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# MAY IT PLEASE WHOSE COURT?: HOW MOOT COURT PERPETUATES GENDER BIAS IN THE “REAL WORLD” OF PRACTICE

Mairi N. Morrison\*

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#### INTRODUCTION

The spring ritual of Moot Court, in which first-year law students write and argue an appellate brief to a panel of judges consisting of both academics and practitioners, has a profound impact on each student's developing impression of what it means to be a lawyer.<sup>1</sup> Moot Court disadvantages law students, particularly women students, in replication of "real life," by teaching that acceptance of legal rules fashioned by and for men is the only path to success and that justice and social change are ideals which cannot be realistically achieved.<sup>2</sup> This Article explores the ways in which the traditional Moot Court program perpetuates gender bias in the "real world" by indoctrinating students in "rules" relating to women's personal appearance, argument styles, and a narrow male-created vision of success. Because there is a direct link between this first-year training in the role of gender and the behavior of new lawyers in the professional

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1. See generally SCOTT TUROW, *ONE L: AN INSIDE ACCOUNT OF THE FIRST YEAR AT HARVARD LAW SCHOOL* 187 (Penguin Books 1987) (1977) (describing Moot Court as "another of the universals of first year education at most American law schools . . . which . . . seeks to acquaint the beginning law student with some of the practical aspects of being a lawyer").

Law faculty have traditionally viewed Moot Court as a key part of the process of their students becoming lawyers. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 111 (Oceana Publications 1981) (1930) (lauding the practical experience provided by "[y]our moot court — not . . . your courses" while criticizing the overly theoretical nature of law school training in general.)

2. If we train lawyers to be courageous and stand up for change in ways that seem small and procedural, they will be more likely to feel that they can be "change agents" with regard to substantive law.

realm,<sup>3</sup> I suggest approaching Moot Court from a feminist perspective.<sup>4</sup>

Because Moot Court is a core first year course, indeed the quintessential first year lawyering course,<sup>5</sup> it is well situated as a vehicle for change. A feminist Moot Court would not only teach the mechanics of argument, but also expose student lawyers to

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3. A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 3 (1992) [hereinafter *MACCRATE REPORT*]. The ABA task force drafting this study contemplates a system in which “law schools and the practicing bar must share responsibility for giving new members of the profession the training needed to practice competently.” *Id.* at 131. In keeping with the *MacCrate Report’s* subtitle, the report suggests that legal educators and practicing lawyers must stop viewing themselves as separated by a “gap” and recognize that they are engaged in a common enterprise — the education and professional development of the members of a great profession. *Id.* at 3.

The report sets out ten fundamental lawyering skills and four fundamental values of the profession. *Id.* at 138-41. I believe that many of these lawyering skills can or should be acquired in Moot Court, e.g., Problem Solving, Legal Analysis and Reasoning, Legal Research, Factual Investigation, Communication, Organization and Management of Legal Work, and Recognition and Resolving Ethical Dilemmas. *Id.* Of the fundamental values recommended by the task force, the following should be integrated into Moot Court: Provision of Competent Representation, Striving to Promote Justice, Fairness and Morality, Striving to Improve the Profession, and Professional Self Development Problems. *Id.*

For a commentary on the *MacCrate Report’s* impact see Jane Easter Bahls, *Jump Start: A new ABA report suggests how law schools should prepare students for practice*, STUDENT LAWYER Apr. 1993, at 19.

From the academic side of the gap, see Lee E. Teitelbaum et al., *Gender, Legal Education and Legal Careers*, 41 J. LEGAL EDUC. 443 (1991).

4. Since one of the hallmarks of feminist jurisprudence is valuation of differing experiences and rejection of the myth of objective truth, feminist jurisprudence is difficult to define. Although there is no unitary feminist perspective, Rosalind Delmar presents a decent working definition of the values that might inform a feminist perspective. See Rosalind Delmar, *What is Feminism?*, in *WHAT IS FEMINISM?* 8 (Juliet Mitchell & Ann Oakley eds., 1986) (asserting that “at the very least a feminist is someone who holds that women suffer discrimination because of their sex, they have specific needs which remain negated and unsatisfied, and the satisfaction of these needs would require a radical change . . . in the social, economic and political order”). See also Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183.

5. In fact, Moot Court is the quintessential first year lawyering activity at most of the 177 accredited law schools in the country. LAW SCHOOL ADMISSIONS COUNCIL, *THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS*, i (Bantam, Doubleday, Dell 1996 ed. 1995). The model is essentially the same whether it is termed Legal Skills, Legal Analysis, Research and Writing (LARW), Legal Methods or Lawyering Skills. The second semester is usually a continuation consisting of either a traditional Moot Court program in which students prepare a brief and argue it to a mock appellate bench or a modified program which includes “motions practice.” The Moot Court portion may be termed Appellate Advocacy, Lawyering Skills II, Legal Methods II, etc.

models of professionalism that include choices in how to dress or argue in the legal profession. In addition, once Moot Court makes students aware that there is a choice of models for oral advocacy, it can teach them to exercise this choice with responsibility and sound independent judgment.<sup>6</sup>

That gender bias is pervasive in practice<sup>7</sup> as well as in legal education<sup>8</sup> is well-documented. This bias persists even though

6. See MACCRATE REPORT, *supra* note 3, at 131-32.

7. Many state court systems have completed gender bias reports. See, e.g., CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, DRAFT REPORT: ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS (1990); REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION (Ricki Lewis Tannen, Reporter), *reprinted in* 42 FLA. L. REV. 803, 942-43 (1993) [hereinafter FLORIDA SUPREME COURT GENDER BIAS STUDY]; REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, *reprinted in* 15 FORDHAM URB. L.J. 8 (1986); REPORT TO THE SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, *reprinted in* 20 U. BALT. L. REV. 1 (1990) (Maryland); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS (FINAL REPORT), *reprinted in* 15 WM. MITCHELL L. REV. 825 (1989) [hereinafter Gender Bias Reports]. For a recent report card on the content of and success rate of these task forces, see Karen Czapanskiy, *Women in the Legal Profession: 1994 and The Challenges Continue*, 2 VA. J. SOC. POL'Y & L. 13 (1994).

For a discussion and analysis of the self-examination begun by the federal courts, see Judith Resnick, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993). For a summary of the first of the federal reports to be published, see *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 STAN. L. REV. 2153 (1993). For the full and final report, see *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994).

8. Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMPLE L. REV. 799 (1988) (discussing the failure of law schools to fully integrate women into the highest ranks of the legal academy and focusing on the chilly climate for women who speak out or otherwise challenge their traditional role); Resnick, *supra* note 7; Sheila McIntyre, *Gender Bias Within the Law School: 'The Memo' and its Impact*, 2 CAN. J. WOMEN & L. 362 (1988) (detailing a Canadian law professor's personal experience with sexism and her decision to go back into practice); Christine Boyle, *Teaching Law As If Women Really Mattered, or What About the Washrooms?*, 2 CAN. J. WOMEN & L. 96 (1986); Elyce H. Zenoff & Kathryn V. Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869 (1983).

For a comprehensive discussion of gender bias against women in academia as a whole, see generally NADYA AISENBERG & MONA HARRINGTON, *WOMEN OF ACADEME* (1988). Legal academia is, of course, not unique in presenting barriers to women's advancement, not the least of which is entrapment in stereotypes, such as the one that women must choose between a life of marriage (private sphere) or adventure (career/public sphere), that mirror the barriers in the wider world. It is unique, however, in the direct relationship its policies have on individuals who will make and enforce the law and therefore allow or disallow discriminatory behaviors to continue.

the number of women “doing law”<sup>9</sup> has increased to almost fifty percent.<sup>10</sup> Some women lawyers,<sup>11</sup> mostly those who have “assimilated”<sup>12</sup> to male standards, have achieved a level of professional success equal to their male counterparts.<sup>13</sup> However, women, individually and as a group, do not possess what Mona Harrington calls “professional authority”<sup>14</sup> — the power to influence and change law and law systems.<sup>15</sup> Law school does not teach the skills needed to change the rules but instead teaches only how to work within existing hierarchies.<sup>16</sup> The presence of women in the legal profession has not had the impact one might expect.<sup>17</sup> While women are rewarded for becoming “social males,” men who possess traits traditionally associated with women may find themselves stigmatized as “social females.”<sup>18</sup>

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9. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 830 n.1 (1990) (using the phrase “doing law” to describe the “professional activities of practicing lawyers, lawmakers, law professors and judges”).

10. MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 15 (1994). In spite of the heartening statistics, women continue to be excluded from influential posts such as law professorships and judgeships. See also Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 29 (1987) (discussing exclusion of the point of view of outsider groups in a country whose “story of law . . . is largely a story about one group of people — middle to upperclass white males”). Menkel-Meadow notes, however, that the “now-included voices” have changed the nature of the debate. *Id.* at 47.

11. See Stephanie B. Goldberg, *Token Women? The ABA Confronts its Glass Ceiling*, A.B.A. J., July 1991, at 58.

12. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1988).

13. Success is defined by the assimilated woman’s conventional male counterparts, whose behavior males recognize as the unstated norm.

14. Mona Harrington makes a distinction between “professional success” and “professional authority.” See HARRINGTON, *supra* note 10, at 9. The latter is the power to shape the institutions which she has joined and is what has been withheld. *Id.* Without this power there can be no appreciable change. See AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 40, 110 (1984).

15. HARRINGTON, *supra* note 10, at 1-39.

16. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) (noting that law school teaches that existing patterns of hierarchy and dominance are “natural”).

17. See generally FLORIDA SUPREME COURT GENDER BIAS STUDY, *supra* note 7 (documenting deeply entrenched hostility to women as members of the bar). I cite the Florida report to support points because I happen to teach at a law school in Florida. Sadly, with the exception of a few regional idiosyncracies, the report is not strikingly different from reports of other states. For graphic excerpts from an array of reports, see Czapanskiy, *supra* note 7.

18. A male lawyer who chooses to pursue family law practice or a male faculty member who chooses to teach Legal Research and Writing, both professions traditionally dominated by women, may be disadvantaged in the same way the male nurse is in the case of *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1984).

Since law school creates, at least in part, the real world of practice,<sup>19</sup> only by degendering the Moot Court experience can we create a legal world<sup>20</sup> in which students are not only taught to see change as necessary, but are also empowered to act as "change agents."<sup>21</sup> Moot Court taught from a feminist perspective would continue to train students to operate in the real world of practice and, at the same time, show them an "ideal world," a goal to work towards.

At present, law schools use Moot Court solely as a training ground for the traditional legal version of the real world. By pas-

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*cert. denied*, 469 U.S. 1036 (1984) (cited in Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1308-09 (1987)). In *Spaulding*, the plaintiff class argued that the lower pay scale of the predominantly female nursing department faculty was gender discriminatory and violative of Title VII. *Spaulding*, a man, was dismissed from the suit. Professor Littleton critiques the court's reasoning as follows:

While most of the plaintiff class were women, one member was a male nursing professor. The Ninth Circuit found that the district court had erred in not dismissing the poor guy from the suit. The following exchange paraphrases the appellate court's discussion:

Male nurse: Equality!

Court: You can't argue equality; you're being treated just like the other nursing professors are.

Male nurse: Wait a minute. Nursing professors are paid less because nursing is a female occupation, and nursing professors tend to be women.

Court: So let them argue that. You can't argue that you're paid less "because" you're a man since that's not why you're paid less. [footnote omitted]

Actually, what the male plaintiff was complaining about was that he was being paid less on the basis of his sociological sex, not his biological sex.

*Id.* at 1308-09.

The experience of both male and female in the female-dominated legal writing "profession" (to the extent that it is seen as a separate category and profession within legal education) is directly analogous to those of the female-dominated nursing profession. Such gender categorizations within law school, where students are learning what is and is not acceptable in terms of treatment of outsider groups, contributes to what Duncan Kennedy calls "reproduction of hierarchy." See Kennedy, *supra* note 16.

See also Gender Bias Reports, *supra* note 7 (giving examples of how the social-male/social-female dichotomy plays out in legal practice).

19. See, e.g., Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); Roger C. Cramton, *Partners in Crime: Law Schools and the Legal Profession*, THE BAR EXAMINER, Nov. 1993, at 8.

20. That substantive law is still highly sexist is amply documented as well. For an interesting survey of how our laws resist change to gender fairness, see Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

21. See *supra* note 2.

sively allowing its training goals to be shaped by the gender-biased<sup>22</sup> world of practice, law schools perpetuate the existing system. Students are taught to excel in the traditional, linear, rational, dispassionate, and “male” style<sup>23</sup> of argument within the larger context of an adversarial, one-winner system. This is in contrast to an alternative “female” style of argument in which real life stories filled with detail and emotion give context to judges and juries.<sup>24</sup>

However, there is a risk in using the alternative female style. To exercise such a style would be to move outside the mainstream and challenge the status quo in which male values are enshrined within the myth of neutral application of objective legal rules.<sup>25</sup> The application of such a style would fly in the face of

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22. In this paper, I adopt the following definition of gender bias contained in Eich, *Gender Bias in the Courtroom: Some Participants are More Equal than Others*, 59 WIS. B. BULL. 22 (1986)(cited in Helen Leskovic, *Legal Writing and Plain English: Does Voice Matter?* 38 SYRACUSE L. REV. 1193, 1199-1200 n.54 (1987):

In simplest terms, gender bias is the pre-disposition or tendency to think about and behave towards others primarily on the basis of their sex. It is reflected in attitudes and behavior towards women — and men — which are based on stereotypical beliefs about the “true nature” and the “proper role” of the sexes rather than upon consideration or evaluation of each individual’s abilities, experiences, or aspirations.

*Id.*

23. Like the Socratic method, which has also been the subject of much critique of late, the traditional Moot Court has venerated this “male” style by advancing the “myth of objective truth.” PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991). Williams describes this phenomenon:

[T]he myth of purely objective perspective, the godlike image of generalized, legitimating others — these are too often reified in law as “impersonal” rules and “neutral” principles, presumed to be inanimate, unemotional, unbiased, unmanipulated, and higher than ourselves. Laws like masks, frozen against the vicissitudes of life; rights as solid as rocks; principles like baseballs waiting on dry land for us to crawl up out of the mud and claim them.

*Id.* at 11-12.

24. Although I use the terms “male” and “female” to recognize that the traits employed by each are traditionally associated with one or the other sex, I join Katharine Bartlett in rejecting “the sharp dichotomy between abstract ‘male’ reasoning and concrete, contextualized ‘female’ reasoning.” Bartlett renames “female” as “practical reasoning” and gives examples I will refer to in my “Reform Recommendations,” *infra* Part IV. Bartlett distinguishes the two approaches in this way:

Traditional legal methods place a high premium on the predictability, certainty and fixity of legal rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility and the ability to *identify missing points of view*.

Bartlett, *supra* note 9, at 832, 850 (emphasis added).

25. See Williams, *supra* note 12.



the one thing that traditional Moot Court programs teach: "how to play ball with the court."<sup>26</sup>

In sum, the current Moot Court teaching methodology, which emphasizes conventional argument models, is incomplete and open to critique. At best, students are taught strategies to cope with gender bias by way of practice tips given by their professors and Moot Court judges on how to handle sexist colleagues, superiors, and judges. At worst, the model is a self-fulfilling prophecy; conformist practitioners are invited to serve as judges and then themselves exhibit gender-biased behavior. This behavior becomes proof that the real world is as intractably sexist as Moot Court indicates.<sup>27</sup>

We must paint a picture of what the legal process should be, modeling an aspirational array of choices in oral argument styles, dress, and ways of dealing with appellate courts. Of course, as law teachers, we have a responsibility not to mislead students into believing that the legal world is a kinder, gentler place than it is and that no gender bias can harm them. Certainly we in legal education can and should apprise students of the existence of gender bias and teach them effective coping skills to deal with gender bias. We can also help students refine their judgment as to what, for each student, constitutes a "true threat"<sup>28</sup> and therefore necessitates challenge. Teaching Moot Court from a feminist perspective can help law schools produce lawyers capable of making incremental change in the gender-biased system which is the real legal world. In tandem with this ideal world goal, as

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26. Not only are there risks in using the alternative female style, but these risks are greater for women than for men in both legal education and in practice. For example, the same impassioned argument made by a woman is often construed as overemotional when from a man it would be seen as forceful. See generally Gender Bias Reports, *supra* note 7. Students need to be empowered to change the fact of discrimination rather than be trained to be overcautious and operate from a base of fear.

27. See *infra* Part I.A.2. in which a woman Moot Court judge who has apparently succeeded through conformity engages in disparate critique of women law students.

28. This Zen concept that it is a talent to recognize when "you cannot or will not retreat any farther, [and] you must fight" has useful application to survival in law. JOE HYAMS, *ZEN IN THE MARTIAL ARTS* 74 (Bantam Books 1982) (1979) (quoting martial arts master Bruce Lee). See also DERRICK BELL, *Preface to CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR* at x (1994) (noting that no one person has the energy to fight every battle against every slight or injustice).

Moot Court professors, we can apprise students of their power to make change in that world.<sup>29</sup> We can teach them to take risks.

In this Article, I examine gender bias in Moot Court from a feminist perspective and offer proposals for eradicating this bias. In Part I, I relate personal observations of gender bias in Moot Court and analyze the impact of this gender bias on law students and new attorneys. I then discuss two recent empirical studies which document gender bias in the law school.

In Part II, I set out a feminist theoretical framework in which to examine Moot Court reform. First, I discuss three stages of feminism: Equal Rights Feminism, Difference Feminism, and Postmodern Feminism. Then, I discuss the values and limitations of these three stages to a reformed Moot Court.

In Part III, I examine how the relegation of women to law school's "domestic sphere" exacerbates the risks women professors take in injecting a feminist perspective in Moot Court. In this section, I also discuss how risks that women professors necessarily take serve as a model to students for disruptive, liberatory, or rebellious lawyering.

Finally, in Part IV, I propose ten concrete recommendations for reforming Moot Court. I make these suggestions with the hope that they will raise consciousness with regard to law school's role in perpetrating sexism and that they will produce new lawyers who feel they have the power and duty to work against gender bias.

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29. For an inspirational, albeit cautionary, tale of the nature of individual protest efforts, see BELL, *supra* note 28. In his latest book, Professor Bell describes the consequences of taking an unpaid leave from Harvard Law School to protest the school's lack of commitment to diversity in hiring. At the end of his two-year leave of absence (the university's limit on such leaves), Harvard had still not tenured a black woman. Professor Bell left Harvard. Bell underestimated the power of the structure that is Harvard in his belief that others would support his cause. Still, he does not regret acting on what he believes was a moral imperative for him as a law professor.

For three excellent inspirational articles on the possibilities of power in under-represented voices, particularly stemming from the African-American oral tradition, see Herbert A. Eastmen, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995); Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994); Odeana R. Neal, *The Making of a Law Teacher*, 6 BERKELEY WOMEN'S L.J. 128 (1991).

## I. THE PROBLEM OF GENDER BIAS IN MOOT COURT

A. *Three Vignettes from Law School Moot Court*

My personal observations as a law teacher help inform this Article. I teach Appellate Advocacy, better known as "Moot Court" to first-year students. In addition, I have acted as faculty advisor to two interschool Moot Court competition teams: the National Sports Law Competition sponsored by Tulane University in New Orleans, Louisiana, and the Judge Gabrielli Family Law Competition sponsored by the University of Albany Law School in Albany, New York.

My experience teaching two other courses, the clinical "Street Law," and the simulation course, "Interviewing, Counseling and Negotiating," presents some of the same opportunities and challenges to shape student minds.

I share the following three vignettes illustrating gender bias in Moot Court.

## 1. Vignette One: The Rumor of the Dress Code

An incident I think of as "the rumor of the dress code" served as my first inkling that my gender-neutral messages are not being entirely internalized by my students. In early spring of 1994, I am having a rare moment of quiet contentment, having survived my first year of law teaching. Interrupting my reverie on the new world I have opened to my students comes Jane<sup>30</sup> — one of my better students — diligent, genuinely curious about the law. She is visibly distraught.

"I've been looking all over for you," she begins. "I heard that there is a rule that we have to wear dresses or skirts for Moot Court. Everyone is saying that the Florida courts are very conservative and that if we wear pants we'll be graded down. I *don't wear dresses!*" she adds emphatically.

At the start of the semester I had posted a sign stating that students should arrive for Moot Court dressed professionally and that the "professional dress" requirement did not mean that women wear dresses and skirts.

Exasperated at the ludicrous nature of the rumor, I reply to Jane's query: "I don't know how anybody who has been in my class for almost a year could *possibly* think I care about that

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30. All student names are pseudonyms.

stuff.” I then go on to reassure Jane that I bear the final responsibility/power for assessing her and her classmates.<sup>31</sup>

She appears reassured and goes on her way. She and a few other female students wear professional pantsuits during the Moot Court orals. I remain troubled.

I chose the above vignette because it indicates how, under the guise of helpful training in how to dress in court,<sup>32</sup> Moot Court culture propagates the worst kind of myth: that there is a direct relationship between how women lawyers look and good lawyering. The constricting rules governing appearance for women contain deeply ingrained stereotypes about women, their sexuality, and their competence.<sup>33</sup>

The woman lawyer who wishes to succeed in a man’s profession must walk a fine line.<sup>34</sup> She is not to dress like a man, but she cannot draw attention to the fact that she is a “mere” woman by dressing in overly feminine or sexy clothing. This might be distracting to a court accustomed to seeing men before it. Choosing the right clothing demonstrates the “lady lawyer’s” good intentions to subordinate herself to the club, without ever presuming to join it.<sup>35</sup>

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31. I bear the responsibility for grading students for their oral argument, as well as their appellate briefs and class participation. In evaluating the oral argument, I naturally take into account the critiques of our guest judges.

32. Although judges certainly have the power to maintain decorum in their courtrooms, and to insist on certain standards of dress, the rumors that there are explicit “dress or appearance codes” in most courtrooms have been greatly exaggerated. For an interesting student comment on the current status of such codes, see Bethanne Walz McNamara, Comment, *All Dressed Up With No Place To Go: Gender Bias in Oklahoma Federal Court Dress Code*, 30 TULSA L.J. 395 (1994).

33. For a general discussion of the constraints on women’s appearance in modern society, see NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991).

34. For those unsure of the appearance rules, guidance abounds. See, e.g., Andrea Higbie, *There Will Be a Brief Recess While We Check Our Wardrobes*, N.Y. TIMES, Nov. 25, 1994, at B11.

35. The idea that a man’s appearance is the norm by which women can be measured comes to mind in the context of judges, the ultimate authority figures in courtrooms, who have traditionally been men. Consider that when women judges don a black robe they neuter themselves whereas men remain men, because, men are “naturally” (a term coined in Resnik, *supra* note 7) judges: “[Judges] are supposed to subdue in themselves any personal attitudes towards the parties before them, . . . which is one reason that they cloak their individuality, symbolically, in voluminous robes.” HARRINGTON, *supra* note 10, at 102. As one federal district court judge stated in an interview with Harrington, “I think there’s a whole sexuality issue that nobody ever talks about. I think that when you become a judge — and I don’t think this is true of men — that you just get neutered.” *Id.* at 102-03.

The emphasis on dress, particularly women's dress, in Moot Court exemplifies the subtle codes and customs that often take the place of codified discrimination.<sup>36</sup> The requirement that women dress a certain way or wear short hair, for example, is the ultimate reification (and one ripe for challenge) of the notion that the appearance code is both a powerful tool of social control<sup>37</sup> and unsupported by any principled justification.<sup>38</sup> Therefore, challenging the appearance code is a good exercise for students in the concept of disruptive lawyering, its benefits and its consequences.<sup>39</sup>

Since no principled justification exists for women's dress codes, why then do first-year women continue to get coached on the necessity of blue suits, short hair, and warned against the perils of letting the court know a woman stands before it? Disparate treatment of the subject of women's and men's appearance continues in Moot Court both in the training phase and in critique after oral argument.

Apologists of the practice are of two stripes, both of which are variations on the "that's the way it is in the real world"

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36. For discussions of gender-specific clothing regulation in the workplace, see Mary Whisner, Note, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 74 (1982) (noting that "[f]eminists who attempt to discuss the concept of oppressive clothing are viewed either as wasting their energy on unimportant issues or, on the other hand, as threatening the family and the natural order of things"). It is interesting that most of the law review articles on appearance codes are student comments. See, e.g., McNamara, *supra* note 32 and Whisner, *supra* (both student pieces). Is it that students are unsophisticated and "wasting energy on unimportant issues," or can it be that some have not yet been fully indoctrinated and are seeing things clearly?

37. See generally Paulette Caldwell, *A Hair Piece: Perspectives in the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Whisner, *supra* note 36.

38. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court made it clear that if promotion decisions are made on the basis of sexual stereotypes, such decisions invoke the presumption of "gender discrimination" within the meaning of Title VII. In *Hopkins*, a woman who was denied partnership in an accounting firm had been advised by a partner to "walk more femininely, talk more femininely, wear make-up, have her hair styled and wear jewelry." *Id.* at 250. See also *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (woman attorney denied promotion because she "just didn't fit in" at a law firm which held a bathing suit competition among its summer law clerks). See generally Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990).

39. Margriet Kraamwinkel, *Dress Codes: The Forgotten Story (in which the Dutch Supreme Court suppresses the freedom of expression and shows gender trouble the way)*, READINGS FOR GENDER, POWER AND THE WORKPLACE PANEL, CRITICAL LEGAL STUDIES CONFERENCE, Apr. 1994 (on file with author) (suggesting dressing in a disruptive way to challenge informal dress codes that say "don't dress too sexy, don't dress too feminine, don't dress too masculine").

theme. The first group acknowledges the unfairness of stereotyped dressing and affirms its belief that sexism be eradicated. However, this camp contends that appearance codes are a fairly frivolous issue — not “an important battle.” But, borrowing Paulette Caldwell’s words on the right to wear braids: “Hair seems to be such a little thing. Yet it is the littlest things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory to its grounding and test its legitimacy.”<sup>40</sup>

The second group of apologists implies that the woman lawyer’s appearance is so important that departure from convention in furtherance of self-expression and change will so damage a woman lawyer’s client as to make for bad lawyering. Yet judicial discretion to maintain courtroom decorum is not unbridled and this justification surely begs the question as to why — out of so many strategy choices a lawyer makes — the question of dress is focused on women lawyers?

## 2. Vignette Two: “This Applies Only to the Girls” — An Oral Argument Critique

When my students speak in class I encourage them to express their ideas in a variety of modes. I reward many different styles of presentation, not just the traditional. In order to reinforce the idea that alternative models of presentation are available and that sexist behavior is unprofessional, I seek out teaching resources that are representative of women doing law.<sup>41</sup> To the ex-

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40. Caldwell, *supra* note 37, at 366-68 (discussing the issue of wearing black braids, a hair style that is prohibited under many grooming codes).

41. It is sometimes difficult to find published models of female lawyering. When possible I present good examples of both male and female lawyering. Having decided to play tapes from famous Supreme Court arguments, I was dismayed to find that only two female lawyers were represented, Sarah Weddington, who represented the plaintiff in *Roe v. Wade*, 410 U.S. 113 (1973), and Justice Sandra Day O’Connor. I chose the former. *MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955* (Peter Irons & Stephanie Guitton eds., New Press 1993) [hereinafter *MAY IT PLEASE THE COURT*]. Sarah Weddington’s argument style was classically female and extraordinarily effective. Weddington is accommodating and flexible in her argument style.

The tapes also contain an example of sexist behavior by a male lawyer which was received as insulting by the court:

Narrator: Sarah Weddington sat down at the counsel table with Linda Coffee. Texas assistant attorney general Jay Floyd began with an attempt at humor.

Floyd: Mr. Chief Justice, may it please the Court. It’s an old joke, but when a man argues against two beautiful ladies like this, they’re going to have the last word.

tent that my women students take me at my word and argue in their own style, some of them suffer by receiving critiques from practitioners that are gender-biased. Such critiques may undermine the work of the semester and discourage some women from going on to practice in litigation or compete in interschool Moot Court. At the very least, the judges' criticisms illustrate the consequences that may accrue to those who take risks, albeit small ones, in the pursuit of reshaping the legal world.

During several rounds of oral argument of a Moot Court competition, I am concerned about the judges' disparate critiques of men and women law students. Still, since I know I am "highly aware" (a non-pejorative self-characterization for what nonfeminists would term "oversensitive"), I let things go by and assume that my intelligent students will take such slights with a grain of salt.

Then comes this language from a *woman*<sup>42</sup> guest judge which pulls me out of my complacency with the comment: "A lot of this applies just to the *girls*. So I'll start with them." I notice that at least one of the women students is also startled. The judge proceeds to go through a litany of criticism on the subject of clothing, vocal intonation, and mannerisms. Specifically, she takes the women law students to task for a gesture of cocking their heads to one side. I take this gesture to be indicative of careful listening but the judge dismisses it with finality as "cutesy."<sup>43</sup>

A week later, Lynne, one of the women students involved, stops me in the hall. She hesitates in broaching the subject but finally asks what I think about the appropriateness of the critique. I confirm her feeling that the judge's comments were offensive. We have a general discussion about her feeling and the way the arguments were conducted. I make a mental note to play a larger role in the selection of judges for next year, to avoid

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Narrator: No one laughed. Chief Justice Burger looked annoyed. After an embarrassed silence, Jay Floyd argued that the case was moot because Jane Roe was no longer pregnant.

*Id.* at 346-47.

42. See GLORIA STEINEM, *Sisterhood*, in *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 116 (1983) ("Women who are conforming to society's expectations view the nonconformists with justifiable alarm. . . . *They will only make trouble for us all.*").

43. A recent study posits that a disposition towards using certain facial expressions and gestures may be biologically linked. See Harry F. Rosenthal, *Study Links Emotional Differences of the Sexes to Brain Functions*, *MIAMI HERALD*, Jan. 27, 1991, at 12A.

empaneling those judges who have proven damaging to my Moot Court students in the past.

I discover a year later the personal repercussions of those silencing critiques when Lynne and I have another conversation. She tells me that because of the experience she has not tried out for the Moot Court Board. Only those students who are accepted for this Board are eligible for interschool competitions. She tells me her main concern is *not* the critique's impact on *her* (some would say this downplaying of personal feelings is typical of females in traditionally male professions),<sup>44</sup> but the example that the critique set for the opposing team, both members of which were male.

Apparently Lynne and her partner had discussed the matter with their two male opponents who were friends as well as classmates. Not surprisingly, the men agreed that the judge was out of line ("yeah, she shouldn't have called you girls"), but essentially thought it was funny and "not something to worry about."<sup>45</sup>

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44. As females in a sexist society we all learn to screen out a large number of offensive statements. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 565-66 (1993) (noting that "[m]ost women living in this society have had to harden themselves to a steady dose of harassment in order to survive"). It occurs to me that the creation of such a false consciousness can be analogized to the way women cope with street harassment. We often act as if it does not exist, much less bother us.

45. Student Interview (Nov. 1994) (on file with author). This response is in keeping with documentation that male law students, like their counterparts in practice, show a significant degree of bias towards women. FLORIDA SUPREME COURT GENDER BIAS STUDY, *supra* note 7, at 942. The male opponents' reaction to the judge's behavior as a minor thing echoes that of male lawyers when questioned about sexist behavior in courtrooms. When polled, a much higher percentage of female lawyers than male lawyers see that sexist behavior and sexist language is routinely employed. *Id.* at 942-43. Even when the two groups agree that sexist behavior does exist, the men are more likely to discount it as merely annoying or ridiculous rather than a true impediment to female success for themselves or their clients. *Id.*

This ability of males to discount the impact of sexism is thrown into relief when a mirror image problem is presented. See *id.* at 943 n.655 (citing FLORIDA SUPREME COURT GENDER BIAS STUDY COMM'N SURVEY OF LAW SCHOOL STUDENTS (1988) (on file with the Florida State Archives, R.A. Gray Building, Tallahassee, FL 32399-0250)):

A male first-year law student who responded with written comments to the [Florida Gender Bias] survey indicated that it was gender bias to have three women judges on a moot court panel. He also stated that when this panel chose a female competitor as the winner, gender bias had occurred. Yet, if a female first-year student had questioned the impartiality of an all-male panel she would have been ridiculed for even raising the issue. Most likely, she would have been reminded that justice and fairness have nothing to do with gender.



The above vignette exemplifies how the law school's passive training efforts have come full circle. Gender-biased critiques of oral argument styles by female judges are both a product of the system and work to perpetuate bias in the system. Moot Court has produced "successful women lawyers" who are able to come back to school and tell current law students that the real world is indeed just as lawyers were told. These lawyers do so, however, because of what they learned in law school.<sup>46</sup>

### 3. Vignette Three: Three Attractive Females and the Moot Court Glass Ceiling

I am asked to advise two of our interschool competitive Moot Court Teams. The first is an all-male Sports Law team, competing at Tulane University; the second, an all-female Family Law team, competing at Albany Law School.

At the Sports Law competition, I observe three excellent oral advocates from another school, who also happen to be blond, attractive, and female. At the largely male-oriented competition (Sports Law being seen as the province of men), they are given consolation prizes, treated as a novelty, and generally seem to be considered "not in contention" for the top spot.

At the Family Law Competition, I observe that many of the Moot Court judges at this competition interact very differently with our team — "three pretty women from the south" — flirting, laughing, and generally acting like stereotypical male chauvinists. The judges' disparate treatment of our team is sufficiently obvious that members and advisors of other teams comment on this behavior and offer their support should we choose to protest or challenge any decisions. Because we are "winning" (we advance to the semi-finals beating several good teams from prestigious schools on the way), I take no action. In

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*Id.*

46. As I recall this situation, I am acutely aware that my passivity of response or nonresponse contributes to the pattern. If I had it to do over again, I think that I would choose a bolder and more obvious option — calling the guest judge on her critique — yes, open disagreement. This option went through my head at the time, but I quickly dismissed it as impolite. Whether as a nontenure track faculty person I feared other repercussions I really cannot remember. At the time, I attempted to counteract our guest judge's language choices by giving a critique that was gender-neutral. This strategy may well have been too subtle, at least for those not already conscious of such things. I made a vow, which I have kept, that I would be more involved with the choosing of judges but I remain struck by how fully the law school's structure had turned me, temporarily, into a passive person who consented, by silence, to the status quo.

short, I played the game. On the surface, no detriment other than a psychic one comes to our team. I fear that in the end my passivity may further gender bias.

With the benefit of hindsight, I can see that in many of these cases I had choices which, though risky, would have done more to empower my students than a mere "Moot Court win" did.

Often the punishment for women's nonconformity in the legal world is the withholding of the rewards of male-defined success. In the courtroom there is a very real set of conventions that an outsider lawyer must comply with to show willingness to be a member of the club. Conformity in mode of dress and argument style are some of the ways in which the would-be insider is asked to prove her willingness to be a member of the club. Such club membership is seen as a necessity to consistent success at winning arguments and must be bought even at a high personal cost.

Theoretically, neutral application of the law protects the advocate and her client against blatant discrimination by the judge on the basis of who is making the argument or how the argument is made rather than on the substance of that argument.<sup>47</sup> However, the intricate customs of the club often coalesce to make the identity of the oral advocate more important than the argument she is making. While the advocate can hide neither color nor gender,<sup>48</sup> she does have control over conformity or lack of conformity to customs. It is these customs that separate those who belong to the club from the outsider. Such a separation may affect the perceived credibility of the advocate and, therefore, the power of the argument.

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47. See WILLIAMS, *supra* note 23 and accompanying discussion. The due process requirement for judicial recusal is not broad enough to catch the subtle, sometimes unconscious, biases that are so dangerous. *But see* Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53 (1990).

48. Perhaps the burdens on the judicial system and the use of the computer may help break up the club. The Court of Appeals in Fresno, California, is just one of a number of jurisdictions that now hold oral argument by way of telephonic conference calls. Arguably, skin color, clothing, and hand movements, for instance, will be less important factors in assessing oral argument. Of course, the lawyer's name is all that is needed, at least in small communities, a female or male voice is usually distinguishable, and accents may give away ethnic or racial identity. *See also* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (asserting that protection against accent discrimination should be included under Title VII).

### B. *Two Studies Documenting Gender Bias*

I am worried that lack of satisfactory Moot Court training will adversely affect our students, particularly our women students, both while in law school and long after they leave.<sup>49</sup> Two recently published studies, one highly publicized and empirical study done at the University of Pennsylvania by Professor Lani Guinier<sup>50</sup> and one conducted by the Chicago Bar Association,<sup>51</sup> confirm my worry by identifying sexism in law schools generally and in Moot Court specifically.

In *Becoming Gentlemen*, Professor Guinier and her colleagues conclude that women do not achieve academically at the same rate as men and that the traditional law school is essentially a hostile learning environment to women.<sup>52</sup> The article describes the process by which women who are as qualified as men are systematically alienated and their contributions devalued while the male norm is glorified as the standard of lawyering excellence.<sup>53</sup>

In both first-year Moot Court and competitive Moot Court, Guinier's study found that men consistently performed better than women where performance was measured by "winning" or "getting the highest score."<sup>54</sup> The reasons for women's under-

49. That women are affected by gender bias in a deep and abiding way is seen in book after book, article after article. See, e.g., HARRINGTON, *supra* note 10; Angel, *supra* note 8; Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); McIntyre, *supra* note 8. Often the pain felt is documented in story form. The fact that such gatherings of women's voices is exactly the kind of contextual scholarship often deemed too emotional, too anecdotal, and therefore not valid only proves the point that women's voices are traditionally not valued and more stories are needed.

50. Guinier et al., *supra* note 49. The article has received attention in the popular media as well as within the legal field.

51. See Timothy Harper, *A Hostile Environment for Women*, A.B.A. J., May 1995, at 16-17; see also Laura Mansnerus, *Men Found to Do Better in Law School Than Women*, N.Y. TIMES, Feb. 10, 1995, at A25 (reporting results of recent empirical study flouting conventional wisdom on law school performance).

52. Guinier et al., *supra* note 49, at 2-6.

53. *Id.*

54. Men did better by a margin of 7:1 in "winning" and 10:2 in "getting the highest scores":

TABLE VI

	Class of 1990		Class of 1991		Class of 1992	
	Men	Women	Men	Women	Men	Women
Moot Court Finalist	7	0	4	2	7	1
Moot Court Board	12	4	11	1	10	2

representation in the ranks of Moot Court winners “cannot be immediately assessed.”<sup>55</sup> The authors concede “that the participation rates [of women in Moot Court], unavailable at the present time, may play a role.”<sup>56</sup>

Describing the potential reasons for the disparate levels of achievement, the authors write:

We can only speculate that the inherently subjective nature of grading oral or written presentations may have a greater impact because most of the graders and questioners are male. The formal and informal use of grades may also be involved. Regardless of the precise cause, women’s continued relative absence is a matter of concern.<sup>57</sup>

In addition to the skewed grading documented by Guinier and her colleagues, a study performed by the Chicago Bar Association’s Alliance for Women reports tales of judging which would chill the confidence of even the most self-possessed person. Comments such as those made by a Moot Court judge to a woman competitor that “[t]his is not ‘Gidget Goes to Law School’ ”<sup>58</sup> resonate with many of us who survived Moot Court and Socratic training only to develop a false consciousness as highly developed as our linear analytical skills.<sup>59</sup> The widespread nature of tales such as this bolsters Guinier’s point that, although her study focuses on data collected at the University of Pennsylvania, the results shed light on legal education in general. As Guinier states, “what is striking about American legal education is not the difference but the sameness.”<sup>60</sup>

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*Id.* at 28.

55. *Id.* at 31 n.83.

56. *Id.*

57. *Id.*

58. STUDY OF CHICAGO BAR ASSOCIATION’S ALLIANCE FOR WOMEN, *cited in* Harper, *supra* note 51, at 17.

59. Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988), *reprinted in* 14 S. ILL. U. L.J. 527 (1990) (studying five law schools, Banks found women law students to be alienated and silenced during their first year of legal education).

60. Guinier et al., *supra* note 49, at 2 n.2 (quoting Robert A. Gorman, Associate Dean of the University of Pennsylvania Law School, in a July 19, 1993 memorandum sent to Professor Guinier about her study).

## II. HOW CURRENT AND PROPOSED MOOT COURT GOALS FIT WITHIN THE THEORETICAL FRAMEWORK OF THREE STAGES OF FEMINISM

### A. *The Three Stages of Feminism*

The lessons of each of the three somewhat distinct stages through which modern feminism has moved in the past thirty years must be considered in designing a Moot Court taught from a feminist perspective. The first stage is Equal Rights or Sameness Feminism; the second, Difference Feminism; and the third, Postmodern, Post-Egalitarian or Degendering Feminism.<sup>61</sup>

The period from the mid-1960s to the early 1970s marked the first stage of modern feminism. At that time, the efforts of the then termed "women's liberation movement" were directed at the twin goals of consciousness raising and securing "equal rights" under the law for women.<sup>62</sup> Many educated women devoted time and energy to securing for women the *same* rights as men. Studies were done and much effort expended to prove that women, in spite of the burdens of socialization and biology, had the potential to be "as good as" men, which translated to the "same as" men. To the extent that traditionally female traits hampered a woman's ability to do the job of a man, feminists believed those qualities could be successfully subjugated by women who were smart enough and driven enough to succeed even at the price of loss of self.<sup>63</sup>

The second stage<sup>64</sup> of feminism takes into account the fact that differences exist between the conversational, analytical, and argumentative styles of males and females in our society. It also

61. It is useful, if utopian, to think of the development of feminism as a chronological progression towards a goal of complete equality for both sexes and I have, therefore, used a three-stage analysis. Within each stage, however, feminists have fallen along a continuum with the two poles described loosely as radical feminists, like Catharine MacKinnon and Andrea Dworkin, and the cultural feminists.

62. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); GERMAINE GREER, *THE FEMALE EUNUCH* (1971); SYLVIA ANN HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986).

63. The movement succeeded in achieving widespread acceptance of the idea that at least some "unusual" women could achieve in the largely male realm if only on male terms. See, e.g., MARTHA FINEMAN, *THE NEUTERED MOTHER* (1995); BETTY FRIEDAN, *THE SECOND STAGE* (1981). This was hardly a small feat. I do not wish to minimize the work of the strong, dedicated women and men who went before. Still, this work was done in relation to the unstated male norm. Therefore, in successive stages, this work must be recognized as a building block.

64. Author Betty Friedan is widely credited with coining this term and infusing it with substance in her book of the same name. See FRIEDAN, *supra* note 63.

celebrates and monumentalizes purportedly female qualities.<sup>65</sup> In her influential, if controversial, work in the area of male and female thought differences, Carol Gilligan posits that males and females construct the world differently and use different moral reasoning.<sup>66</sup> The provocative idea that women are holders of a special morality, or "ethic of care," is the basis for much of the scholarship by feminists in law<sup>67</sup> and other disciplines<sup>68</sup> regarding differences in law school performance and lawyering between men and women.

The study comparing "Amy's web" and "Jake's ladder" is well known in the discourse of sameness/difference feminism and legal reasoning.<sup>69</sup> Although Gilligan's study does not directly address the legal profession, the conclusion that men (and boys)

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65. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

Feminist scholars and others owe an enormous debt to Gilligan's work. There is no feminist commentator whose work does not build in some way upon *In A Different Voice*. Recently, popular writers have taken on Gilligan's mantle and have made these concepts household words. See, e.g., DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* (1992) (addressing the effects of men's and women's different conversational styles and how these differences result in somewhat predictable miscommunications); DEBORAH TANNEN, *TALKING FROM 9 TO 5* (1994) (detailing how women's conversational style works to their disadvantage in workplaces still dominated by male expectations and the unstated male norm).

66. See, e.g., Janet Taber, *Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988).

67. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

68. For two articles with a philosophical rather than a legal focus on the moral reasoning implications of Professor Gilligan's work, see Owen Flanagan & Kathryn Jackson, *Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622 (1987); James C. Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 LEGAL STUD. FORUM 287 (1986). See also NANCY CHODOROW, *REPRODUCTION OF MOTHERING* (1978) (using Gilligan's theories in parallel development of a critique of the psychoanalytic view of motherhood and discussing how the social conception of mother/father roles reproduces inequality).

69. In the "Amy and Jake" study, Gilligan compares the analytical approach of a young man, "Jake," and a young woman, "Amy," to a Kohlberg problem of how a husband, "Heinz," should act when a drug exists which could save his wife's life but which the couple cannot afford, and how the law should treat the man if he steals the drug and administers it to his wife. GILLIGAN, *supra* note 65, at 113-14.

In response to the question "Should Heinz steal the drug?" eleven-year-old Jake analyzes his answer as a math problem and Amy as "not a math problem with humans but a narrative of relationships that extends over time." *Id.*

look at the law as rights-based and women (and girls) see law as relationship-based has broad implications for law teaching and gender relations.

Although it is not at all clear that we have moved successfully through the first two stages,<sup>70</sup> there appears to be some consensus that we are now in the postmodern, post-egalitarian, or third stage of feminism.<sup>71</sup> This third stage is probably the most difficult one in the war for full equality. As in any revolutionary movement, the hardest battles are those fought after full formal legal rights have been accorded to the previously disadvantaged group.<sup>72</sup> Traditionally, it is only after codified discrimination is eradicated that the subtle and insidious, unwritten laws, called "customs," come into play in both the legal world<sup>73</sup> and the classroom.<sup>74</sup> Such customs are created for the sole purpose of distinguishing the traditionally oppressed from the dominant group, which was previously protected by the written laws. The result is that full participation and citizenship remain a mirage.<sup>75</sup> So it is with women in legal practice.

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70. See *Firing Line: Resolved — The Women's Movement Has Been Disastrous*, (PBS television broadcast, Dec. 23, 1994) (transcript on file with author). This fascinating debate was moderated by Michael Kinsley. The "pro" side was argued by William F. Buckley, Jr., Arianna Huffington, Elizabeth Fox-Genovese, and Helene Alvarez. The "con" side was argued by Betty Friedan, Karen Burnstein, Camille Paglia, and Kathryn Kolbert.

71. I will use the term "third stage" for clarity and to recognize that the substance of this third stage is still being hammered out by legal scholars and activists. See, e.g., Christine Bell, *All I Really Need to Know I Learned in Kindergarten (Playing Soccer): A Feminist Parable of Legal Academia*, 7 YALE J.L. & FEMINISM 133 (1995) (analyzing three different feminist approaches through the lens of the author's participation as the only woman on a traditionally all-male faculty soccer team); FINEMAN, *supra* note 63 (crafting the focus of a "post-egalitarian" society as the mother-child unit and suggesting a redefinition of family to reflect this change).

72. Oppressed groups, such as African-Americans in the United States after the Civil Rights movement or blacks in South Africa after the lifting of apartheid, face the same plateau of customs which acts as a barrier to complete equality. Other groups such as gays and lesbians have still to achieve even de jure equality.

73. For a cogent exposition of how customs and stereotypes have impeded the achievement of full rights for African-Americans see DERRICK BELL, *AND WE ARE NOT SAVED* (1987). See also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Anti-discrimination Law*, 101 HARV. L. REV. 1331 (1988). "Throughout American history, the subordination of Blacks was rationalized by a series of stereotypes." *Id.* at 1370. So it is with women and all other oppressed groups who have worked only within the law for full equality. See also LORDE, *supra* note 14.

74. See Banks, *supra* note 59 (noting that the more subtle and arguably more damaging vestiges of sexism are alive and well in the classroom).

75. See *supra* note 72.

Each stage of feminism in isolation fails to further the goal of equality of women and women lawyers in at least one way. Equal Rights feminism fails to value women's contributions and operates from an unstated male norm in which women can never be equal unless they become men. Difference Feminism allows for alternative modes of argument, but by labelling some styles of reasoning or argument as female or male, the less privileged female group is necessarily disadvantaged in a sexist world. Furthermore, neither all men nor all women fall into the categories set out by Difference Feminists. Therefore, Difference Feminism constrains the unconventional or unusual of both sexes. Finally, to the extent that Postmodern Feminism seeks to build on the second stage and move into a gender-blind society, women may be given a falsely idealistic picture of the world.

B. *The Values and Limitations of the Three Stages of Feminism in the Context of Moot Court*

It is clear that no one stage either completely diagnoses or provides a prescription for the problem of Moot Court reform.<sup>76</sup> Nevertheless, the body of scholarship grappling with ways of defining and injecting a feminist perspective and other outsider perspectives into substantive law courses,<sup>77</sup> as well as the more recent scholarship addressing the problem in the context of clinical courses,<sup>78</sup> has been invaluable to my exploration of how to reform Moot Court.

While the critique of essentialism<sup>79</sup> embraced by third-stage feminists is valuable, some permutations of third-stage feminism

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76. On the "difference dilemma," see generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 20 (1990) (stating "[t]he stigma of difference may be recreated both by ignoring and by focusing on it").

77. A selection of the most compelling articles includes: Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Mary Irene Coombs, *Non-Sexist Teaching Techniques in Substantive Law Courses*, 14 S. ILL. U. L.J. 507 (1990); Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509 (1992); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

78. See, e.g., Beverly Balos, *Learning to Teach Gender, Race, Class, and Heterosexism: Challenge in the Classroom and Clinic*, 3 HASTINGS WOMEN'S L.J. 161 (1992); Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1 (1991).

79. Essentialism is a term used in the feminist discourse to describe either the reference to all women or all men as characterized by certain essential traits as well as attributing the traits of a subgroup, particularly white, upper class women, to all



seek complete degendering.<sup>80</sup> While perhaps desirable as an end product, degendering is dangerous now because the world, the legal world in particular, is still in fact highly gendered. Degendering before we have successfully recognized the benefits and burdens of difference is dangerous. In this way, the first stage (women must be like men to succeed) and the third stage (characteristics necessary for success are not gender-related) look suspiciously alike. By not addressing perceived or real gender differences, we risk creating not brave lawyers capable of taking educated risks but naive and highly vulnerable lawyers unprepared for the damaging ways in which gender operates in the legal world.<sup>81</sup>

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women and not embracing attributes of black women, lesbian women and those of other ethnicities. See *Even When the Law is Female It's Still Only One Color*, 21 HUMAN RIGHTS, Fall 1994, at 4 (recounting charges by the A.B.A. Commission on Women in the Profession that the feminist movement has not recognized and done work to eradicate the special problems of multicultural woman lawyers). I, of course, am limited by my position as a white heterosexual women. See Regina Austin, *Sapphire Bound!*, 1989 Wis. L. REV. 539 (1989) (exhorting African-American women in legal academia to do scholarship aimed at eradicating stereotypes about their sisters and noting the pressure to do traditional work instead). Actually, since I am not an essentialist I do not purport to be the voice of *any* other woman, even another white woman, and merely hope that this work contributes to an ongoing conversation. See, e.g., Catharine A. MacKinnon, *From Practice To Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991) (capturing variety of experiences of white women by tongue in cheek catalogue of what she is not: "not poor, not battered, not raped (not really)"). *Id.* at 18.

80. By degendering I do not mean a muting of differences between people but eradicating the system in which spoils of "success" are distributed according to gender.

81. For instance, the dress dilemma poses an ethical question for academics and practitioners alike who seek to encourage women lawyers to break free of male-controlled standards of appearance. See Caldwell, *supra* note 37 (describing her decision as an African-American law professor to wear braids to work and her discomfort at having that decision be viewed as a statement and imposing a duty to justify her reasons to law students as they read employment cases addressing the issue of appearance codes). Whether we like it or not, as law professors we are looked to as models by our students. Unconventional appearance decisions by Professor Caldwell and the late Professor Mary Joe Frug, a feminist who "dressed sexy," may be risky. See, e.g., Frances Olsen, *In Memoriam: Mary Joe Frug*, 26 NEW ENG. L. REV. 659, 662 (1991) (noting that "Mary Joe Frug embraced high-heeled shoes and make-up"). Students see this and whether their professor's choice empowers or hinders them is, in part, up to that professor. Being a relatively young woman professor who dresses casually, sexy, and professionally by turns, I have decided that the fact that students see varying dress decisions coexisting with an intelligent woman is enough. It may be subtle but no explanation is needed.

My dilemma in addressing student concerns in Vignette 1 (see *supra* Part I.A.) mirrors the dilemma faced by the woman partner described in *Women Lawyers* who has succeeded by conforming to the rules. When asked by some men in her firm to discuss with a young associate the inappropriate nature of her waist-length flowing

### 1. First-Stage/Equal Rights Feminism

Traditional Moot Court training conforms most closely to the Equal Rights Model of feminism. Although most Moot Court teaching materials espouse the use of gender neutral language,<sup>82</sup> many would call this window dressing. Many women law students feel deeply that the traditional model sees their sex as nothing but a potential distraction which needs to be kept in check.<sup>83</sup>

The Equal Rights model for Moot Court training fails to counter sexism.<sup>84</sup> Products of the system have entered the legal world in high numbers but have not concomitantly changed the topography of that world.<sup>85</sup> The model fails because it does not take into account that the current structure of the legal system and accepted models for oral advocacy arise out of a narrow, male-oriented vision that does not value passion, flexibility, or storytelling.<sup>86</sup>

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hair, she chooses not to. She herself does not know whether she resents the fact that the men have saddled her with the responsibility of warning the young woman or whether she does not want to contribute to controlling this woman's sexuality. HARRINGTON, *supra* note 10, at 87, 101-02.

82. See, e.g., ALAN D. HORNSTEIN, *APPELLATE ADVOCACY IN A NUTSHELL* (1984); LAUREL CURRIE OATES ET AL., *THE LEGAL WRITING HANDBOOK* (1993); HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (2d ed. 1991).

83. See, e.g., Banks, *supra* note 59; Stephanie Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. OF LEGAL EDUC. 147 (1988); K.C. Worden, *Overshooting the Target: a Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1148-49 (1985).

84. See Bell, *supra* note 71 at 134. Professor Bell notes Professor Olsen's insightful critique given in an Address at Queen's University of Belfast (April 28, 1994). Olsen describes Bell's presence as the only woman on the soccer team as an illustration of the flaws of a first-stage approach in which "the best girl" (as defined by men) gets to play. "This approach is . . . counterproductive; men use the 'best girl's' participation to legitimate the whole system as fair." *Id.* at 134.

85. Until the legal rules which govern us reflect the experiences of women, little change can be expected. For example, one critique of the use of personal narrative, detail and context is that it is impossible to generalize from such specific, victim-focused tales. In addition, critics claim that abstract legal rules still serve the largest number of people. But abstract legal rules reflect centuries of the stories of mostly white, property-owning men who had law making capabilities either because of access to the franchise (control over legislation) or the courts (control over common law). Perhaps, when enough stories of women and other outsiders, made so by virtue of color, class, sexual orientation or ability, have been heard and incorporated into the abstract rules, it will be possible to abide by the mythological principles of neutrality.

86. Of the student textbooks available on Moot Court, the traditional focus is still apparent. See, e.g., HORNSTEIN, *supra* note 82, at § 8-2 ("dark suits and ties for men and similarly conservative attire for women"); LAUREL CURRIE OATES ET AL., *THE LEGAL WRITING HANDBOOK* § 8.4.4 (1993) ("Men wear conservative suits and

The application of a first-stage feminism approach to skills such as oral argument in Moot Court would train students in a mechanistic technique using the male<sup>87</sup> argumentative norm as the standard in which logic and rationality hold sway, never emotion and passion. Students would be encouraged to choose clothing that would minimize noticeable differences between women and men that might distract the court. The floppy bow tie and navy blue suit<sup>88</sup> may now be passé<sup>89</sup> but the image is illustrative. For example, a student at American University in the mid-1980s, having "played along and played diligently," by wearing "little pumps, nylons and straight skirt," and arguing in the best "male voice" she could muster, was shocked to find that the chief justice in her Moot Court evaluation "focused not only on the substance and delivery of my legal argument but on my failure to wear a suit."<sup>90</sup> Ultimately, even attempts at compliance may be fruitless.

## 2. Second-Stage/Difference Feminism

Although Difference Feminism is currently in disfavor, its theoretical underpinnings have much to contribute to a reformed Moot Court. Difference Feminism calls on members of both sexes to value nontraditional (nonmale) qualities. For example,

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ties, and women wear conservative dresses or suits."). *But see* HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 281 (2d ed. 1991) (making no reference to dress in the oral argument section, and stressing that "there is no single way to present an oral argument").

The fact that many successful male lawyers such as Louis Nizer and F. Lee Bailey are glorified is not of particular help to women. This is because, in a patriarchal society, women are not free to exercise the same skills. For example, when women speak in an impassioned way they are labeled as overemotional in a way men are not. *See, e.g.*, FLORIDA SUPREME COURT GENDER BIAS STUDY, *supra* note 7, at 921-22.

87. One might add the qualifier "white" male.

88. *See* JOHN T. MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS BOOK* (1977). This bible for women entering largely male professions advocated this outfit as the safe uniform for advancement in those professions. Eventually this uniform came to be seen as just as much of a straitjacket to female personhood as the gray flannel suit for men of the 1950s. *See* SLOAN WILSON, *THE MAN IN THE GRAY FLANNEL SUIT* (1955). *See also* discussion *supra* Part I.A.1. on the role of clothing for the female lawyer and the possibilities for disruptive lawyering that lie in defying archaic court conventions and the largely unwritten rules in that area.

89. *See* HARRINGTON, *supra* note 10, at 101 (evidencing her belief that there is now "some leeway for color and exuberance of style" with a compendium of fashion observations of women lawyers in "a pink linen suit with matching pink heels in Atlanta," "a bright red dress with a deep flounce at the knee in Boston," and "corduroy jeans on an associate in a big firm in Los Angeles").

90. Worden, *supra* note 83, at 1148.

Difference Feminism would raise awareness among students of the role that women lawyers have played throughout history and certain modes of persuasion, such as passion or an ongoing conversation where one listens more than one speaks. In addition, a Difference Feminism Moot Court would encourage women to dress "like women" if they so desire. The ultimate goal of this approach would be to accustom the court to seeing lawyers who wear dangling earrings, so it would no more be distracted by them than by a pair of jazzy red "power" suspenders.

The principle that in order to treat women fairly it may be necessary to treat them differently is directly applicable to the problem of women's silence in the classroom.<sup>91</sup> Chilling women's participation during law school denies them full access to valuable facets of legal education, such as feedback, and impairs their success. This dynamic needs to be kept in mind in Moot Court in order to remedy harms to women.

To the extent that a Difference Feminism model is used exclusively, students, particularly women students, may be disadvantaged unnecessarily when they jump from the ideal world to the real world. In the real world, they may discover that choices, such as mode of dress, are often far from safe. The penalties for making these choices may be more detrimental than they are willing to accept for themselves, personally and professionally, and for their clients. Even if a particular trait is inherently valuable, its identification as a female trait will lead many who are in the position of evaluating arguments to view it as a negative. This can operate to the detriment of men who choose to select a traditionally female style of argument as well but probably not to the extent that it disadvantages women who employ the same style.<sup>92</sup>

### 3. Third-Stage/Postmodern Feminism

Partly in response to the "qualified" success of the second stage, feminist scholars, activists and others are now grappling with a conception of third stage feminism. Assigning traits by gender contributes to imposed categories which constrain all who operate within them, even those in privileged positions such as white men.

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91. Wildman, *supra* note 83.

92. See Kennedy, *supra* note 16 and accompanying text (exploring the "social male/social female" dichotomy).

The naming of traits as male or female works to the detriment of women in all phases of practice and teaching. Those women who work in traditionally male areas of the law, such as litigation, criminal prosecution, and law teaching, are made to understand that they must walk a fine line between masculinity and femininity or be penalized. The level of scrutiny is high for women in such jobs, with respect both to initial job choice ("what kind of woman would want to be a prosecutor anyway?") and the way they comport themselves once on the job. To be soft is to admit that one's femaleness impairs one's ability to be a good prosecutor; to be too tough is to be the "bitch."<sup>93</sup>

The view that women are too soft for the really high-level jobs is ladled out in good and explicit doses from those who judge Moot Court competitions. Lynne, my student who received the harsh and undeniably gender-biased critique described in Vignette 2, recalls: "I was told I was too soft. It is hard to know what to do with that information. If I change my speech patterns and try to be very aggressive I'd come off like a bitch."<sup>94</sup> A woman at another law school had similar post-Moot Court feelings:

The implicit patriarchal message is that prospective women attorneys must silence their 'female voice,' but should not try or expect to be like men either. The message is a variation of the self/other conflict. 'Be like us, but not totally; join our game, play by our rules . . . but not on our team and not on their team.' It is a Catch 22.<sup>95</sup>

In order to survive professionally and to access justice for their clients, women lawyers are forced to develop the skill — call it flexibility or bilinguism,<sup>96</sup> double consciousness<sup>97</sup> or less positively, professional schizophrenia<sup>98</sup> — of working both within the male-constructed legal paradigm and outside it. This kind of bilingualism has a long tradition in outsider groups pleading for outsider causes.

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93. Obviously not my word.

94. Student Interview, *supra* note 45.

95. Worden, *supra* note 83, at 1149.

96. Shauna Van Praagh, *Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education*, 2 COLUM. J. GENDER & L. 111, 141 (1992) (describing the dual consciousness and dual mode of communication as "bilingualism").

97. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1933) (coining the term "double consciousness").

98. See Robin West, *Love, Rage, and Legal Theory*, 1 YALE J.L. & FEMINISM 101, 105 (1989).

The skill of William Shakespeare's "Portia"<sup>99</sup> models the best in an outsider lawyer while highlighting the inequities of a system which requires advocates to develop bilingualism skills. In the play's most powerful speech, Portia, dressed as "doctor of laws" Balthazar (a man),<sup>100</sup> argues for mercy and justice rather than a strict construction of the law under which the merchant, Antonio, must pay a "pound of flesh" according to agreement. In one of the most eloquent oral arguments in literature, Portia argues that "[t]he quality of mercy is not strain'd."<sup>101</sup> Mercy is not weakness but, instead, is "mightiest in the mightiest."<sup>102</sup>

The properties of this fine argument, including appeals to kindness, flexibility, and emotion, are the kind that are traditionally associated with women. Unless employed by an extremely skillful female advocate today, a Moot Court judge might well take Portia to task for overemotionalism. Portia's plea for mercy is ignored in her time as well, perhaps because such unconventionality was outside the parameters of the accepted male argument style of that day.

When Portia/Balthazar's plea for mercy is ignored and the judge decides to apply the strict rule of law and enforce the words of the agreement so that Shylock gets his "pound of flesh,"<sup>103</sup> Portia resorts to a strict legalistic argument. In so doing, she both wins for her client and highlights the ludicrous and inhumane nature of such rote applications of the law:

Then take thy bond,  
take thou thy pound of flesh;  
But, in the cutting it, if thou dost shed  
One drop of Christian blood, thy lands and goods,  
Are by the laws of Venice confiscate.

Therefore prepare thee to cut  
off thy flesh.  
Shed thou no blood; nor more than  
just a pound of flesh.<sup>104</sup>

The story of Portia illustrates the problems inherent in a Moot Court which enshrines the characteristics of the social male

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99. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

100. *Id.* Note Portia's willingness to dress as a member of the "club" consisting of men.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

and denigrates those of the social female.<sup>105</sup> This is demonstrated in the fact that Portia, of necessity, employs two argument styles. Her first attempt is based on her "female" values and the belief that the law should look at the whole person and that application of rules is a means to an end — justice. Her second attempt is based on the "male" thinking of the judge.

Such a strategy could easily be used with benefit by a man. But would it be? Perhaps if appeals to rights or appeals to mercy were seen as practical ones, rather than gender related ones, the law profession as a whole would benefit.

### III. THE ROLE OF WOMEN IN THE LAW SCHOOL AND THE RISKS THEY TAKE BY TEACHING MOOT COURT FROM A FEMINIST PERSPECTIVE: WHOSE CLASS IS IT ANYWAY? — LAW SCHOOL'S DOMESTIC SPHERE

It is ironic that the traditional Moot Court program, aimed at teaching students of both sexes to "be gentlemen,"<sup>106</sup> is taught in the majority of cases by women.<sup>107</sup> These women professors are not generally on a tenure track and have little job security and, therefore, power.<sup>108</sup> The result is that those who teach Moot Court and who arguably are in the best position to inculcate intelligent reform, often possess the least amount of power within the law school.<sup>109</sup>

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105. The long history of denigration of women's voices in courtrooms as both witnesses and lawyers can also be seen in the fact that Shakespeare illustrates that Portia must don the persona of a man, Balthazar, in order to even be heard by the court.

106. See Guinier et al., *supra* note 49.

107. Angel, *supra* note 8.

108. *Id.*; see also Joyce E. McConnell, *A Feminist's Perspective on Liberal Reform of Legal Education*, 14 HARV. WOMEN'S L.J. 77, 80 (1991) (noting that lower wages and lesser authority which devolve from ghettoization of traditionally subordinated groups are only a part of the larger problem which is that doing so "sends a message that members are not as competent as members of the historically dominant group," and results in reinforcement of existing negative stereotypes).

109. Legal Analysis, Research and Writing programs have replaced clinics as the "pink ghetto" in which the women who seek to enter legal education are placed. Angel, *supra* note 8, at 804. Professor Angel notes that:

[t]oday in legal education a substantial debate rages over whether clinicians should be tenured. *Very few people even discuss whether legal writing instructors should be tenured.* In the world of legal education, clinicians and legal writing instructors are viewed as holding bottom of the ladder positions. . . . Law schools have created a new caste system, and the lowest caste is composed of women.

*Id.* (emphasis added).

With the women “in the basement taking care of the kids,”<sup>110</sup> the largely male tenure-track professors are free to continue in their traditional roles of distant scholars and “men” of affairs. In this way the law school replicates the outside world, where women occupy the private sphere and men the public sphere, and thereby perpetuates it.<sup>111</sup>

Scholars have noted how the vestiges of the separate spheres doctrine operates in academia, diminishing the power of women to influence the direction of legal education by placing them in caregiver/nurturer positions.<sup>112</sup> For instance, Professor Joyce E. McConnell writes about how her progressive law school’s<sup>113</sup> attempt to reform first-year legal education to “address the emotional as well as the analytical aspects of lawyering”<sup>114</sup> crashed unexpectedly on the sharp rocks of sex-stereotyping. The law school had organized its first-year Legal Methods program on a “house” system in order to “allow frequent and less formal contact between students and professors.”<sup>115</sup> The teachers, called “Counselors” [read “mothers”], in the “Houses” [read “homes”] were mostly women and people of color — who were, it was thought, suited to the intensive work with students seen as a requirement for the job.<sup>116</sup>

As McConnell writes: “Unfortunately, the House system was plagued with problems of the sort that can be directly traced back to stereotypes — students took their advisors for granted, they abused their time, treated them and the course with increas-

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110. The domestic metaphor is consonant with the reality that those who teach Moot Court are often seen as nurturer figures for their students.

111. The age-old tradition of separate spheres continues in our law structures, albeit in a subtler way. Echoing off the walls of these intransigent structures are the words of Justice Bradley’s infamous concurring opinion in *Bradwell v. Illinois*, 83 U.S. 130 (1876). In *Bradwell*, Bradley wrote of the “wide difference in the respective spheres and destinies of man and woman” and the “natural and proper timidity and delicacy which belongs to the female sex” which “evidently unfits it for many of the occupations of civil life . . .” *Id.* at 141-42.

112. McConnell, *supra*, note 108. McConnell specifically discusses the parallels between the private sphere and the house system and how stereotypes about women as lacking in rigor and possessing nurturing skills evolved to conscript women in the most demanding and least rewarded area of the curriculum. *Id.* at 79-116.

113. *Id.* The City University of New York at Queens College (CUNY) is the target of this cogent critique.

114. *Id.* at 77.

115. *Id.* at 80.

116. *Id.* at 95-104 (noting that association of women with “soft” aspects of lawyering led to the creation of the Houses as “private spheres” within the larger curriculum).



ingly less respect."<sup>117</sup> Although the compartmentalization of women and people of color in the law school's private sphere at CUNY is starkly revealed by the use of explicit domestic metaphors,<sup>118</sup> the same dynamic can be seen in law schools' treatment of legal writing teachers<sup>119</sup> even when domestic metaphors are not so obvious. In many subtle ways, this group is kept in the insulated domestic world.

A Moot Court teacher who tries to teach something other than the traditional course takes a risk for which there may be substantial penalties. When a Moot Court professor tries to train students to value both male and female argument styles she is stepping out of her appropriate sphere, the private, and into the public. There is often a backlash to stepping out of her place. Like the tough female practitioner, the nontraditional professor is now the "bitch." The effect on the students' education is bound to be detrimental.

On some level, the recognition that risk factors exist for professors departing from convention in order to change the status quo is a positive. Given that one of the goals of a feminist Moot Court is to make all students aware of the concept of disruptive,<sup>120</sup> liberatory,<sup>121</sup> or rebellious lawyering,<sup>122</sup> it is appropri-

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117. *Id.* Turow echoes this attitude in *One L* in which the author and his partner work closely with a 3L student advisor, Margo, in preparation for their Moot Court. Turow's partner's hostile attitude toward "that girl's" attempts to do her job in critiquing the brief in progress clearly has a strand of sexism. TUROW, *supra* note 1, at 204. Although Margo's status may also be a factor in his attitude, the gendered nature of the trouble cannot be overlooked. See CASEY MILLER & KATE SWIFT, *THE HANDBOOK OF NONSEXIST WRITING* 85-86 (2d ed. 1988) (discussing how the word "girl" infantilizes and demeans women).

118. For example, the administrative work of the Houses is called "Housekeeping." McConnell, *supra* note 108, at 103.

119. Angel, *supra* note 8, at 803.

120. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983). In this groundbreaking article on the principles and practice of disruptive lawyering, Gabel and Harris urge that socially responsible lawyers must weigh risks of disruption against client values and the larger responsibility to be part of incremental progress against bias in the legal process.

121. See also Odeana R. Neal, Address Before the Panel on Liberatory Lawyering at Critical Legal Studies Conference (March 11, 1995). Professor Neal talked about lawyering which frees the lawyer to make her own choices as to means and ends of the representation based on client values. She shared a powerful anecdote about a female client in her domestic violence clinic who believed it was very important that her legal battle be "girls against boys." Although during one semester a man had been on her team of lawyers and had done an undeniably good job, when the time came for the transfer of cases, the client asked that no man be assigned to her case. If we, as teachers, can empower our students to believe they can make

ate that some of these principles should be brought into play in the teaching. Such a Moot Court can empower students to choose to depart from what is expected or perhaps even required in professional practice and use such choices strategically to serve client values, personal or political ideals, and justice.<sup>123</sup>

#### IV. REFORM RECOMMENDATIONS: HOW TO TEACH MOOT COURT FROM A FEMINIST PERSPECTIVE

The following recommendations are intended as a beginning and not an end. Individual professors should use these recommendations as they see fit given their own pedagogical goals and knowledge of their student population:

1. Institutions should recognize that Moot Court is more than a mechanistic training ground for how to present an appellate argument and acknowledge that there are important ethical ramifications inherent in presenting an argument from a given perspective.

2. The Moot Court course should include a component on feminist jurisprudence in which students are introduced both to the history of women advocates and to models of successful argument styles which differ from the traditional.<sup>124</sup>

3. Multiple consciousness or bilingualism as skills should be stressed,<sup>125</sup> along with the value to both men and women of having options and the flexibility to move among different argument styles. While the "bilingualism" that has been employed by successful women and other outsiders is now a liability, it could be an asset.<sup>126</sup> If all lawyers were encouraged to develop these abili-

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choices, such as disallowing men from joining the team, we will be closer to success than we are now.

122. GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (discussing this Harvard Law School graduate's experience as an activist and rebellious, or subversive, lawyer and contrasting this vision with the conservative lawyering model presented to him at his alma mater).

123. Gabel & Harris, *supra* note 120.

124. For example, Sarah Weddington's oral argument in *Roe v. Wade* set out in *MAY IT PLEASE THE COURT*, *supra* note 41, at 344-54.

125. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, Address Before the Yale Law School Conference on Women of Color and the Law (April 16, 1988), in 14 *WOMEN'S RTS. L. REP.* 297-300 (1992).

126. For ideas on what black culture can bring to our argument tradition see Odeana R. Neal, *The Making of a Law Teacher*, 6 *BERKELEY WOMEN'S L.J.* 128 (1991) (noting the benefits of oral teaching over purely written teaching and how the richness of her African-American oral tradition often seems to get lost in the translation to paper).

ties, these skills could serve as building blocks for social change rather than a burden on outsiders.

4. Consciousness-raising, or what Angela Harris refers to as "education work,"<sup>127</sup> should be done on what gender bias is and how it affects litigants, lawyers, and others.<sup>128</sup>

5. When examples of great charismatic orators are presented to a Moot Court class, examples of women should be included whenever possible. The fact that numerous charismatic women practitioners exist but are less visible than their male counterparts could be examined as well.

6. Examples of court opinions which employ "practical reasoning,"<sup>129</sup> counter-narratives,<sup>130</sup> or other means of precedent changing methodology,<sup>131</sup> should be given to students in order to make students aware that rule-bound, precedent-heavy reasoning is only one possibility and not the best choice for every advocate in every case.

7. Moot Court judges should be carefully selected for diversity. To the extent that the make-up of Moot Court panels has

127. Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125 (1990).

128. The consciousness-raising goal may well be different for men and women students. Such dichotomous goals will recognize differing socialization. Women may need to be encouraged to speak more and to recognize the male norm. Men may need to recognize interruption style.

129. Bartlett coins this phrase. See Bartlett, *supra* note 9, at 850. It may be useful to review her analysis of the methodology used in the appellate opinion *State v. Smith*, 85 N.J. 193 (1981). *Id.* at 858-63. The *Smith* court rejects the defendant's marital exemption defense, in a "multi-layered" approach which "illustrates some of the attributes of the 'highly contextual,' pragmatic approach to decision-making." Bartlett, *supra* at 858-61. Bartlett notes that feminists might wish to pursue certain avenues further than the court did and then suggests how that might be done. *Id.*

130. For other ideas on how to broaden the principles of judicial review, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). In *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that the University of Michigan's hate speech policy was both overbroad and vague), the court noted in an addendum that it had "[i]mplicitly . . . not [been made] aware of a conference in legal storytelling at the University's Law School" and in particular of Professor Matsuda's paper and noted that "[a]n earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues." *Id.* at 869.

131. The lawyering strategy behind *Brown v. Board of Education*, 349 U.S. 294 (1955), consisted of well-chosen litigation in which past precedent, which reinforced the notion of "separate but equal" in education and characterized education as a privilege, was chipped away. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), marked a victory for Catharine A. MacKinnon who had gathered social science data and done exhaustive scholarship on which the Supreme Court could rely in recognizing a right of action for "hostile environment sexual harassment." *Id.*

been problematic in a particular school's competition, it may be worthwhile to hold an orientation on gender bias for guest judges similar to the sensitivity training held for real world judges.<sup>132</sup>

8. Institutions should raise the status of those who teach Moot Court.<sup>133</sup> It is a necessary precursor to successful Moot Court reform that those who teach it be compensated in keeping with the value of their work. Tenure-track status or at least long-term contracts would endow these professors with the same sense of academic freedom to be inventive and break boundaries as their "substantive law course" counterparts.

9. Law schools should continue their emphasis on eradicating gender-biased and racially-biased language from legal parlance.<sup>134</sup> Recognition of the relationship between law and language and the need to change sexist language has become one of the comparative strengths of law school training, including Moot Court, in the past several years, and should continue.

10. In the area of appearance, work should be done to free our students of stereotypical expectations. Professional dress means dress that shows respect for the court, not dress which eradicates all traces of femininity or culture. Students should be made aware that there is choice in the area of appearance and that there is room for subversive or disruptive lawyering experiments.

#### CONCLUSION

Consciousness of discrimination is the first step towards change. My proposed solutions to bias in Moot Court are offered with the hope that they will further two broader goals. First, by adopting these proposals, law schools will raise consciousness with respect to the continued existence of gender bias and law schools' role in perpetrating sexism. Second, we will produce

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132. Certainly practitioners who judge students in Moot Court should not attempt to throw students off with real world sexism. Sensitivity training would mirror some of the best aspects of the real world. For example, many jurisdictions now counsel judges as to their duty to eradicate gender bias in the courtroom. See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1685 n.13 (1991). For an aspirational view from the bench of a degendered, ideal appellate courtroom, see Sheryl S. Abrahamson, *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, 61 U. CIN. L. REV. 1209 (1993).

133. See text *supra* Part III.

134. The emphasis is on sensitivity to the effect of language. There is no blanket rule for gender-neutral language, which can be discriminatory if misapplied, as we have seen in the substantive law of rape.

new lawyers who feel that they have the power to work against that bias and, in fact, have a duty to do so.

Instilling in our future lawyers the courage to take risks and the judgment to know when and how to do so should be a goal of our reformed Moot Court which will train lawyers to represent clients competently within the external constraints imposed by the gender-biased real world. At the same time, we will teach them about the role of choice in lawyering, specifically that there always is a choice, even if not a safe choice, to go beyond the conventional parameters in service of a larger goal.