Feminist Perspectives on the Legal Education upon the Profession

Katharine T. Bartlett

FEMINIST PERSPECTIVES ON THE IDEOLOGICAL IMPACT OF LEGAL EDUCATION UPON THE PROFESSION

KATHARINE T. BARTLETT*

I. INTRODUCTION

It is no longer appropriate to speak of "the" feminist position on a particular issue. Feminists are those who think critically about the role gender plays in existing social, political, and legal arrangements and who are committed to changes, of one sort or another, in these arrangements.[1] Because there are different ways to criticize and to improve how gender matters in our culture, there are different feminist points of view. Feminists disagree about matters as basic as what constitutes equality. Some favor formal equality, which compels the elimination of all types of gender-based distinctions and practices, even those intended to help women. Others defend substantive equality approaches that use affirmative, sometimes gender-specific, measures to remove the disadvantages of women's biological and culturally created differences.[2] These approaches can lead to quite different results with respect to such issues as school sports teams,[3] accom-

* Professor of Law, Duke University School of Law.

1. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833 (1990).

2. The formal equality perspective is represented in such works as CYNTHIA F. EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER 118-35 (1988); WENDY KAMINER, A FEARFUL FREEDOM: WOMEN'S FLIGHT FROM EQUALITY 11-34 (1990); Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 888-909 (1971); Ruth B. Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 27-42 (1975); and Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982). The substantive equality perspective, which itself has many variations, is reflected in such works as Herma H. Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 21-37 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-13 (1984); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1314-35 (1987); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 28-48 (1990-91); and Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 124-28, 142-44 (1986). *See generally* KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (1993) (comparing formal equality, substantive equality, nonsubordination theory, different voice theory, autonomy theory, and nonessentialism as feminist legal perspectives).

3. *See* Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 217-40 (1985) (comparing equal treatment and special treatment approaches to school sports teams).

modations to pregnancy in the workplace,[4] and the division of marital property,[5] but in their self-conscious orientation toward ending the effects of gender disadvantage, both approaches meet my definition of feminist.

I will discuss, then, not "the" feminist perspective on the ideological impact of legal education upon the profession, but different feminist perspectives. My focus is on two feminist perspectives that are less familiar than the equality approaches to which I just referred: (1) the "different voice" perspective and (2) the dominance, or nonsubordination, perspective. I have three reasons for choosing these particular models. First, I hope to demonstrate my point that feminists do not speak with one voice and that there are, indeed, a variety of feminist points of view with quite different implications and consequences. Second, these perspectives help to expose the links between legal education and gendered ideologies in the profession that are not easily revealed by the equality principles with which most practicing attorneys are likely to be most familiar. Finally, the juxtaposition of these two perspectives will show how difficult reform in this area will be. Different feminist perspectives reveal different dilemmas and disadvantages. Unfortunately, addressing one type of gender disadvantage often tends to reinforce or aggravate another. I conclude by suggesting that progress in removing gender-based disadvantage cannot be made by law schools alone, without corresponding changes in the legal profession.

II. Different Voice and Dominance Perspectives

The primary commitment of different voice theory is to identify those characteristics and values of women that are different and undervalued in this society and to promote affirmatively, or *revalue*, those characteristics.[6] Unlike equality theory, which attempts to eliminate gender-based disadvantage in a world that presupposes existing values and norms, different voice theory questions existing values and norms and contends that women have priorities that are not only different from, but superior to, the "male" values currently rewarded in society.[7] It questions, for example, the qualities of individualism and privacy upon which our economic system—which values

4. *See* Littleton, *supra* note 2, at 1291-1304 (comparing different feminist approaches to sex-specific differences).

5. *See, e.g.*, Martha A. Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (1991) (rejecting formal equality approaches and advocating outcome fairness as the guide to property distribution at divorce).

6. Bartlett, *supra* note 2, at 589.

7. *Id.* This perspective springs from the work of psychologist Carol Gilligan, whose book, In a Different Voice: Psychological Theory and Women's Development (1982), has strongly influenced many feminist legal theorists. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 28-30 (1988); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39, 43-55 (1985); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations For*

individual effort, merit, and reward—is based. It also questions the individual rights orientation of our legal system, which leaves individuals alone to care for themselves and their families. These values, according to different voice theory, reflect male values and a male version of reality, in contrast to female priorities that favor connections, community, and responsibility for others. This theory supports the view that society as a whole would be improved if women's values were more highly prized. The Family and Medical Leave Act of 1993[8] is an example of a legal reform that might be said to substitute the female-associated values of connection and community for the male-associated values of individualism and privacy because it helps to spread the burdens of childrearing from individual family units to the larger society.[9]

Dominance, or nonsubordination, theory approaches women's differences from another direction altogether. It posits that feminists' primary concern should not be women's differences but the imbalance of power between men and women; women are harmed not because they are different from men but because they are subordinated to them.[10] It is this subordination, rather than different treatment per se, that dominance theorists strive to eliminate.

Dominance theory's focus on women's subordination has broadened into a critique of some of the most basic principles of the liberal state. It asserts that the very principles which are supposed to guarantee objectivity, neutrality, and justice under the law in fact reflect male interests and help to maintain male dominance. The equality principle upon which feminists have sought equal rights with men is one example. Because this principle only extends to women's equal treatment to men, women are disadvantaged as to all arrangements and settings designed primarily with men in mind. Thus, even if women are given the same access to the same workplace as men, they are not identically affected by such workplace features as the "standard" forty-hour work week, tools and machines requiring employees with "male" strength and size, and workplace safety standards that treat

---

Our Judges, 61 S. CAL. L. REV. 1877, 1912-14 (1988); Suzannah Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580-91 (1986).

8. Pub. L. No. 103-3, 107 Stat. 6 (1993) (to be codified as amended in scattered titles of U.S.C.).

9. This spreading is, to be sure, quite limited. The Act requires employers of more than 50 employees to provide only up to 12 weeks of leave without pay. *Id.* § 102. In contrast, other industrialized countries have far more liberal provisions. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 53-54 (1987) (comparing American, French, German, and Italian parental leave laws); Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 571-87 (1993) (comparing American and Italian parental leave laws).

10. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND THE LAW 40-45 (1987).

accommodations to hazards that males face as neutral and those necessary to protect women as special.[11]

Similarly, the liberal state takes the free speech protection of the First Amendment as a neutral and objective principle—everyone is "free" to speak, regardless of the content of the speech, with only a few limited exceptions. According to dominance theorists, however, this neutrality is illusory, for the powerful are able to use the First Amendment to maintain the subordination of the powerless.[12] The best example of this phenomenon is pornography. Pornography is protected speech that defines women as worthless except as sexual objects for the pleasure of men. This definition cannot be countered by women, Professor Catharine MacKinnon argues, insofar as the pornography itself has undermined the credibility of women as subjects who might have something to say that is worth hearing.[13]

Privacy is another principle that, in its purported neutrality (the law does not single out some individuals for more or less privacy than others) enables men to dominate women. Dominance theory emphasizes that because men have more social, economic, political, and physical power than women, protecting privacy means leaving women subject to what men do to them in private—which, according to Professor MacKinnon, is decidedly non-neutral from the point of view of women.[14]

There are important similarities between different voice theory and dominance theory. In particular, each theory accepts the prominence of certain important differences between men and women, which the equal treatment model of equality does not do. These approaches part ways, however, over the significance that should be given to those differences. Different voice theory celebrates women's differences and, indeed, is so enthusiastic about them that it views these differences as forming a better foundation for law than the male values that currently predominate. Dominance theory, in contrast, focuses on how the differences associated with women—most es-

11. For one of the first serious feminist examinations of how the contemporary workplace favors men, see Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 56-61 (1979). Among the many other excellent articles on the topic are Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1186-97 (1989); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 100-09 (1989) and Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1824-43 (1990).

12. *See* MACKINNON, *supra* note 10, at 207; Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 489-94 (1992).

13. *See* Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 811-12 (1991); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 340-45 (1984).

14. *See* MACKINNON, *supra* note 10, at 99-102.

pecially, and not accidentally, the characteristics celebrated by different voice theory—operate to subordinate women by limiting women's availability and inclination to compete with men in the public sphere, while ensuring that men have someone to take care of them.[15]

III. Insights and Implications for Reform

The two perspectives I have described offer a number of insights about legal education. After describing these insights, I will attempt to explain their implications for reform.

A. *The Different Voice Critique*

Different voice theory helps to identify a number of features of legal education that might be labelled "male," and less desirable than the female values to which they might be contrasted. First, legal education idealizes individual performance, competitiveness, and autonomy rather than group process, cooperation, and collective learning. Students are called on to perform in class; they compete with one another to excel; and their grades, made competitive by grading curves, are usually based on an individual's performance on one, single exam. Students receive few, if any, external rewards for performances in joint problem-solving exercises or for treating their adversaries with dignity and respect. Together, these aspects of legal education may reinforce what is damaging and dehumanizing in the law and in the public sphere more generally: excessive competitiveness and cutthroat individualism.[16]

In addition to reinforcing competitiveness and individualism, legal education rewards the ability to take any side and argue any point of view. The assumption of our legal system is that all parties are entitled to have their interests represented and that no one set of interests should be privi-

---

15. *Id.* at 38-39.

16. *See* Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 Berkeley Women's L.J. 1, 41-46 (1989-90); *Project—Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 Stan. L. Rev. 1209, 1238-59 (1988) [hereinafter *Project—Gender, Legal Education, and the Legal Profession*].

Ironically, as different voice theorists often point out, reinforcing these traits may not prepare students well even for the world of practice, insofar as service to clients often demands that lawyers—colleagues and opponents alike—be able to trust and work well with one another. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 794-829 (1984); *see also* Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 Law & Soc. Inquiry 289, 316 (1989) [hereinafter Menkel-Meadow, *Exploring a Research Agenda*] (suggesting that feminist lawyers' greater sensitivity to client relations will improve their success in the conventional sense that clients will come back to them "because they feel they are really being heard and served").

leged over any other. Because all clients are equally entitled to the same degree of zealous representation, the attorney must be able to argue her client's side of a case with zeal, whichever side that may be.[17] By the same token, legal education does not encourage any genuine empathy for, or understanding of, either side of the case. What results is the kind of zeal that blinds rather than enlightens. Students are taught to attach themselves to their client's cause with great enthusiasm, without the kind of genuine understanding of either client or adversary that might guide the parties to resolve disputes with the least amount of damage.[18]

Complementing the stress in legal education on competition and zealous advocacy is the emphasis on adversarial appellate cases. This emphasis serves to define the lawyering process primarily in terms of the pre-formed "case" and undervalues the complex interactions through which lawyers and clients work together to define and resolve problems.[19] Similarly, treating cases litigated through the appellate level as the primary texts of legal education contributes to the devaluation of alternative, non-adversarial methods of dispute resolution. These alternatives have been promoted by feminists who have spoken explicitly from "a different voice," arguing that

17. For a justification of this role based on the values of individual autonomy, equality, and diversity, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615-19. Those who contemplate the ethical dilemmas involved in the attorney's habit of advocacy see different ways of addressing these dilemmas. Professor Anthony Kronman charges legal educators with the responsibility of providing moral education, to offset the indifference to truth generated by the advocacy role. *See* Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 963-68 (1981). Jonathan Macey is more pessimistic about the ability of legal educators to alter the values of instrumental reason and advocacy with which law students learn to identify in law school. He urges, instead, that law schools focus not on morality, but on greater skepticism for the law, so that law students understand that legal and moral positions are not the same. *See* Jonathan R. Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 STAN. L. REV. 1937, 1946-53 (1993).

18. *See, e.g.*, Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 77-81 (1988); *see also* Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1645-55 (1991) (explaining that an interactive, less hierarchical lawyering style, typically associated with powerlessness and femininity, might actually improve the process of attorney representation of clients). Steven Ellman analyzes how an ethic of care might affect ethical rules and legal practice, concluding that it would lead lawyers to be more likely to select and represent clients in accord with their own moral principles and sense of responsibilities and to relate more interactively with their clients. Stephen Ellman, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2679-2712 (1993).

19. Peggy Davis distinguishes an authoritarian, controlled style of lawyering from a more interactive process and explains how the New York University Lawyering Process Colloquium has tried to expand beyond the unexamined assumptions of legal education that contribute to the dominance of the former over the latter. *See* Peggy C. Davis, *Law and Lawyering: Legal Studies With an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185, 189-90 (1992).

legal education has focused too much on face-to-face, adversarial combat and too little on *avoiding* conflict.[20]

The emphasis on appellate cases also reinforces abstract reasoning processes over factually rich contextual ones. From the different voice perspective, more attention should be given to contextual reasoning, through which a rule's exceptions and qualifications might be discovered. This in turn would loosen up the predetermined scripts from which abstract legal principles are derived.[21] Contextual reasoning also helps to soften the entrenched dichotomies between reason and emotion, objectivity and subjectivity, and mind and body—dichotomies that alienate law students and distort and impoverish the quality of legal thought and learning.[22]

B. The Dominance Theory Critique

Dominance theory provides a basis for attack on legal education that both builds on and departs sharply from the insights of different voice theory. It agrees that conventional legal reasoning methodologies are too abstract and limiting. The implications of this critique for dominance theorists, however, are not the same as those drawn by different voice theorists. According to different voice theorists, legal reasoning is improved by greater contextualization, which enhances the possibilities for compassion and innovative decisionmaking. Dominance theorists view the issue in more substantive (or "political") terms. From the dominance perspective, the problem with abstract legal decisionmaking is not the loss of opportunities for richer contextualized dispute resolution per se, but the fact that the

---

20. Carrie Menkel-Meadow's work has been especially important on this point. *See, e.g.*, Menkel-Meadow, *Exploring a Research Agenda*, *supra* note 16, at 315; Menkel-Meadow, *supra* note 18, at 80; Menkel-Meadow, *supra* note 7, at 61.

Not all feminists have supported nonadversarial dispute resolution techniques. Especially with respect to divorce-related issues, many women's advocates have expressed concern that mediation disadvantages women because it exploits their willingness, and high incentives, to compromise. Battered women are the most vulnerable. *See* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2157-71 (1993); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1561-62 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 81-97 (1984); Lenore J. Weitzman, *Gender Differences in Custody Bargaining in the United States*, *in* ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE 395, 405 (Lenore J. Weitzman & Mavis Maclean eds., 1992). Recent research has put into question the severity of some of these concerns. *See* Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 279, 283-89 (1993) (concluding that research does not support the claim that mediation disadvantages women).

21. *See, e.g.*, Bartlett, *supra* note 1, at 849-63; Linda R. Hirshman, *The Book of "A"*, 70 TEX. L. REV. 971, 971-85 (1992); Menkel-Meadow, *supra* note 18, at 77-81; Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1724-25 (1990); Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1742-46 (1990).

22. *See* Angela P. Harris & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1775-79 (1993).

particular, concrete abstractions produced within the current legal regime represent and maintain male dominance. These abstractions are not undesirable because they are abstractions, but because, in this current social order, they are derived from male scripts that impose male-serving standards of what is reasonable, consensual, and objective.[23]

Dominance theory's critique of objectivity and neutrality provides another line of analysis that might be aimed at legal education. Law schools teach what they understand the law to be—rational, objective, and neutral. If this understanding is flawed or, worse, a cover for particular interests the law in fact represents, law schools themselves might be said to be complicit in the law's imposition of male dominance and female subordination.[24]

Dominance theory also provides a basis for an attack on the organization and contents of the traditional law school curriculum. This curriculum feeds male dominance by maintaining a hierarchy between a core set of courses in business and finance—affecting mostly men—and a set of more optional, "fringe" courses such as family law, employment discrimination, and even legal ethics—in which women are more likely to be interested.[25] Note that this is a point about power, not values. While different voice theory might be concerned about cultural norms—i.e., how a heavily business-dominated, litigation-centered curriculum reinforces competition and individualism over cooperation and group responsibility—dominance the-

---

23. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162-64 (1989); *see also* MACKINNON, *supra* note 10, at 234 n.27 (describing the "mechanistic quality" of legal thinking). Many feminists have called for more contextualized legal reasoning, using insights from dominance theory to demonstrate how new scripts can help challenge male dominance. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1051 (1991). One of the best examples of applied scholarship in this area is Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

24. The adversarial, accusatory tone conveyed in this sentence is characteristic of some dominance theory. *See, e.g.*, MACKINNON, *supra* note 10, at 204-05 (accusing of "collaboration" women lawyers who defend pornography on First Amendment principles). I discuss this point at Bartlett, *supra* note 1, at 876-77.

25. Women's greater interest in ethical issues has been demonstrated in the context of law practice by Lloyd Burton et al., *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 J. DISP. RESOL. 199, 244. On the role of law school curriculum in gender discrimination, see Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101, 103-05 (1988).

Feminists have shown how the privileging of legal issues affecting mostly men over issues affecting mostly women operates throughout the legal system. *See, e.g.*, Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1739-50 (1991) (explaining how federal jurisdiction rules exclude cases involving "domestic relations" and other issues that disproportionately affect women). This hierarchy builds on the public/private dichotomy, which feminists informed by dominance theory have identified as a central component to the law's participation in female subordination. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-99 (1983); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151 *passim* (David Kairys ed., rev. ed. 1990).

ory is concerned with how the structure of a curriculum might itself become a means by which male dominance is obscured and perpetuated. The marginalization of women in law school textbooks and in the topics covered in law school courses[26] is, likewise, seen as a different issue for each group of theorists. Different voice theorists worry about the primacy of the dominant but inferior "male" values; dominance theorists focus on how the appearance or disappearance of women in legal texts is a means of male control and female subordination.[27]

Dominance theory also provides some insight into the climate issues associated with legal education. Abundant evidence exists that women are disadvantaged by law school pedagogies. A questionnaire administered to law students at the University of California at Berkeley in March 1988, for example, found that men are almost twice as likely to ask questions in class, volunteer in class, and ask questions of their professors after class.[28] These results were duplicated in studies at Stanford and Yale law schools.[29] In the Berkeley study, women students reported lower levels of self-esteem and a steeper decline in confidence since coming to law school than that experienced by men. And although the women studied entered law school with LSAT scores and grades not significantly lower than those of men, the men examined received a significantly larger proportion of the highest grades.[30] Finally, fifty-one percent of women students, as compared to twenty percent of male students, reported pressure to set aside their own values in order to think like a lawyer.[31] Similar gender differences have been identified among practicing attorneys.[32]

What explains these findings? Different voice theory emphasizes the gap between women's sharing, community-focused values and the competitive atmosphere and abstract "male" values prevalent in legal education. It provides a perspective on how legal education may alienate women by reflecting values not their own. Dominance theory moves beyond this explanation to the structural advantages these differences give to men. It

26. *See* Erickson, *supra* note 25, at 103-05; Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2198 (1993).

27. *See, e.g.*, Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1074-75 (1985).

28. Homer & Schwartz, *supra* note 16, at 28, 50.

29. *See Project—Gender, Legal Education, and the Legal Profession*, *supra* note 16, at 1239, 1242; Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1335-45 (1988).

30. Homer & Schwartz, *supra* note 16, at 51.

31. *Id.* at 52.

32. *See* RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 73, 78, 188-90 (1989) (explaining, for example, that a female attorney is far more likely to disclose a letter demonstrating that her client is less fit to have custody of a child).

underlines how the features of legal education outlined above allocate rewards based on rules that disadvantage women and reinforce male dominance.

Studies of higher education lend some support to this more conspiratorial analysis. A study commissioned by the Association of American University Women, for example, documents a host of behaviors by professors that suppress women's self-esteem and thereby weaken their performance levels.[33] Professors make eye contact with men more often than with women,[34] so that individual male students are more likely to feel recognized and encouraged to participate in class. Professors use tones and postures with male students that communicate interest, which are not similarly employed with female students (for example, leaning forward when men speak while adopting a patronizing tone and inattentive posture, e.g., looking at the clock, when talking to women). Professors are also more likely to call on men than women; call men by name; credit comments to male students; probe a male student's response to a question for a fuller answer requiring a higher level of critical thinking; wait longer for a man to answer before going on to another student; interrupt female students; give a longer and more complete answer to male students; and write stronger recommendation letters for male students.[35]

IV. CONCLUSION

Despite their divergences, each of the above perspectives offers a useful vantage point for thinking about the gender implications of legal education. Taken separately, they highlight specific aspects of legal education and suggest how legal education might support ideologies that make gender matter. Taken together, they demonstrate how difficult the problem of improving these gender implications will be. I will conclude by noting three specific difficulties in contemplating a feminist reform agenda for legal education.

The first difficulty is that changes in legal education that seek to promote "women's values" tend to reinforce women's identification with qualities, such as cooperativeness and caring for others, that have been used historically to keep women subordinate to men. This is Professor MacKinnon's complaint with different voice theory: To the extent the glorification of women's values reinforces those qualities that have historically made women different—members of the support cast rather than leaders and initiators—women risk falling deeper into the age-old trap upon which the sys-

33. *See* ROBERTA M. HALL & BERNICE R. SANDLER, THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN? (1982).

34. *Id.* at 7.

35. *Id.* at 7-11.

tem of male dominance depends.[36] To avoid this trap, the revaluation of traditionally female values must proceed by breaking the link between these values and the gender of those who hold them.

The second difficulty is that special attention to women's interests, as defined under either different voice or dominance theory, tends to reinforce the idea that women are different from the (male) norm. This phenomenon, known as the "difference dilemma,"[37] is illustrated through such "special" women's activities and accommodations as women's law student organizations, attention to women in the admissions process, women's law journals, special awards for women, and representation by women on particular committees and boards. Each of these women-centered activities or practices parallels a similar phenomenon in the legal profession itself. Under strict equality-based approaches, or at least an equal treatment approach,[38] these measures are, on balance, undesirable, in that they reinforce difference and stigmatization based on gender. If one accepts the critique that legal education is based on "male values," however—as different voice theorists would contend—or preserves male dominance—as dominance theorists would insist—one could argue that the law and law schools are already organized to accommodate men's interests. Thus, some reordering appears to be justified—not to *favor* women, but to *neutralize* the male bias and interests.

Finally, there is the problem of how law schools can best prepare students for the world they are to enter, which is still a very male world. It might be said that the more that is done in legal education either to reflect women's values better or to protect women from male dominance, the less prepared women will be for the male world of legal practice that awaits them. Pursuing this line of thought, it is bad enough that women have to face this bias[39] and the burdens of their imagined, as well as their genuine,

---

36. *See* MACKINNON, *supra* note 10, at 38-39; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 836-40 (1989).

37. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

38. In the only United States Supreme Court decision addressing the constitutionality of "benign" sex-based discrimination in the educational setting, the Court followed an equal treatment approach and invalidated the discrimination. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982).

39. Gender bias studies show that women attorneys face bias in law practice on the part of litigants, other attorneys, and judges. Judges, for example, give less weight to the arguments of female lawyers than to those of male lawyers and are more likely to cut them off when they are speaking in court. *See, e.g.*, MARYLAND SPECIAL JOINT COMMITTEE, REPORT OF THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 260 (1989) (60% of female litigators reported that judges often or sometimes appear to give less weight to female attorneys' arguments than to those of male attorneys); NINTH CIRCUIT GENDER BIAS TASK FORCE, THE PRELIMINARY REPORT 52-53 (Discussion Draft 1992) (40% of female attorneys report that judges cut off the arguments of women counsel while allowing men more time). The Maryland and Ninth Circuit judicial bias

differences.[40] It would be unfortunate, indeed, if in attempting to correct a systemic problem in which men and their values predominate, law schools further undermined women's capacities to compete in a male world.

One conference participant articulated a version of this problem when he asked members of the panel how a law partner should handle case assignments in his firm when he knows that a judge is biased against female attorneys. Should the partner act on, and thereby perpetuate, the judge's bias or should that bias be ignored even though, as a result, the judge may act to the client's detriment? The question illustrates how the problems law schools face in eliminating, or at least reducing the effects of, gendered ideologies are replicated in law practice itself. We can say, as has the Supreme Court, that acting upon certain biases of others is impermissible.[41] But to act as if these biases did not exist hurts other parties—in this case, clients—to whom we owe a very high duty. We must, of course, always question whether imagined bias is real. But to the extent the gender bias identified by feminists is genuine, so must be the concerns about how transition costs of eliminating that bias should be distributed between clients and lawyers.

If there is an answer to this difficult problem, it is unlikely that either law schools or law firms can find it on their own. Law firms cannot be expected to resocialize new attorneys whose training reinforces the kind of "male" ideologies feminist theory has identified, nor can law schools make a dent in the gendered ideologies of legal practice if the practice remains determinedly "male." This conference, although its goals are modest, is a rare opportunity for the kind of mutual exchange about the relation between gender and the law—as learned both in law schools and in law practice—on which the successful, and necessarily incremental, reshaping of gendered ideologies depends.

---

studies, and several others reporting similar phenomena, are discussed in Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 247-51 (1993), and Resnik, *supra* note 26, at 2199-2209.

40. Carol Rose has used game theory to explain how even when individual women rise above stereotypes, the expectations that they are, say, less aggressive than men works against them in the negotiation setting. Carol M. Rose, *Women and Property, Gaining and Losing Ground*, 78 VA. L. REV. 421, 423 (1992). In addition, commentators have pointed out that women are penalized not only for not being aggressive enough, but for being too aggressive in situations in which men would not be so judged. *See* ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION 201-02, 208 (1977) (explaining that a group which constitutes less than 15% of an organization is particularly vulnerable to stereotyping); Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of* Price Waterhouse v. Hopkins, 15 VT. L. REV. 89, 92-104 (1990).

41. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that the racial bias of others cannot be taken into account by a court in deciding the custody of a child whose mother is in an interracial marriage).