorted to excluding them from continuing transactions.⁴⁴

If lawyers expect to be part of private problem-solving, they may have to figure out ways to intervene productively to avert litigation. As the experience of lawyers working with Stanford University's general counsel illustrates, they may have to respond to the demands to join with human resource departments to design mediation programs for resolving grievances before they escalate into lawsuits.⁴⁵ In this shifting environment, the very skills many of the women in our survey wanted to develop - skills of teamwork, building on what others say, and listening - are necessary for success.

Debra Zumwalt, a litigation partner at Pillsbury, Madison & Sutro's San Jose, California office, resonates, "One of the biggest complaints about lawyers is that they do not communicate with their clients. You need to find out how they want to be communicated with and then do it accordingly."⁴⁶ Or, as my colleague Susan Sturm suggests, we must transcend the misconception of lawyers as gladiators.⁴⁷ Unfortunately, even the title of purported courtesy for American lawyers, "esquire," is infused with imagery of valiant aspirants to knighthood and the accompanying armaments of battle.⁴⁸

Thus, the invitation issued by our research is to rethink legal education by strategizing backwards from what we want students to learn so that it prepares and trains everyone, not just women, to meet the challenges of [*16] serving as tomorrow's lawyers for Bovis, for other corporations, or for a community group lacking the funds to go to court. For many students, a teaching style that legitimizes alternative forms of participation, respects all perspectives, and broadens the educational dialogue makes them better advocates by deepening their knowledge of the world around them as well as enhancing their understanding of the implications of their claims. Concededly, in the short-term, maybe women must become "gentlemen" in order to succeed within the present system. But, for the long-term, this is a chance not for women to think like men, but for men to start thinking with women about how to solve America's problems, bringing a fresh perspective to a profession suffering from public dissatisfaction.⁴⁹ Changing legal pedagogy can help us educate all students using multiple approaches that stimulate, not stifle, intellectual curiosity and that will enable them to be creative problem-solvers as attorneys.

The lessons of *Becoming Gentlemen*, in other words, are that problems that may converge around women are often located in the institution of legal education and not in the women. The challenge is to find a way to begin a much larger conversation about the role of lawyers as 21st century private and public problem solvers, and about the kind of legal education most capable of preparing our students - all of our students - to meet those challenges.

FOOTNOTES:

¹Lani **Guinier**, Michelle Fine & Jane Balin with Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 2 (1994) (hereinafter **Guinier**).

²The following autobiographical sketch is excerpted from Lani **Guinier**, Michelle Fine, & Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* 85, 85-86 (1997). An earlier version of this chapter was published under the title "Of Gentlemen and Role Models" by Berkeley Women's L.J. (1991) [hereinafter **Guinier**].

³**Guinier**, supra note 1 at 46.

⁴Id.

⁵Id. at 44-45.

⁶Elizabeth Mertz, Wamucii Njogu, & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education* at 5 (1996) (unpublished manuscript, on file with author) (describing study of law school teaching since 1990, in which researchers observed classroom dynamics ranging across the status hierarchy: two schools were in the "elite" category, one in the "prestige" category, two in the "regional" category, and one night school class; data collection involved taping and coding the interactions during the entire first semester of "Contracts" classes). In six out of eight classrooms, male students spoke more frequently and for longer periods of time than did women. Id. at 47.

⁷Catherine Krupnick, *Women and Men in the Classroom: Inequality and Its Remedies*, 1 *On Teaching & Learning: J. of the Harv-Danforth Center* 18 (1985) (finding from analysis of videotaped observation of twenty-four teachers that male students spoke 2.5 times longer than did women in the "predominant classroom circumstance: i.e., the situation in which the instructor is male and a majority of the students are male"; participation was "based on quick thinking instead of deep or representative thinking," and was biased toward the more verbally assertive, who tended to be white males).

⁸The resistance of women to approaching professors after class raises an objection to the argument that cold-calling on students alleviates male dominance in volunteering. Some colleagues suggest that the best way to assure that all voices are heard is to treat everyone the same by calling on each student in turn to recite involuntarily. Yet, this approach may reinforce another problem. It may send the message that what some women value - a provocative and stimulating intellectual forum - is not possible unless it is accompanied by an aggressive or intimidating

posture. This may inadvertently cause women to retreat even more, waiting for signs of empathy or welcome before they even approach a professor after class. See **Guinier**, supra note 1, at 62-3 (documenting the discontent of women within the informal networks at the University of Pennsylvania Law School).

¶9. Nor is the solution merely to increase the number of women on law school faculties. See Emily M. Bernstein, *Law School Women Question the Teaching*, N.Y. Times, June 5, 1996, at B10 (expressing that "female professors who use the Socratic method can be just as off-putting as men"). But see Linda Hirshman, *Men, Women, and Law School*, Chi. Trib., May 22, 1997, 1, at 31 (concluding that shared characteristics, such as strong commitment to training lawyers to work in the public interest, are associated with women's success at certain institutions; in particular, women had a good chance of making law review at elite national schools like Duke, Stanford, and NYU where more than 20 percent of the faculty was female). See also Linda Wightman, *Women in Legal Education: A Comparison of the Law School Performance and Law School Experiences of Women and Men* 100 (1996) (finding a correlation between women who did well and instructors with positive attributes, including friendliness, interest in teaching, and concern about the problems of minorities and the disadvantaged). Wightman's analysis is based on data collected from the LSAC operating database, which tracks all law school applicants to ABA- accredited schools, and on information obtained from law schools taking part in the LSAC Bar Passage Study, which had an overall student response rate from participating schools of 75 percent.

¶10. See **Guinier**, supra note 1, at 44.

¶11. *Id.* at 131 n.89.

¶12. *Id.* at 36.

¶13. *Id.* at 37-38.

¶14. *Id.* at 37.

¶15. Telephone Interview by Lisa Otterbein with Richard Sander, Professor of Law, UCLA (June 6, 1997) (discussing forthcoming report, undertaken in conjunction with Kristine Knaplund, that will compare students' survey responses directly against their predicted and actual performance as gathered from over twenty schools fully participating in the "1995-1996 National Study of Student Performance in the First Year of Law School" to determine, amongst other hypotheses, whether the greater alienation experienced by women in certain law schools is caused by identifiable factors of the institutional environment).

¶16. Susan Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 Duke J. Gender L. & Pol'y 119, 121 (1997) (labeling the dominant model of legal education

and lawyering which "celebrates analytical rigor, toughness, and quick thinking").

¶n17. See *id.* (elaborating that successful performance is defined as "fighting to win"). Some then misconstrue case dissection as a fight to prevail, not as a method of inquiry. To the extent this occurs, the technique of Socratic teaching looks to some women like ritualized combat and, thereby, suppresses initiative.

¶n18. *Rojas v. Victoria Indep. Sch. Dist.*, 1988 U.S. Dist. LEXIS 11049 (S.D. Tex. 1988), *aff'd*, 490 U.S. 1001 (1989).

¶n19. But cf. Deborah Pearlstein, *The Limits of Equal Access: Women and Grades at Harvard Law School*, (May 24, 1997) (unpublished manuscript, on file with the author) Pearlstein theorizes that the legal style of writing may be "male": impersonal, mathematical, rule-based, certain. *Id.* at 79, citing Wightman, *supra* note 9, at 100, 113 (finding that "women who performed worse than predicted found every aspect of the [first year legal] writing program to be more difficult."). As Pearlstein notes, rather than mathematical thinking, effective performance as a lawyer may require the "ability to think analogically and creatively about how the facts of some cases relate to the facts of others." Pearlstein, *supra* at 82.

¶n20. See Howard Wainer & Linda S. Steinberg, *Sex Differences in Performance on the Mathematics Section of the Scholastic Aptitude Test: A Bidirectional Validity Study*, 62 *Harv. Educ. Rev.*, Fall 1992, at 323 (revealing that women scored lower than men of comparable college mathematics performance on the mathematics section of the SAT); William Beaver, *Is It Time to Replace the SAT?*, 82 *Academe*, May/June 1996, at 37 (reiterating that the SAT consistently underestimates the actual college performance of women). See also Katharine Q. Seelye, *Group Seeks to Alter SAT's to Raise Girls' Scores*, *N.Y. Times*, Mar. 14, 1997, at A25 (quoting Leslie R. Wolfe, President of the Center for Women Policy Studies, who stated that boys and girls scored differently because of their dissimilar approaches to taking tests, not because girls take fewer math courses: Girls tend to try to work out each problem, while boys employ "test-taking tricks"; they "play this test like a pin-ball machine," and are rewarded for plugging in answers already offered in the multiple-choice format.).

¶n21. See Mona Harrington, *Women Lawyers - Rewriting the Rules* 49 (1993) (asserting that depending on how the Socratic method is used, it can undermine the credibility of women and silence their voices). Unpredictability fosters anxiety. Some urge professors to notify students in advance that they will be called on to alleviate anxiety. See Sarah Thiemann, *Beyond Guinier: A Critique of Legal Pedagogy* 24 *N.Y.U. Rev. L. & Soc. Change* 17 (1998) (advocating modifications to the Socratic approach, such as allowing students to "pass" and calling on a group of students so that individuals are not overwhelmed). See also Wightman, *supra* note 9, at 58-59, 73 (finding greater gender differences in academic self-concept than in any other area evaluated). In particular, Wightman found a correlation between women who did worse and instructors with what she termed negative

attributes. See Wightman, *supra* at 100. She also found that the esteem lowering effects of law school were felt by black women more than any other group. Wightman, *supra* at 58.

¶n22. See Thiemann, *supra* note 21, (recommending greater use of take-home exams and paper options in addition to practice and midterm test administrations).

¶n23. See Wightman, *supra* note 9 at 114 (finding that twice as many women who performed worse than expected came to law school intending to pursue careers in government or public service). The asymmetrical effect of law school on those with particular career goals has a disproportionate affect on women since more women than men (at least extrapolating from the Penn study) come to law school motivated by an interest in social justice and public service. See **Guinier**, *supra* note 1.

¶n24. See Thiemann, *supra* note 21, (advocating the use of alternative teaching styles such as brainstorming, actual case files, role-playing, and narrative).

¶n25. See Uri Treisman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23 *C. Mathematics J.* 362, 366-69 (1992) (encouraging peer group study sessions which dramatically improved the performance of African- American and Latino students in calculus; this program was designed to simulate the studying styles of successful Asian students). See also Wightman, *supra* note 9 (describing the experience of women in law school). This is not a plea to abandon wholesale the Socratic method. Nor is it an attempt to impose another, single pedagogic technique. There are, however, many students with different learning styles. Some might learn most effectively how to be a lawyer in an environment in which students shadow current practitioners; others might willingly assume more responsibility for their own learning in order to learn how to solve a problem rather than just to earn a grade.

¶n26. See Law School Admission Council/Law School Admission Services, *Law as a Career: A Practical Guide* 17 (1993) (stating that many lawyers do not litigate at all).

¶n27. See A.B.A., *The State of the Legal Profession* 15 (1991) (showing that the majority of lawyers in private practice spend 0 to 20 percent of their time in trial and courtroom activities).

¶n28. See *id* at 7 (finding that only 16 percent of lawyers in private practice are employed by firms comprised of more than ninety lawyers).

¶n29. In the law school classroom, the professor has read the cases in their entirety, knows the development of subsequent doctrine and has probably written extensively in the area. The professor presents the students with a narrow set of edited materials from which the student is expected to extract relevant legal

principles. Some defend this approach on the grounds that it reproduces the relationship some lawyers will experience as oral advocates. My own experience as an appellate advocate suggests that the "sage on the stage" model does not necessarily reproduce but instead may reverse the information base of normal oral argument. When I litigated a case, I knew the case and relevant precedent in the area far better than many if not most of the judges before whom I appeared.

³⁰. See Kris Bosworth, *Developing Collaborative Skills in College Students*, 59 *New Directions for Teaching and Learning*, Fall 1994, at 25, 26 (contrasting collaboration to the traditional academic setting characterized by a narrow focus on one's own work, the sometimes destructive criticism of others' work because they are the competition, the sharing of ideas only with power figures, and a manipulation of the system to one's own benefit wherever possible).

³¹. *Narrowing the Gap: Legal Education and Professional Development - An Educational Continuum*, 1992 A.B.A. Sec. Legal Educ. & Admissions B. 138 (presenting problem-solving as comprised of identifying and diagnosing the problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas).

³². Interview with Judith Rodin, President of the University of Pennsylvania, in Phila., Pa. (Oct. 1, 1997). See also Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 *J. Legal Educ.* 241, 242 (1992) (proposing the adoption of the problem method as the "primary method of instruction in the standard large class and the standard core course, in every year of law school").

³³. See **Guinier**, *supra* note 1, at 36.

³⁴. See *id.*

³⁵. See *id.* at 54. This is corroborated by the national study conducted by Linda Wightman for LSAC. Women tend to do less well in law school than would be predicted by their undergraduate academic records; men may tend to do better. Yet women reported higher undergraduate grades than men. Their records of undergraduate performance, however, are not a consequence of selecting less rigorous undergraduate majors and indeed, women consistently earned higher grades than men even within the same undergraduate major. Wightman, *supra* note 9, at 17, 23-6.

³⁶. See **Guinier**, *supra* note 1, at 38-41.

³⁷. Telephone Interview by Lisa Otterbein with Robert H. Preiskel, retired partner, Fried, Frank, Harris, Shriver & Jacobson (July 1, 1997).

³⁸. See e.g., John M. Burman, *Out-of-Class Assignments as a Method of*

Teaching and Evaluating Law Students, 42 J. Legal Educ. 447, 449 (1992) (suggesting that many students who do not perform well on exams "ultimately will become excellent lawyers"; in a clinical program, students ranked in the bottom of the class typically perform as well as or better than top-ranked students); Lauriz Vold, Legal Preparation Tested by Success in Practice, 33 Harv. L. Rev. 168, 174-75 (1919) (study of all those admitted to the North Dakota Bar between 1902 and 1913, comparing success in court to law school grades, found that the highest ranking students academically were less successful in court than the next lower tier of students).

¶39. Fine distinctions between people with essentially comparable credentials are usually statistically indistinguishable; thus, comparisons based on minute grade delineations often yield no predictive value. See Susan Sturm & Lani **Guinier**, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953, 975 (1996) (expressing the justification difficulties for the use of ordering systems that attempt to distinguish among those who perform within a relatively narrow band).

¶40. See Robert M. Thorndike & Elizabeth P. Hagen, Measurement and Evaluation in Psychology and Education 253 (5th ed. 1991) (enunciating that the greatest "disadvantage of essay tests is their low reliability, partially resulting from variations within and among readers and partially resulting from the small number of questions").

¶41. See David R. Culp, Law School: A Mortuary for Poets and Moral Reason, 16 Campbell L. Rev. 61, 71 (1994) (expressing that "undue competition is at least partially, if not in the main, the result of the premium placed on grades"); Robert Stevens, Law Schools and Law Students, 59 Va. L. Rev. 551, 673 (1973) (attributing the comparatively low level of competitiveness at Yale Law School to the evaluation of first-semester students on a credit/fail basis; the elimination of grades was further credited with improving classroom atmosphere and allowing a freer exchange of ideas among students).

¶42. Thomas Petzinger, Jr., The Front Lines: Bovis Team Helps Builders Construct a Solid Foundation, Wall St. J., March 21, 1997, at B1.

¶43. See Claudia 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 employee of the 1990s); 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); see generally, Jeff Coburn, What Law Firms Should Learn from Corporate America, Am. Law., June 1996, at 23 (advocating reevaluation of traditional firm practices by comparing the management styles of the top American companies which value qualities such as open communication, use of teams, wide sharing of information, maximum employee trust and delegation, and

receptiveness to change, with dominant styles of major law firms which are described as elitist, secretive in guarding information, nonparticipatory, yielding poor feedback, hierarchical, and change averse).

¶n44. See Jill Schachner Chanen, *Constructing Team Spirit*, A.B.A. J. 58, 59 (1997) (exemplifying the insistence of today's corporate counsel that their outside lawyers "look out for a company's overall well-being;" this model for practicing law is "a throwback to when lawyers truly acted as counselors" when managing and team playing were essential in most lawyer-client relationships); Thomas Petzinger, Jr., *The Front Lines: Joe Morabito Beats the Competition with Cooperation*, Wall St. J., Feb. 7, 1997, at B1 (elucidating through the success story of Paragon Decision Resources, a provider of relocation services to major corporations, that "Business is moving from the transaction era to the relationship era.").

¶n45. See Chanen, *supra* note 44, at 59 (describing Carol Dillon's experience as part of a team of San Francisco-based lawyers from the firm of McCutchen, Doyle, Brown & Enersen working on a fixed-fee contract with Stanford University). Charles Morgan, a partner at Chicago's Mayer, Brown & Platt, former general counsel to a large corporation, adds: "Each party has to look at how to enhance the relationship (between clients and lawyers) over the long term." *Id.* at 60.

¶n46. *Id.* at 61.

¶n47. See Sturm, *supra* note 16

¶n48. See 5 *The Oxford English Dictionary* 398 (2d ed. 1989) (explicating that the designation of "esquire" is commonly understood to be due to all persons "who are regarded as 'gentlemen' by birth, position, or education"); *The New Fowler's Modern English Usage* 262 (R. W. Burchfield ed., 3d ed. 1996) (commenting on the American appendage of "Esq." to the names of women lawyers by prefacing this detail with the word "curiously"). Perhaps this traditional male title should be abandoned as a remnant of the Dark Ages because it reflects the previous belief that a female could not become an attorney-at-law. Additionally, the history and symbolism attached to this term are antiquated in light of the twenty-first century role of attorneys as informed, collaborative assistants who serve the broad-range needs of multiple entities.

¶n49. See Gary A. Hengstler, *On the Profession: Vox Populi*, 79 A.B.A. J., Sept. 1993, at 60, 62 (presenting the results of a survey on the public perception of lawyers: in addition to lawyers, the only other professionals that received a less-than-majority favorable opinion were stockbrokers and politicians).