

WHISTLING VIVALDI: LEGAL EDUCATION AND THE POLITICS OF PROGRESS

DEBORAH L. RHODE*

In his autobiographical account of life as a graduate student at the University of Chicago, Brent Staples describes one of his early ways of coping with racial stereotypes. As a large African American male living in a high crime neighborhood, Staples became aware of the anxiety he triggered among white residents. To avoid problems, he began "going out of his way onto side streets to spare [couples] the sense that they were being stalked."¹ When that proved too inconvenient, Staples discovered another solution: whistling Vivaldi.

So too, many men of color, and women of all races, have developed the metaphorical equivalent of whistling the classics in the hope of fitting more comfortably in law school. Faced with lingering, largely unconscious stereotypes, and a climate that often feels unwelcoming, students have adopted various strategies of acculturation. Yet the price of these approaches is often to perpetuate the problem. True progress will require changes in the legal academy rather than in the groups that it traditionally has excluded.

Of course, the increased presence of those groups reflects partial progress that should not be taken for granted. When I was in law school some two decades ago, diversity-related issues were not subjects of discussion. I had no course from a woman professor, and none that addressed gender inequality. And what seems most striking to me now is how little of this was striking to me then. Sol Linowitz, a prominent Washington practitioner, similarly recalls that although there were only two women in his class at Cornell Law School, neither he nor his male classmates questioned the skewed ratio. However, they did feel somewhat uncomfortable when the women were around. And, Linowitz ruefully acknowledges, "it never occurred to us to wonder whether *they* felt uncomfortable."²

Now, at least, many more students—and faculty—are wondering. But those who are most concerned are not always those who most need to be.

* Professor of Law, Stanford University; Director, Keck Center on Legal Ethics and the Legal Profession, Stanford; President-Elect, Association of American Law Schools. B.A., 1974, J.D., 1977, Yale University.

1. BRENT A. STAPLES, *PARALLEL TIMES: GROWING UP BLACK AND WHITE* 203 (1994).

2. SOL M. LINOWITZ *with* MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 6 (1994).

The problems for women and men of color in law schools are partly attributable to people who believe that the problems have been solved. Partial progress has created its own obstacles to further change.

This symposium aims to remind us of the distance we have yet to travel. With that end in view, each contributor explores issues of diversity from a somewhat different angle. My focus is on gender, and my hope is to highlight problems that remain for women in legal education. Areas of particular concern involve the underrepresentation of women in positions of greatest academic reward, the marginalization of "women's issues" in the core curriculum, and the devaluation of women's capacities and interests in educational contexts.³

I.

To a casual observer of legal education, gender inequality looks like a problem long since solved. Women now constitute almost 45 percent of law school students and 30 percent of law school faculties.⁴ Because women seem well represented on both sides of the podium, we lose sight of where they are missing.

The absences are in predictable places. In law school, as in life, women are overrepresented at the bottom and underrepresented at the top. National studies find that female students perform less well than men given predictions based on their test scores and college performance, and are less likely to be in the upper half of the class. The gap widens if race and ethnicity are taken into account.⁵ In-depth research on other areas of performance at selected institutions, such as the University of Pennsylvania Law School, also finds that women are less likely than men to graduate in the top ten percent of the class and to hold certain key positions, including membership on law review and moot court boards.⁶ Although such patterns do not hold at all law schools, neither are they isolated problems.⁷

3. For a fuller account of these issues, see Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993).

4. Richard A. White, Data Summary from The Directory of Law Teachers (Nov. 19, 1996) (unpublished memorandum, on file with author); A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 6, 39-40 (1995) [hereinafter *WOMEN IN THE LAW*]. Both of these sources include Deans, Associate Deans, and Assistant Deans within the definition of "faculty." If these individuals are not included in the definition, women comprise only about twenty-five percent of law school faculties.

5. LINDA F. WIGHTMAN, LAW SCHOOL ADMISSION COUNCIL RESEARCH REPORT SERIES, *WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN* 25 (1996).

6. Lani Guinier, Michelle Fine, & Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PENN. L. REV. 1, 30 (1994).

7. For example, women's academic performance is not lower than men's at the University of Iowa or Brooklyn Law Schools, but it is at Georgetown Law Center. See *Iowa Study Defies Trend*, NAT'L JURIST, Oct., 1995, at 28; LORRAINE DUTSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 29 (1996); Deirdre Shesgreen, *An Education in Equality*, LEGAL TIMES, March 3, 1997, at 1, 18.

Female faculty are also underrepresented in positions of greatest power, status, and security. Women account for about 30 percent of full-time faculty, but less than 20 percent of tenured positions and less than 10 percent of law school deans.⁸ The sparse research available on women of color indicates that they fare worse in law school hiring processes than similarly qualified men of color, and that these women have significantly higher rates of attrition than their white male colleagues.⁹

What accounts for such patterns is a matter of considerable dispute. To many observers, gender differences in achievement among students and faculty reflect gender differences in their choices and capabilities. For example, some individuals interpret the University of Pennsylvania findings as evidence not of gender bias but of "meritocratic streamlining."¹⁰ From this perspective, "the point of law school is to promote a particular type of legal thinker who is competitive [and] adversarial, . . . [and who values] logic over emotion. . . ."¹¹ If men as a group are better at demonstrating these capabilities, the fault lies not with legal education but with the societal forces that confer such advantages. Yet this explanation both understates the damage from persistent gender stereotypes and overstates the value of the traditional classroom culture.

II.

During the mid 1990s, a number of bar associations, legal scholars, and prominent journalists published accounts of gender bias in law school.¹² None make for cheery reading. Conduct that in isolation often had been dismissed as trivial or aberrant assumes greater significance when viewed as part of broader patterns. Although the problems at most institutions involved unconscious stereotypes or inadvertent insensitivity, there also have been a striking number of intentionally demeaning incidents.

Gender bias among faculty has taken a variety of forms. Some professors have been more likely to call on male than female students and to provide more positive reinforcement, both verbal and nonverbal, for men's

8. The full-time faculty percentage includes deans. *WOMEN IN THE LAW*, *supra* note 4, at 39-40; White, *supra* note 4; ASSOCIATION OF AMERICAN LAW SCHOOLS, *MEETING THE CHALLENGES OF DIVERSITY IN AN ACADEMIC DEMOCRACY* (1995).

9. Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992) (comparing the success of women of color in obtaining tenure-track positions at law schools with that of men of color and analyzing the differences); Richard A. White, Summary and Comments on Preliminary Report on a Study of the Promotion and Retention of New Law School Faculty Hired in 1990 and 1991 (1996) (unpublished memorandum, on file with author).

10. Michelle Fine & L. Muv. Wong, *Perceived (In) Justice: Freeing the Compliant Victim*, in *CONFLICT, COOPERATION, AND JUSTICE* 338-39 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995).

11. *Id.*

12. See *supra* and *infra* sources cited in notes 3, 4, 5, 6, 7, 9, 15, 28.

participation.¹³ Other faculty have made comments that devalue women. A Yale torts professor wondered whether there was any such thing as the "reasonable woman."¹⁴ A faculty member presiding over a moot court competition in Chicago reminded one of the female participants that "this is not Gidget goes to law school."¹⁵

Some professors have implicitly marginalized women by failing to address gender-related issues or feminist perspectives in class. A survey of Chicago law schools by the local Bar Association's Alliance for Women found that none of the schools incorporated such issues or perspectives into the traditional curriculum. The coverage that did occur often looked like an afterthought: a brief digression from the "real" subject.¹⁶ Other studies have found that some male professors even fail to include topics that are of obvious importance, such as rape in criminal law, because the issues appear too politically or emotionally freighted for "rational" discussion.¹⁷

Issues of particular concern to lesbians and women of color are noticeable largely for their absence.¹⁸ And, as Kimberle Crenshaw notes, when matters involving race and ethnicity do arise, minority students often are "put on the spot" with questions about their particular experiences.¹⁹ This approach increases the likelihood that classmates will discount the views of students of color as "biased, self interested, and unduly subjective."²⁰ The implicit message is that the white male heterosexual is the norm and that other points of view are "special."

What is most disturbing about such patterns is the tendency among some faculty to dismiss the significance of bias or to ridicule others who do not. For example, in one law school whose published guidelines suggested

13. Guinier, Fine, & Balin, *supra*, note 6, at 32-33; Robert Grainfield, *Contextualizing the Different Voice: Women, Occupational Goals and Legal Education* 16 *LAW & POL'Y REV.* 1, 10-11 (1994). See also BERNICE RESNICK SANDLER, *WOMEN FACULTY AT WORK IN THE CLASSROOM, OR WHY IT STILL HURTS TO BE A WOMAN IN LABOR* (Center for Women's Policy Studies, May 1993).

14. DUTSKY, *supra* note 7, at 22.

15. LAW SCHOOL OUTREACH PROJECT OF THE CHICAGO BAR ASSOCIATION ALLIANCE FOR WOMEN, *WOMEN STUDENTS' EXPERIENCE OF GENDER BIAS IN CHICAGO AREA LAW SCHOOLS: A STEP TOWARD GENDER BIAS FREE JURISPRUDENCE* 24 (1995) [hereinafter, *LAW SCHOOL OUTREACH PROJECT*].

16. *Id.* at vi, 53.

17. *Id.* at 55; DUTSKY, *supra* note 7, at 39. The problem is long standing. See Karen B. Czapskiy & Jane B. Singer, *Women in the Law School: It's Time for More Change*, 7 *LAW & INEQ. J.* 135 (1988) (arguing that reforms in legal education are necessary in order to incorporate women as full and equal members of the legal profession). For the special problems concerning rape, see Susan Estrich, *Teaching Rape Law*, 102 *YALE L.J.* 509 (1992); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks & Rewards*, 102 *YALE L.J.* 481 (1992).

18. Kimberle Crenshaw, *Forward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 *NAT'L BLACK L.J.* 1, (1989); Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 *LAW & INEQ. J.* 555, 558, 569 (1996).

19. Crenshaw, *supra* note 18, at 6.

20. *Id.* at 7.

that professors should use gender neutral language, a male professor responded by changing all "man" endings to "person," as in "Doberperson Pincher."²¹ Another professor used a birth control hypothetical in class and asked women students to raise their hands if they had ever used birth control. One student objected, and two weeks later, the professor retaliated by making her the subject of a defamation hypothetical in which he asked if it was "ok to call her a radical feminist bitch."²²

Incidents of bias among students take similar, though sometimes more virulent forms. Women who raise gender-related concerns have been ridiculed by classmates for "overreaction," "overemotionalism," or "ultrafeminism."²³ They also have acquired labels like "feminazi," "dyke," or "manhater."²⁴ Women student organizations have received comparable nicknames and their posters, along with those of gay and lesbian groups, have been removed or defaced.²⁵

Such hazing frequently silences women, particularly where faculty and administrators fail to take it seriously.²⁶ Professors concerned about negative student course evaluations can be silenced as well. Some decide to avoid criticism by avoiding issues likely to provoke it.²⁷

Although women who challenge conventional gender stereotypes frequently risk harassment, those who conform to those stereotypes may pay a different price. Like other professionals, women law students and faculty face a longstanding double bind; they can be penalized for being either too feminine or not feminine enough. That point was brought home at Yale during the fall of 1995 when unsigned flyers began appearing in law school mailboxes. These flyers identified several female classmates as the campus's "Total Packages" and described their physical appearance with terms such as "Boy Toy" and "Exotic [while] Erotic."²⁸ At other schools, similar characterizations have surfaced on student evaluation forms for women

21. LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at 27.

22. *Id.* at 27-28.

23. *Id.* at 35; DUTSKY, *supra* note 7, at 28.

24. LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at vii, 35; Guinier, Fine, & Balin, *supra* note 6, at 52.

25. LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at 39; Ihrig, *supra* note 18, at 568.

26. LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at 41; DUTSKY, *supra* note 7, at 22-23.

27. LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at 53.

28. Sandra Toity, *Voice of Concern Grows Louder on Gender Bias Issue*, WASH. POST, Nov. 20, 1995, at F07; Sandra Toity, *ABA Panel Finds Sex Bias in Law Schools*, WASH. POST, Feb. 3, 1996, at A03. See also, A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 14-15, 25-26 (1996) (describing bias, discrimination, and harassment at a number of law schools) [hereinafter *ELUSIVE EQUALITY*].

faculty. "I enjoyed watching her jiggle when she wrote at the chalkboard," was one such assessment.²⁹

To many (usually male) observers, such comments seem relatively harmless. "Get a life" was a common reaction to the Yale women who complained about the flyers. But the cumulative effect of such incidents should not be discounted. They serve to undermine women's sense of comfort, credibility, and competence. Female faculty and students need to focus on what is written on chalkboards, not on how they look like while writing or reading it. Moreover, psychological research makes clear that gender stereotypes can adversely affect performance. Many individuals either internalize messages of inferiority or feel threatened by the need to respond to them. In Claude Steele's recent studies of college women, informing talented math students that females generally do worse than males on standardized tests caused those students' own scores to decline.³⁰ So too, studies finding that women's self-esteem drops during law school are especially worrisome in light of research linking self-confidence with academic achievement.³¹

Recent evidence also suggests that women's absence in positions of authority may reinforce negative stereotypes and impair other women's confidence and comfort levels.³² The underrepresentation of female legal academics in tenured and upper level administrative positions reportedly has such effects by diminishing students' access to mentors, role models, and decisionmakers who are sensitive to gender-related concerns.³³

III.

For many women, the problems in legal education extend beyond the patterns of bias and underrepresentation most directly linked to gender. A related concern involves conventional classroom approaches. Values that traditionally have been central to women — care, connection, context — are not the values that have been central to law school teaching. The authoritarian, abstract, and competitive framework that dominates legal education ill-serves the needs of many of its constituents.

29. ELUSIVE EQUALITY, *supra* note 28, at 36; Elizabeth A. Delfs, *Foul Play in the Court Room: Persistence, Cause and Remedies*, 17 WOMEN'S RTS. L. REP. 309, 320 (1996).

30. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape the Intellectual Identities and Performance of Women and African Americans*, AM. PSYCHOLOGIST (forthcoming, 1997).

31. For reports of declining self-esteem, see Wightman, *supra* note 5, at 73; Guinier, Fine, & Balin, *supra* note 6, at 62. For the linkage between self-esteem and achievement, see Steele, *supra* note 30; MYRA SADKER & DAVID M. SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* (1994).

32. See Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 ACAD. MGMT. J. 589, 594-596, 604-618 (1995).

33. See LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at 51-52; Ely, *supra* note 32, Anita Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L. J. 22 (1990).

In theory, law school's heavy reliance on quasi-socratic dialogue in large classes fosters rigorous analysis and careful preparation. In practice, however, it often preempts both. As experts in educational theory note, a high level of control over students' speech fails to develop their own independent reasoning skills.³⁴ The hyper-competitive ethos of many classrooms also tends to undermine self-esteem and discourage less confident or assertive students from involvement.³⁵ All too often, the search for knowledge becomes a scramble for status. Because women often have been socialized to avoid self-promotion, they are particularly likely to remain silent. A wide variety of studies find that female students participate less than their male classmates in law school courses and experience greater frustration with socratic methods.³⁶

Traditional classroom approaches also fail to develop capacities that are highly important but too often lacking in young attorneys. Overemphasizing doctrinal analysis teaches law at the expense of lawyering. Such a focus also neglects interpersonal, cooperative, and problem solving skills that are central to effective practice. Students get the functional equivalent of "geology without the rocks"; legal rulings are divorced from social contexts involving real people with real problems.³⁷ Moreover, legal education models forms of hierarchy that compromise performance in other contexts. Relationships between partners and associates, lawyers and clients, and professionals and support staff frequently replicate overbearing dynamics reinforced in classroom settings.

IV.

We do not lack for alternatives. Educational experts, including those who participated in this symposium, remind us what is necessary.³⁸ We

34. CHRIS KYRACOU, *EFFECTIVE TEACHING IN SCHOOLS* 144 (1986); JOSEPH M. NOTTERMAN & HENRY N. DREWRY, *PSYCHOLOGY AND EDUCATION: PARALLEL AND INTERACTIVE APPROACHES* 189 (1993); ELIZABETH HAYES, *EFFECTIVE TEACHING STYLES* 30-59 (1989).

35. NOTTERMAN & DREWRY, *supra* note 34, at 189; Frances Maher, *Classroom Pedagogy and the New Scholarship on Women*, in *GENDERED SUBJECTS: THE DYNAMICS OF FEMINIST TEACHING* 29 (Margo Culley & Catherine Portuges eds., 1985); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 151 (1988).

36. Guinier, Fine, & Balin, *supra* note 6, at 32, 46; Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L. J. 1 (1989-90); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988). See also Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571 (1993) (discussing whether a feminist Socratic method is possible and what it might look like).

37. PAUL WICE, *JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE* 16 (1991) (quoting Lawrence Friedman).

38. STEPHEN D. BROOKFIELD, *THE SKILLFUL TEACHER: ON TECHNIQUE, TRUST, AND RESPONSIVENESS IN THE CLASSROOM* (1990); JOHN T. BRUER, *SCHOOLS FOR THOUGHT: A SCIENCE OF LEARNING IN THE CLASSROOM* (1993); C. R. CHRISTENSON, *EDUCATION FOR JUDGEMENT: THE ARTISTRY OF DISCUSSION LEADERSHIP* (1991).

need more strategies that create supportive and collaborative learning environments, that foster a diverse range of skills, and that encourage mutual respect. To that end, commentators have proposed a broad range of initiatives. Law schools could survey students, faculty, and staff to assess gender-related concerns; allocate formal responsibility for addressing such issues; seek adequate representation of women, particularly women of color, at all faculty and administrative levels; promote curricular integration projects; encourage innovative classroom teaching approaches; increase appropriations for mentoring and for feedback on student performance; and support special programs and organizations that will further equal educational opportunity.³⁹

These strategies will emerge only if we also rearrange educational reward structures. Valuing diversity must become a central mission, not just in theory but in practice.

39. ELUSIVE EQUALITY, *supra* note 28, at 35-61; LAW SCHOOL OUTREACH PROJECT, *supra* note 15, at 61; Carl Monk, AALS Memorandum to Deans of Member and Fee-Paid Schools (July 3, 1996) (including questionnaire for deans to assess schools and respond to the experiences of women); Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 U.C.L.A. WOMEN'S L. J. 81 (1996) (describing efforts at a school founded to create a supportive student environment).