DIVERSITY AND LEARNING: IMAGINING A PEDAGOGY OF DIFFERENCE

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INTRODUCTION

The diversity of law school faculties and student bodies has become the focus of intense discussion and debate.[1] Most of the attention to date has been paid to the introduction of diversity: admitting students from groups traditionally underrepresented in the profession, and hiring and tenuring faculty from these underrepresented groups. Undeniably, more and more women,

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1. Students have demonstrated on behalf of greater faculty and student diversity and, in some instances, have been arrested while advocating change. During the first week of April, 1990, "thousands of students at more than 40 law schools" joined in a demand for greater faculty diversity. Edward W. Lempinen, *A Student Challenge to the Old Guard*, STUDENT LAWYER, Sept. 1990, at 12. Some faculty members have recognized the need for diversity; Professor Derrick Bell of Harvard Law School has taken an indefinite unpaid leave of absence to pressure his colleagues to offer a tenured faculty position to a black woman. *Id.* at 14.

people of color, lesbians and gay men, and people from economically disadvantaged backgrounds are entering law school,[2] and there is better representation of these groups on law faculties.[3] Yet these changes have not generally been accompanied by alterations in the curriculum.[4] Genuine diversity requires more than just changes in the make-up of the community; it requires a new order so that the traditional roles of power and authority and the overriding vision of the institution do not remain the same.[5]

Too often, the operating assumption has been that all students who are given an equal opportunity to gain a legal education will succeed in direct proportion to their ability. Admitting a diverse group of students without making changes in the law school curriculum has been considered sufficient to make up for the past exclusion of certain groups. But just as adding more women's bathrooms fails to make a formerly all-male school truly co-ed, so too merely assuming that students from these previously underrepresented groups will assimilate themselves into the existing system is insufficient to create true diversity.[6] Diversity requires accepting and appreciating difference, including differences in learning needs. When difference is ignored or belittled, students who see themselves as different become alienated.

Celebrating diversity and considering changes in curriculum to accommodate students' various learning needs require an acceptance of difference not generally found in our culture. The concept of "equal opportunity,"

2. *See A Review of Legal Education in the United States, Fall 1988: Law Schools and Bar Admission Requirements*, 1989 A.B.A. Sec. Legal Educ. & Admissions to the Bar. Law school students are 42% women and 13% people of color. Although more difficult to quantify, the number of openly gay and lesbian students is reflected in the growing number of schools with organized gay and lesbian student groups and the organization in 1989 of the National Lesbian and Gay Law Students Association. The increased percentage of students on financial aid illustrates, to some extent, greater diversity of economic background in the student body.

3. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, (1988). In the 1986-87 academic year, the total percentage of minority faculty members — not including faculty at traditionally minority-operated institutions — was 5.4%, 26.4% of law schools had no minority faculty members, and the percentage of women in tenured or tenure-track classroom or clinical positions was 15.9%. As an indication of the presence of lesbians and gay men on law school faculties, the Association of American Law Schools Section on Lesbian and Gay Law has more than 250 law teachers on its mailing list. Although not everyone who receives the newsletter is lesbian or gay, this list is maintained by the Section, not the AALS, and therefore can include those who do not want their interest in the Section known. Telephone conversation with AALS Section on Lesbian and Gay Law Newsletter Editor (Feb. 3, 1992).

4. I do not mean to imply that there are no changes being made in the law school curriculum; there are, and some of them may serve the purpose of supporting students who have been traditionally underrepresented in law school.

5. *See* Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 148 (1990).

6. The development of women's studies and feminist pedagogy was encouraged by changes in student population in colleges and universities in the 1960s and 1970s. "Along with shifts in student concerns and student populations came the need to rethink the organization and delivery of 'knowledge' as traditionally vested in the composition of the academic canon across the disciplines." GENDERED SUBJECTS: THE DYNAMICS OF FEMINIST TEACHING 3 (Margo Culley & Catherine Portuges eds., 1985).

which has shaped debate over correcting past injustices, has been controlled by the assumption that differences are bad and should be ignored or overcome.[7] Discussion of difference often leads to hierarchies of what characteristics are good or bad, better or worse.[8] Differences are often framed as one-sided: "women are different from men."[9] There is a presumed norm against which all else is measured: the characteristics of the white, heterosexual male. Any deviation from that norm is viewed less favorably.[10]

Difference itself is often overtly or subtly denigrated. For example, in my own constitutional law class, when women expressed strong feelings about the Supreme Court's decision in *Roe v. Wade*,[11] the professor mockingly referred to the speakers as "cheerleaders" for a cause. Similarly, the professor covered several major civil rights cases very quickly and with little student input, although African-American students in particular had expressed great interest in discussing them. While each of these incidents was minor in itself, and the

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7. *See generally* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

8. "[D]ifference has two aspects. It is both distinction (women and men differ) and hierarchy (women are different from men), where one half of the distinction becomes a norm from which the other half is distinguished. The problem with difference is that the neutrality of evident distinctions between men and women (whether psychological, philosophical or otherwise) masks the hierarchical content of gender difference, which is inevitably a function of power and perspective. Feminist attempts to uproot from our own thoughts as well as from our institutions the consequences of difference-dilemma type reasoning shows (sic) how hard it is to resist the irresistible urge to rank."

Nitya Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 BUFF. L. REV. 325, 354 (1986).

9. Catharine A. MacKinnon argues that gender is a question of dominance and "the options of either being the same as men or being different from men are just two ways of having men as your standard." Ellen C. Dubois et al., *Feminist Discourse, Moral Values, and the Law - A Conversation*, 34 BUFF. L. REV. 11, 21 (1985).

10. "Difference is not something which is intrinsic in the 'different' person, but rather the product of a comparison." Martha Minow, *Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance*, 39 DEPAUL L. REV. 1, 3 (1989). The danger in celebrating difference is in knowing whether differences are a product of oppression or of inherent, natural preferences. *See id.* at 7-9 (considering the conflicting expert testimony presented in *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), as to whether women preferred not to take commission sales jobs or expressed preferences consistent with the real economic opportunities available to them); *see also* Dubois et al., *supra* note 9, at 74 (arguing that women's morality is unknowable given the reality of patriarchal dominance).

Discussing the difficulties raised by efforts to treat women equally with men — for example, the impoverishment of women following divorce which has resulted from the development of no-fault divorce laws — Nitya Duclos observes:

> The root of these paradoxes is revealed when it is understood that difference is not an objective fact, but a socially constructed relation. More accurately, it is the construction of a relationship by someone from an often unstated reference point for some purpose. All statements of difference are a matter of perspective and there is no neutral status quo.

Duclos, *supra* note 8, at 354 (footnote omitted).

11. 410 U.S. 113 (1973) (finding that a woman has a limited right to terminate her pregnancy protected by the due process clause of the fourteenth amendment).

professor may have made valid pedagogical decisions about how best to allocate time for discussion, they nevertheless communicated a subtle but powerful message about priorities and legitimacy.

The denial of the value of difference has led to assimilation as a goal for equality; if we are all the same, then the most powerful model — white, heterosexual male — sets the standard for those who wish to gain power.[12] But this model is increasingly recognized as inaccessible or undesirable.[13] The sense that difference plays a powerful and potentially positive role has taken on new importance.[14]

My understanding of difference in legal education has arisen from stories — my own, those of my classmates and students, published anecdotes, and even one from a potential employer during a job interview.[15] After one traditional law school class which I attended, I overheard two conversations which illustrate how the sense of being an outsider interferes with learning: at the end of the first contracts class of the year, one white man observed to his white male neighbor (with whom he had apparently prepared for class) that their preparation had "gotten [the professor's] major questions." In front of me, one white woman who had raised her hand several times but not been called on, turned to another and said, "Is it my imagination, or did he not call on any women?" The man felt affirmed by the class; the woman felt negated.

12. "[A]ll too often in order to be successful, women have adopted assimilation as their intellectual strategy and equal treatment as their substantive principle." Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 26 (1990). The same can be said for other traditionally underrepresented groups, since the price of admission has been assimilation. "The tension that 'diverse' faculty members, especially the untenured, feel around the issue of collegiality is often intense. 'Collegiality' often feels like a command to assimilate at all costs." Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125, 128 n.10 (1990).

13. Minow, *supra* note 10, at 12 ("To be meaningful, equality requires . . . . paying attention to context, and acknowledging the limits of our own point of view. It also means selecting better ideals for society as a whole, such as equality between men and women, not merely for women who adapt themselves to the male role.").

14. Beginning with the publication of Carol Gilligan, IN A DIFFERENT VOICE — PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), feminists have begun to re-examine gender and difference in a new light. Gilligan points out that her work compares women to psychological theory — not to men — and describes a voice not previously acknowledged in the psychology of moral development, and moral philosophy. Dubois et al., *supra* note 9, at 38. The implications of her work for finding a voice not previously heard in the legal and political system has prompted enormous attention. *See, e.g.*, Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Dubois et al., *supra* note 9; Duclos, *supra* note 8; Fineman, *supra* note 12; Jennifer Jaff, *The Difference That Difference Makes*, 19 CUMB. L. REV. 467 (1989); Minow, *supra* note 10; Sharon Elizabeth Rush, *Understanding Diversity*, 42 FLA. L.REV. 1 (1990).

15. The stories I have heard and read come mostly from women. There are a number of likely reasons for this; among them are my gender, which makes it easier for women to talk to me and harder for men to do so, and the growing social acceptance of women as storytellers. "[N]arrative is emerging as a feminist method of moral argument, both in practice and in theory. The divergence maps another aspect of our difference: women just do rely on narrative, anecdote and story more than do men for purposes of making moral arguments." Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 90 (1987) (footnote omitted).

In the same vein, a practicing attorney related to me the experience which had epitomized law school for her: her legal writing instructor told her that she did not "think like most people who go to law school." In another account, Benita Ramsey, a black woman, describes being told by a classmate that she would not survive law school because her command of English was not as good as that of white students.[16]

The experience of difference is felt by those students who do not fit within the norm of what is considered "right," and this feeling is often reinforced by external forces. The failure to see oneself as belonging within the norm leads to a profound sense of alienation based not just on the newness of legal education — which many first year students share — but on the sense that while one is struggling to succeed, the system itself is set up to limit one's success.[17]

All first-year law students strive to understand and find their place in the culture of the law, and a law school education is intended in large measure to enable them to accomplish this. But for students who fail to identify — who feel alienated[18] — this failure can hamper their ability to achieve their goals. Students from groups traditionally underrepresented in law school or the legal system — women, people of color, lesbians and gay men, people from economically disadvantaged backgrounds — experience alienation which stems not from their individual abilities or failings, but from the fact that their identities, backgrounds and experiences are not deemed relevant to their development as lawyers and as legal thinkers.[19] Their education focuses on fitting them into a mold shaped by others.

Legal education is more than just learning new skills. It is about taking on a role in the legal system, a role with substantial power to shape the institutions which govern and control lives. Students from groups which traditionally have not had power in our society report that this is often a different and more difficult process than it seems to be for students who see themselves reflected in the composition of traditional decision-makers. This Article will consider both the implications of these differences and the pedagogical needs of a diverse student body.

What I propose here is the development of a "pedagogy of difference,"

16. Benita Ramsey, *Excluded Voices: Realities in Law and Law Reform*, 42 U. MIAMI L. REV. 1, 2 (1987).

17. Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988) [hereinafter Matsuda, *Affirmative Action*]; *see also*, DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY; A POLEMIC AGAINST THE SYSTEM (1983).

18. " 'Alienation' describes the experience of being unable to identify with the 'mainstream' — the 'culture, society, family or peer group.' " A CONCISE ENCYCLOPAEDIA OF PSYCHIATRY (Denis Leigh, C.M.B. Pare, John Marks eds., 1977).

19. One Latina student described to me the feeling of being "stripped of who she was" because her background and experience was deemed irrelevant and was not reflected in what she saw in the law school environment. *See also* Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

both to meet the needs of, and take advantage of, the changing student body.[20] I focus on the first-year curriculum as a starting point because it is the most consistent area of the law school curriculum, and the most traditional. In addition, it is largely where students learn how to learn the law, where they learn the basic concepts of legal analysis and the legal system, and where they begin to envision and shape their role in that system.[21] The first year of law school is a powerful imprinting experience, driving students to see themselves and everyone around them as slotted into particular strata in the profession's hierarchy.

Pedagogy premised on the assumption that all students are alike and will therefore respond identically to a single teaching methodology has been critiqued on the basis of research done in psychology and adult education as being too limited. Studies in these fields have found that in order to meet students' needs, it is necessary to listen to their different experiences and to understand their different learning needs. Only by acknowledging these differences can we teach to a diverse student body.

This Article examines some of the research done in these fields and considers the application of their insights to law school pedagogy. In order to create a pedagogy of difference for the first year of law school, it is necessary to draw on an understanding of what students from traditionally underrepresented groups bring to law school and to incorporate their different experiences into the curriculum. While I think many of the effects of difference which I include here are equally true for all those who find themselves outside the norm in law school, my primary empirical evidence is based on the experience of women. I draw on my own experience and from a study of women's intellectual development.[22] Combining the ideas found there regarding successful learning experiences for women with the principles of adult education, this Article evaluates learning needs and difference, and explores some strategies for minimizing or eliminating students' alienation stemming from difference. It then examines the dominant pedagogy of the first year of law school with an eye to learning needs and recommends specific changes in law school teaching that would enhance the learning of all students.

My focus in this Article is on the education of women, because I can verify those principles through my own experience. I think that many of the ideas which I include here are equally applicable to all those who see them-

20. *See* Rush, *supra* note 14, at 10 (goal of diversifying faculty is "not just a tolerance of, but a genuine appreciation for men of color and women").

21. While the learning needs of students do not necessarily change after the first year of law school, the first year curriculum is unique in several ways. It is largely required, and the socialization to legal norms and learning of basic concepts is essentially complete after the first year. In addition, after the first year, students can make choices not only about the substance, but about the learning formats of their legal education, including seminars, clinics, non-attendance, and jobs. Thus, students have learned the basic concepts and norms and have a greater ability to see that their needs are met after the first year.

22. MARY FIELD BELENKY, ET AL., WOMEN'S WAYS OF KNOWING; THE DEVELOPMENT OF SELF, VOICE AND MIND (1986) [hereinafter WOMEN'S WAYS OF KNOWING].

selves as outsiders in law school, but I leave it to others to validate this.[23] The empirical studies drawn on in this Article support the conclusion that respect for difference makes education accessible to all students. The development of a pedagogy of difference is based on the premise that students will thrive in an environment that respects diversity, so that the application of these ideas to legal education will benefit not just women, or "outsiders," but all students.

I. LAW SCHOOL PEDAGOGY

As it is currently presented, the pedagogy of the first year creates substantial alienation in students.[24] While this is an experience shared by students from many different backgrounds, it has a powerful effect on students who do not see the institution as open to or welcoming of them and their histories.[25] Students who are "other"[26] feel forced into a mold they do not fit and find themselves alienated from the curriculum. This process places learning barriers in their way and makes their education more of a struggle; they often receive lower grades, thereby limiting their futures.[27] By accepting and teaching to difference, rather than assuming that all students will readily adapt themselves to the white male norm, we can create an atmosphere which not only respects but celebrates the diversity of students and which allows all students to learn from the varying perspectives and experiences of a diverse community.[28] If the first year of law school is focused on meeting the learning needs

23. Debate on multicultural and afrocentric education also reflects a growing sense that equal opportunity is not equal when the norm against which measurement is made is white and male. This holds true for all those who do not find their life experiences reflected or appreciated in their education.

24. *See generally* Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970).

25. An examination of difference leads to the conclusion that the law "primarily represents and reflects male experiences and norms." Fineman, *supra* note 12, at 26.

26. Following the lead of Professor Matsuda, I use the terms "other" and "outsider" throughout this Article "to encompass various out-groups, including women, people of color, poor people, gays and lesbians, indigenous Americans, and other oppressed people who have suffered historical under-representation and silencing in law schools." I do so "to avoid the use of 'minority.' The outsiders collectively are a numerical majority in this country. The inclusive term is not intended to deny the need for separate consideration of the circumstances of each group." Rather, these terms are used here to emphasize the need for inclusion of respect for difference as a general matter in the pedagogy of law schools. Matsuda, *Affirmative Action*, *supra* note 17, at 1 n.2.

27. *See* Derrick A. Bell, Jr., *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304 (ascribing the lower grades received by "a sizeable percentage of those who belong to minority groups," *id.*, to a failure to effectively communicate their knowledge to law teachers whose "standards of quality will be based in part on cultural reference points," *id.* at 308.)

28. *See* Duclos, *supra* note 8, at 35 n.157 (quoting SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 163, 193 (1986)) ("Sandra Harding speaks of 'embracing' our multiple identities, viewing them as a cause for celebration and exhilaration, not as a weakness.").

In Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978), where the United States Supreme Court held that an admissions program which employed a quota violated the equal protection clause, the Court also approved the process of considering the race of an applicant to identify students who will bring "experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital

of all kinds of students, it is possible to meet the educational goals of the curriculum and also minimize alienation. The result is greater inclusion of "others" in the law school culture and more effective diversity. This would be a benefit to all members of the community.

Law schools in the United States differ in many ways, but there is one element which is virtually unchanged from school to school and from year to year: the first-year curriculum.[29] Few first-year law students are given the opportunity to choose more than a fraction of their courses,[30] and the courses which they are required to take vary only slightly across the country.[31] The first-year curriculum is so consistent that it serves as the "common denominator" which is tested by virtually every state through the Multi-State Bar Exam.[32] One reason for this consistency is the shared conviction that these fundamental courses provide the best opportunity for students to acquire an understanding of the concepts of legal education, and in particular an understanding of legal analysis.[33] An examination of some of the premises underlying the pedagogy of the first year illustrates the problems inherent in assuming that students who are "other" will assimilate successfully into the traditional curriculum.

The most fundamental premise is that law is neutral.[34] This maneuver is equivalent to identifying some approaches as political and some as neutral; it

service to humanity." *Id.* at 314 (plurality opinion) (footnote omitted). The presence of a diverse student body is valued, but it is too often taken for granted that diversity in admissions is sufficient.

29. There is a limited number of exceptions to this statement. A non-comprehensive list of schools making changes in the first-year curriculum includes Georgetown, Columbia, University of Montana, Mercer, Brooklyn, George Mason, Fordham, New York University, University of Maryland, and City University of New York Law School at Queens College (CUNY). Don J. DeBenedictis, *Learning by Doing*, A.B.A. J., Sept. 1990, at 54; Nancy Zeldis, *Breaking with Tradition*, A.B.A. J., Sept. 1990, at 60. The changes range from including a required seminar (Brooklyn) to the complete re-thinking of the first year reflected in the CUNY curriculum.

30. When students are given any choice in the first year, it is generally some form of "perspective" course or similar seminar. The choice is not whether to take that type of course, but which to choose from a limited selection offered in a given year.

31. Almost everyone takes contracts, torts, property, criminal law, civil procedure, and sometimes constitutional law. *See* Sylvia A. Law, *The Messages of Legal Education, in* LOOKING AT LAW SCHOOL 131, 133 (Steven Gillers ed., 1990).

32. Subjects tested on the Multi-State Bar Examination are Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts. In 1982, 46 jurisdictions required that applicants for bar admission by exam take the Multi-State exam. Richard A. Lord, COMPLETE PREPARATION FOR THE MULTI-STATE BAR EXAMINATION (1982).

33. *See* David L. Chambers, *The First-year Courses: What's There and What's Not, in* LOOKING AT LAW SCHOOL, *supra* note 31, at 151. "[N]early all the first-year courses may turn out to be the same course - how to think about legal problems as American lawyers tend to think about them." *Id.* at 157.

34. "Traditional legal scholarship tends to view the status quo as unbiased or neutral . . . . Feminist theory can demonstrate that the status quo is *not* neutral; that it is as 'biased' as, and certainly no more 'correct' than, that which challenges it." Fineman, *supra* note 12, at 31; *see also* Minow, *supra* note 10, at 6.

ignores the political nature of the choice of a starting point.[35] By maintaining law's "neutrality" as a governing principle, legal education forces students to leave political convictions at the door,[36] unless their beliefs are consistent with the balance theoretically created by treating "like cases alike."[37] Thus students who wish to be lawyerly, but who also support, for example, the curtailment of hate speech, are silenced by the argument that the law must be neutral.

The neutrality premise gives rise to concepts that make sense to some and not to others. Professor Ann Scales believes that the law adopts a white male viewpoint of the concepts of "time, space and causality" and raises them to the level of a universal truth.[38] For example, she locates this perspective in the prosecution of battered women who kill their batterers by imposing a "reasonable man" standard on a situation where the reality of violence against women should stand as a separate and acknowledged truth, the male view of "imminent harm" denies women's reality.[39] The teaching of property law also embraces a white male perspective, accepting without question that "space is divided; the acquisition and 'protection' of property justify violence; property boundaries must be defined and controlled; property has meaning because

35. "[N]o novel is ever politically neutral, because 'even the attempt to say nothing about politics is a big political statement. You are saying then, that everything is O.K.'" Gerald Graff, *The Nation: A Campus Forum on Multiculturalism: Opening Academia Without Closing it Down*, N.Y. TIMES, Dec. 9, 1990, at E5 (quoting Chinua Achebe); *see also* Kennedy, *supra* note 17 (legal education portrays "legal reasoning" as logical and neutral, but in fact all law is ideological and based on political assumptions).

36. KENNEDY, *supra* note 17.

37. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989) [hereinafter Matsuda *Multiple Consciousness*].

> For example, the ongoing dilemma of neutral principles is challenged by outsiders' reality. Legal theorists puzzle over the conflicting desire for finite and certain principles of law, free from the whims of the despot. The trouble is, then, that the law itself becomes the despot - neutral concepts of rights end up protecting corporate polluters and Ku Klux Klan hate mongers. Standard liberal thought sees no way out of this dilemma, arguing for neutrality as a first principle, and the inviolability of fixed rules of law as the anchor that keeps us from drifting in a sea of varied personal preferences.
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> From communities of outsiders struggling around their immediate needs — for jobs, for education, for personal safety — we see new legal concepts emerging to challenge the citadel of neutrality. Proposals for non-neutral laws that will promote the human spirit include: affirmative action; proposals for desegregation; proposals for curtailment of hate groups and elimination of propaganda advocating violence against women; and proposals for reparations to Native Americans for loss of their lands. All of these are controversial proposals, and debates continue about their worth. The very controversy reveals how deeply they cut into the unresolved dilemma of neutrality that lies at the heart of American law. These proposals add up to a new jurisprudence — one founded not on an idea of neutrality, but on the reality of oppression. These proposals recognize that this has always been a nation of dominant and dominated, and that changing that pattern will require affirmative, non-neutral measures designed to make the least the most, and to bring peace, at last, to this land.

Id. at 9.

38. Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95 (1990).

39. *Id.* at 103-06.

property is infused with the owner's ego."[40] Scales asserts that this "domination-based idea of space"[41] is "shocking" to women, and to those Native American students raised on reservations or pueblos, whose upbringing teaches that dominating the land is sacrilege.[42]

Consider also the assumption that justice is established by rules, against which individuals can test their behavior and know what is right and what is wrong.[43] The contextual, community-oriented focus which women see as more equitable[44] shows that the prized "rule of law" theory is not the only conception of justice.[45]

Some of the assumptions which make up the first year involve the structure of the classes themselves.[46] For example, the nearly exclusive use of large classes in the first year assumes that the needs of students are sufficiently universal and that very little individualization is necessary. It is assumed that the resources required for small classes are better utilized after the first year, when seminars and clinics become more widely available.

Finally, there is an assumption that the basics of legal analysis can be adequately communicated by the analysis of appellate cases and some writing. It is assumed that first-year students will sufficiently grasp these basic concepts such that evaluating them on the basis of graded exams is a reasonable determination of their ability. Although the success of many practicing lawyers will be based more on oral than written presentations (for example, criminal lawyers, or practitioners who engage in a great deal of counseling and negotiating), little or no credit is given for such skills. Also, students are expected to assimilate material quickly, so that at the end of one semester of study they can demonstrate mastery of material on a written exam. This assumes that

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40. *Id.* at 111 (footnote omitted).

41. *Id.*

42. *Id.*

43. Gilligan describes the approach an eleven-year-old boy takes to moral reasoning as "sort of like a math problem with humans." GILLIGAN, *supra* note 14, at 26.

44. *See id.*; Weiss & Melling, *supra* note 19.

45. Robin West argues that virtually all modern, male, American legal theorists subscribe to the "separation thesis" — that the self is physically separate and therefore autonomous from all other human beings. Feminist theorists, on the other hand, begin from a fundamental assumption that women are "essentially connected" both physically and existentially. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

Professor Scales questions the use of sports metaphors to accurately illustrate what law is; she proposes that mothering ("a dialectic of persuasion") better portrays law and the source of law's authority. Scales, *supra* note 5, at 149-52. The common use of sports metaphors not only limits understanding to those who know the rules, but seeks to portray law as equally bound by fixed rules whether or not it actually functions in that way.

46. My critique of the structure of the first-year curriculum as unappreciative of difference is certainly not the first attack on the case method of study or the general approaches which dominate the modern study of law. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); Kennedy, *supra* note 24, at 71; Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-generic Legal Education*, 91 W. Va. L. Rev. 305 (1989). These critiques do not, however, address the specific changes required for effectively meeting the learning needs of a diverse student body.

the concepts will be familiar, that students will be comfortable manipulating ideas in the expected manner, and that students already possess the ability to integrate the material for an exam.[47]

"Outsiders" who go to law school must already have sufficiently learned the requisite skills to be admitted.[48] But law school not only sets up new challenges, it also raises the stakes. Law school success or failure determines relative levels of power in the future: places on law reviews, judicial clerkships, jobs with powerful law firms, and law professorships are at least partially handed out based on first-year grades. So those who do not connect naturally with the substance and the method of the first-year curriculum can suffer permanently in the form of reduced influence, wealth, and prestige.

II.
LEARNING NEEDS AND DIFFERENCE

All institutions of higher education were, until recently, intended for the benefit of white male students. Access to institutions of higher education was generally limited to men, and those institutions dedicated to the education of women were intended to show that women were capable of doing the same work as men.[49] The accepted concepts of what was educationally valid and necessary were based on an understanding of white men's needs. "Outsiders," once admitted, have found in those institutions, as in law schools, that they are expected to assimilate into an educational culture which, it was casually assumed, would meet all students' needs.

Close examination of the underlying assumptions of the assimilation approach to education has led to questioning of its universality. Carol Gilligan's book, *In A Different Voice*,[50] brought questions of differences in psychological development to the forefront by including women in studies previously conducted with only male subjects. Building on Gilligan's work, a study of women students in different educational settings explored whether accepted truths about intellectual development applied equally to women and to men.[51]

Comparing the concepts of development laid out in *Women's Ways of Knowing* with a leading study, conducted by William Perry, which included only men as subjects,[52] I find a divergence of understanding that has implica-

47. *See infra* note 75.

48. Mari Matsuda describes the position of a fictional woman-of-color law student as follows: she has decided to adopt standard legal discourse for the classroom, and to keep her woman-of-color consciousness for herself and for her support group. This bifurcated thinking is not unusual to her. She's been doing it throughout her schooling — shifting back and forth between her consciousness as a Third World person and the white consciousness required for survival in elite educational institutions.

Matsuda, *Multiple Consciousness*, *supra* note 37, at 8.

49. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 5-6.

50. GILLIGAN, *supra* note 14.

51. WOMEN'S WAYS OF KNOWING, *supra* note 22.

52. WILLIAM PERRY, JR., FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME (1968). It is the editorial policy of *The Review of Law and*

tions for law students. To the extent that law school pedagogy is premised on the belief that students have experienced development as outlined by Perry based on his male subjects, it will meet only the needs of those students who have followed his scheme. By looking at the distinctions drawn when the development of women is considered, I find a basis for proposing changes which will truly teach to difference.[53]

Perry's study of undergraduates at Harvard University (which has emerged as a leading authority in the field) provided the basis for a definition of the intellectual development of college students.[54] Although both men and women were initially included in the study, the author later excluded women from the sample and based his developmental scheme solely on the pattern defined by men.[55] Based on interviews at the conclusion of each of the four years of the subjects' college education, Perry identified a scheme of growth from a black-and-white, "dualistic" view of the world to a complex "relativistic" understanding of knowledge and the individual's ability as a learner.

Perry found that students begin with a "basic duality" in which all can be defined as right or wrong, good or bad, we or other. At this stage, the student perceives there to be right answers for everything, and the teacher's role is to provide those answers.[56] As the provider of answers, the teacher wields enormous authority. Students moving beyond this state of mind develop either in accordance with their understanding of authority, or in opposition to it.[57] Nonetheless, they follow similar paths of development as they detach themselves from the idea of authority as holding all the answers.[58]

The next stage, Perry asserts, is a discovery of "multiplicity," wherein a student begins to perceive a "diversity of opinion, and uncertainty."[59] Rather than valuing diversity, he sees only that anyone has a right to his own opinion, with the implication that no judgments among opinions can be made.[60] Authority figures are perceived by some students to be presenting diverse opinions because "they want us to work on these things;" the focus is not on substance but on the process of coping with nonabsolute ideas considered to be

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Social Change to use "she" as the generic pronoun referring to both genders. In this discussion of Perry's study and its implications, however, I use the pronoun "he" because Perry based his conclusions on a sample made up only of men.

53. Developing a curriculum respectful of difference will not only improve the educational experience, it will allow law students to become better attorneys:

> When outsiders' perspectives are ignored in legal scholarship, not only do we lose important ideas and insights, but we also fail in our most traditional role as educators. We fail to prepare future practitioners for effective advocacy and policy formation in a world populated by women and men of differing points of view.

Matsuda, *Affirmative Action, supra* note 17, at 4.

54. PERRY, *supra* note 52.

55. Id. at 16; *see also* WOMEN'S WAYS OF KNOWING, *supra* note 49, at 9.

56. PERRY, *supra* note 52, at 9.

57. *Id.* at 73.

58. *Id.*

59. *Id.* at 9.

60. *Id.* at glossary (appended to end leaf).

valuable for students.[61] Other students perceive multiplicity to exist because the one correct answer has not yet been found.[62] The perception of multiplicity begins to raise questions of the validity of evaluation and grading, because authority does not have a correct answer against which to measure the student's effort.

According to Perry, the concept of multiplicity grows as a student encounters ideas about which answers may never be found.[63] As the students in this study shifted from seeing diverse ideas as "the way They want us to think about things" to the way knowledge is constructed, their relationship to authority also changed.[64] Authority, once the possessor of the right answer, becomes an aspect of social organization — a function of power or expertise.[65]

In a profound restructuring of understanding, Perry found, a student next begins to see all knowledge as relative, including a "plurality of points of view, interpretations, frames of reference, value systems and contingencies in which the structural properties of contexts and forms allow of various sorts of analysis, comparison and evaluation in Multiplicity."[66] Truth is shown not by what the authorities know, but by what support and evidence is found.[67] Once he understands that truth is relative, "that the meaning of an event depends on the context in which that event occurs and on the framework that the knower uses to understand that event, and that relativism pervades all aspects of life, not just the academic world,"[68] Perry concluded that a student begins to see the need to make a commitment, or an "affirmation of personal values or choice . . . . A process of orientation of self in a relative world."[69] At the level of commitment, a student is confirmed as a thinker and a member of a community of thinkers.[70] Perry found that his subjects' relationship to authority changed, and they began to see their own authority, or the possibility of acquiring it. Their knowledge, he believed, was based on their own efforts, and

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61. *Id.* at 78.

62. *Id.* at 78-81.

63. *Id.* at 89.

64. *Id.* at 61.

65. "[U]ncertainty and complexity are no longer considered mere exercises or impediments devised by Authority but seen as realities in their own right . . . ." *Id.* at 89.

66. *Id.* at glossary (appended to end leaf). "[M]y sense of who is responsible shifts radically from outside to me." *Id.* at 34.

67. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 10.

68. *Id.*

69. PERRY, *supra* note 52, at glossary (appended to end leaf).

70. [T]he liberally educated man, be he a graduate of college or not, is one who has learned to think about even his own thoughts, to examine the way he orders his data and the assumptions he is making, and to compare these with other thoughts that other men might have. If he has gone the whole way, as most of our students have done, he has realized that he thinks this way not because his teachers ask him to but because this is how the world "really is," this is man's present relation to the universe. From this position he can take responsibility for his own stand and negotiate — with respect — with other men.

Id. at 39-40.

the commitment they made was arrived at freely.[71]

The nature of this developmental process presents several questions regarding law school pedagogy. First, is the pedagogy of law school premised on the assumption that students will have followed this path and arrived at the level of commitment which Perry describes? If so, students who are "other" and have experienced their intellectual and ethical development differently will be disadvantaged.[72]

Second, the "commitment" of students in Perry's scheme would likely include a view of law and justice consistent with a relativist point of view — which would see it as very possible for a judge to put aside her own background and view the case before her, relying only on precedent and law to arrive at a just decision in the same way that all truth is known by the evidence found for it. Having made a commitment to the use of precedent to decide law, judging is an objective, non-emotional process. Truth is not based on what any individual knows, or has experienced, but is found exclusively in the external support and evidence available.[73] In contrast, "others" might view justice from a more contextual perspective, where one is never free from the biases and experiences of the past.[74] This conflicting perspective can interfere with the process of law school learning, because the relativistic position is so deeply imbedded in the curriculum.[75]

Third, the relationship to authority which Perry describes is an essential element of the developmental scheme. He describes a process whereby the student's developing understanding leads from a perception of authority as the controller of knowledge to a perception that the student has earned a shared membership in authority.[76] But in many areas, including law school, students who are "other" are going to face greater difficulty merging with authority, since those who hold power are not like them. Therefore their ability to take on power and success is more limited.

Finally, Perry describes the need students feel for "community" — the

71. The distinction between the commitments made at this stage and any made earlier is likened to the distinction between belief and faith: "belief may come from one's culture, one's parents, one's habit; faith is an affirmation by the person. Faith can exist only after the realization of the possibility of doubt." *Id.* at 34.

72. *See supra* notes 12-15 and accompanying text.

73. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 10.

74. *See* Minow, *supra* note 10, at 6-7 (discussing a defense motion in a sex discrimination suit seeking to disqualify a black woman judge on the grounds that she would identify with the plaintiff; and the underlying assumption that a white male judge would be free of any bias because maleness is the norm); Jaff, *supra* note 14, at 495 ("maybe, abstract theory is meaningless until it is applied to a context, so that the *context* determines which theory is appropriate in each situation").

75. In addition to these substantive differences, Perry points out a process, whereby students grasp relativism by putting ideas together, seeing how they relate, and pulling the "big issues" together for an exam. This sounds very much like the expectation of what students will do on a law school exam. If students who are "other" have not learned this method, they will likely be less successful on exams. PERRY, *supra* note 52, at 120-121.

76. " '[W]e and They' can merge." *Id.* at 109.

sense that "they were in the same boat not only with each other but with their instructors as well."[77] Like the relationship to authority, this notion ascribes development to identification with others; it too will be more difficult for those who feel like outsiders. Community is an element in finding one's place in the new environment of the law, but both the role community plays, and the ability to find it in law school are different for outsiders.[78]

In contrast, the study described in *Women's Ways of Knowing: The Development of Self, Voice and Mind* found that women students did not follow the same pattern of development, nor did they experience themselves as knowers in the same way as the men Perry studied. The authors of *Women's Ways of Knowing*, Mary Field Belenky, Blythe McVicker Clinchy, Nancy Rule Goldberger, and Jill Mattuck Tarule, interviewed women of a range of ages, from varying economic and ethnic backgrounds and from different types of educational institutions.[79] The authors then looked at their findings to see how women's understanding of their intellectual growth matched with the patterns identified by Perry. They found that although there were areas of overlap, the women they interviewed did not fit into the categories laid out in Perry's scheme.[80] Since they did not interview most of the women repeatedly, as Perry did, they were unable to define a pattern of growth, but instead described the different ways of knowing they encountered in the interviews.[81] They do not assert that all women will proceed from the initial perspective through the later ones;[82] they describe some transitions from one to another, attributing some of the differences between perspectives to factors other than intellectual development, such as economic circumstances and family experiences.[83]

A small group of women were found to occupy a world of silence. For these women, words are perceived to be weapons, and authority is based entirely on might — there are no questions of expertise, no "why's" in the lives of this group of women. The authors found women's ways of knowing to be intertwined with their self-concept[84] and the "silent" women, they found, have little or no self-esteem.

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77. *Id.* at 213.

78. *See infra* notes 139-42 and accompanying text.

79. The authors interviewed one hundred-thirty five women; ninety of them were enrolled in one of six academic institutions which "differ[ed] markedly among themselves in educational philosophy and in the composition of their student bodies." They ranged from a prestigious women's college and a private co-educational liberal arts college to an inner-city community college. In addition, they interviewed forty-five women from family agencies that deal with clients seeking information about or assistance with parenting which they refer to as "invisible colleges." WOMEN'S WAYS OF KNOWING, *supra* note 22, at 12.

80. *Id.* at 14.

81. *Id.* at 14-15.

82. *Id.* at 15.

83. *Id.* The scheme which Perry lays out is not followed invariably by every student either; he identifies three positions he calls "Alternatives to Growth" — temporizing, retreat, and escape. PERRY, *supra* note 52, at 177-198.

84. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 3.

Where the silent women see themselves as unable to understand or remember what others say to them, the second group of women sees words as central; these are "received knowers" who learn from listening to others but have little confidence in their own ability to speak.[85] These women use the same dualistic thinking, and the same belief in the ability of experts to give *the* answer that Perry described.[86] Their relationship to authority, however, is different. Where Perry describes the dualistic thinkers as aligned with authority,[87] *Women's Ways of Knowing* describes the received knowers as viewing authority as "they" not "we."[88] The men in Perry's study "seem to lecture more than listen."[89] Conversely the women "cultivate their capacities for listening while encouraging men to speak."[90] These women see their ability to learn as governed in large part by sex role stereotypes, so that they rely on the role assigned to them to define their ability to know.[91]

The next group considered by the authors of the study is described as "subjective" knowers. Unlike "received" knowers, who see all truth as coming from outside authorities, the subjective knowers trust only the truths they find within themselves. They rely on their intuition and distrust methods they identify as impersonal and male.[92] The women identified as subjective knowers find authority inside themselves at least in part because men in their lives have failed to live up to their socially-designated role as authorities.[93] Men disappeared, failed to protect these women, or in some cases physically or sexually abused them.[94] Just as Perry identified men's shift from external to internal truths,[95] these women find authority within themselves; their experiences form the basis of what they know. In contrast to how the men in Perry's study approached this knowledge, however, the women simultane-

85. *Id.* at 37.

86. *Id.* at 37, 44.

87. "Authority-right-we" stand together in opposition to "illegitimate-wrong-other." PERRY, *supra* note 52, at 59.

88. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 44.

89. *Id.* at 45.

90. *Id.*

91. *Id.*

92. *Id.* at 54, 71.

93. *Id.* at 57.

94. The authors found that sexual harassment and abuse was "a shockingly common experience for women" and one not limited to any particular epistemological grouping of women in the study. They did not initially collect information on sexual abuse, but it became clear in their interviews that women "spontaneously mention childhood and adolescent sexual trauma as an important factor affecting their learning and relationships to male authority." When they began asking systematically about sexual and physical abuse, they found that of seventy-five women, 38% of the women in schools and colleges and 65% of the women from family agencies said that they had been subject to incest, rape, or sexual seduction by a male in authority over them. "Some women indicated . . . that their sexual history made them cautious around male professors, confused about 'what was really going on,' and consequently conflicted about receiving praise. Often the denial and silence that had been imposed upon them in the incestuous relationship carried over into present interactions with teachers who had power over them." *Id.* at 58-60 (citation omitted).

95. Perry, *supra* note 52, at 34.

ously seek to maintain their connections to others.[96] By analyzing their relationships with others, these women draw on their connectedness to expand their understanding.[97]

The women in the study who were successful in traditional academics were generally "procedural" knowers. These women had previously used a mixture of received and subjective knowing, and then moved toward the more reasoned reflection characteristic of procedural knowing.[98] To them, knowledge is not static, but rather, a process.[99] At this stage, form takes precedence over content,[100] but they are learning to develop objectivity, to pay attention to "objects in the external world,"[101] not just to their own feelings. This is in sharp contrast to the men in Perry's study, who rarely saw their own feelings as relevant to their study of, for example, poetry. The men discern a diversity of opinions among men;[102] these women learn to synthesize their internal and external worlds.[103]

The authors of *Women's Ways of Knowing* identify two types of procedural knowers; separate and connected.[104] Separate knowers are more like the men in Perry's study than any of the other groups of women.[105] These women reject the stereotypes of women as knowers, and seek to meet the standards of traditional academic authority. "Presented with a proposition, separate knowers immediately look for something wrong — a loophole, a factual error, a logical contradiction, the omission of contrary evidence."[106] But there are, nonetheless, differences between separate knowers and the men in Perry's study; the differences center on the "doubting" versus "believing" approaches to critical thinking.[107] The women separate knowers learn the "doubting" game and, as they are expected to, look for something wrong in each idea they consider. They tend, however, to take the "game" personally. Men are more inclined to see an argument as being between different positions, while women tend to see the same argument as being between persons.[103] Even so, these women become skilled at the male adversarial form. They see themselves as

96. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 65, 66. This is consistent with Gilligan's thesis that women emphasize relationships over rules and their connectedness to others is foremost in their approach to decision-making.

97. *Id.* at 85-86.

98. *Id.* at 87-88.

99. *Id.* at 97.

100. *Id.* at 95.

101. *Id.* at 98.

102. PERRY, *supra* note 51, at 35.

103. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 98-99.

104. *Id.* at 101.

105. *Id.*

106. *Id.* at 104. "The methodology of separate knowing is the methodology of the law school classroom. While critical thinking is one of its products, so is a division between the speaker and the spoken, the teacher and the student, the student and the student." Weiss & Melling, *supra* note 19, at 1305.

107. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 104.

108. *Id.* at 104-05.

pitted against authority, and they develop skills to defend themselves.[109] Their success costs them, however. The separate knowers may always feel inadequate to the task, and the process requires them to suppress their selves.[110] With feelings excluded, these women partake in the process, but see it as an "empty exercise."[111]

Connected knowers build on subjective knowledge to learn from others through empathy. This is the "believing" game, which women find much easier than men.[112] These women learn by connecting the experiences of others with their own and by being non-judgmental. This reveals truth that is "personal, particular and grounded in firsthand experience."[113]

Both separate and connected knowers accept the system in order to learn from it; they take on the expectations the system has and learn its standards in order to meet or exceed them.[114] Some of the women in the study moved away from procedural knowledge by taking steps to break out of the system.[115] They stopped being the "good girls" they had been,[116] even though doing what they had chosen rather than what was expected felt selfish to them.[117] They began to reconnect with feelings, and to bring together the various ways of knowing they had learned.

The women who move beyond procedural knowledge arrive at what the authors call "constructed" knowledge; they weave together "the strands of rational and emotive thought and . . . [integrate] objective and subjective knowing."[118] These women try to combine all aspects of their lives and to appreciate its complexity; they try to avoid the compartmentalization of "thought and feeling, home and work, self and other" which they see in many

109. *Id.* at 106-07. "We showed that we could do it their way, and yet their way was not our way." Weiss & Melling, *supra* note 19, at 1344. The law school classroom typifies learning which calls on women to use skills that may make them profoundly uncomfortable, even as they choose to learn the substance of the law. "The courtroom is a place where lawyers use words to win fights. The classroom is the courtroom's shadow." *Id.* at 1339. "[W]omen describe what parts of themselves are left behind in argumentative classes." *Id.* at 1340.

110. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 107, 109.

111. *Id.* at 110; *see also* Weiss & Melling, *supra* note 19 (repeated references to the competitive "game" which dominates legal education).

112. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 113.

113. *Id.* Learning in this way is grounded in empathy. Male and female ideas of empathy seem to differ; the *Oxford Universal Dictionary* defines empathy as "the power of projecting one's own personality into, and so fully understanding, the object of contemplation." Many women, on the other hand do not see empathy as projection, but rather as reception. "I receive the other into myself, and I see and feel with the other." *Id.* at 122 (quoting NELL NODDINGS, CARING 30 (1984)).

114. The thinking of procedural thinkers, "is encapsulated within systems. They can criticize a system, but only in the system's terms, only according to the system's standards. Women at this position may be liberals or conservatives, but they cannot be radicals." WOMEN'S WAYS OF KNOWING, *supra* note 22, at 127.

115. *Id.* at 128.

116. Weiss & Melling, *supra* note 19, at 1327 ("We all had this same 'nice' problem.").

117. They feel selfish because their sense of self-identity is weak; they have always subordinated their selves to authority. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 129.

118. *Id.* at 134.

men.[119] By bringing together the various approaches to knowledge which they have experienced, they understand that truth is a matter of context, and by changing their frame of reference they can expand knowledge.[120] The systems they use for constructing knowledge take on prominence, and question-posing and problem-posing become important.[121] They seek 'real talk' where parties cooperate to develop ideas rather than stating positions.[122] Again, believing is seen as more valuable than doubting; even though these women know how to be tough and play the doubting game, they do it with resentment.[123] These women are educated and successful, and yet even though they have found their voices, they still report feeling silenced by being dismissed or ignored.[124] They are capable of the same success as men, but their approaches and thoughts about their success are different than those of men. Their choices are more contextual than rule-based,[125] and while the men in Perry's study perceived commitment as a single act, their view of commitment brings together the threads of their lives as an ongoing process.[126]

The authors of *Women's Ways of Knowing* found that for women students, "confirmation and community are prerequisites rather than consequences of development."[127] Women "needed to know that they already knew something (although by no means everything),"[128] before they could feel capable of learning. This held true for students in the study who attended prestigious colleges, leading to the authors' conclusion that "achievement does not guarantee self-esteem."[129] Women have been trained away from seeing themselves as thinkers,[130] and are more likely to feel they do not deserve to take up time and space in the classroom.

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119. *Id.* at 137.

120. *Id.* at 138-139.

121. *Id.* at 139 ("Women tend not to rely as readily or as exclusively on hypothetico-deductive inquiry, which posits an answer (the hypothesis) prior to the data collection, as they do on examining basic assumptions and the conditions in which a problem is cast.").

122. *Id.* at 144; *see also* Weiss & Melling, *supra* note 19, at 1341 (deriding "nonconversation" as a form of discussion accepted in law school classes and describing it as people asking complex questions which "require speeches as answers if answers are possible at all," and objecting to it as "elitist and self-centered.").

123. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 146.

124. *Id.* at 146-47. "There were times when women made points, and they were ignored or trivialized. Five minutes later, a man would make the same point, in three parts, and it was discussed." Weiss & Melling, *supra* note 19, at 1336.

125. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 149; *see also* GILLIGAN, *supra* note 14.

126. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 150.

127. *Id.* at 194.

128. *Id.* at 195.

129. *Id.* at 196.

130. *Id.*

III.
CONNECTED TEACHING

The students interviewed by the authors of *Women's Ways of Knowing* by and large did not find their education to be responsive to their needs. Most of the educational institutions attended by these students "emphasized abstract 'out-of-context' learning."[131] The authors of the study found that the women they interviewed were generally "not opposed to abstraction as such. They found concepts useful in making sense of their experiences, but they balked when the abstractions preceded the experiences or pushed them out entirely. Even the women who were extraordinarily adept at abstract reasoning preferred to start from personal experience."[132]

The authors were, however, able to identify some experiences which offered real learning for the women. They characterized "connected teaching" as providing a successful educational experience. Together, an examination of connected teaching and the principles of adult education provide a basis for considering what should be included in the first year of law school to enhance the learning of "outsider" students.

The distinction between connected teaching and more traditional education is that connected teaching begins with what students already know. Students who start the process of learning something new with an understanding that their own past experiences will provide a basis for their learning are able to see education as a building process, rather than a simple "banking" process, as Paolo Freire termed traditional education.[133] The shift from "banking," where the teacher controls what students learn and how they learn it, to "building," where the student assumes much greater responsibility and autonomy, succeeds because it respects and empowers students.

From a basis in their own experience, women learners benefit most from "problem-posing education," which encourages students to seek answers which are not predetermined by the "expert" — the teacher. What students already know is the starting point, and the role of the teacher is to assist students in expanding, and sharing what they know; not to think something dif-

131. *Id.* at 200.

132. *Id.* at 201-202. One study participant observed:

> I think women care about things that relate to their lives personally. I think the more involvement they have in something that affects them personally, the more they're going to explore it and the more they're going to be able to give and to get out of it. I think that men—because they're male they haven't been put down all the time for their sex, so they can go into any subject with confidence, saying, "I can learn about this" or "I have the intellect to understand this." Whereas I think women don't deal with things that way. I think they break down an issue and pick out what it is about it that has happened to them or they can relate to in some way, and that's how they start to explore it.

Id. at 202.

133. PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED (1971). The teacher's role in traditional education is "to 'fill' the students by making deposits of information which [the teacher] considers to constitute true knowledge" *Id.* at 63. The student's job is merely to store the deposits. *Id.*

ferent, but to "think more."[134] Problem-posing education pushes students beyond their initial knowledge, without destroying their sense of confidence in what they know. The focus is not on absorbing what the professor knows, but on developing their own ability to think and to understand.[135] "Instead of the teacher thinking about the object privately and talking about it publicly so that the students may store it, both teacher and students engage in the process of thinking, and they talk out what they are thinking in a public dialogue."[136]

The theory and practice of effective adult education follow many of the same lines as the "connected teaching" described in *Women's Ways of Knowing*, and the emphasis on an individual focus allows difference to be appreciated rather than squelched.[137] The development of a distinct science of educating adults — andragogy[138] — stems from respect for the differences adults bring to the learning experience. Adult education theorist Malcolm Knowles has defined four assumptions about adult learners that are different from the assumptions about child learners which have informed traditional pedagogy: first, that as a person matures, her "self-concept moves from one of being a dependent personality toward one of being a self-directing human being;"[139] second, she "accumulates a growing reservoir of experience that becomes an increasing resource for learning;"[140] third, her "readiness to learn becomes oriented increasingly to the developmental tasks of . . . social roles;"[141] and fourth, her "time perspective changes from one of postponed application of knowledge to immediacy of application, and accordingly his orientation toward learning shifts from one of subject-centeredness to one of

134. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 218; *see also* Freire, *supra* note 133, at 72 ("Problem-posing education affirms men as beings in the process of *becoming* — as unfinished, uncompleted beings" (emphasis in original)).; WOMEN'S WAYS OF KNOWING *supra* note 22, at 138-139 ("Once knowers assume the general relativity of knowledge, that their frame of reference matters and that they can construct and reconstruct frames of reference, they feel responsible for examining, questioning, and developing the systems that they will use for constructing knowledge. Question posing and problem posing become prominent methods of inquiry . . . .").

135. WOMEN'S WAYS OF KNOWING, *supra* note 22, at 218-219.

136. *Id.* at 219; *see also* Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433, 437 (1986)(describing a required first-year jurisprudence course in which faculty renounced their own authority, tried not to lecture, lead discussions or assign paper topics, and selected third-year students to be "co-non-teachers").

137. A number of the tenets of adult education already play a substantial part in legal education. Frank S. Bloch, *Clinical Legal Education at Vanderbilt University, in* ANDRAGOGY IN ACTION 227 (Malcolm S. Knowles and Associates, eds. 1984). The value of experiential education is verified by the principals of adult education, and the rise of clinical courses in law schools has built on that value. Most of the effect, however, has not trickled down to the first year. In addition, legal education has taken on very little of the emphasis in adult education on an individualized process that values what each student brings. As long as we treat students as monolithic, education is not diverse.

138. MALCOLM KNOWLES, THE MODERN PRACTICE OF ADULT EDUCATION (1970).

139. *Id.* at 39.

140. *Id.*

141. *Id.*

problem-centeredness."[142] By meeting these specific needs, educators can provide learning which is responsive to each individual.

The "banking" approach, in contrast, does not meet the needs of difference.

> In our inherited folk wisdom there has been a tendency to look upon education as the transmittal of information, to see learning as an almost exclusively intellectual process consisting of the storing of accumulated facts in the filing drawers of the mind. The implicit assumption underlying this view of learning is that it is essentially an external process in the sense that what the student learns is determined primarily by outside forces, such as the excellence of the teacher's presentation, the quality of reading materials, and the effectiveness of school discipline. People holding this view even today insist that a teacher's qualifications be judged only by his mastery of his subject matter and clamor against his wasting time learning about the psychology of learning. For all practical purposes, this view defines the function of the teacher as being to teach subject matter, not students.[143]

Knowles explains the futility of attempting to teach people by a method which does not take into account their learning needs:

> Although there is not yet agreement on the precise nature of the learning process . . . , there is agreement that it is an internal process controlled by the learner and engaging his whole being — including intellectual, emotional, and physiological functions. Learning is described psychologically as a process of need-meeting and goal-striving by the learner.[144]

Education which meets individual needs requires mutual planning, diagnosis of learning needs, articulated objectives for learning, and learning models which enable students to meet their objectives.[145] By basing education on the experiences and needs that students bring to the process (appreciating different students' differing needs) and by working with students to meet their specific needs, the process of learning can be responsive and therefore successful.

All students' experiences in the classroom are shaped by their sense of themselves as knowers and learners. In order to develop an atmosphere that will foster learning, it is important to look at three elements: how the institution as a whole, can be changed to provide support for meeting the learning needs of law students; how the structure of the curriculum and the limitations of the traditional law school curriculum can be adapted to meet students needs; and, finally, what specific approaches can be taken within the classroom

142. *Id.*
143. *Id.* at 50.
144. *Id.*
145. *Id.* at 272-92.

in order to teach to students' varying needs. All of these factors go into creating a pedagogy of difference, and for a diverse student body to succeed, students' needs must be met on all three levels. By reshaping the first year of law school in these ways, the learning experience is broadened to encompass traditional and "outsider" students, rather than encouraging any one group at the expense of others.

IV.
APPLYING CONNECTED TEACHING TO LEGAL EDUCATION

A. Institutional Structure for Meeting Learning Needs

"No educational institution teaches just through its courses, workshops, and institutes . . . they all teach by everything they do, and often they teach opposite lessons in their organizational operation from what they teach in their educational program."[146] In order to create a community supportive of learning for all students, it is necessary to consider what, in addition to the classroom dialogue, will assist and affirm students. An institution that considers diversity valuable at every level should minimize alienation and create a supportive learning environment. There are three steps that can initiate the development of such an environment:

1. Hire (and Tenure) a Diverse Faculty and Administration.

This is an obvious point, but I include it to reiterate that only by putting different faces in positions of power will we be in a position to learn from and appreciate difference in more than a superficial way. Perry noted the importance of "community" and relationship to authority for students learning to identify themselves as thinkers.[147] As long as students who are "other" do not see themselves reflected in the faces of those who instruct them, they will be at a disadvantage in the learning process.[148] I include administration as well as faculty because it is important to develop diversity at all levels; it is not just in the classroom that students learn the lessons of the law and their relationship to it.

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146. *Id.* at 60.

147. *See supra* notes 76-78 and accompanying text.

148. This means confronting the often-heard protest that "there are not enough qualified people out there." Examining some of the assumptions behind that statement reveals how it conceals a reluctance to commit to diversity, by relying on standards which ignore the lives of those who are "others." For example, Sharon Rush points out that there may be reasons (which are not obvious) that explain why qualified women may not have the typical "excellent" credentials for law faculty positions:

> . . . a woman may attend a less prestigious law school because she has no other option available without relocating her family. Similarly, she may choose to forgo an opportunity to participate in law review because of her familial obligations. We might think that her decisions to forgo professional opportunities are her choice, but in reality we also value family commitment. Women and men are socialized to expect women to make any career aspirations secondary to familial obligations.

Rush, *supra* note 14, at 9.

Included in hiring and tenuring a diverse faculty is the need to value difference in faculty. This requires not merely tolerating or even just respecting new voices, but making the effort to see the world from their perspective. As Mari Matsuda points out, faculty need to develop new skills in listening in order to hear and understand outsider scholarship. "The voices bringing new knowledge are sometimes faint and self-effacing, other times brash and discordant."[149]

2. Provide Support Services to Meet the Needs of All Students.

In order to allow students to take advantage of their education regardless of their circumstances and backgrounds, it is essential that law schools acknowledge that the inclusion of "outsider" students means that students have more varied needs than in the past. The fact that women see themselves in relation to others more than men to emphasizes the necessity of meeting a broader range of needs; unless their personal concerns, or family obligations are cared for, women's intellectual development will suffer.[150] This includes providing financial aid which is conscious and respectful of students' actual needs, by being attentive to such factors as economic independence, support of dependents, and medical care costs; providing child care for students (and others in the law school community) who are primary caretakers; and providing tutorial support which insures that all students perform at the highest level of their ability. It could also include providing counseling sensitive to students differing needs, strong financial support for student organizations, and support of student efforts to meet their own needs through student-run courses and reading groups. Providing an active network of faculty and alumni mentors would give students opportunities to discuss their educational and career choices. Mentors could provide role models, especially for those who see few others like themselves in the law school, and broader perspectives about what students are learning in law school.

3. Provide Diversity Education for Faculty and Students.

Unless the entire faculty acknowledges that it can learn and benefit from different voices, the power of the traditional norm will prevail. To shift to "problem-posing" education, which is responsive to the needs of "others," faculty must give up their role as experts and be willing to learn from those who are different.[151] "Outsiders" on the faculty will remain just that until the insiders allow themselves to learn something from the new voices. Faculty members also need to understand the ways in which the approach they take in the classroom affects the lawyers their students will become, so that if differ-

149. Matsuda, *Affirmative Action, supra* note 17, at 7 (citing Professor Harry Kitano's suggestion that minority group writers, having suffered under racist conditions, "are likely to write with great emotion and little patience").

150. *See supra* notes 119-26 and accompanying text.

151. *See supra* notes 134-36 and accompanying text.

ence is not appreciated by the faculty, students will not benefit from the ability to learn from difference in practice or in legal education. In addition, we should not require from our students what we do not expect of ourselves; if faculty are to give up the exclusionary role of "expert" in order to participate in a pedagogy of difference, they must engage in learning with students, and diversity education is one step towards that learning.

By specifically devoting "official" time to education regarding diversity, students can learn to understand and appreciate difference and be sensitive to potential cross-cultural and cross-gender conflicts. Diversity education should do more than just create sympathy for students who are outsiders; it should give students the information and understanding necessary to build bridges across differences:

> . . . [A]lthough men, as a group, cannot know the pain women experience as women in "their" world, just as whites, as a group, cannot know the pain people of color experience in "our" world, that does not mean that men cannot empathize with women or that whites cannot empathize with people of color. As men and women, whites and people of color, we may speak with different voices peculiar to the ways in which we experience the world. But the fact that we have our different voices does not mean that we should not speak at all on behalf of each other. All of us must speak, and, perhaps more importantly, all of us must listen.[152]

Thus, students would benefit more from learning in a diverse environment, and "outsiders" would feel more included and less divided from their classmates.

By examining the institution as a whole, it is possible to refocus the work of the law school on the learning needs of all students. While no one element stands alone, the structure of the curriculum and the content of each class directly affect students' learning and require close examination.

B. Developing a Law School Curriculum for Connected Teaching

Teacher-student dialogue is a fundamental component of connected teaching. Indeed, Freire saw dialogue as the key element of the ideal educational process, because real dialogue creates a dynamic environment where all students can learn and achieve effectively.[153] Real dialogue requires both action and reflection on the part of the student.[154] The student is not just a passive "reflector," but an "actor" as is the teacher, thus both teacher and student share the responsibility for the joint educational venture.

Students come to law school with applicable skills as well as information. "[O]ur students come to us with all the awesome intellectual tools they will

152. Rush, *supra* note 14, at 23-24 (citation omitted).
153. FREIRE, *supra* note 133, at 67-68.
154. *Id.* at 75.

ever need: perception and language. They know how to infer reality, they have complex concepts of self."[155] Beginning from that basis, "[a]ll they need from us are experiences in transformation, opportunities to reexamine their internalized norms, paths along which to roam and ramble and grapple with the tough issues."[156]

Success in meeting students' needs depends on working the principles of connected or contextual teaching into the structure and goals of the law school curriculum. To create a pedagogy of difference it is necessary to consider how we convey the substance of the first year. I propose restructuring what is required, in order to meet a broader scope of needs. This is less a question of what is taught than it is of how; by considering learning needs first, we create a pedagogy of difference.

I propose dividing the first-year curriculum into three conceptual areas which cover the work students currently undertake in some form in the first year: "Case Law and Theory," to convey substantive and jurisprudential material along with an understanding of the premises underlying the concepts; "Lawyers' Work," to allow students to discover what lawyers do, and what they need to know to complete tasks and accomplish goals; and "Lawyering Skills," to convey the skill-based information of the first year. Finally, I address the issue of evaluation which cuts across all subjects. In order to develop a pedagogy of difference we must reshape how we measure success, so that it is consistent with needs-based learning.

Some of the work in each of these areas is currently conveyed in typical "orientation" sessions before the "real" work of the semester begins. This division between orientation and study conveys the message that the work students should be focused on is what occurs in traditional law school classes and nothing else. Highlighting and equalizing all three areas sends the message that there is more to be gained from the first year than substantive legal knowledge and the process known as "thinking like a lawyer."

Students encouraged to consider what different kinds of work lawyers do and the skills involved in doing that work can acquire substantive knowledge in the context of its use in their future. Thus, students can focus on those skills they will rely on heavily. Giving skills work equal weight with substantive courses allows students to find a comfortable balance for themselves between different kinds of work. And finally, allowing room into the substantive courses for students to understand better the rationale behind what they are doing will permit them to engage more fully in the act of learning and making choices about how they will learn. Taking these steps provides the context that the authors of *Women's Ways of Knowing* found valuable for women students.[157]

155. Johnson & Scales, *supra* note 136, at 446.
156. *Id.*
157. *See supra* notes 118-30 and accompanying text.

1. Case Law and Theory

One valuable change in the first year curriculum could be for the beginning of the year not to start with every class immediately plunging into the work of the semester, or after a cursory overview. The same form of discourse that occurs on the first day of the semester in a traditional class goes on throughout the semester. The substance may become more sophisticated, but the form remains largely the same. Students who find this method to be confusing or alienating, particularly "outsiders" who naturally take a different approach to learning, get the message from the first day that this is what they have to look forward to for the rest of the semester.

As an alternative, I propose that the semester begin with a close look at what the year or semester will bring. Students could be told, as precisely as possible, the expectations for the year, and what they should know at the end of the year. In addition, an introduction to jurisprudential materials could encourage students to begin considering and questioning how the substantive legal principles came to be, and why they take the form they do. From this they can begin to fashion the steps they will take to accomplish the overall goals. I would provide examples of all the possibilities: what Socratic classes provide, with an analysis of what can be gained through participation in such an enterprise; what projects students might take part in, and what they can expect to gain from participating; what simulations can offer them; what writing they might undertake; and how they will be evaluated.

Once students understand how they will be expected to learn the substantive material, and what material will be covered, they can focus on the work of learning. This allows "outsider" students to develop an approach that meets their needs. Faculty, after laying out their expectations for what students will achieve, would then assist students in learning in the way that will most benefit each student. This means shifting the focus from controlling how students learn toward actively participating with students in the process of learning.

For example, if students are going to learn property law concepts regarding landlord and tenant law, faculty might work with students on a simulated eviction hearing which raises several warranty issues. The professor could accompany work on the simulation with a traditional class on related issues. This would broaden students' knowledge and at the same time, the research which students conducted for the simulation might raise new issues in the traditional class that would not have been encountered otherwise. In this way, students' learning is expanded by the variety of approaches. For those students who understand concepts best when they see their effect, a simulation allows them to apply and interpret concepts in context. Instead of their professors' choices governing the scope of their learning, it is the work students do that determines the paths they follow.

2. Lawyers' Work

Along with the introduction to what they will learn and how, I envision

another form of introduction. Many students, particularly those from groups traditionally underrepresented in law school, come to law school with little or no exposure to where this is all leading — how law graduates use their degrees — so it is difficult for them to see the purpose of the methods of legal education. If students gained a sense of how the various elements of law practice fit together, they could better grasp why lawyers write in the way they do, why research is so crucial, and how the problems arise that end up in casebooks. Rather than just listening to alumni talk, students will be given opportunities to explore the work law graduates do in greater depth. Mentoring programs, visits to courtrooms, observation of mediations and in-depth discussions with various types of practitioners are all useful.

Teaching students how legal education fits with the various ways law graduates use their legal educations would allow students to make more informed choices. Often students are provided the opportunity to listen to alumni discuss the practice of law, but this is not sufficiently focused to allow students to understand the rationale behind the curriculum. Students who want to become litigators often fail to appreciate what skills they will rely on outside a courtroom. Students who are interested in corporate problems do not always know what the value of interviewing and counseling will be to them. As long as they are learning property law just because they have to, it will remain too distant for students who seek to relate their learning to their experiences and who need a context to create a rationale for learning. But if they understand how real issues are developed into legal cases, students can begin to see a need to acquire the understanding traditional classes seek to provide. By making this information available, students from traditionally under-represented groups can make choices on a more equal footing with those who begin law school more comfortable with the options and requirements.

Because students do not know all that they can gain from such experiences, it would be useful, in the beginning, to encourage them to delve under the surface by proposing particular questions or things to consider. For example, what is being worked on right now? How did this issue come to the person's attention? What are the substantive issues? Procedural issues? How did you know? What research is necessary? What writing? What other skills are or will be used? Is this a problem best solved by litigation? What alternatives are available? What options have already been considered or attempted? How does this compare with other work done in the past? By looking at these kinds of questions in different settings, students can begin to understand patterns, preferences, and opportunities. They will have models to draw upon and discuss, and a broader perspective of what the study of law offers.

The nature of the legal profession is such that lawyers almost invariably represent some interest other than their own. Because of this, it is a valuable aspect of diversity education for all students to look beyond their own experience to understand other perspectives. "Lawyers' Work" will give students an

opportunity to learn from lawyers, judges, clients and others, to look beyond their lives as students, and to reflect on the impact of what they are learning. Whether they are attempting to understand the point of view taken by a business client, to get inside the head of a defense attorney, to anticipate courtroom strategy, or to persuade a reluctant witness to come forward, the ability to respond with an open mind to different ways of looking at the world gives students an advantage they will not have if they assume that their own experience is universal. This is the heart of diversity education; to learn how different people see the world, to question the universality of any one experience, and to listen hard and with an open mind to other views and perspectives.

This component can include discussions among students, between students and faculty, and between students and lawyers of issues raised by clients and by colleagues, about what has been observed and what has been experienced. It can include discussions of what experiences students bring with them to law school, the different perspectives of materials they read and reactions to what they are learning. For example, after outside visits students could discuss what viewpoints, assumptions or prejudices they encountered: were they surprised by how a judge treated litigants, or how they themselves reacted to a criminal defendant? Did someone treat them in a manner that made them uncomfortable? By giving attention to these questions, students can learn from the perspectives others bring to these encounters, and can also learn to appreciate the value of interpersonal skills in achieving legal objectives.

3. *Lawyering Skills*

While "Case Law and Theory" exposes students to the substantive and jurisprudential work of the first year, and "Lawyers' Work" gives them access to the broad scope and context of what they will need to know to accomplish their goals, "Lawyering Skills" focuses on the skills lawyers use in addition to case analysis.[158] Lawyering Skills provides an opportunity to practice the vast range of skills lawyers rely on: reading cases and other legal documents, researching, writing various types of legal documents, interviewing, negotiating, counseling, mediating, oral advocacy, and witness examination. In addition to using these skills, it is a place to focus on the variety of roles lawyers play, to consider what lawyers are generally trained to do well (i.e., anticipate the consequences of various courses of action) and how they might learn to serve other functions (i.e., how community organizing will allow a lawyer to successfully represent a tenants' organization).

Most first-year programs teach some "Lawyering Skills" in areas such as

158. There will be some natural overlap between "Lawyering Skills" and "Case Law and Theory" if more varied approaches are included in the teaching of substantive law. One way to use this overlap might be to teach some part of the substantive material through a skills approach — simulating a criminal case through trial to teach criminal law and criminal procedure, for example.

legal writing and moot court. However, they are often limited to only a few of the skills lawyers use and are not focused on providing the education that would most benefit "outsider" students. Furthermore, these courses are often marginalized and taught by upper-year students or non-tenure track faculty, which minimizes the effect of these alternative ways of looking at lawyer's work. If "Case Law and Theory" still relies heavily on the reading and analysis of appellate court decisions to teach doctrine, even if the methodology is varied, Lawyering Skills becomes the only place where students can "try on" other useful skills.

In order to give students the opportunity to experiment with a range of skills, simulations which require a variety of different approaches should be included.[159] Students could be organized into groups so that their work on problems could be divided up, or so that they could play different roles, depending on what was required. Using groups also allows students to develop their own approaches to the work, have more control over the process, and gain experience working closely with others.

In addition to developing practical skills, "Lawyering Skills" provides an opportunity to experience and discuss the roles lawyers play, and the interpersonal nature of much legal work. Many students are only familiar with being students, a role where one is only responsible for one's own work. Representing others, sharing responsibility, and relying on third parties (i.e., judges) for the desired outcome, puts students in new positions. By discussing these issues explicitly, students learn from one another, and are given an opportunity to examine how their backgrounds inform their approaches.

For example, when evaluating negotiations conducted by students, I have repeatedly observed gender issues affecting approaches and perceptions. By making the issue explicit, students can discuss and learn from this, rather than ignoring it. They can consider whether they acted differently toward an opposing counsel of the opposite gender than they would have toward someone of the same sex, and whether that altered the outcome; they can consider whether their own behavior was affected by gender stereotypes and whether that harmed their client or changed their expectations and results. Discussing these questions allows students to evaluate and change patterns and behaviors that, if left unexamined, could hinder their effectiveness.

4. Evaluation

Cutting across all the areas of the first year is the question of evaluation. Nothing else so quickly divides students into various social strata within the law school and the legal system. However, students are tested nearly exclu-

159. An example of such a course is the Lawyering course taught at New York University School of Law. Anthony Amsterdam, Lawyering Materials (1992) (unpublished teaching materials, on file with author); *see also* Philip Schrag, *The Serpent Strikes: Simulations in a Large First-Year Course*, 39 J. LEGAL EDUC. 555 (1989) (describing a simulation in a civil procedure class of 125-140 students).

sively on their ability to express ideas in writing, and generally under the time pressure of an exam. As pointed out above, this is an area where students who followed the scheme laid out by Perry will have an advantage over those who did not, as they will be more prepared to assimilate the concepts and integrate them for an exam.[160]

Evaluation could be made more equitable and fair by using a mix of approaches. Students who excel at oral presentations but not in writing would be on more equal footing if that skill were valued as part of their overall evaluation. Also, if evaluations were spread throughout the semester and year, and a greater variety of work were evaluated, less emphasis would be placed on communicating in a particular style to a particular audience. Since lawyers deal with a variety of audiences and rely on various methods of communication, a mix of forms of evaluation would more successfully measure students' skills and prepare them for the world outside the law school. It would also avoid relying on the assumptions that "outsider" students have successfully assimilated, and give students who respond to different kinds of learning greater opportunities to demonstrate their strengths.

We give students a greater opportunity to identify their needs and develop structures for meeting them when we value learning other skills equally with learning legal doctrine. By changing how students' work is evaluated, we give credit to their own ability to meet their needs, and evaluation becomes part of the learning process. To enable students to take full advantage of this pedagogy of difference, it is also necessary to consider how learning is encouraged within the classroom.

C. Connected Teaching in the Law School Classroom

"Problem-posing" education emphasizes mutual planning rather than questions and answers already worked out by the "expert" teacher,[161] diagnosing learning needs, and using models which enable students to meet both their needs and the articulated objectives of students and teachers. It takes advantage of differences, rather than imposing a false uniformity on students, and thus can meet the different learning needs of "outsider" students. This requires considerably more flexibility in planning courses, as students are given the opportunity to define what the objectives will be and how they will be reached. Within the context of a particular course, once faculty define certain basic concepts with which all students should be familiar, there is still room for students and teachers to define together how they will acquire and prove their knowledge. Students could design projects, or collaborate with each other and faculty to develop simulations covering a given subject. This will empower "outsider" students to meet their own learning needs.

An analysis of what they need to learn will, logically, begin with what students already know. They can then build on that knowledge, expanding

160. *See supra* note 47 and accompanying text.

161. FRIERE, *supra* note 133, at 67.

and deepening what they know through an analysis of how the legal system has approached such problems in the past, and how looking at how new problems can be analyzed in light of past experience. This is, in essence, what the reading of appellate opinions teaches students to do, but the traditional process does it in reverse order.[162] Rather than beginning with problems students see and understand, the usual case method forces students to develop on their own the context in which the problems arise and the system which makes problem solving in the legal system consistent.[163] Contextualizing problems minimizes the "abstract, 'out-of-context' learning" that is disfavored by women.[164]

For example, if a Property law class includes consideration of landlord-tenant law, some students working with a campus housing group might discuss an eviction hearing to spark classroom discussion of warranty issues. The students could lead the discussion, based on the research they did in preparing for the hearing, and considering other issues that did not arise. Others could work in a group to create a policy development project, analyzing local problems with affordable housing legislation. This could include considering the requirements for an ideal lease, and various liability issues which arise. Other students might observe housing court eviction hearings and write a paper on what they observed. Similarly, civil procedure classes lend themselves to creating and using the various steps in the litigation process rather than simply reading cases exemplifying the problems and limits of the rules of civil procedure.[165]

An exercise using a contracts problem could develop the same or better understanding of contracts concepts as a traditional class by means of a different approach. A student beginning to struggle with the concepts of a first year contracts class will arrive with a lay person's understanding of what a contract is and how contracts order business affairs. A contextual approach would have students begin by discussing a situation where use of a contract is expected. They could then create the contract, or read one already developed. From there, they learn about the execution of the contract and discuss disputes which might arise. They might read cases on substantial performance, in order to judge the likely damages for the existing breach or move in a different direction depending on the nature of the problem.

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162. Lopez, *supra* note 46, at 322 ("Law teachers almost obsessively study the results of formal legal disputes but pay almost no attention to how disputes emerge and transform and to how professional lawyering affects these emergences and transformations.").

163. *See* Weiss & Melling, *supra* note 27, at 1347-48 (considering the treatment of facts — the stories of the law — in cases and classes and the value women place on knowing and understanding more of the story); Duclos, *supra* note 8, at 371. ("Uncovering how the dominant culture maintains its hegemony . . . means recognizing that law itself is a cultural phenomenon; the structures through which problems become cases and cases come to court, and the processes through which policies and statutes are created all reflect and maintain the perspective of the dominant culture" (citation omitted)).

164. *See supra* note 131 and accompanying text.

165. *See, e.g.*, Schrag, *supra* note 159.

In my experience, substantial performance is an issue many students do not anticipate or understand intuitively.[166] But by working through a problem where they evaluate the competing demands of a contractor and a business owner, and where they must use case law to justify their advice to a client, students must stretch beyond their instinctive sense that one should get exactly what is written into the contract. By working from a problem students can visualize, they are able to develop their own understanding of what else they need to know, since the problem itself will lead them into the complexities of the legal system.

Contextualized learning emphasizes the factual nature of the problem so that the process of analysis will not be divorced from a situation students can understand.[167] Students who require a context in order to grasp the abstract will be able to transfer the general principles thus acquired to other areas, just as they are expected to be able to use the analysis developed in traditional classes to solve new problems on exams.

This process also makes students participants in their own education, rather than passive recipients. While Socratic dialogue is intended to be a less passive educational experience than lectures, the experience is active only for one student at a time, as the student who is "on call" is the only one expected to participate. Also, to the extent that students can participate in the design of what they will learn, they can insure that it meets their individual needs, and they are therefore more likely to be engaged by it.[168]

CONCLUSION

Until we listen with a fundamental belief in the value of difference, we will fail to understand or appreciate it. As Martha Minow writes, "[w]e usually do not think of our own viewpoint as being a viewpoint because it is constantly reinforced by those who are like us. Those to whom we look to confirm our perceptions tend not to be those whom we think are unlike our-

166. My experiences with this problem arise from teaching a simulation problem in NYU's Lawyering course, developed by Professor Anthony Amsterdam, which asks students to evaluate a substantial performance problem in order to advise a contractor-client.

167. Similar ideas have been discussed or implemented in first-year courses for other reasons — primarily, I think, the desire to give students a dose of experiential education in the first year of law school. They are valuable no matter what reason led to their introduction. They will be most valuable to students who are "other" when they are a part of a conscious "pedagogy of difference" and they are not marginalized by the attitudes held toward the courses and the faculty hired to teach them.

168. There seems to be a law (or, at least, a tendency) of human nature that goes like this: Every individual tends to feel committed to a decision (or an activity) to the extent that [she] has participated in making it (or planning it). Teachers of adults who do all the planning for their students, who come into the classroom and impose preplanned activities on them, typically experience apathy, resentment, and probably withdrawal. For this imposition of the will of the teacher is incongruent with the adult's self-concept of self-directivity.

KNOWLES, *supra* note 138, at 42.

selves."[169] This inability or unwillingness to reach beyond entrenched positions has created a gulf in our understanding of the needs and desires of a new, diverse generation of law students. Students have been trying to reach across the gap, but until faculty members consider the role that pedagogy plays in creating the problem, it will be virtually impossible for change to occur.

"It is hard," said Dorothy Day, founder of the Catholic Worker Movement, "to say no to the existing social and political order — and to mean it, to mean it with an everyday commitment of energy."[170] Fundamental change is a tall order, and I am not foolish enough to think that the implementation of a new pedagogy will happen quickly or that law schools are necessarily open to change at all. Nonetheless, once we accept the view that difference is a value which diversity brings to a community, many things begin to fall into place. To know that students have different needs and to not try to meet those needs is to fail in the task of education.

In order to succeed in this effort, faculties will have to make hard choices about the use of law school resources. This means shifting additional resources to first year courses, and making a commitment to equalize power amongst traditional and new approaches to legal education. There is a marked tendency to marginalize the work of those who are "other" and of those who are teaching outside of the traditional first-year curriculum.[171] To achieve true diversity, the non-traditional and individualized approaches must be valued in making tenure decisions, and even in deciding which positions are tenure-track. People teach in ways that were successful for their own learning; it is necessary to value their different approaches in order to value the diversity they provide to students and to the community.

I have learned from feminist theory that things which seem settled result from a collective acceptance of certain assumptions of "the way things are." Within legal education, this complacency affects many things, not the least of which is the first year curriculum. It is reflected in a reluctance to give careful consideration to pedagogy at all, much less to contemplate radical reform of the curriculum. But "outsider" students are being silenced by this complacency, and hampered in their attempts to reach their goals. Legal educators have a responsibility to learn what it is that will assist these students and a consequent responsibility to use every available means to do so.

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169. Minow, *supra* note 10, at 3.

170. Quoted in Robert Coles, *Hierarchy and Transcendence* (Book Review), 97 HARV. L. REV. 1487, 1487 (1984) (reviewing KENNEDY, *supra* note 17).

171. There is substantial overlap between these two groups, since women, for example, predominate in the "soft" courses like legal writing, which give students more individualized instruction and personal attention. Chused, *supra* note 3, at 557 (in the 1986-87 academic year 68.4% of contract status legal writing teachers were women); *see also*, Joyce McConnell, *Feminist Analysis of a Counterhegemonic Pedagogy*, 14 HARV. WOMEN'S L.J. 72, 121 (1991) (even at CUNY, which uses a thoroughly non-traditional curriculum, women and men of color are over-represented in teaching the course that focuses on non-doctrinal issues).