ESSAY

"HEY! THERE'S LADIES HERE!!"

REFLECTIONS ON:

BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE by Lani Guinier, Michelle Fine, and Jane Balin

WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN by Linda F. Wightman, Law School Admission Council

WHAT DIFFERENCE DOES DIFFERENCE MAKE?: THE CHALLENGE FOR LEGAL EDUCATION by Elizabeth Mertz with Wamucii Njogu and Susan Gooding

CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING by Louise Harmon and Deborah W. Post

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INTRODUCTION

When the 2,000 Year Old Man was asked about the origins of sex, he recalled Bernie's Discovery: "One morning," the 2,000 Year Old Man said, "Bernie woke up smiling, and he said, 'Hey! There's ladies here!!'"[1]

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[1] Old jokes often have their problems. This one makes heterosexual sex the unmarked case, and it makes men, rather than women, the agents and discoverers, even of sexual pleasure. (Times have changed somewhat; advance word on the 2,000 Year Old Man in the year 2000 has it that Bernie, who so loved kissing that he invented kissing a loved one at the stroke of midnight on New Years Eve, "'kissed everybody, including many men. It's

There have been significant numbers of "ladies" in law school classrooms for more than thirty years. Although the Supreme Court held in 1873 that women could, consistent with the Constitution, be barred from the practice of law (and, presumably, from law schools) so that, as Justice Bradley suggested in dictum, they might hold their proper place in the domestic sphere,[2] the Court's decree was destined to become an embarrassing anachronism. Myra Bradwell, the plaintiff who brought the issue to the Court, persevered to become a member of the bar of Illinois in 1890,[3] and over the years—gradually in the first hundred, and rapidly in the last twenty-five—tens of thousands of women have followed Bradwell's example. Bradwell was joined in succeeding years by an impressive roster of distinguished pioneers, but the pace of gender diversification did not accelerate noticeably until the mid-1960s. In 1972, seven percent of American law degrees were awarded to women; twenty years later, forty-three percent of all American law degrees were awarded to women.[4]

Many have wondered in print about the characteristics and experiences of the women who now seem destined to assume a proportionate share of lawyering responsibilities. How have they experienced law school and legal practice? Have they been welcomed or abused? Have they enjoyed or endured the rigors of qualification for the bar and the challenges of practice? How, if at all, have women affected law schools and legal practice? Do large numbers of women in the profession bring different sensibilities? Differently developed strengths? Different approaches to legal work? If women express dissatisfaction with law school, is it because they are unsuited or ill-prepared for it? Or are they simply more likely to question shortcomings of legal education that inhibit learning for all students?

Tackling these questions is a treacherous process. Any effort to trace the experiences of women is fraught with risks of essentializing on one hand and with risks of denying social and cultural realities on the other. It is easy—and wrong—to expect all women in or at the

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coming out now. Ellen DeGeneres is opening up the floodgates.'" Judith Stone, The Shtick of Shticks, N.Y. Mag., Oct. 6, 1997, at 56, 59 (quoting Mel Brooks and Carl Reiner)). But the original Bernie joke is funny. And we thought it an irresistible way to make the point that diversity can lead to happy surprises.

[2] See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (finding that "natural and proper timidity and delicacy [renders women unfit for] many of the occupations of life").

[3] See Jane M. Friedman, America's First Woman Lawyer 30 (1993) (noting public recognition of Bradwell's bar admission).

[4] See Linda F. Wightman, Law School Admission Council, Women in Legal Education: A Comparison of the Law School Performance and Law School Experiences of Women and Men 1 (1996).

gates of the profession to be or behave similarly. Still, it is equally wrong to deny that men and women, as groups, are socialized differently and perceived differently within the culture, and that these experiences affect the likelihood that men and women will develop certain strengths, preferences, and behavior patterns. Having among us several decades of experience in United States law schools, we have become sensitive to the risks of both kinds of error: We appreciate that stereotypically "male" and "female" tastes, abilities, and working styles are distributed rather unpredictably among male and female law students. At the same time, we have observed that when women are present in more than token numbers, law school discourse sometimes changes, broadening to encompass concerns and approaches to lawyering that were previously neglected.[5]

This phenomenon of change in the face of diversity should not surprise us. Students of diversity have observed repeatedly that when new groups join any established culture, the culture responds in patterned ways. As we have thought about the influence women are having on law and legal education, we have found it illuminating to think in terms of these patterned responses. When named and understood, they provide conceptual tools for interpreting, and making the most of, processes of diversification. The first contribution of this Essay is, then, a typology of responses to diversification, adapted from scholarly analyses of diversification in other contexts, for the purpose of analyzing change in the law school context. This typology is set out in Part I.

In Parts II through V, we use our typology of responses to diversification as an interpretive frame within which to review the findings and conclusions of an important set of recent studies of legal education. The first of these studies is *Becoming Gentlemen*,[6] a multifaceted account of the culture of the University of Pennsylvania Law School as perceived by an increasingly gender-diverse student body. The second and third, *Women in Legal Education*[7] and *What Difference Does Difference Make?*,[8] are examinations of large, multisite

[5] In our teaching, we have made similar observations about students of color and other minority law school constituencies. See Workways, Overview (visited Feb. 13, 1998) <http://www.nyu.edu/law/workways/workways.html>; Workways, Working Paper on Stereotype Vulnerability and Attribution Theory, <http://www.nyu.edu/law/workways/theoretical/stereo_vul.html> (visited Feb. 13, 1998).

[6] Lani Guinier et al., Becoming Gentlemen: Women, Law School, and Institutional Change (1997).

[7] Wightman, supra note 4.

[8] Elizabeth Mertz et al., What Difference Does Difference Make?: The Challenge for Legal Education (unpublished manuscript, on file with the *New York University Law Review*).

data sets. *Women in Legal Education*, by sociologist Linda Wightman, is an analysis of performance and questionnaire data concerning a large cohort of students from virtually all United States law schools. *What Difference Does Difference Make?*, by legal scholar and sociolinguist Elizabeth Mertz, is a study of students' classroom participation patterns, drawn from recorded transcripts of a full semester of the first-year contracts classes of eight professors at eight different law schools. The final study, *Cultivating Intelligence*,[9] is less conventional: It is an account of what law professors Deborah Post and Louise Harmon learned in a critical examination of their own teaching practices, in study of cognitive theory, and in experiments with alternative approaches to law school pedagogy.

These four studies of gender-diversified legal education suggest that law schools are on the brink of constructive and far reaching change. Taken together, they persuade us that a substantial proportion of law students—many, but by no means all of them, women students—experience frustration, or alienation, or both, because of law schools' failure to engage and develop the full range of intellectual capacities necessary to successful and responsible practice. These students perceive gaps and deficiencies in legal education that seem to coincide with practitioners' and scholars' perceptions as expressed in accounts, like the MacCrate report,[10] that decry the lack of fit between legal education and legal practice. Increasingly large and overlapping groups of scholars, practitioners, students, women, and members of cultural minority groups argue persuasively that legal education must be broadened and deepened to encompass neglected but important aspects of the intellectual work that legal professionals do. In Part VI, we argue briefly for broadening and deepening legal education in ways that respond less to the fact that "there's ladies here" than to the fact that there are professional obligations we are not fully preparing our students to meet.

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[9] Louise Harmon & Deborah W. Post, Cultivating Intelligence: Power, Law, and the Politics of Teaching (1996).

[10] Legal Education and Professional Development—An Educational Continuum, Report of Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 A.B.A. Sec. Legal Educ. and Admissions to the Bar (exploring "gap" separating legal education and legal practice); see also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 34-42 (1992) (lamenting gulf between legal scholarship and legal practice).

I

A Typology of Responses to Diversification

Social theory is almost always inconclusive and controversial. Mathematical principles may be absolute, but principles about how people and societies function represent our best judgments, with clear limitations of perspective, knowledge, and understanding. This fact in no way detracts, however, from the value of social theory. Searching for patterns in history and human behavior helps us to anticipate human events, to learn from experience, and to be self-aware as we approach challenges.

Social scientists have begun to theorize about diversity.[11] In the process, they have mapped out responses that large and small cultures manifest when people who are seen as different appear in substantial numbers.[12] These responses are not universally defined or agreed

[11] See, e.g., Marilynn B. Brewer & Norman Miller, Intergroup Relations (1996) (reviewing dominant paradigms and empirical findings in field of intergroup relations); Susan T. Fiske & Shelley E. Taylor, Social Cognition (1991) (arguing that normal cognitive processes account for much of how people understand themselves and others); Norman Miller & Marilyn B. Brewer, Beyond the Contact Hypothesis: Theoretical Perspectives on Desegregation, in Groups in Contact: The Psychology of Desegregation 281 (Norman Miller & Marilyn B. Brewer eds., 1984) (discussing factors that determine category-based interaction and hypothesizing as to when and how category-based interaction may successfully give way to personalized social interaction); Power, Dominance, and Nonverbal Behavior (Steve Ellyson & John F. Dovidio eds., 1985) (collecting works); Prejudice, Discrimination and Racism (John F. Dovidio & Samuel L. Gaertner eds., 1986) (same); John F. Dovidio & Samuel L. Gaertner, Affirmative Action, Unintentional Racial Biases, and Intergroup Relations, 52 J. Soc. Issues 51 (1996) (reviewing empirical findings that racial bias is expressed more subtly now than it has been historically); John F. Dovidio et al., How Does Cooperation Reduce Intergroup Bias?, 59 J. Personality & Soc. Psychol. 692, 702-03 (1990) (demonstrating that cooperation induces experimental participants to think of themselves as part of one "superordinate" group rather than separate groups); Susan T. Fiske & Peter Glick, Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change, 51 J. Soc. Issues 97 (1995) (analyzing stereotyping of women and jobs); Susan T. Fiske et al., Category-Based and Attribute-Based Reactions to Others: Some Informational Conditions of Stereotyping and Individuating Processes, 23 J. Experimental Soc. Psychol. 399 (1987) (discussing impression formation in pluralistic contexts); Samuel L. Gaertner & John P. McLaughlin, Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics, 46 Soc. Psychol. Q. 23 (1983) (introducing new method for studying stereotypes); Samuel L. Gaertner et al., Reducing Intergroup Bias: The Benefits of Recategorization, 57 J. Personality & Soc. Psychol. 239 (1989) (detailing two strategies for reducing intergroup bias); Susan E. Jackson et al., Socialization Amidst Diversity: The Impact of Demographics on Work Team Oldtimers and Newcomers, 15 Res. in Organizational Behav. 45 (1992) (proposing framework for studying way in which diversity affects "newcomers" and "oldtimers" in team settings).

[12] Social scientists have also theorized about the reactions of cultures to integration of small numbers of people who are different, finding that token status leads to hypervigilence, insecurity, and inhibition on the part of the minority group member and, on the part of the majority, to heightened scrutiny, classifying those with whom one is comfortable as exceptions to general rules about their group, and too readily judging

upon; different theorists describe them differently and in different numbers. The responses are not mutually exclusive or inevitable. They do, however, help us to understand experiences of diversification as they have been documented by thoughtful students of individual and social behavior. Understood for what they are, these typologies, or sets of responses, can help us take perspective on the findings of Guinier-Fine-Balin, Wightman, Mertz, and Post-Harmon, and on the phenomena those thinkers have described. As the authors of a particularly useful morphology have said, "an intellectual overview can be a key strategy to help those participating in the change process to identify sources of resistance in others and in themselves."[13]

Our typology of responses to diversification is informed by a number of studies of social change, but drawn primarily from three: two accounts of the stages of curricular change in academia and one account of the paradigms according to which people interpret diversification in business and professional organizations.[14] Each of these three studies focuses primarily or heavily on gender diversification (although each considers, and has implications for, other kinds of diversity as well). Taken together, these accounts exemplify the social responses commonly isolated in studies of diversification. Moreover, they are nuanced in response to two contexts—the academic and the corporate/professional—that are directly relevant to men and women preparing, in an academic setting, for the practice of law.

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others as typical of their group. In law school cultures, and with respect to women, these were the issues of the 1960s and 1970s. With respect to people of color, these issues recur or persist. See, e.g., Rosabeth Moss Kanter, Men and Women of the Corporation 206, 242 (1977) (discussing how proportions in which men and women are represented in workspace affect relations between men and women in that space); Rosabeth Moss Kanter, Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women, 82 Am. J. Soc. 965, 974 (1977) (discussing effects on women of inhabiting token status); Janice D. Yoder, Rethinking Tokenism: Looking Beyond Numbers, 5 Gender & Soc. 178 (1991) (reviewing Kanter's work on tokenism in light of recent empirical research).

13 Marilyn R. Schuster & Susan R. Van Dyne, Stages of Curriculum Transformation, in Women's Place in the Academy: Transforming the Liberal Arts Curriculum 1, 14 (Marilyn R. Schuster & Susan R. Van Dyne eds., 1985).

14 See id. (providing theoretical framework and practical strategies for reconstructing a comprehensive liberal arts curriculum that is more responsive to women's experience); Peggy McIntosh, Interactive Phases of Curricular Re-Vision: A Feminist Perspective (Wellesley College Center for Research on Women Working Paper No. 124, 1983) (describing five interactive phases of curricular revision from feminist perspective); David A. Thomas and Robin J. Ely, Making Differences Matter: A New Paradigm for Managing Diversity, Harv. Bus. Rev., Sept.-Oct. 1996, at 79 (introducing new learning and effectiveness paradigm which shows how diversity within workplace can leverage people's different perspectives and improve manner in which work gets accomplished).

Although some of the authorities on whom we rely have posited a set of *phases* of diversity, we have found it most useful to posit a set of *responses* to diversity. It is true that responses to diversity fall naturally into an imagined temporal sequence and therefore are easily thought of as stages. We use the term "responses," rather than the term "phases," to reflect the fact that the responses we describe have no *necessary* temporal sequence. Indeed, the responses described below often coexist, and responses that might seem to us less "advanced" can disappear only to recur, while responses that seem to us more "advanced" can emerge and then dissipate.[15]

A. Exclusion

All of the studies on which we have relied begin with, or clearly imply, a wholly or partially repudiated attitude of exclusion. The result of this attitude is that people from a subordinate group are shut out altogether. Thus, the studies of academic cultures begin, in the case of a study of history curricula, with "womanless history"[16] and, in a more general study of curricular change, with "invisible women."[17] In the study of corporate and professional practice, this initial stance toward women is left unnamed, as the status quo prior to what is called the first paradigm. We will refer to this repudiated attitude, simply enough, as Exclusion.

B. Quantitative Diversity

Following its description (or implication) of Exclusion, each of the studies describes a deliberately assumed attitude of *in*clusion. Motivated by the belief that exclusion is inequitable, untenable (in light of the disapproval or opposition of the excluded and of those in sympathy with them), or some combination of the two, representatives of the excluding entity determine to admit some number of the previously excluded. We call this response Quantitative Diversity, for it is marked by the fact that inclusion is meant to be quantitative only; diversification is imagined as occurring without making a *qualitative* difference in the newly diversified whole. In the curricular context, this is the response that leads professors to expand their syllabi to include "exceptional" women—"the female Shakespeares, Napoleons, [and] Darwins."[18] In the context of business and professional employ-

[15] This point was emphasized by Robin J. Ely in her responses to an earlier draft of this Essay. We are in her debt for this insight and for a number of other equally helpful suggestions.

[16] McIntosh, supra note 14, at 3-4.

[17] Schuster & Van Dyne, supra note 13, at 16.

[18] Id. at 18-20.

ment, this is the response that leads managers to hire traditionally qualified members of the formerly excluded group and to take comfort in the thought that, despite superficial differences, everyone within the company is, or aspires to be, the same. Working from this response, managers assume that "it is not desirable for diversification . . . to influence the organization's work or culture. The company should operate as if every person were of the same race, gender, and nationality."[19]

C. *Retooling the Newcomers*

In a setting in which Quantitative Diversity holds sway, people typically begin to recognize cultural difference—often as the result of tension or conflict. When this happens, majority group members in positions of authority cite difference as a cause for concern, and respond with efforts to "retool" newcomers so that they can be assimilated or "fit in." The aim is to make Quantitative Diversity work smoothly and comfortably. The newly admitted group is the object of the retooling effort. Its members are seen as either assimilating to majority norms or resisting the dominant ethos. Although newcomers sometimes take the initiative to retool themselves to conform to norms dominant in their new environment, for the most part newcomers are not seen as participants in the analysis by which the terms of diversification are established. We call this response Retooling the Newcomers. It is best illustrated in business and professional contexts: When group differences cause tension, managers, still working within a paradigm of sameness and blindness to difference, perceive that the company is being pulled "away from its original culture and its mission"[20] and that the new workers are "undermining . . . [its] traditional strengths";[21] newly included workers, therefore, are directly or subtly told to conform.[22]

Although, as we have said, newcomers sometimes initiate and participate in retooling efforts, Exclusion, Quantitative Diversity, and Retooling the Newcomer typically are responses of a dominant group with respect to a group whose members it regards as outsiders. The remaining responses are significantly different in that they typically are *collective* responses of established group members and newcomers. Indeed, the character of each of the remaining responses is determined in significant part by the fact that it reflects the sensibilities and

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19 Thomas & Ely, supra note 14, at 81.

20 Id. at 82.

21 Id.

22 See id.

perspectives of both the established and the formerly excluded groups.

D. *Taking Perspective on Exclusion*

The next two responses to diversity involve taking a more careful look at the nature and causes of difference, so that it is seen not simply as an obstacle or irritant to be removed, but as a social phenomenon to be understood. As we have said, the thinking and analysis that shape these responses are the thinking and analysis of both established group members and newcomers. This coalition of old and new group members comes to view difference less aversively and works to understand prior exclusion and present tensions by critically analyzing the roles and practices of each group and the relationship between the groups. Our sources who have studied curricular reform describe perspective-taking in which people analyze both the mechanisms of exclusion and the social roles and lived experiences of the excluded.[23] We refer to this process as Taking Perspective on Exclusion, for it involves understanding the causes and mechanisms of prior discrimination and its remnants. Women, for example, are studied—and study themselves—*as a subordinated group*. This kind of study illuminates the causes of women's subordination and the cultural practices by which it is maintained. It focuses not only on exclusion per se but also on conceptualizations and practices that keep women subordinated even in a context of inclusion.

E. *Taking Perspective on Difference*

Taking Perspective on Exclusion goes hand in hand with a response that we call Taking Perspective on Difference. Having gained some insight into exclusionary practices, people often are able to revisit the subject of difference, bringing to it a new ability to distinguish differences that are healthy from those that are malignant. Analysis of women as a subordinated group is followed, for example, by analysis of women in their own terms.[24] Re-evaluation illuminates both the ways in which mechanisms of subordination have been internalized to produce self-defeating behaviors and the extent to which women have developed characteristic strengths, made unrecognized social contributions, and developed alternative ways of working. And, although our sources do not trace it, we believe that Taking Perspective on Difference often involves a more discriminating look at the dominant

[23] See McIntosh, supra note 14, at 9-14.

[24] See Schuster & Van Dyne, supra note 13, at 20-24.

group, such that it is not uncritically demonized, but seen in terms of its strengths as well as its faults, weaknesses, or vested interests.

In the professional and corporate sectors, managers are described as skipping the more analytic aspects of perspective taking to cut to a less analytic version in which they consider the possibility that formerly excluded people can bring value to their enterprises. For example, managers seeking access to special markets might give authority and legitimacy to members of formerly excluded groups working within those markets. When newcomers are given authority and use it successfully, managers are led, by experience rather than study, to rethink the implications of difference. As one manager put it, "'We know they're good, but we don't know the subtleties of how they do what they do.... We knew enough to *use* people's cultural strengths, as it were, but we never seemed to learn from them.'"[25] Whether it takes the form of historical and critical analysis or the form of seeking to capitalize on success, this period of taking—or seeing the need to take—perspective opens the possibility of qualitative change.

F. Qualitative Diversity

With some perspective on difference, the majority and minority groups both become motivated to integrate the strengths of their newly diversified community. We call this response Qualitative Diversity—so named because newcomers are seen, and see themselves—as being capable of bringing unique value to an enterprise rather than as being in need of retooling. In this phase, purely assimilative integration is abandoned in favor of an integration in which the strengths of all constituent groups are blended and cultural transformation is possible. In this period, curricular development is described, in a phrase borrowed from Catharine Stimson, as moving from "the deconstruction of error" to "the reconstruction of theory."[26] Women's Studies, for example, moves from critiques of exclusion and difference to confidence "that gender as a category of analysis enriches and illuminates traditional subjects."[27] Business and professional organizations move to a paradigm that "organizes itself around the overarching theme of integration" and "lets the organization internalize differences among employees so that it learns and grows because of them."[28]

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[25] Thomas & Ely, supra note 14, at 84 (quoting senior executive from company under study).

[26] Schuster & Van Dyne, supra note 13, at 25.

[27] Id.

[28] Thomas & Ely, supra note 14, at 86.

G. *The New Synthesis*

Some of our sources posit an unrealized condition in which Qualitative Diversity is replaced by or leads to something better—a paradigm shift made possible because of new perspectives on difference and because of the experiences of mutually respectful, qualitative diversification. In the studies of academic cultures, the unrealized condition is described, rather mysteriously, as presently inconceivable,[29] but leading to a focus on "process rather than immutable products and fixed principles"[30] to transcultural perspectives and to reconstructed knowledge.[31]

We refer to this unrealized condition as the New Synthesis. We tend to agree with those who have said that the New Synthesis is remote and unknowable. It is not even clear to us whether it will be the result of a new response to diversity or whether it is the condition that will be created when an attitude of Qualitative Diversity is predominant. Nonetheless, we have some hypotheses—and some hopes—about it. First, it seems to us that once people have taken perspective on the causes of exclusion, they will generalize about it, learning in the process to be aware and critical when new forms of difference lead to new patterns of subordination. There is hope, then, that the New Synthesis will be characterized by an ethic of antisubordination learned in the process of taking perspective on exclusion. Second, it seems to us that when people have taken perspective on, and re-evaluated, the situations and lives of the excluded, they will see the error of defining worth and competence with reference only to narrowly conceived majoritarian or superordinate images. Similarly, people might engage in a process of re-evaluating the strengths and contributions of the dominant group and see that standards of worth and competence should not be uncritically counter-hegemonic. There is hope, then, that a New Synthesis will also be characterized by an ethic of tolerance and mutual respect learned in the process of taking perspective on difference. Finally, it seems to us that when people have lived and worked in qualitatively integrated environments and in an atmosphere of mutual respect, they will see that the strengths of other groups can be learned without sacrifice of self-respect and that versatility may be preferable to specialization. There is hope, then, that the New Synthesis will produce individuals who are intellectually versatile, manifesting strengths in combinations that once were unimaginable. Alas, it also seems to us that any New Synthesis eventually will become old

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[29] See Schuster & Van Dyne, supra note 13, at 26.

[30] Id.

[31] See McIntosh, supra note 14, at 20.

and in need of different influences to shake those living under it from destructive habits.

We have, then, a template against which we can consider recent studies of law schools in a condition of gender diversity. We will want to evaluate both the perspectives and insights of authors whose work we survey and the findings that they report against the responses of Exclusion, Quantitative Diversity, Retooling the Newcomers, Taking Perspective on Exclusion, Taking Perspective on Difference, and Qualitative Diversity. And we will want to hold in mind the possibility of a New Synthesis.

II

BECOMING GENTLEMEN: WOMEN RESIST RETOOLING

As we have said, we describe a typology of responses to diversity, rather than a typology of stages of diversification, because our categories are not necessarily sequential; they emerge and overlap in complex patterns. Moreover, as we look at studies of diversification in law schools, we see distinctions among the responses the authors attribute to law schools, the responses exemplified in their research designs, and the responses their research leads them to advocate. *Becoming Gentlemen*[32] illustrates all of this rather nicely. Its authors advocate Qualitative Diversity, but they use the methodologies of Taking Perspective on Exclusion and Taking Perspective on Difference to develop a scathing critique of the Retooling response.

Lani Guinier, Michelle Fine, and Jane Balin take heart from the observation that law school discourse is broadening and changing because of the presence of women. They believe that qualitative gender diversification can cause lawyers to abandon the gladiator style of lawyering modeled in many law school classrooms, in favor of a problem solving style that will be more useful in meeting clients' needs. This positive vision of qualitative diversity is not being realized, they argue, because too many law schools are wedded to what we would call a retooling response to gender diversity. In an effort to encourage a shift from the retooling paradigm to a paradigm within which problem solving capacities advocated and utilized by women can be appreciated, *Becoming Gentlemen* offers a painstaking critique of Retooling the Newcomer. It tells a disquieting story of women who suffer or resist being retooled to be "gentleman gladiators" and too often fail to thrive academically. Professor Guinier describes a "Business Units 1" professor at Yale Law School in the early 1970s who greeted his stu-

[32] Guinier et al., supra note 6.

dents each morning with the phrase "Good morning, *gentlemen*."[33] The findings reported in *Becoming Gentlemen* suggest that the instruction to "become gentlemen," although perhaps no longer communicated as explicitly and unabashedly as it was in Business Units 1, remains central and that it has a negative impact—academically and psychologically—on a significant number of women law students.

The Guinier-Fine-Balin account is based on a quantitative analysis of the performance of male and female students at the University of Pennsylvania Law School and on analysis of extensive questionnaire and interview data.[34] Its central quantitative finding is that despite entering the University of Pennsylvania with equivalent academic credentials, women perform less well than their male peers throughout law school. Male and female students entered the University of Pennsylvania with virtually equivalent undergraduate Grade Point Averages (GPAs), class ranks, Law School Aptitude Test (LSAT) scores, and Lonsdorf Index scores (a composite of LSAT score, median LSAT score at undergraduate institution and undergraduate GPA).[35] Notwithstanding this statistical equivalence, at the end of the first year the mean GPA of the women law students studied was 0.77, as compared to a 0.93 mean GPA for male students.[36] This disparity was maintained through graduation, with male students graduating with a mean GPA of 1.05 and women students graduating with a mean GPA of 0.92.[37] Disaggregating these summary findings, Guinier, Fine, and Balin reveal that the male-female performance differential is heightened at the highest level of achievement, with first-year men almost three times more likely than women to reach the top ten percent of their class, and third-year men almost twice as likely to graduate in the top ten percent.[38]

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[33] Id. at 85.

[34] The quantitative data were derived from a cohort of 981 students. The more qualitative data consisted of: (1) responses to a survey designed by third-year law student Ann Bartow (the "Bartow Survey") to track male and female law students' attitudes and experiences and (2) a qualitative database that includes: narrative responses to open ended questions about experiences of gender discrimination, focus-group data, seminar discussions, records of a Women's Law Group meeting, in-depth interviews of 27 students, and several meetings with faculty (collectively, the "interactive data"). See id. at 30-32.

[35] See id. at 36. While, on average, the women law students studied entered law school with slightly higher GPAs, class ranks, and Lonsdorf Index scores, and the men entered with slightly higher LSAT scores, none of these differences is statistically significant at the .05 level.

[36] See id. at 37. The authors explain the University of Pennsylvania Law School's grading system later in the text. See id. at 129 n.84.

[37] See id. These differences in GPA are statistically significant, with p=.000.

[38] See id. at 39.

The qualitative data permit Guinier, Fine, and Balin to identify and to take perspective on practices by which law schools continue, after admitting substantial numbers of women students, to exclude stereotypically female sensibilities from legal discourse and to identify and take perspective on the competing sensibilities themselves. These data reveal differences in men's and women's engagement and comfort in the law school environment that seem to stem, at least in part, from law schools' valorization of the gladiator model and their neglect of problem solving and policy conscious models of lawyering.

Guinier, Fine, and Balin discerned in many of the women they studied a proclivity to employ reasoning based on relational logic and empathy and a tendency to favor collaborative, rather than combative working styles.[39] For these women—and for many like-minded men—classroom interactions, especially in the first year, were a primary source of alienation,[40] for practices within the law school belittled relational reasoning, empathy, and collaborative ways of working in favor of more "gentlemanly" ones.[41]

Students complained that their training neglected the moral and policy implications of lawyers' and judges' actions, demeaned diplomatic and empathetic problem solving strategies, and valorized antagonistic approaches to legal problems. Guinier, Fine, and Balin found that, as a result, successful classroom participation required dispassionate responses that stayed confined to a narrow, faculty imposed institutional perspective. As one third-year woman said, "[empathy or compassion] is something that is eradicated in law school. . . . We are really taught that compassion is a bad thing."[42] The institutional perspective was seen as stripping away categories of analysis that students often thought relevant, forcing them to constrain their thinking in ways that felt wrong or unnatural, to remain silent, or to risk ridicule.[43] Moreover, this perspective was thought to be excessively—or even exclusively—top-down and rule oriented, and therefore to neglect and devalue relational logic and bottom-up reasoning.[44]

Instruction in the institutional perspective, with its emphasis on top-down, dispassionate, and antagonistic practices, and the retooling of students inclined towards relational, empathetic, and collaborative ways of working, were understood to be reinforced by law school pedagogy. Students described faculty teaching methods as overly hi-

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39 See id. at 14, 66-67.
40 See id. at 48-50.
41 See id. at 67.
42 Id. at 52.
43 See id. at 51.
44 See id. at 52-53.

erarchical and autocratic, creating unnecessary performance pressures, and fostering competitiveness among students.[45] Many remained silent in Socratic classrooms because in that context they felt that "speaking feels like performance."[46] They perceived that the professor often used the Socratic method "to intimidate or to establish a hierarchy within large classes."[47]

As one might expect in an environment that prizes the stereotypically male and belittles the stereotypically female, women tended to internalize law school's formal evaluation of them, attributing performance differentials to their own lack of capacity rather than to institutional failures or to remediable mistakes in preparation for examinations. As one female student remarked, "[w]hen we get bad grades, we just think we're stupid. You guys get over it! . . . Guys think law school is hard, and we just think we're stupid."[48] Perhaps as a consequence of internalizing negative evaluations of their work, women exhibited higher rates of depression and anxiety than their male counterparts.[49] Moreover, women who were interviewed consistently expressed stronger feelings of alienation and repression than did their male counterparts. These feelings were most often focused on the first year, which typically was described as a "radical, painful, or repressive experience."[50]

The more qualitative data also show that the portrayal of lawyering as a gentle (or not so gentle) man's sport may have caused women to engage less, and less easily, in important aspects of law school discourse. Still, a reluctance to participate in classroom dis-

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[45] See id. at 48.

[46] Id. at 50.

[47] Id.

[48] Id. at 49. This finding and the exemplifying student comment are consistent with social science research on male and female attribution patterns, which suggests that women tend to attribute disappointing performance to internal causes such as lack of ability, whereas men tend to attribute disappointing performance to external situational factors. See, e.g., Kay Deaux, Sex: A Perspective on the Attribution Process, in 1 New Directions in Attribution Research 335 (John H. Harvey et al. eds., 1976).

[49] See Guinier et al., supra note 6, at 48. Women in the study were "significantly more likely to report eating disorders, sleeping difficulties, crying, and symptoms of depression or anxiety." Id. at 49. This finding is consistent with the findings of several other studies that measure the psychological and physiological impact of law school on male and female students. See, e.g., Wightman, supra note 4, at 73-74 (finding that women begin second year of law school with higher level of anxiety than their male counterparts); Daniel N. McIntosh et al., Stress and Health in First-Year Law Students: Women Fare Worse, 24 J. Applied Soc. Psychol. 1474, 1488-89 (1994) (finding that while there were no significant differences in self-reported amounts of illness, stress, and depression between male and female students entering University of Michigan Law School, by end of first year women had more symptoms of poor health than men ($p<.05$) and were marginally more depressed ($p<.10$)).

[50] Guinier et al., supra note 6, at 48.

course characterized a majority of *all* students studied, suggesting that a constrained, and constraining, vision of lawyering may alienate both male and female students. Female law students were significantly more likely than their male counterparts to report that they "never" or "only occasionally" asked questions or volunteered in class.[51] Sixty-seven percent of the women surveyed reported that they never asked questions in class in their first year. But so did forty-four percent of the men.[52] Fifty-five percent of first-year women, and thirty-five percent of their male counterparts, reported that they never volunteered in class.[53] Women's self-reported rates of classroom participation decreased over time—by their third year, seventy-two percent of women reported they never asked questions, and sixty-eight percent reported they never volunteered.[54] Nonetheless, by their third year, women were far more comfortable with their level of class participation than they were in their first year. In their first year, only twenty-eight percent of women answered "yes" to the question "Are you comfortable with your level of voluntary participation in class?"[55] By the third year, sixty-four percent of women responded in the affirmative to this question.[56] Over the same three-year period, men's rates of participation also decreased, as did their affirmative responses when asked if they were comfortable with their level of class participation.[57]

The self-reported gender differential in participation was not limited to formal learning contexts; women also reported being less comfortable than men with approaching faculty after class and outside the classroom. This discomfort was attributed in part to a tendency to expect and await largely absent "friendliness cues" (to use the jargon of sociolinguistics) from faculty before approaching them informally and, more generally to the dispassionate, hierarchical, and competitive culture of the law school may have caused female students to engage less outside the classroom as well.[58]

At times, as might be expected, the deprecatory practices occurring in law school classrooms extended beyond the devaluation of relational, empathetic, and collaborative ways of working to overt discrimination against female students. Women reported that their

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51 Id. at 130 n.86.

52 See id.

53 See id.

54 See id.

55 Id. at 44-45.

56 See id. at 45.

57 See id. at 44-45.

58 See id. at 63.

participation in class discussion at times resulted in gender-based hazing by their male colleagues. Those who challenged prevailing interpretations of legal texts felt that they were consistently subjected to disparaging remarks, particularly when their challenge resulted from taking account of the interests and perspectives of women. One female student described feeling silenced by what she characterized as "a group of frat boys who call you man-hating lesbian, or feminist—as though those are bad—if you are too outspoken."[59] Many women who saw themselves as adopting the dominant perspective also reported being subjected to hissing, public humiliation, and gossip merely for speaking in class.[60]

Guinier, Fine, and Balin also report that women at the University of Pennsylvania were far more likely than men to perceive gender bias on the part of the male faculty members who taught the great majority of law school courses. The primary components of this perceived gender bias were: (1) faculty enforced male dominance of classroom discourse, (2) failure to use gender neutral language, and (3) failure of faculty to sanction student comments that the respondents thought sexist. Thirty-five percent of women, for example, believed that men received more class time than women when called on, and forty percent believed that men received more follow-up questions. Male responses to these questions were affirmative at rates of 1.4 percent and five percent, respectively. This discrepancy in perception remained throughout law school, with twenty-six percent of third-year women, as compared to five percent of third-year men, believing that male faculty favored male students.[61]

Findings with respect to the career goals of women and men in law school were consistent with the thesis that law school demeans and undermines the goals and values of women students. First-year women were at least three times more likely than first-year men to express interest in careers in public service. However, women's interest in public service dropped dramatically during their law school careers: whereas a quarter of all first-year women described public service as a professional ambition, by their third year women's interest in public service had fallen to near seven percent—the level reported by men throughout law school.[62]

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[59] Id. at 48.

[60] See id.

[61] See id. at 130-31 n.87. Interestingly, by year three, more men believed that male faculty favored women in the classroom (7%), than believed that they favored men (5%); no third-year women believed that male faculty favored women, although 3% of first-year women did. See id.

[62] See id. at 133 n.101.

Drawing on the full range of their data, Guinier, Fine, and Balin conclude that the University of Pennsylvania is a "hostile learning environment for a disproportionate number of its female students."[63] Moreover, the consistency between their findings and the findings of other studies persuades them that this conclusion is generalizable across most law school contexts.[64] The word "hostile" is telling. The authors of *Becoming Gentlemen* do not describe women as people ill-equipped or poorly prepared for the study of law. They emphatically resist the conclusion that women require retooling, seeing women, not as misfits in the law school culture, but as miners' canaries who test the law school environment and serve notice of its quality when they sicken and fail to thrive.

Guinier, Fine, and Balin embrace—and expand upon—their informants' critique that legal education is stifling as a result of its inordinate emphasis on intellectual detachment, combativeness, and competition and its devaluation of collaboration, empathetic engagement, and relational thinking. Relying in part on the extent to which women's critiques of law school are shared by students of all descriptions, and relying in part on a vision of the requirements of what they refer to as twenty-first century law practice,[65] they argue that law school fails *in its primary mission* as it fails to develop "the multiple kinds of intelligence [and] motivation" that a diverse student body

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[63] Id. at 57.

[64] The authors of *Becoming Gentlemen* find the results of their study to be consistent with several prior studies focusing on the experiences of women law students. See, e.g., Taunya L. Banks, Gender Bias in the Classroom, 38 J. Legal Educ. 137, 141 (1988) [hereinafter Banks, Gender Bias I] (finding, in study of five unidentified law schools, that almost twice as many women as men self-report never voluntarily participating in class); Robert Granfield, Contextualizing the Different Voice: Women, Occupational Goals, and Legal Education, 16 Law & Pol'y 1, 6, 19-21 (1994) (finding, in study of approximately half of law students at Harvard Law School in 1987, significant differences in orientations toward law and legal practice); Suzanne Homer & Lois Schwartz, Admitted but Not Accepted: Outsiders Take an Inside Look at Law School, 5 Berkeley Women's L.J. 1, 29 (1989-90) (finding, in study of Boalt Hall Law School, that white men asked questions and voluntarily participated in class discussions at substantially higher rates than women or men of color); Catherine Weiss & Louise Melling, The Legal Education of Twenty Women, 40 Stan. L. Rev. 1299, 1332-45 (1988) (finding, in study of Yale Law School, that women had outsider status in law school classroom). But see Janet Taber et al., Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates, 40 Stan. L. Rev. 1209, 1248-49 (1988) (finding, in study at Stanford Law School, few gender differences in students' responses to hypotheticals pertaining to moral reasoning). The authors of *Becoming Gentlemen* find further support for their conclusions in the Wightman report, which concludes that "'law school is not an environment that nurtures the academic development of women.'" Guinier et al., supra note 6, at 9 (quoting Wightman, supra note 4, at 14).

[65] See Guinier et al., supra note 6, at 5.

brings to the pursuit of legal education.[66] This is so, they argue, because law schools' "hierarchical, ruthlessly competitive, and aloof institutional design"[67] not only inhibits the academic and professional flowering of a large proportion of its students, but also reflects a counterproductive and all too narrow vision of what lawyers do. Law schools' antagonistic model of lawyering is incompatible with what Guinier, Fine, and Balin posit as a professional climate in which lawyers are increasingly called upon to serve as problem solvers rather than gladiators.[68] Indeed, the problem solving model of lawyering, which in the Guinier-Fine-Balin account relies heavily on strategies that minimize conflict and maximize collaboration, embodies precisely the strategies and ways of working that are frustrated, to the dismay of many students, in the gladiator-style classroom.

Guinier, Fine, and Balin believe, then, that their study, and their informants' critiques, provide the insight necessary for a positive "transform[ation of] the educational dialogue for *all* . . . students"[69]—a transformation to a qualitatively diverse academic culture.

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[66] Id. at 13.

[67] Id. at 140 n.130.

[68] The description of lawyers as problem solvers is not unique to the authors of *Becoming Gentlemen*. See, e.g., David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach 2-3 (1991) (describing problem solving as central task of lawyering). However, *Becoming Gentlemen*'s emphasis on cooperation and collaboration as primary problem solving techniques distinguishes it from traditional notions of how lawyers should interact when resolving disputes. See, e.g., Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509, 511 (1994) (stating that dominant view in legal profession is that zealous advocacy requires lawyers to fight with each other, rather than to cooperate to resolve disputes efficiently). For an especially persuasive critique of the gladiator model, see Susan P. Sturm, From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession, 4 Duke J. Gender L. & Pol'y 119, 134 (1997) (arguing that lawyers of future will need to be "highly trained and flexible synthesizers, integrators, and collaborators who work in teams at all levels of production").

[69] Guinier et al., supra note 6, at 97. Guinier, Fine, and Balin also offer a number of concrete suggestions for remodeling legal education. They suggest, for example, replacing the large Socratic classes in the first-year curriculum with an array of less hierarchical and combative teaching methodologies that valorize a fuller range of legal skills and social values, see id. at 72; they suggest that legal educators learn more about how students learn best, see id. at 74; and they urge that law faculties devote themselves to mentoring "that builds on students' emotional engagement and emphasizes the mutuality of their role in the educational conversation," id. at 95.

III
WOMEN IN LEGAL EDUCATION: TESTING *BECOMING GENTLEMEN*'S PREMISES

The findings on which *Becoming Gentlemen* was based, first published in a 1994 law review article,[70] were a bombshell in the world of legal scholarship. Many people in law school communities were heartened and energized by Guinier, Fine, and Balin's critique of legal education, but many others were dismayed that women might feel abused by legal education or that their performance might systematically lag behind that of men. In a large-scale study sponsored by the Law School Admission Council, Linda Wightman set out to address limitations of the Pennsylvania study and of other similar analyses of women's experiences in law school.[71] Believing that these earlier studies had "limited impact"[72] as a result of their small sample sizes, sample bias, and over-reliance on anecdotal evidence, Wightman assembled a massive data set, drawn from a national sample of students entering 152 different law schools in 1991. Over 28,000 students completed an initial questionnaire as they entered their first year. From a longitudinal sample selected for follow-up, over 6,000 students completed a second questionnaire a year later.[73] Wightman also had available to her LSAT scores, undergraduate grade point averages, and first-year law school GPAs.

We discern in Wightman's work no critique of retooling, no expression of support for qualitative diversity, and no conscious effort to take perspective on exclusion or on difference. Still, the data that Wightman has assembled tend to support *Becoming Gentlemen*'s central critique. Wightman establishes, happily, that male-female performance discrepancies are not as great nationwide as they were among the students studied by Guinier, Fine, and Balin, but she confirms that the law school performance of women lags behind that of men. Indeed, she argues that women do significantly less well than one would predict on the basis of a proper interpretation of their qualifications. Moreover, to the extent that the design of her study permits comparisons, Wightman's data support *Becoming Gentlemen's*

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70 See Lani Guinier et al., Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 U. Pa. L. Rev. 1 (1994).

71 See Wightman, supra note 4, at 1. While she does not specifically name these studies, she refers to Homer & Schwartz, supra note 64, and Deborah Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163 (1988) for "excellent summaries of the studies," as well as analyses of their strengths and weaknesses. See Wightman, supra note 4, at 3 n.4.

72 Wightman, supra note 4, at 1.

73 See id. at 5-6. Of the follow-up sample, approximately one-half were students of color, and the other half were white. The gender data are analyzed and presented separately by ethnic group so as to distinguish race and gender effects. See id. at 6.

findings that women are less comfortable in the law school environment. The chief differences between the two studies have less to do with results than with analysis: *Becoming Gentlemen* takes perspective on exclusion and difference, seeing women's discomfort and underperformance as results of exclusionary practices that forestall a healthy integration of stereotypically female ways of working into the mainstream of legal culture. The Wightman study maintains a quantitative approach to diversity. Rather than critique factors that might contribute to women's discomfort or underperformance, it looks to retooling measures that might reduce the discomfort and improve the performance.

The study has four parts. First, Wightman examines how women fare academically in law school in relation to their incoming credentials and the performance of their male peers. Second, she examines women's law school experiences, including the students' perceptions of themselves, or self-concept. Third, she compares the characteristics of women who performed better than their entering credentials would predict with the characteristics of women who performed less well than their entering credentials would predict. Finally, she repeats, for male students, the comparisons of those who did and did not meet or exceed predictions based on entering credentials.

As we have suggested, Wightman's initial comparison of first-year GPAs confirms, but moderates and complicates, *Becoming Gentlemen*'s finding that women earn lower grades than men. Wightman found that, on average, women earned slightly lower grades than men. While acknowledging that the male-female grade differential is statistically significant, Wightman does not label it "practically significant," because, "less than 1 percent of the variance in first-year grades can be explained by gender."[74] She notes that these findings are consistent with the results of other studies that report summary, rather than disaggregated, data.[75] Importantly, though, Wightman observes that valuable information about women's performance may be masked by the use of simple summary statistics. As Guinier, Fine, and Balin recognized, summary statistics focusing on average group performance may miss other kinds of performance discrepancies. For example, this kind of statistic provides no indication of the relative distribution of grades for women compared with the distribution for men in the same class.

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[74] Id. at 11.

[75] See id. Wightman again refers to Rhode, supra note 71, and Homer and Schwartz, supra note 64, for a listing of these studies. See Wightman, supra note 4, at 11 n.1.

Disaggregating her data in much the same way that Guinier, Fine, and Balin did, Wightman finds that while 53.9% of men earned GPAs at or above the mean, only 50.6% of women were at the same level.[76] Using similarly disaggregated data, Guinier, Fine, and Balin found that first- and second-year men were 1.6 times more likely to be in the top 50% of the class.[77] Wightman concludes that the national pattern of male and female law school performance "lend[s] credibility" to the findings of other researchers, but that the differences are not as dramatic as those reported in smaller studies.[78]

In an effort to place this academic performance differential in perspective, Wightman explores how women *should* have done based on their own past academic performance. It is in this aspect of the research that Wightman makes her most innovative contribution. According to Wightman, women consistently score lower than men on standardized tests like the Scholastic Aptitude Test (SAT), the Graduate Record Examination (GRE), or the Graduate Management Admission Test (GMAT), but just as consistently earn higher grades than men in every academic setting: secondary, undergraduate, or graduate.[79] In light of this performance pattern, Wightman argues, one should look to undergraduate GPA, rather than to standardized test scores or to composites of GPA and standardized test scores, as the benchmark from which to predict women's academic performance. This is appropriate, she argues, because standardized tests consistently underpredict women's performance.[80]

Women entering law schools are like women entering other academic settings in that they have histories of earning significantly higher grades but lower standardized test scores than their male classmates.[81] Based on the performance patterns of men and women in other academic contexts, Wightman then predicted that women's performance would be stronger than that of men in law school. The pat-

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76 See id. at 12.

77 See Guinier et al., supra note 6, at 37. A similar pattern was found at Boalt Hall. See Homer & Schwartz, supra note 64, at 51. In a January 1995 newspaper article, Guinier is quoted as "finding support" for her findings in Wightman's then-soon-to-be-published study. The article notes that in both studies, men outperform women by the equivalent of one grade in one of eight courses in the first year. For example, if a male student got seven Bs and one A, the female student would receive 8 Bs. See Dale Russakoff, Lani Guinier Takes Law School to Task as 'Hostile' to Women, Wash. Post, Jan. 29, 1995, at A1.

78 See Wightman, supra note 4, at 1.

79 See id. at 15.

80 See id. at 14-15.

81 See id. Wightman counters the argument that women's higher undergraduate GPAs are based on self-selection into less rigorous majors by doing a comparison by field, noting that women do better than men in every field, except for engineering, a field in which male and female performance is virtually identical. See id. at 16-17.

tern of other academic entities is not, however, re-created in the law school context. Except at the very highest level of the grade distribution, men do better than women in law school.[82] These data establish law school as the exceptional case: whereas in every other graduate field, women do better than men—despite scoring lower on standardized admission tests—in law school, women do less well on the standardized test for admission (LSAT) *and* less well in their courses.

The combination of women's statistically significant lag in overall performance and the much greater discrepancy between women's law school performance and the performance that women's undergraduate records predict caused Wightman to conclude that "law school is not an environment that nurtures the academic development of women."[83] She therefore set out to explore "the ways in which women and men experience law school differently"[84] and to examine areas where "different experiences or perceptions" might be related to academic performance.[85] Questionnaire data addressing these issues might have tested, in a national sample, *Becoming Gentlemen*'s conclusion that women perceived law school as a hostile environment that inhibited their thinking and belittled ways of working that they thought important. Features of Wightman's questionnaire design preclude meaningful comparison of the Guinier-Fine-Balin and Wightman data in some respects relevant to these questions, but the qualitative findings of the two studies are consistent in other important respects.

Wightman's attempt to explore how women experience law school is undermined by the wording of her questionnaire. Students were asked to rate a variety of law school experiences against their original *expectations*, rather than against independent criteria. As Wightman notes, this does not tell us, where women and men give the same rating, whether women and men rate law school experiences in the same way or whether women have lower expectations that are simply being met.[86] Similarly, in attempting to gauge students' level of satisfaction with law school, Wightman asked only about their satisfaction with the *decision to enter law school*. She asserts that men and women are equally satisfied and thus that her results "appear to contradict recent studies,"[87] but we don't really know whether women (or

82 See id. at 16-18.

83 Id. at 26.

84 Id. at 29.

85 Id.

86 See id. at 37, 72.

87 Id. at 36. It bears noting that black women were significantly less satisfied with their decision to attend law school than black men, although Wightman asserts that the differ-

men) are satisfied with their law school experience, or merely with their decision to take on the challenge of law school.

Still, as we have said, Wightman's data reveal a number of gender differences that are consistent with *Becoming Gentlemen*'s findings. These findings address women's self-confidence, stress, neglected strengths, and perceptions of gender bias.[88] Although Wightman says in reporting her questionnaire results that differences in men's and women's law school experiences are "significant" in only a "limited number of areas," we find the differences telling. She reports, for example, that after their first year, men rated themselves significantly higher than women in academic ability, competitiveness, public speaking, and self-confidence in academic situations.[89] She also notes that women express higher levels of anxiety as they enter the second year.[90] Men who, after their first year, were doing better than their undergraduate grades would predict rated themselves higher on self-confidence in academic situations than men who did worse than their undergraduate grades would predict, but comparably situated women did not experience this boost in confidence.[91] Women who before entering law school rated themselves highly in terms of leadership, public speaking, and social self-confidence did worse than their undergraduate grades would predict,[92] but among men there was no such pattern.[93] Approximately one-third of women in each ethnic group reported experiencing gender discrimination or adverse treatment while in law school, a level comparable to that at which Hispanic or Asian American students of both sexes reported experiencing discrimination due to race or ethnicity.[94] Fifty-five percent of black students of both sexes reported race discrimination.[95] Women also reported higher levels of difficulty with coursework, more time studying, more time spent on family and personal responsibilities, and less time for recreation and relaxation.[96]

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ence does not meet the criterion for practical significance. In addition, Asian American women and black women were significantly less satisfied with their decision than white women. Here again, Wightman states that the "magnitude of the differences is small." Id. at 36. However, at least regarding black women, it nears the level of practical significance.

88 See id. at 72. Wightman does note real and perceived differences for women of color. See id. at 74. She also notes that women of color are represented in significantly larger proportions among the women who performed worse than predicted. See id. at 79.

89 See id. at 53.

90 See id. at 67, 74.

91 See id. at 101, 141.

92 See id. at 89.

93 See id. at 128.

94 See id. at 60.

95 See id.

96 See id. at 39, 41, 63.

Wightman does not highlight or explore the significance of these differences. Moreover, her effort to explain how women experience law school is hampered by the relatively quantitative nature of the study. There are no narratives that might give voice to women's experiences, and, as Wightman readily concedes, the study is "lacking the richness" that might be added by these stories.[97]

In reporting her quantitative findings, Wightman consistently deemphasizes performance disparities. She has an understandable concern about essentializing women's experiences and perfectly reasonable fears that a myopic focus on women's underperformance will cause significant academic achievement by women to go unrecognized.[98] Thus, she is careful to emphasize that her data show women to be "holding their own" and capable of academic excellence in law school.[99] Perhaps as a result of the sparseness of her more quantitative data concerning women's experiences of law school culture, Wightman does not draw from the data a critique of legal education. Rather, she uses them to explore retooling opportunities that will address what she is careful to characterize as relatively small performance differentials. Wightman discovered that women expressed more difficulty than men expressed with analytic aspects of the legal writing program, although they reported less difficulty with writing style.[100] She also found that the time women report spending in study is disproportionate to the results they achieve in final examinations.[101] She therefore focuses on women's legal writing and study skills, suggesting that legal writing, as it is reflected in final exams, may account for the entire differential in grades and that both legal writing and study skills should be a focus of more research.[102] She also suggests that both women and men who underperform academically may be "underprepared" for law school, particularly as to writing, and that this, too, should be the subject of more research.[103] Thus, in Wightman's account, women's lower levels of performance and self-confidence and their higher levels of stress are not interpreted as evidence or remnants of exclusionary practices, but are taken as signals of a need for retooling or remediation. We are left, then, with evidence that supports many of *Becoming Gentlemen's* findings, but remains aloof from

97 See id. at 1.

98 See id. at 26.

99 See id.

100 See id. at 51. Wightman does not explore whether this may be a problem of self-perception, since there is no corroborating evidence such as legal writing grades to confirm the perception.

101 See id. at 112-13.

102 See id. at 100, 113, 140.

103 See id. at 102, 142.

its analysis. As we shall explain below, Elizabeth Mertz attempts to take on, with new tools, some of the difficult interpretive work that stands outside the scope of Wightman's analysis.

IV

WHAT DIFFERENCE DOES DIFFERENCE MAKE?: NEW METHODOLOGIES FOR TAKING PERSPECTIVE

Concerned by reports, such as *Becoming Gentlemen*, indicating that women law students are less engaged in their classes, Elizabeth Mertz enlists the powerful and versatile tools of sociolinguistics to take perspective on women's exclusion from law school classroom discourse.[104] While previous studies have relied on self-reported data[105] or on observations by students who were themselves in the classes,[106] Mertz and her assistants, Wamucii Njogu and Susan Gooding, observed, videotaped, and transcribed every class in eight contracts courses in eight different law schools throughout the country.[107] Using a variety of measures of class participation to analyze this extensive data base, Mertz and her assistants confirm that in many law

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104 See Mertz et al., supra note 8, at 35-37.

105 See id. at 13-14, 30-31 (discussing Taunya L. Banks, Gender Bias in the Classroom, 14 S. Ill. U. L.J. 527 (1990) [hereinafter Banks, Gender Bias II]; Banks, Gender Bias I, supra note 64; Guinier et al., supra note 70; Homer & Schwartz, supra note 64; Joan M. Krauskopf, Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools, 44 J. Legal Educ. 311 (1994); Janet Taber et al., supra note 64.

106 See Mertz et al., supra note 8, at 13-14, 30-31 (discussing Weiss & Melling, supra note 64; Karen Wilson and Sharon Levin, The Sex-Based Disparity in Class Participation, The Phoenix (University of Chicago Law School student newspaper), Nov. 26, 1991, at 3; The University of Chicago Gender Study 1 (1993) (manuscript on file with authors)).

107 Mertz chose to look at first-year classes to highlight the socialization process that occurs during that period of time. She chose the schools and classes in an effort to maximize school and professor diversity. See Mertz, supra note 8, at 37. Of the eight classes, two were in elite schools, one was in a prestigious school, two were in regional schools, three were in local schools (one of these was a night school class). Five were taught by men, and three by women. Two were taught by professors of color, and six by white professors. See id. at 5. With one exception, Mertz researched professors with six to twenty years of experience. See id. at 41. The total number of students in all eight classes was 705. See id. at 38. Overall the sample was similar to national norms in terms of the proportion of females and African Americans in the group; the sample included a disproportionately small number of Latina/o students and a disproportionately large number of Asian American students. The total study sample was 41.8% female, 6.2% African American, 6.1% Asian American, and 2.7% Latina/o students. See id. at 39. National statistics on first-year law students indicate that the class of 1991-1992 was 42.6% female, 7.2% African American, 4.6% Asian American, and 4.8% Latina/o students. See id. The gender and racial compositions of the specific classes differed greatly. The percentages of female students ranged from 33.3% to 56.2%. The percentages of African American students ranged from 1.3% to 12.5%. The percentages of Asian American students ranged from 0.0% to 21.9%. And the percentages of Latina/o students ranged from 0.0% to 5.3%. See id. at 42-45. Where possible, Mertz interviewed the professors and student focus group members. See id. at 38.

school classrooms, women[108] do not in fact participate as much as expected given their numbers. Still, in this early and ambitious effort to use the tools of sociolinguistics, we learn more about the complexities and limitations of the perspective-taking process than about the roots of women's experiences.

The research reported in *What Difference Does Difference Make?* builds on previous studies that found that women law students participate less in class,[109] are less satisfied with law school,[110] have lower self-esteem[111] and more limited professional aspirations,[112] and receive lower grades than their male classmates.[113] Drawing on these studies, as well as on research in other educational settings, Mertz hypothesizes that exclusion is the result of a more complex set of interrelated contextual factors than previous researchers have been able to analyze. While in some cases exclusion is a product of overt discriminatory behavior, more often it results from subtle interactions. Citing

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[108] As the title of the report suggests, Mertz also looked at the participation rates of students of color. She found that in four of the eight classrooms, students of color did not participate as much as expected given their numbers. See id. at 74.

[109] See Banks, Gender Bias I, supra note 64, at 141 (reporting significant difference in frequency of volunteering); Banks, Gender Bias II, supra note 105, at 530-31, 534-35 (reporting observations of women's volunteer rate); Guinier et al., supra note 70, at 32-33 (reporting disparity in volunteering); Homer & Schwartz, supra note 64, at 29, 50 (finding that majority of women and students of color never asked questions or volunteered compared with two-thirds of white men who reported doing so frequently); Alice D. Jacobs, Women in Law School: Structural Constraint and Personal Choice in the Formation of Personal Identity, 24 J. Legal Educ. 462, 470 (1972) (reporting that women volunteer and are chosen to answer questions less often than men); Krauskopf, supra note 105, at 314 (finding difference in volunteer rates); Taber et al., supra note 64, at 1239 (finding statistically significant difference in volunteer rates and questions asked in class); Weiss & Melling, supra note 64, at 1364 (reporting average participation rates of men and women in 19 courses); Wilson & Levin, supra note 106, at 3 (finding that in seven of nine classes men's participation exceeded women's); The University of Chicago Gender Study, supra note 106, at 15 (noting disparities in participation rates).

[110] See Homer & Schwartz, supra note 64, at 33, 53 (finding women have more negative feelings towards law school than men); E.R. Robert & M.F. Winter, Sex-Role and Success in Law School, 29 J. Legal Educ. 449, 452-53 (1978) (finding law school experience to be "far more negative for women than men").

[111] See Homer & Schwartz, supra note 64, at 33, 52 (finding differences in self-evaluation of intelligence, confidence, and competence); Jacobs, supra note 109, at 468-71 (reporting attitudes of women towards law school and legal careers); Krauskopf, supra note 105, at 314 (finding that more women than men feel less intelligent and articulate since beginning law school); Wightman, supra note 4, at 53-54 (finding differences in academic self-concept).

[112] See Jacobs, supra note 109, at 466-67 (finding that women gravitate towards specific areas of law).

[113] See Guinier et al., supra note 70, at 21-26 (comparing mean grade point averages of men and women, and percentages in top fiftieth and top tenth percentile of class); Homer & Schwartz, supra note 64, at 30, 51 (finding, over time, decline in women's grades in inverse proportion to men's); Wightman, supra note 4, at 2, 11-12 (comparing mean first-year law school grades of men and women).

James Gee's research on teachers' subtly dismissive responses to student speech that does not follow mainstream narrative conventions,[114] Mertz hypothesizes, for example, that language often serves to exclude in profound, yet invisible ways—through miscommunication, misunderstanding, and indirect cues about value and privilege. Yet, in this cut at analyzing the contracts class data, Mertz does not work at a level of detail sufficient to unearth subtle linguistic cues. Instead of testing her hypotheses regarding linguistic subtleties, she uses her data to test earlier findings with respect to grosser variables.

Because previous studies found that female students feel more comfortable participating in smaller, less formal classes taught by female professors, Mertz looked at the gender and race of the professor, class size, class composition, and patterns of classroom discourse.[115] Noting that other studies suggested a possible correlation between classroom discourse and institutional prestige,[116] Mertz also looked at the prestige of the schools at which the classes were taught and those at which the professors had been trained.[117]

As we have said, Mertz's findings support the premise that women are excluded in some law school classrooms. Using a sophisticated variety of measures to quantify the extent to which male and female students participated in class (percentage of class time, percentage of turns in the conversation, the mean number of minutes per speaker, the mean number of turns per speaker,[118] and the allocation of first turns to male and female students[119]), Mertz concludes that male students participated disproportionately more than female students in six of the eight classes.[120] Mertz also notes that in the classrooms in which women spoke disproportionately more than the men, the discrepancies were small—often smaller than those of the most inclusive male-dominated classes. In other words, the discrepancies

114 See Mertz et al., supra note 8, at 7 (citing James Gee, The Narrativization of Experience in the Oral Style, 167 J. Educ. 9, 24 (1985)).

115 See Mertz et al., supra note 8, at 41.

116 See id. at 25-26, 28.

117 See id. at 64-65.

118 The percentages were calculated with reference to all of the male and female students enrolled in the class, while the means were calculated with reference to the students who actually spoke at some point during the class. See id. at 47-49.

119 With regard to each of these measures, Mertz calculated a ratio of proportionality reflecting the extent to which male and female students' participation was proportionate to their numbers in that class. See id. at 48.

120 In these six classrooms, male students took between 10% and 54% more turns than female students and between 12% and 38% more time. See id. at 47. In the same six classrooms, men took between 11% and 65% more first turns than did female students. See id. at 69. In five of the seven classrooms in which Mertz was able to calculate means, men took between 1.6 and 73.2 more mean turns and 11% to 71% more time than women. See id. at 50.

favoring men were much greater than the discrepancies favoring women.[121] The data also show that in one of the two classes in which women spoke disproportionately more than men, all of the dominant speakers were male.[122] On the other hand, women were among the dominant speakers in five of the six classrooms in which men spoke disproportionately more than women.[123]

Mertz's findings are less straightforward when she attempts to link student participation to particular contextual factors. For example, Mertz noted that the two classes in which women participated disproportionately more than men were those taught by white women in local schools and that the class with the ratio of participation most favorable to men was the class taught by a female professor of color in an elite institution.[124] Together these findings suggest a possible effect of school prestige. Mertz does not, however, find a clear connection among prestige of school, classroom pedagogy, and class participation.[125]

Noting previous research, including *Becoming Gentlemen*, suggesting that women respond negatively to the Socratic method[126] and participate less in classes relying heavily on volunteers, Mertz also attempted to link student participation to "Socratic" discourse patterns in each of the classes. Using the length of exchanges between faculty and students (and unexplained ethnographic observations) as concededly imperfect indicators of the Socratic character of the classes under study, Mertz determined that the three classes taught by white men who had been trained in elite schools and were teaching in non-elite

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121 See id. at 47.

122 See id. at 53.

123 See id.

124 In the section of the article that includes the results regarding race, Mertz reports that this class was the most racially inclusive. See id. at 72. Noting, at the end of the article, that her findings would have been different had she looked at race and gender simultaneously, Mertz reports that in this same class men of color had the highest participation rates while white male students had the lowest. See id. at 95-96.

125 See id. at 71-72.

126 There appears to be no consensus on what the term "Socratic" actually means; most law professors have their own understanding of the term. Generally, however, the term is used to denote an approach in which students read appellate court opinions outside of the classroom and then engage in class with the professor in a question and answer dialogue regarding those cases. As envisioned by Christopher Columbus Langdell, who popularized this approach in the late 1800s at Harvard Law School, the goal of the method was for "the casebook and the professor to serve not only as a springboard for discovering legal reasoning, but also as a means for learning legal doctrine. Using inductive reasoning, students would discover the legal principles; using scientific reasoning, students could then apply similar reasoning to other problems." Ruta K. Stropus, Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century, 27 Loy. U. Chi. L.J. 449, 454 (1996).

schools were the most Socratic (classes #1, #4, and #5);[127] that the two classes taught by professors of color who had been trained in elite institutions and were teaching in elite schools were somewhat Socratic (#2 and #8);[128] and that the two classes taught by white female professors trained in regional or local schools and teaching in local schools were the least Socratic (#3 and #6).[129]

She then apposed these findings with her findings on male and female students' participation overall and in extended versus shorter exchanges[130] and volunteered versus called-on turns.[131] Again, the results were less than straightforward. The two least Socratic classrooms had the ratios of participation most favorable to women (#3 and #6); however, the classroom with the ration of participation most favorable to men was only somewhat Socratic (#8). Furthermore, in two of the three most Socratic classes, women participated relatively more[132] in extended dialogues than in shorter exchanges.[133] And, in one of these two classes, women also participated more in called-on turns than in voluntary turns.[134] Similarly, in one of the two somewhat Socratic classes, women participated more in extended exchanges than in shorter, non-focused exchanges, and in one of the two least Socratic classes, women participated more in called-on that in voluntary turns. Despite these somewhat inconsistent findings, Mertz suggests that:

> [T]he confluence of a number of factors—white male professor trained in elite school, teaching in relatively elite school, highly formal style—appears to correlate with an adverse impact on gendered

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127 See Mertz et al., supra note 8, at 65.

128 See id.

129 See id. The fourth white male professor who had been trained in a regional school and was teaching in a regional school was outspoken about his preference for lecture and was apparently well able to fulfill his goal of lecturing much of the time (#7). See id. at 63.

130 Extended exchanges are comprised of four or more turns—two for the professor and two for the student; shorter exchanges (designated in Mertz's terminology as "non-focused exchanges") are comprised of no more than one consecutive turn each. See id. at 156 n.190.

131 Mertz associates extended and called-on exchanges with the Socratic method. See id. at 54, 58.

132 Throughout, Mertz compares ratios of participation, i.e., she compares the ratio of women's participation as compared to men's for extended exchanges to the ratio of women's participation as compared to men's for shorter, nonfocused exchanges. Thus, if the ratio for participation in extended exchanges is higher than the ratio for participation in shorter, nonfocused exchanges, the women participated relatively more in the shorter, nonfocused exchanges.

133 The four classrooms in which women's participation as compared to men's was greater for extended dialogues than for shorter, nonfocused exchanges were, in order of disparity: #5, #7, #2 and #4. See id. at 57.

134 The five classrooms in which women's participation as compared to men's was greater for called-on turns than for volunteered turns were, in order of disparity: #5, #7, #2, #8, #1. See id. at 59-60.

> participation in shorter, volunteered discourse (and also, interestingly, on overall women's participation) in one classroom. On the other hand, the overlap of different factors—female professor, lower status school, more informal style—seem [sic] to correlate with a positive impact on gendered participation (both in shorter, volunteered interactions, and in overall participation rates) in other classrooms.[135]

Notably, Mertz's discussion of the study reflects an awareness of the limitations of her work and, implicitly, of prior research focused on the experience of exclusion. In the final sections of the article, she reiterates that it is important to take complex, contextual perspectives on classrooms. In light of her own complicated findings, she seems to acknowledge that her study, while more contextual than many previous studies, ultimately was not contextual enough. Prioritizing her interest in patterns of exclusion, Mertz chose to study a discrete set of variables across a relatively large number of classes,[136] instead of looking more deeply at students' experiences in fewer classrooms.[137]

Mertz's measure of Socratic discourse provides a prime example of the limitations of studying discrete variables rather than taking a deeply contextual perspective. Although acknowledging that the approach was problematic, Mertz characterized all exchanges of four or more turns as Socratic. She did not differentiate exchanges initiated by student questions from those initiated by professor questions; friendly exchanges from those that a student might consider unfriendly; or exchanges focusing on the basic application of rule to facts from those that take perspective on the analytic process at hand. These aspects of classroom interaction, which almost certainly affect student participation, are invisible to her categories. Thus, despite the fact that her research is comparatively contextual, it does not appear contextual enough to explain why students do or do not participate in the classes she has studied. Relying solely on her categories, Mertz could not explain why, for example, female students in one highly Socratic class (taught by a white man trained in an elite school and teaching in a non-elite school) participated more when volunteering, while in two other highly Socratic classes (also taught by white men

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135 Id. at 67-68.

136 Mertz's sample size is relatively large for contextual or ethnographic research. Given her goal of identifying patterns of exclusion across classrooms, her sample size is too small and her variables too interrelated.

137 Mertz takes a more contextual perspective in other analyses of her data. See supra text accompanying notes 124-35.

trained in elite schools and teaching in non-elite schools) they participated more when called on.[138]

Mertz also warns in the final sections of the article against treating gender and race as essential categories. In doing so, she draws attention less to the limitations of her research than to limitations of the process of taking perspective on exclusion. Because Mertz's focus is exclusion, she naturally and valuably uses categories that differentiate groups of people who are often excluded from those who generally are not. Still, the use of these identity group categories seems to assume that all female students or faculty, or all students or faculty of color, perceive and respond similarly, or, that students' responses to faculty are determined primarily by the physical manifestations of their respective identity groups and not also by aspects of their behavior which may or may not be associated with those identity groups. A more contextual study might have attended to such characteristics while also reflecting the diversity within categories such as "white male." For example, Mertz might have found that one of the white male professors paused frequently during class, enabling students, many of them women, who prefer to take more time before speaking, to feel more comfortable volunteering. Or, she might have found that one of the white male professors encouraged students to analyze cases from a broader range of perspectives. Despite the limitations of her research, Mertz's discussion of the problem of categorizing people acknowledges the diversity of experience among women students and students of color. Likewise, questions she poses towards the end of the article—"who are the women who are excluded?" and "who are the women who are not excluded?"—reflect a shift in attention, away from the mechanisms of exclusion towards the complex of different experiences and characteristics identifiable among those who are excluded.

What Difference Does Difference Make? also exposes a second limitation inherent in the process of taking perspective on women's exclusion from classroom discourse. By asking what factors are associated with female students participating less than expected based on their numbers, Mertz suggests that her immediate goal is equal participation for all students. Given the empirical evidence indicating that class participation is connected to performance, self-esteem, and professional outcomes, this seems a significant and valuable goal. Yet, it also seems constrained and uncritical. Mertz appears to want women

138 She is also unable to clarify why one of the three highly Socratic classes taught by white men who had been trained in elite institutions was among the most racially inclusive while the other two were among the least.

students and students of color to be equal participants in the existing classroom conversation; she does not question the terms of the conversation. To put the matter in terms of our typology of reactions to diversity, Mertz takes perspective on exclusion, but she does not extend the analysis by also taking perspective on difference. She does not explore the relationship between women's sensibilities and their disengagement or question the conditions and constraints of successful engagement. As a result, Mertz's work—like Wightman's—seems more suggestive of a need for retooling women than of a need for fundamental change in legal education.

In earlier analyses of her classroom data, Mertz has examined discourse patterns without regard to gender.[139] These works also stop short of critiquing conventional law school discourse, but, ironically, they tell us more about the relationship between difference and exclusion than we are able to learn from *What Difference Does Difference Make?* Mertz documents the ways in which teaching practices used in law school classrooms initiate students into particular conventions of legal discourse and thought. Working from close readings of telling moments in individual classes, Mertz constructs insightful descriptions of the conventions of legal discourse.[140] She illustrates, for example, how students learn, through their interactions with professors, to focus on the procedural and doctrinal contexts of legal texts, rather than on their narrative or factual content. Offering an insight that has particular significance for the study of gender, Mertz also finds that students are taught to ignore social difference—to see it as irrelevant or as a "wildcard" that sometimes explains "anomalies" in legal outcomes. She is at pains to demonstrate "the way in which legitimacy—both in professional identity and of legal language in the wider society—may hinge on a profound denial of the systematic and sustained effects of difference, despite appearances to the contrary."[141] Still, Mertz argues that as a convention of legal discourse, the denial of difference is something that must be taught.[142]

Juxtaposing *What Difference Does Difference Make?* and Mertz's earlier analyses of the classroom data, we are led to ponder their connections. On the one hand, the exclusion of women documented in

139 See Elizabeth Mertz, Linguistic Constructions of Difference and History in the U.S. Law School Classroom (Am. Bar Found. Working Paper No. 9419, 1995) [hereinafter Mertz, Linguistic Constructions]; Elizabeth Mertz, Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom (Am. Bar Found. Working Paper No. 9418, 1995) [hereinafter Mertz, Recontextualization as Socialization].

140 See Mertz, Linguistic Constructions, supra note 139, at 7-13, 16-18, 20-21; Mertz, Recontextualization as Socialization, supra note 139, at 21-22, 24.

141 Mertz, Linguistic Constructions, supra note 139, at 24.

142 See id.

What Difference Does Difference Make? may justify taking a more critical perspective on the conventions of legal discourse. On the other, the conventions of legal discourse identified in the earlier studies may be among the invisible contextual factors resulting in women's exclusion. As Guinier, Fine, and Balin argue, by retooling women, we not only exclude them, we lose the opportunity to use their experience to inform our understanding of legal education and the profession. We lose the opportunity to critique the system and to imagine a qualitative diversification in which students' different strengths can flourish in law school classrooms and, ultimately, in legal practice. Mertz herself has written that "professors are in a sense trapped by their need to socialize students effectively to the system within which they will be working."[143] It may be, however, that effective teaching requires that we not only transmit conventional wisdom but also engage perspectives that challenge conventional wisdom. As we shall see, Deborah Post and Louise Harmon have engaged new perspectives to escape what Mertz defines as an unavoidable "trap."

V

CULTIVATING INTELLIGENCE: EXPERIMENTS IN QUALITATIVE DIVERSITY AND GLIMPSES OF A NEW SYNTHESIS

Deborah Post and Louise Harmon, professors at the Jacob D. Fuchsberg School of Law, Touro College, did not need to be convinced that their classrooms contained miners' canaries who were failing to thrive or that law school pedagogy was often dysfunctional. They began with a conviction, based on their experiences in the classroom, that law school teaching was poorly attuned to the concerns and learning practices of many of their students, *regardless of gender*, and that it did not adequately prepare students to meet the professional and ethical demands of practice. Rather than document the problem, they set out to address it. Taking perspective both on features of the law school environment that effectively exclude different voices and on the voices of difference, they developed an analytic frame. Then they began experiments in qualitative diversity.

In an important shift of frame, Harmon and Post take us beyond the gender-based analysis highlighted by the other works described in this Essay. They take perspective on difference without regard to gender, focusing on the broad range of working and learning styles represented in their student body. They argue that traditional law school teaching does a disservice to all students by "emphasiz[ing] one kind

143 Id.

of intelligence or one cognitive style to the exclusion of all others, when the practice of law allows, [and] in fact probably requires, competency in a much wider variety of both."[144] While they thus echo many of the concerns raised by the feminist critique of law teaching, they go further, suggesting by example a reconstructive vision of qualitative intellectual diversity in law school, within which a broad range of capacities is acknowledged, valued, and developed. In this respect, Post and Harmon champion the intellectual diversity that we have counted as a hallmark of the New Synthesis.

Cultivating Intelligence argues that to be more effective, teachers must focus on how students learn. At the beginning of the project which resulted in this book, Harmon and Post hired education specialists L. Lee Knefelkamp and William Welty[145] to address a Touro Law School faculty retreat. These experts advised the faculty to evaluate their class materials, list the kinds of intellectual tasks the course required and how they intended to assess success, and communicate this information to their students. Knefelkamp "even made the radical suggestion that we design our exams to test whether the students have indeed mastered the tasks that we have chosen for them to tackle."[146] Harmon, eager to put cognitive theory to the test in her teaching, decided to accept the challenge to assess and communicate. She was struck by the simple notion that teachers might facilitate more learning among their students by clarifying for themselves, and conveying to the students, what they must learn, and then consciously choosing teaching methods that best suit those objectives. She also learned that this is no easy feat when one is faced with classes as large as ninety to one hundred students. As she put it, "I thought we would learn how to challenge our students, and ended up being the one who was challenged."[147]

Harmon notes that Knefelkamp's simple suggestion that the faculty members *list* the intellectual tasks required for their courses assumed that they already knew what those tasks were. However, when Harmon sat down to make her list, she was "chagrined to admit after almost ten years of teaching"[148] that she did not know what kind of thought her first-year course in Property required. Moreover, she

144 Harmon & Post, supra note 9, at 203.

145 L. Lee Knefelkamp is a professor of higher education and the chair of the Higher and Adult Education Department at Teacher's College, Columbia University. William Welty is a professor of management at Pace University's Lubin Graduate School of Business, director of the Center for Faculty Development and Teaching Effectiveness, and codirector of the Center for Case Studies in Education.

146 Harmon & Post, supra note 9, at 51.

147 Id. at 101.

148 Id. at 163.

came to the uncomfortable realization that she had fallen heir to "the schizophrenia that has become the hallmark of legal education: what the teacher does in class bears little relation to what will be on the exam."[149] She found that at least a third of the materials for her Property course required students to perform "a set of fairly mundane tasks: understanding, organizing, and memorizing the doctrines."[150] These materials represented the technical competence she silently expected of her students, but did not *explicitly* discuss in class. So, she prepared handouts with definitions, rules, and exceptions—all the "blackletter" information students usually look for in commercial outlines. She then told her students, for the first time ever: "[H]ere it is; you have to learn this stuff. I will test you on it, probably with multiple-choice questions, even if we do not talk about it in class."[151]

Harmon instituted a midterm exam, worth only twenty-five percent of the grade. This gave her an opportunity to provide students with early feedback and evaluation,[152] and she "spilled the blood of a dozen pens on their papers, telling them what they had done wrong, and praising their work when they got it right."[153] She followed up with sample answers, and explained to students what she expected on the final exam:

> I told them I wanted the papers to show a sensitivity to the sources of law, from the oldest layers of common law to the newest legislative gloss, and to recognize the interrelationships among these competing authorities. I expected arguments to follow a logical sequence; rules to be stated before exceptions; tests and standards to be articulated before being applied. I expected difficult terms to be defined and analyzed. In application, I expected the student to ferret out relevant facts from red herrings. I expected the landlord's position to be fully explored, and the tenant's as well. I expected the student to be able to assess the strengths and weaknesses of the

149 Id. at 82.

150 Id. at 88.

151 Id. at 89.

152 Many professors note the value to students of opportunities for evaluation and feedback and bemoan the lack of such opportunities. See generally Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1 (1996). When asked what different or new technique(s), if any, they would like to see used more often in legal education generally, professors said that they would like to see "frequent evaluation of students with much feedback," "more evaluation opportunities," and "multiple tests," since "students deserve more feedback than the end of the semester exam." Id. at 34. Educators at the Harvard Graduate School of Education have noted the need for multiple occasions of assessment. See David Perkins & Tina Blythe, Putting Understanding Up Front, Educ. Leadership, Feb. 1994, at 4 (noting that assessment coming at end of topic which focuses on grading and accountability does not serve students' learning needs).

153 Harmon & Post, supra note 9, at 91.

different arguments, and to explain why the landlord might be doomed, or why he might prevail.[154]

While "[t]hese criteria are no surprise to any teacher of law, or to any successful taker of law school exams,"[155] Harmon's self-critique led her to acknowledge that the average first-year law student would not intuit them.[156]

To give students an opportunity to express themselves in their own language, and to "experience confusion and seek its resolution without devastation,"[157] Harmon assigned a ten-page paper, to be completed within a month, which would count as twenty-five percent of the student's grade. The students were to apply at least one theory of Property to one of several "peculiar circumstances: the discovery of pre-Celtic coins in a farmer's field in England; the unearthing of the bones of 420 colonial slaves in downtown Manhattan; the disposition of dinosaur bones in the Black Hills of South Dakota; the division of a graduate degree when love had dried up and blown away."[158] This component was designed to give equal opportunity to those students who work more successfully when they have time for introspection or time to pick and choose their words with care.[159]

From a teaching perspective, Harmon exults, "[T]aking the advice of a specialist in cognitive theory was a resounding success."[160] In restructuring her course, Harmon provided students with multiple opportunities for feedback and evaluation, and students had the chance to demonstrate a broad range of knowledge and skills.[161] For Harmon as a person, however, and "particularly as a writer, it was a resounding failure."[162] The summer season, set aside for finishing a law review article, evaporated as she was all but crushed under the weight of grading twenty long papers and forty short reflection pieces from her Jurisprudence course, in addition to the ninety blue books and ninety ten-page papers from Property. Challenging students certainly exacts a price.

Post responded differently to the faculty retreat. Rather than experimenting in the classroom, she opted to spend more time studying learning theory before coming to any conclusion about whether, and how, it might be useful in the law school context. After almost a year

154 Id. at 91-92.
155 Id. at 92.
156 See id.
157 Id. at 96.
158 Id. at 93.
159 See id.
160 Id. at 96.
161 See id. at 92-96.
162 Id. at 96.

of grappling with the complex typologies and taxonomies related to cognitive development, she concluded that teaching in law school ought to be approached differently because "[p]ractice and problem solving may require a wider variety of cognitive skills and maybe even the application of different forms of intelligence"[163] than are critical to success in law school.

Post joins Guinier, Fine, and Balin in assuming that the goal of legal education is to produce legal problem solvers. She also shares *Becoming Gentlemen*'s conclusion that the political or moral underpinnings of legal doctrine are neglected, ignored, or denigrated in too many law school classes. According to Post, students need to understand that as problem solvers, lawyers necessarily make political and moral choices. They should be encouraged to "think about the relevance of their own values and beliefs to practice . . . [and] to consider what justice means and to understand the imperatives of justice."[164] She notes, however, that "the revelation of unstated but powerful assumptions underlying doctrine and theory" are viewed by some not as an important educational objective, but as "something other than law."[165] This view is problematic, because it tends "to set doctrinal analysis apart from all other kinds of lawyering work,"[166] and it obscures the importance of the *integration* of capacities needed for effective law practice. In Post's view, far from being "something other than law," explicit discussion of moral, political, and personal values makes legal analysis more rigorous and comprehensive. There are, of course, risks involved. Many students prefer that professors remain as authority figures dispensing incontrovertible legal wisdom, and many professors are uncomfortable opening realms of uncertain and contested ideas. "For professors to let these values 'intrude' is to risk losing control over the learning process, polarizing the classroom, alienating our students, and muddying our image as exemplars of rational thought."[167]

In the usual Socratic dynamic,[168] "(1) the teacher knows all that is important to know about the subject, (2) the students' task is to discover what the teacher already knows, and (3) the teacher's task is to

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163 Id. at 147.

164 Id. at 19.

165 Id. at 20.

166 Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, A Dialogue About Socratic Teaching, 12 N.Y.U. Rev. L. & Soc. Change 249, 251 (1997).

167 David Simon Sokolow, From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon For Current Legal Education, 1991 Wis. L. Rev. 969, 971 (describing lack of consideration given to values and facts in traditional legal education).

168 See supra note 126.

force the students to pursue the quest."[169] Post describes her very different version of the oft-reviled Socratic method as "engag[ing] individual students in a discussion."[170] Her self-conscious "'couch and conversation' style,"[171] characterized by extended conversations with individual students, provides "innumerable occasions to point out the connections between ideas and have the connections that others see revealed to you."[172] In Post's conception of a well-rounded law school, intellectual and moral development are valued, and students and teachers are partners in a collaborative learning process. Teachers learn, and learners teach. Personal experience is relevant, valued, and incorporated into the classroom dialogue as a basis for understanding that "practice necessarily includes political *and* moral choices."[173] This approach, however, does not sit well with some of Post's students. On days when she chooses to lecture, they tell her how good the class was, she says, "as though they think that a little positive reinforcement will make me mend my ways."[174] Sometimes the class comes to "a screeching halt"[175] as students search for an answer to her question. "Other students get impatient; colleagues suggest techniques for 'moving the class along.'"[176] Post, however, doesn't see what the rush is all about. After all, she notes, "Time is an important ingredient in problem solving."[177]

CONCLUSION

The ladies here in legal academia have caused quite a stir. The studies we have reviewed broaden our perspective on the ways in which attitudes and practices linger from overtly exclusionary times to complicate the process of diversification. Although the academic performance differential between men and women is—happily—not as great nationwide as the data presented in *Becoming Gentlemen* suggested, Linda Wightman's national study suggests that even if women are understood to be "holding their own" in law school, they could and should be doing even better. Wightman's work has also contrib-

169 Sokolow, supra note 167, at 981.

170 Harmon & Post, supra note 9, at 133.

171 Id. at 13.

172 Id. at 15.

173 Id. at 19. See also generally Frances Ansley, Starting With The Students: Lessons from Popular Education, 4 S. Cal. Rev. L. & Women's Stud. 7 (1994) (arguing that education must start with and build on strength, skills, and knowledge that students already possess).

174 Harmon & Post, supra note 9, at 13.

175 Id. at 133.

176 Id.

177 Id.

uted to the data, if not to the analysis, necessary to take perspective on difference and the remnants of exclusion.

Elizabeth Mertz's work has helped us to come to terms with the complexity and difficulty of the process of taking perspective. Mertz helps us to appreciate the enormity, and the value, of the task of closely studying the complex of contextual factors that shape the process of diversification. We take heed of her balanced message that despite the value of making visible the myopic and exclusionary nature of many traditional legal constructs, myopic and exclusionary legal constructs must be taught and learned. Yet, we see in her earlier work reason to worry that women's voices that could be positive and transformative will be muted in the learning process. Perhaps that is why we value so much the voices of Guinier, Fine, and Balin.

Becoming Gentlemen's resistance to retooling and its affirmation of values embraced by its female informants keep audible the voices for transformation and qualitative diversity in a world in which retooling, accommodation, and acceptance of the status quo would be all too easy. We welcome *Becoming Gentlemen*'s challenge of the status quo, and we share Guinier, Fine, and Balin's confidence that a broader approach to educating lawyers will lead to pedagogies that better serve all students and to professional training that better positions lawyers to serve their clients and improve the legal culture.

Our own view of transformation is close to that of Post and Harmon. To say, as Guinier, Fine, and Balin do, that lawyering in the future will be more a matter of problem solving than one of combat may make matters too dichotomous. We share Post's sense that lawyering of every kind involves more intellectual capacities and a wider range of considerations than the typical law school classroom encompasses. Virtually all legal work is interactive, requiring narrative, interpersonal, intrapersonal, and strategic intelligences in equal measure with categorizing and deductive reasoning. Fact sensitivity is as important to competent legal work as is rule sensitivity. And to lawyer without regard for the policy implications of various rule interpretations is not only to miss an important means of influencing decisionmakers' discretion, but to yield the responsibility for constructing legal culture that makes practice socially useful and morally fulfilling.

Like Harmon, we have been challenged by the task of identifying, both for ourselves and for our students, the various kinds of intellectual work necessary to capable and responsible lawyering. And like Harmon, we find that our teaching becomes more effective as we become clearer about what strengths our students need to develop and how those strengths will be integrated and used in practice. For several years, we have worked collaboratively to name, understand,

learn, and develop the workways of lawyering. In our research, we have isolated logical-mathematical, interpersonal, intrapersonal, narrative, categorizing, and strategic intelligences, and found that *each of them is important to doing every kind of lawyering work.* The analysis of doctrine is deeper if one has the intrapersonal intelligence to grasp multiple perspectives; the conduct of a mediation is more successful if one has the logical-mathematical intelligence to calculate prospective gains and losses; advocacy is more convincing if one has the strategic intelligence to assess both the efficacy of a move in the small world of litigation and the policy implications of a legal interpretation in the larger world.

Our goal for legal education is to provide contexts in which students can learn fundamental legal concepts, develop intellectual versatility, learn to use the range of their intellectual capacities across the range of lawyering tasks, and develop a critical consciousness about their professional role, and we find that our work is deeply resonant with Post's and Harmon's vision of qualitative intellectual diversity. But we also find that our work resonates with *Becoming Gentlemen*'s image of women as miners' canaries in the legal culture. Although men and women come to law school with unpredictable mixes of intellectual strengths and preferred working styles, it is a fact of our culture that certain intelligences (e.g., logical-mathematical and categorizing) are associated stereotypically with men, while others (e.g., interpersonal and intrapersonal) are associated stereotypically with women. We have found that the intelligences typically neglected in law school pedagogy are stereotypically female intelligences. And, consistently with the theories advanced by social psychologist Claude Steele,[178] we have found that women perform with more anxiety when

[178] In a series of creative experimental studies, Steele and his colleagues have shown that test performance is negatively affected whenever subjects are aware that their ability is being gauged in a domain in which members of the subjects' group are generally thought to perform poorly. For example, when equally able male and female students take a difficult math test, the female students perform significantly less well than the male students. When equally able male and female students take a difficult English test, they perform equally. Moreover, when equally able male and female students take a difficult math test after having been told that it is a test on which men and women perform equally, the male and female students perform equally (the male students performing somewhat less well and the female students performing better than in the unprimed condition). Similarly, black students perform less well than white students on a verbal test when told it is a measure of ability, but perform equally well when told performance is unrelated to ability. Steele hypothesizes that awareness of a stereotype that predicts failure for a subject creates in that subject a level of anxiety that interferes with performance. He calls this condition of anxiety "stereotype vulnerability." See Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. of Personality and Soc. Psychol. 797 (1995) (analyzing experimental data concerning stereotype vulnerability); see also Claude M. Steele, Race and the Schooling of Black Americans, Atlantic

they feel called upon to perform exclusively or primarily in domains in which men, rather than women, are thought to excel. When, in the course of providing broader and more effective training for work in the legal profession, we have *balanced* and *integrated* stereotypically male and stereotypically female capacities, we have found that many women work more comfortably and that men and women learn to be more versatile in their approaches to legal problems. Seeing this, we have come to understand that the discomforts of our miners' canaries signal fundamental deficiencies in the law school environment. It is possible, of course, to adapt and thrive in this environment—possible to learn to work comfortably when one is nourished only within the intellectual domains that traditional law school pedagogy celebrates. But it is better, we think, to clear the air of intellectual bias and nourish all of the capacities that matter to well-rounded professional growth.

Monthly, Apr. 1992, at 68 (explaining relatively high dropout rate of black Americans as result of racial stigma and stereotype vulnerability).