

VIRGINIA LAW REVIEW ONLINE

VOLUME 108

FEBRUARY 2022

55–71

SYMPOSIUM

THE GENDER PARTICIPATION GAP AND THE POLITICS OF PEDAGOGY

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“When it comes to silencing women, Western culture has had thousands of years of practice.”

–Mary Beard¹

INTRODUCTION

“Speak Up” and similar studies documented something that many thought they already knew about large law school classes: Male students talk a heck of a lot more than female students do. A recent study of the University of Virginia School of Law² adds important nuance to this observation. The gender participation gap is not set in stone but responds to, among other things, shifts in pedagogy. For example, the gap expands when professors achieve participation by calling on the students who volunteer to answer questions at the moment they are posed, and it retracts when professors use a system for choosing in advance the students on

* We are indebted to Rip Verkerke and Sophie Trawalter for their insights into gender-related classroom dynamics and for working tirelessly for almost a decade on their study investigating this issue, and also to Naomi Cahn for sharing her wisdom and experiences.

¹ Mary Beard, *Women & Power: A Manifesto*, at xi (2017).

² Molly Shadel, Sophie Trawalter & J.H. Verkerke, *Gender Differences in Law School Classroom Participation: The Key Role of Social Context*, 108 Va. L. Rev Online 30 (2022).

whom they will call.³ Some readers may construe this finding to be an endorsement of the law-teaching technique known as the Socratic Method, an umbrella title bestowed on a motley collection of question-and-answer strategies used by law professors for the last century or so, including the technique of “cold-calling.”⁴ Were it correct, this takeaway from the University of Virginia study would be a painful irony for the numerous women who have reported over the years that the Method, particularly a version that relies heavily on cold-calling, fosters a classroom “dynamic in which they feel that their voices were ‘stolen’ from them.”⁵

As we read it, however, the University of Virginia study comes neither to praise nor to bury the Socratic Method and its cold-calling kin. Instead, the study reveals only that professors may help to shrink the gender gap by using a participation method that does not depend solely on the alacrity of student volunteers.⁶ Cold-calling is one such method, but there are many others that law professors could adopt. Since that is the case, our agenda in this Essay is to provoke a conversation about the value of retaining cold-calling at all. Like other law professors, we have found cold-calling to be an ineffective way of teaching important topics with which some students—and, surely, some instructors too—have had painful experiences. If cold-calling impedes the teaching of materials in which many of us have the deepest interest and investment, why would we continue to use it?

For purposes of this initial foray, we assume that it is beneficial for women law students to participate in the classroom discussion, just as it is for law students who happen to be men or to be non-binary. In some cultures and contexts, talking and being heard might not be the preserve of the powerful. Instead, silence may be that which confers authority and

³ The participation gap closes as well when class size is smaller, and it seems to be driven by concerns that the student who speaks will be the recipient of backlash. Therefore, one may hypothesize that the gap will close if the threat of backlash is removed. See *id.* at 43–45.

⁴ Cold-calling occurs when an instructor directs questions about assigned readings, which in large law school classes invariably consist of appellate cases, to a student whose hand is not raised and who has not been given advance notice that they will be put on the spot. Cold-calling varies in intensity in terms of the length of time the student remains on call and the complexity of the professor’s questioning, which may range from the factual to the procedural to the doctrinal to the political to the ethical.

⁵ See Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1, 4 (1994).

⁶ See Shadel et al., *supra* note 2, at 40.

prestige. However, in our legal profession and myriad other contemporary locations where momentous decisions are made—places ranging from the Oval Office to the boardroom to the factory floor—effective participation in public discourse is all but synonymous with political muscle.⁷ Although public speech may no longer be the sine qua non of masculinity, the gender participation gap reveals that it still tends to “be the business of men”⁸ and not of women. Therefore, the University of Virginia study demands that—once again—we inspect and resist pedagogical strategies and communication conventions that mute women’s voices and diminish their power in the public sphere.

The Essay proceeds as follows. We start by sketching the emergence of the cold-calling version of the Socratic Method as the dominant pedagogy in American legal education. Next, we invite readers to contemplate the challenge of using cold-calling to teach hurtful material, with specific examples drawn from teaching the law of rape. We conclude with some thoughts about how to teach such topics, based both on the data from the University of Virginia study and our own classroom experiences. In short, we offer the Essay as an agenda for future work that we hope will be done by the authors of the University of Virginia study and other commentators.

I. A VERY BRIEF HISTORY OF THE SOCRATIC METHOD IN LAW TEACHING

According to received wisdom, most law schools in the United States today use some form of the Socratic Method, particularly in first-year classes.⁹ Said to be the brainchild of Christopher Columbus Langdell, this dominant pedagogy could be, and has been, given a number of different labels, including the Socratic Method, the Case Method, the Langdell Method, and (most hilariously) the Scientific Method.¹⁰ Whatever handle

⁷ See Beard, *supra* note 1, at i–xi.

⁸ See *id.* at 4.

⁹ See William M. Sullivan, Ann Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* 47 (2007); see also Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 *J. Legal Educ.* 1, 17 (1951) (describing the key features of the Socratic Method). As William Sullivan and his colleagues declare in their report for the Carnegie Foundation for the Advancement of Teaching, the “case-dialogue method” is the “signature pedagogy” through which law schools induct new members into the field. Sullivan et al., *supra*, at 23–24.

¹⁰ See Patterson, *supra* note 9, at 2; Jeannie Suk Gerson, *The Socratic Method in the Age of Trauma*, 130 *Harv. L. Rev.* 2320, 2321 (2017).

you prefer, key features of the Method are said to be derived from a mode of disruptive teaching first used by Socrates in ancient Greece.¹¹ Langdell allegedly introduced the Method to law schools in 1870, and, depending on which source you read, the Method transformed law teaching with the speed either of wildfire or of molasses in winter.¹² Since the authorship and ascendancy of the Method are among the legal academy's foundational myths, we here offer only a brief account of its arrival, together with anecdotal material that suggests that the coming of women law students created anxiety for the Method's most prominent practitioners and promoters, not to mention for the women themselves.

Back in the dark days—before Harvard Law School got its act together and laid down the pedagogical law—men who desired to join the bar could travel there by more than one route. The avenues included self-directed reading and study of well-regarded legal treatises and, for those who could not buy or borrow a book, service as an apprentice to a member of the bar who had treatises of his own.¹³ For now, we will leave unfocused the toils of the legal apprentice¹⁴ as our plot commences with the creation of formal law schools and the emergence of a pedagogy that was “intended to exclude the traditional methods of learning law by work

¹¹ See, e.g., *The Collected Dialogues of Plato* 353, 359 (Edith Hamilton & Huntington Cairns eds., W.K.C. Guthrie trans., 1973) (excerpting a dialogue between Socrates and Meno). If our word allotment and time allowed, we might venture to describe the episodes in Socrates's life and work that are relevant to the legal pedagogy with which his name is associated. However, we happily ditched that plan entirely after reading one expert's warning that securing any image of Socrates is “difficult,” even “impossible, or at least as baffling as trying to depict an elf wearing a hat that makes him invisible.” See Soren Kierkegaard, *The Concept of Irony, With Constant Reference to Socrates* 50 (Lee M. Capel trans., 1965).

¹² In a speech he gave at Harvard College's Phillips Brooks House, K.N. Llewellyn noted that it took several decades for Langdell's “genius” to “dent his guild” even though his pedagogy carried over many of the outworn traditions against which he himself “had rebelled.” See K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 *Colum. L. Rev.* 651, 661 (1935). See also Suk Gerson, *supra* note 10, at 2323–24.

¹³ Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 *Wash. U. L.Q.* 597, 601–03 (1981); see also D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, 28 *J. Legal Educ.* 485, 485 (1977) (citing Chroust, *The Rise of the Legal Profession in America* 173 (1965)) (describing four ways colonial Americans could pursue legal education).

¹⁴ As is true of so many other subjects political and legal, Thomas Jefferson had something to say—and, yes, it was critical—about “the apprentice system of legal training in which he had been schooled.” McManis, *supra* note 13, at 604 (quoting a private letter in which Jefferson said that a legal apprenticeship “was rather a prejudice than a help”). John Adams also had bad things to say about his legal apprenticeship. See Gerard W. Gawalt, *Massachusetts Legal Education in Transition, 1766–1840*, 17 *Am. J. Legal Hist.* 27, 32 (1973).

in a lawyer's office, or attendance upon the proceedings of courts of justice."¹⁵ According to one historian of the legal profession, these developments had the effect of preserving for the "best men" the "best professional opportunities."¹⁶ Apart from a few conspicuous exceptions, the "best men" were wealthy, white, and Christian.¹⁷

The earliest law schools were proprietary. These academies provided students with the opportunity to learn the law not by reading books all on their own, but by attending lectures, "which frequently amounted to little more than a professor standing before a class reading one or two chapters from a legal treatise and which, even in the hands of a brilliant scholar, often left the majority of students in dazed incomprehension."¹⁸ The first and most famous proprietary school was the Litchfield Law School, which was founded by Tapping Reeve in 1784 and which allowed him to supervise the increasing number of young men who sought to apprentice themselves to him.¹⁹ Rather than taking on apprentices one-by-one, Reeve must have thought, why not build a roomy hall where many apprentices can gather and pay me their fees to read treatises together? Eureka!

Impressed by the success of this entrepreneurial model, universities followed suit and began creating their own law schools in the opening decades of the nineteenth century. Alas, however, models of academic rigor these early law schools were not. The schools had no prerequisites whatsoever for admission, no formal plan of studies, and no examinations.²⁰ Students self-reported their progress on their way to earning a diploma.²¹ This to us unimaginable and lethargic system appears to have made university leaders worry that some law graduates might be illiterate, not to mention incompetent to represent clients in even the most basic legal matters.²² While it is impossible to know what Langdell actually was thinking about this sorry state of affairs—some

¹⁵ Jerome Frank, *What Constitutes a Good Legal Education?*, 19 ABA J. 723, 723 (1933) (citing *Centennial History of the Harvard Law School* 231 (Harv. L. Sch. Ass'n 1918)).

¹⁶ See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 14–39 (1976).

¹⁷ See *id.* at 29.

¹⁸ Anthony Chase, *The Birth of the Modern Law School*, 23 Am. J. Legal Hist. 329, 336–37 (1979).

¹⁹ See McManis, *supra* note 13, at 617–18.

²⁰ See Peggy C. Davis & Elizabeth E. Steinglass, *A Dialogue About Socratic Teaching*, 23 NYU Rev. L. & Soc. Change 249, 261 (1997); William Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. Legal Educ. 399, 399 (1981).

²¹ See Davis & Steinglass, *supra* note 20, at 261.

²² See Brainerd Currie, *The Materials of Law Study*, 3 J. Legal Educ. 331, 368–72 (1951).

commentators have remarked that he wrote very little and said even less about the voyages that our histories associate with his name²³—it is plausible to infer that he too had some misgivings. Appointed Dean of the Harvard Law School in 1870, Langdell’s first order of business was curricular and pedagogical reform.

Langdell busied himself. He drew up a roster of required classes, instituted mandatory final exams, and wrote a Contracts casebook. But it is his work in the classroom for which he is most celebrated, and it is the remnants of that pedagogy that concern us here. According to Langdell, law is “a science” that students are to master “by studying the cases in which it is embodied”²⁴ and by participating one-by-one in teacher-initiated question-and-answer sessions to work out for themselves the significance of those cases.²⁵ And so, it is said, it came to pass that law students ceased absorbing legal knowledge solely by reading treatises, and law professors ceased imparting legal knowledge solely by lecturing. The case-dialogue strategy was born, and its “logical structure and pedagogical drama” became the distinctive teaching technology used in virtually every American law school.²⁶

As is true of most complex and useful technologies, the Method’s angels and devils are in its details. As William Sullivan and his colleagues asked when preparing their report on legal pedagogy for the Carnegie Foundation for the Advancement of Teaching, one crucial question is: “How is it done?”²⁷ Although the Method is practiced in a variety of ways, researchers claim—and we have found—that it generally proceeds as follows. Aided by a classroom seating chart, the professor calls on students one-by-one and asks them a range of questions about cases they were assigned to read before they arrived in class. Often, the on-call student has the impression that their name was picked out of a hat, and that may well be true. Probably, the professor will ask that student to recite the facts of the case, its procedural posture, and the rule it articulates. The professor likely will pose for the student a number of hypothetical problems that are designed to test their grasp on the meaning and boundaries of the rule in the principal case. The professor usually

²³ See McManis, *supra* note 13, at 636.

²⁴ See C.C. Langdell, *A Selection of Cases on the Law of Contracts*, at vi (1871).

²⁵ See Patterson, *supra* note 9, at 17–19.

²⁶ See Sullivan et al., *supra* note 9, at 48; see also Davis & Steinglass, *supra* note 21, at 263–64 (explaining the genesis of Langdell’s teaching style).

²⁷ See Sullivan et al., *supra* note 9, at 47.

sticks with one student for a considerable time before letting the first one off the hook and turning to another.

There is a consensus that the pedagogy accomplishes a lot of things well. It allows law schools to gather a large number of students in a single classroom and train them there to think in at least one of the important ways that lawyers supposedly are supposed to think. The Method also offers students the opportunity to work out the answers for themselves, to see that one question may have more than one “correct” answer, and to understand that lawyers assist courts to arrive at the truth of the matters before them by reducing complex lived experiences into stripped-down narratives in which human beings are presented as legal strategizers.²⁸ Cold-calling also is said to duplicate the public speaking experience that students will need after they graduate.

Over the years, law students and law professors have raised objections to many different aspects of the cold-calling pedagogy. We here offer just a brief summary of a few relevant criticisms from this vast literature. Some students find the Method to be useful as a means of learning to articulate an idea aloud under pressure, but others experience it as a sort of ritualized hazing, whose primary purpose is to indoctrinate them into the elite ranks of a professional hierarchy.²⁹ In a book based on essays he wrote while a student at Yale Law School, Harvard Law professor Duncan Kennedy famously described the Socratic law classroom as follows:

The classroom is hierarchical with a vengeance, the teacher receiving a degree of deference and arousing fears that remind one of high school rather than college. The sense of autonomy one has in a lecture—with the rule that you must let the teacher drone on without interruption, balanced by the rule that he can’t do anything to you—is gone. In its place is a demand for pseudo-participation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you.³⁰

²⁸ See *id.* at 63.

²⁹ See *id.* at 2 (noting that for some students, “there is often excitement,” while others experience the method as a “game of ‘hide the ball’”), 57 (citing the Best Practices for Legal Education project, which argues that case-dialogue teaching can be used as a “tool for humiliating or embarrassing students”).

³⁰ Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 *J. Legal Educ.* 591, 593 (1982) [hereinafter Kennedy, *Legal Education*]; see Duncan Kennedy, *How the Law School Fails: A Polemic*, *Yale Rev. L. & Soc. Action*, Spring 1970, at 71, 72–73.

According to Kennedy, the Socratic Method reinforces and replicates hierarchy. It places the professors at the top of the heap, teaching students to respond cheerfully to humiliation by an authoritarian figure—behavior that they will reproduce once they enter the profession of law. Students are also ranked based on grades, teaching the “inevitability and also the justice of hierarchy,” when in fact the hierarchy is false and unnecessary.³¹ Kennedy writes that students are further incapacitated because the Socratic classroom fails to teach practical lawyering skills, leaving students with little understanding of how to acquire them and without a clear career path other than to join a large law firm, where presumably they will learn the rest of what they need to know.³² To Kennedy, the value of the Socratic Method in teaching a student to “think like a lawyer” is outweighed by the lessons it also transmits in succumbing to, and then replicating, a dangerous hierarchy.

In their report, Sullivan and his co-authors echoed Kennedy’s concerns about how well the Socratic Method actually imparts basic lawyering skills.³³ Reading cases and answering questions about them offers students practice in analytical thinking, teaching them to be good law clerks or academics or judges. But it does not offer useful practice in other essential skills that make up the professional activity of being a lawyer, such as collaboration, communication, listening, or advocacy, let alone how to gain an understanding of the social context and cultural expectations of what it means to be a lawyer.³⁴ Sullivan and his colleagues emphasized the declining trust in the legal profession and the erosion of morale among attorneys, which they believe arise because “law school typically blares a set of salient, if unintentional, messages that undercut the likely success of efforts to make students more attentive to ethical matters.”³⁵ They connect this falling-off directly to the Socratic Method, which requires students to set moral norms aside, and teaches them that the safest and quickest route to professional success is to compete, rather than collaborate, with each other.

In her powerful critique of the Socratic Method, Kimberlé Williams Crenshaw of Columbia Law School observes that the pedagogy requires students to take a “neutral” stance that privileges the dominant white male

³¹ Kennedy, *Legal Education*, supra note 30, at 600.

³² *Id.* at 601.

³³ See Sullivan et al., supra note 9, at 76.

³⁴ *Id.* at 187–88, 197–98.

³⁵ *Id.* at 31.

perspective.³⁶ To adopt that allegedly “objective” point of view, students must discard their own lived experiences and reactions. Answering a question in a Socratic classroom is anxiety-provoking for just about anyone. Mandated to do so while also being required to assume a stance that denies one’s own identity multiplies this stress and imposes extra burdens on women and students of color.³⁷

A recent study of gender dynamics at the University of Virginia School of Law found that women, more than men, dislike the Socratic Method.³⁸ One crucial finding of the study is that women are more likely to be subject to backlash than are men for speaking in class and that the Method triggers greater perceived costs for women because of that backlash. Similarly, studies of student experiences at Harvard, Yale, the University of Chicago, and the University of Pennsylvania point specifically to the Socratic Method as a likely cause of the gender differences in experiences by law students.³⁹ However, the University of Virginia study also showed that the Socratic Method closed participation gaps in speaking. In classes in which the professor called on students, men and women spoke in measures roughly proportional to their enrollment numbers in the class. By contrast, in classes in which participation was driven by volunteers, men dominated the class time.⁴⁰

At the end of the day, our assessment of the Socratic Method is mixed. It can be an active way for students to engage with difficult and unfamiliar material. It can offer students the opportunity to practice analytical thinking and articulating their ideas aloud. It can encourage equal participation in classroom discussion between men and women when used systematically. It can also cause intense anxiety in students, which can obstruct their ability to learn. It can reinforce pernicious hierarchies. It can be used to inflict harm. And it may not be the best tool to teach

³⁶ See Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 *Nat’l Black L.J.* 1, 2–3 (1988).

³⁷ *Id.*

³⁸ See Shadel et al., *supra* note 2, at 44.

³⁹ See Adam Neufeld, Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School, 13 *J. Gender, Soc. Pol’y & L.* 511, 536 (2005); Yale Law Women, Yale Law School Faculty and Students Speak Up about Gender: Ten Years Later 13 (2012); Mallika Balachandran, Roisin Duffy-Gideon & Hannah Gelbort, Speak Now: Results of a One-Year Study of Women’s Experiences at the University of Chicago Law School, 2019 *U. Chi. Legal F.* 647, 661–62; Lani Guinier et al., Becoming Gentlemen: Women, Law School, and Institutional Change 13 (1997).

⁴⁰ See Shadel et al., *supra* note 2, at 40.

some of the subjects that lawyers most need to learn. With these issues in mind, we turn now to a discussion about teaching the law of rape.

II. TEACHING THE LAW OF RAPE

When the Socratic Method was adopted in 1870, law schools, like the legal profession itself, were “masculine sanctuar[ies].”⁴¹ At that time, women had just started seeking admission to the bar, as well as access to the educational portals that led there. Institutional leaders were not keen to bring women on board, putting forward a range of arguments about women’s unfitness for higher education in general and for law training in particular. As for why women should be excluded from higher education, the claims ranged from the notion that women’s health—especially their reproductive capacities—would be destroyed if some of their vital energy was spent studying to the idea that women lacked the necessary cognitive function for complex intellectual work to the proposition that nature had designed women only for service in the home and other domestic spaces.⁴² As for why women should not be trained to practice law, a prominent and recurring explanation was that women would be rendered unfit for their role as virtuous wives and mothers if they were exposed to legal speech, especially to legal speech about sex.⁴³ Law school deans, faculty, and students also expressed concern that the sight, sound, and

⁴¹ See Cynthia Fuchs Epstein, *Women in Law* 38 (4th ed. 2012); Michael Grossberg, Institutionalizing Masculinity: The Law as a Masculine Profession, *in* *Meanings for Manhood: Constructions of Masculinity in Victorian America* 133, 134–35, 143–44 (Mark C. Carnes & Clyde Griffen eds., 1990).

⁴² See Edward H. Clarke, *Sex in Education; Or, A Fair Chance for Girls* 21–29 (1873). To be fair to Dr. Clarke, just as he wanted to be fair to the girls, he believed that “[t]he real question is not, *Shall* women learn the alphabet? but *How* shall they learn it?” *Id.* at 16.

⁴³ As the Supreme Court of Wisconsin proclaimed in 1875 when denying Lavinia Goodell’s motion for admission to the bar:

There are many employments in life not unfit for female character. The profession of the law is surely not one of these Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man’s reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice.

In re Goodell, 39 Wis. 232, 245–46 (1875).

scent of women would be distracting to male students and that the admission of a woman would have the effect of denying a precious seat to a man.⁴⁴ However, as has proved to be their way, women just kept knocking on the door. In the late nineteenth and early twentieth century, women started gaining admission to law schools throughout the country, including a select few who were allowed to enroll at the University of Virginia School of Law in 1920, Columbia Law School in 1928, and Harvard Law School in 1950.⁴⁵

When called upon to explain why Harvard finally threw in the towel on women, Dean Erwin Griswold gave a grudging statement that may have provided some solace to those of his constituents who remained opposed to women's presence:

It does not seem to me that this particular development is either very important or very significant. Most of us have seen women from time to time during our lives, and have managed to survive the shock. We have even had a few around Langdell and Austin Halls for a good many years now, with no serious consequences. . . . I think we can take it, and I doubt if it will change the character of the School or even its atmosphere to any detectable extent. As of today, I doubt if this change alone will require any of our faculty members to revise many of their lectures.⁴⁶

Just as Griswold predicted, law schools did not swiftly reform their curricular requirements or pedagogical strategies in response to the coming of women. And some of the earliest changes that did take place seem to have been calculated to mute women's full participation.

For example, women in some law school classes were silenced by a simple expedient: Their professors did not call on them at all.⁴⁷ Perhaps, these professors did not expect that women would function as strong or shiny foils in the professor-led classroom "banter" through which—among other things—"the professor demonstrates his verbal virtuosity."⁴⁸ Or professors may have wanted to "spare" women from the

⁴⁴ Epstein, *supra* note 41, at 38–40, 49.

⁴⁵ *Id.* at 38; see also Common Law, *Teaching the Law of Sexual Assault* (Mar. 3, 2020), <https://www.law.virginia.edu/commonlaw/show-notes-teaching-law-sexual-assault> [<https://perma.cc/4R2Y-5A43>] (describing the experiences and successes of the women who were among the first female students to graduate from law schools in the country).

⁴⁶ See Erwin N. Griswold, *Developments at the Law School, 1950 Harv. L. Sch. Y.B.* 10.

⁴⁷ See Epstein, *supra* note 41, at 51.

⁴⁸ See *id.*

embarrassment of breaking down under the pressure of a cold call.⁴⁹ Then too, still other professors may have avoided calling on the women because they suspected what the women themselves knew, i.e., that the women were capable of doing analytical work as accomplished as that of their male peers.⁵⁰

For other professors, the whole point of calling on women was to humiliate them. According to many women, their professors hosted what were known as “Ladies’ Days,” an institution common in many schools until the 1960s. During these classes, women students were called on to recite for the purpose of providing “entertainment,” or a special play within the larger Socratic play for the amusement of their male professors and male classmates.⁵¹ As late as the mid-1960s, one professor would kick off his Ladies’ Day by saying, “Will all the little virgins please come to the front of the room.”⁵² Surely, the women must have felt somewhat anxious about the nature and content of the exercise to which they were being summoned, but, after the passing of the first Ladies’ Day or two, everyone knew what was coming their way. For these sessions, professors pulled together—and examined the women about—“all the embarrassing and difficult-to-discuss problems” thought to be of special interest to women, such as the “intricacies of dower.”⁵³

Rape was another topic that seems to have provided plenty of humorous fodder for the Ladies’ Day spectacles. The law of rape itself was not included in the curriculum when women first arrived in law schools, but rape cases tended to appear at various points in the criminal law syllabus as vehicles for analyzing the mechanics of “general” problems, such as the exculpatory power of so-called “mistake of fact” defenses.⁵⁴ One professor used the sessions as an opportunity to investigate the nature of the actus reus of rape, questioning the women

⁴⁹ See *id.* (reporting that one respondent stated that, as of 1969, “[e]ven the most liberal professors rarely called on women, and when they did, hurried to get on to a man whom they could harass without fear of provoking overt (i.e. feminine) emotional collapse”).

⁵⁰ See Shadel et al., *supra* note 2, at 39.

⁵¹ See Epstein, *supra* note 41, at 51–52.

⁵² See *id.* at 51.

⁵³ See *id.* at 51–52.

⁵⁴ It is in large part thanks to Nancy Erickson that rape began to be covered as a topic in its own right. In the mid-1980s, Erickson, then a professor at the Ohio State Law School, surveyed criminal law case books and professors to determine what was being taught in their classes. She found that the vast majority of criminal law case books did not cover rape at all, or touched on the topic only marginally, as part of other subjects. See Nancy S. Erickson, Final Report: “Sex Bias in the Teaching of Criminal Law,” 42 *Rutgers L. Rev.* 309, 345–46 (1990).

who were on call about “the degree of penile penetration required” to constitute the crime.⁵⁵ Over time, we believe, these formal Ladies’ Days have faded entirely from the scene, but classroom conversations about rape have remained uncomfortable for women students to navigate in part because of their perception that professors are treating the topic cavalierly or belligerently. According to students who contributed to a recent profile of a prominent criminal law professor at Harvard, his classroom discussions in the 1990s returned repeatedly to the subject of rape, even when the topic was not on the syllabus, and he tended to emphasize convoluted and sexist theories for finding that the accused man had made a reasonable mistake about his partner’s consent.⁵⁶ Finally, a woman student raised her hand in class and “said, essentially, O.K., enough rape examples! There are women in this class who have been raped. Can we move on to something else?” According to other students in the room, the professor did not take kindly to this intervention.⁵⁷

We don’t know how long these sorts of stories have stuck in students’ minds. At least in some classrooms—including perhaps one of ours—students seem to perceive that the days devoted to studying the law of rape will serve some of the same functions as the Ladies’ Days did. Today, our students call those days “Rape Week,” a label that is challenging for us to interpret as an improvement.⁵⁸ More to the point, we keep reading and being told directly that students do fear their arrival at this point in the criminal law syllabus, and they are asking for our help.

Some professors seem inclined to throw in the towel on teaching rape.⁵⁹ In our estimation, that would be a big loss because rape is among the most

⁵⁵ See Epstein, *supra* note 41, at 51. In 1968, women students at Harvard Law School took it upon themselves to put an end to Ladies’ Day. Knowing that the questioning was sure to include a property case that had something to do with underwear, at the end of the session, the women pulled lingerie from their briefcases and threw it at the professor. And that was that. See *id.* at 52.

⁵⁶ See Connie Bruck, Alan Dershowitz, Devil’s Advocate, *The New Yorker* (July 29, 2019), <https://www.newyorker.com/magazine/2019/08/05/alan-dershowitz-devils-advocate>, [<https://perma.cc/7CYT-CVE6>].

⁵⁷ One male student recounted that the professor’s “hair just caught on fire . . . He seemed to take that as a challenge to his authority, and he made it clear he was going to teach what he wanted to teach.” *Id.*

⁵⁸ See Katie J.M. Baker, Teaching Rape Law in the Age of the Trigger Warning, *BuzzFeed News* (Apr. 3, 2015), <https://www.buzzfeednews.com/article/katiejmbaker/teaching-rape-law-in-the-age-of-the-trigger-warning>, [<https://perma.cc/Y4WZ-4KAB>].

⁵⁹ See *id.*; Jeannie Suk Gersen, The Trouble with Teaching Rape Law, *The New Yorker* (Dec. 15, 2014), <https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>, [<https://perma.cc/AQT5-TCAU>].

dynamic areas in the criminal law curriculum in terms of law reform and the public has a deep interest in the topic. After all, most people want to—and do—have sex, and rape law speaks directly to the question of whether—and under what circumstances—our sexual activity is lawful or unlawful. And because so many people have themselves been survivors of rape, it is likely that some of those survivors are present in the classroom. They have a personal stake in the discussion and in what reforms should look like. Handled poorly, classroom conversations about rape can be quite difficult because those conversations remind those students about—and perhaps cause them to re-experience—the painful events that we are aiming to eliminate. Surely, we can do better.

III. WHAT NOW?

We propose that it is essential to continue to teach topics that, like rape, are legally, politically, and culturally loaded. It is equally essential to teach these subjects carefully so that professors and students have a shot at studying the material free from the special anxieties its coverage historically has created for women entrants to this masculine citadel. We know that if a discussion is left uncontrolled, men are more likely to speak than women. For this topic, like so many others, women's voices are critical to the conversation. For these reasons, we believe that it is important for professors to be mindful of the students' experiences in the classroom, and to be intentional in their pedagogical choices.

Cold-calling is an ineffective way to teach topics like rape. This pedagogy ends up being “cold” along at least two different dimensions. First, the student experience can be quite chilly.⁶⁰ Cold-calls are cold because they take students by surprise, requiring them to answer the questions of the professor in front of their classmates. Public speaking is an activity that makes most people anxious. Being forced to do it without advance notice—and about a topic in which the speaker has little expertise and almost no language—compounds the pressure. Indeed, this is the stuff of actual nightmares. If the student has personal experience with the subject matter at hand, the student's pain is likely to be multiplied. Because a cold call is public, there is no way for the student to opt out of the discussion privately—even the request to “pass” becomes a public moment, and sometimes a moment of humiliation for the student. That

⁶⁰ See Bernice Resnick Sandler, Lisa A. Silverberg & Roberta M. Hall, *The Chilly Classroom Climate: A Guide to Improve the Education of Women* 38 (1996).

student certainly will not have learned anything about the material from such an interaction, nor is it likely to foster cheerful participation from the rest of the students.

Second, cold-calling and the Socratic Method generally can also be “cold” in that the practices usually require students to strip away their own human reactions to material in the process of extracting a legal principle from the cases they are reading. Pain lies below the surface of every case we read in law school—at the heart of each case, something has gone terribly wrong, leading to a lawsuit. When we learn to “think like a lawyer,” we may be learning to treat human beings as legal abstractions. An injured child is “the plaintiff.” A dead child is part of “an estate.” Gruesome torts and contracts cases become the stuff of in-class jokes. In an effort to master the doctrine, we sometimes lose sight of our own human intuition and sympathies.

No, we are not recommending that law school classes should become group therapy sessions, though more and more law schools are including professional counselors on their administrative staffs. Certainly, students must learn how to master the art of legal analysis. Discussions centered only on students’ intuitions about and personal reactions to the topic at hand are insufficient. However, as Kennedy and Crenshaw note, our law schools are now, thankfully, populated by students with myriad backgrounds and perspectives. The ostensibly “objective” perspective of an appellate judge or the author of the casebook being used in class is sure to be inconsistent with the lived experiences of many of our students and the communities from which they come. Requiring students to sublimate their experiences—to behave as if there is no humanity at play here—unfairly burdens the students with the highest stakes in the material and is likely to impede their ability to learn.⁶¹

So, if conventional cold-calling should be off the table, what should you do? Start with the obvious: Faculty teaching cases about painful and all-too-common experiences such as rape—and, really, all other topics in law school—should keep in mind their objectives, what they are hoping their pedagogy may achieve.

For our part, first, we want to teach students to engage in analytical thinking. The Socratic Method can help achieve that goal in that it offers students the opportunity to have focused and disciplined conversations about the material. However, there is no reason that the conversation

⁶¹ See Crenshaw, *supra* note 36, at 3; Kennedy, *Legal Education*, *supra* note 30, at 594–95.

needs to happen without notice. A system in which students know when they will be expected to speak leads to better preparation and often a better classroom discussion. Then too, professors can give students guidance about the general or particular questions that will be explored in class so that they can be prepared to do a decent job. Moreover, the conversation need not be between one student and the professor. Allowing or requiring students to speak to one another in pairs or groups—before or during the classroom session—can be beneficial as well.

Second, we want to teach students to be able to articulate their ideas aloud. With that goal in mind, a single cold-call is counterproductive. Speaking up is more easily done with practice. In a class that fosters active conversation, students have practice at expressing their ideas, and they will get better at it. A class in which a student is only called upon to speak once does not offer that student an opportunity to practice, and that single recitation feels magnified because it is a stand-alone experience. Ideally, all law school classes would be smaller in size to offer students multiple opportunities to speak—the University of Virginia study shows that classes of 30 or less result in more gender parity in conversation.⁶² In larger classes, it is helpful to give students notice when they will be on call so that they are more likely to be able to answer questions effectively and feel good about the experience.

We also suggest that the conversation will be better if the students are made aware of their responsibility for their contributions to the dialogue. This may require a professor and the students to spend time at the start of a course agreeing on norms that encourage classroom participation, so that students understand that they empower themselves by speaking and take it as part of their job to unlearn patterns of disengagement.⁶³ Such a conversation also offers the professor the opportunity to remove some of the threat of backlash that women in the classroom might face for speaking up by framing participation as a requirement of the class. It can be very useful for a professor to create a schedule of when students are expected to speak so that the “job” of who is speaking is clear.

Third, we want to teach students to manage the human side of what it means to be a lawyer. Just as a doctor must learn to treat a suffering patient without falling apart in the face of that patient’s pain, so too a lawyer must be able to manage the emotions at play when a client needs help. If we

⁶² See Shadel et al., *supra* note 2, at 35.

⁶³ See, e.g., Crenshaw, *supra* note 366, at 13.

use the Socratic Method to teach students to dehumanize their clients or to ignore their own human intuitions and experiences, then we are not teaching them to be effective lawyers. We suggest foregrounding the emotional component of the topic—to state explicitly that the legal principles are not the only things that are important about these cases. It is useful for students to be reminded that these cases are about human beings, and by exploring them, we are trying to make the law a tool that can make things better in these traumatic situations. By tackling hard cases, students are practicing managing their own emotions so that they can think strategically. Students should also have the right to opt out of being on call if a public recitation about a subject would impede their learning, privately and without penalty. Lawyers are able to avoid certain kinds of cases if they choose to. Law students should have similar freedom.

Sometimes, the silent students have the most useful insights. Their participation lights up the whole classroom and, with it, the legal world. That is why we believe that it behooves professors to design classes that encourage student participation from the beginning, so that students feel comfortable speaking and listening to one another. It is possible to create an environment in which a student will choose to speak, which benefits both the student and the class as a whole. It is the job of the professor to take on the challenge of creating such an environment.