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Separate but Equal Is Unequal: The Argument against an All-Women's Law School

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An examination of current topics in legal education reveals the prominence of gender issues. Women's experiences in law school have changed throughout history and continue to be the subject of much debate, as was evidenced by a "summit" at Mills College, an all-female college in California. The summit included a debate about the potential value of a women's law school, which yielded "To Give Them Countenance": The Case for a Women's Law School, an article by Jennifer Gerarda Brown calling for single-sex legal education. This note argues against that proposal and in favor of legal education, where both men and women learn in the same classroom. Part I reviews the history of women in legal education, the plight of earlier all-women's law schools and the strides that have been achieved by women in coeducational law schools. Part II addresses women's experiences in law school today and questions the existence of a gender gap. The recent debate about single-sex education is addressed in Part III. Based upon that information, Part IV concludes that single-sex education is not an adequate solution to the gender issues in legal education nor in the law profession as a whole. In evaluating the different articles on the subject of gender, it is nearly impossible to do so with pure objectivity. As will be discussed, gender affects one's viewpoint. And most authors have written in the context of the law school at which they taught or attended;

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therefore, I acknowledge that I write from the viewpoint of a female student at Notre Dame, one of the last law schools to admit women.2

I. PAST EXPERIENCES OF WOMEN IN LEGAL EDUCATION

Ada Kepley was the first female to graduate from an American law school in 1870.3 Kepley's struggle to gain admission and acceptance represents the struggle many women have faced upon entering the legal profession, as Kepley was not admitted to the bar until 1881.4 From the first introduction of women in the legal field5 to the beginning of the twentieth century, women accounted for approximately one percent of the nation's law students. That number rose to four percent in 1964,6 and in 1972, women earned seven percent of the law degrees awarded; twenty years later, women were awarded forty-three percent of all law degrees in the United States.7 Law schools were slow to admit women, with Notre Dame and Washington and Lee being the last to admit women in 1969 and 1972, respectively.8

Women have made inroads into law school and presently account for half (or more) of all students entering law school.9 In 1960, ninety-seven percent of the lawyers in the United States were male, and women comprised only three percent of the profession.10 In the year 2000, the American Bar Association

3. See Karen Berger Morello, The Invisible Bar 49 (1986). See also Epstein, supra note 2, at 50. Kepley graduated from the Union College of Law, which is now Northwestern University School of Law.
4. See Epstein, supra note 2, at 49-75; and Morello, supra note 3, at 49-50. Law professors and administrators made gaining admission into law school very difficult for women, but being admitted to the bar made the fete of law school admission seem easy. See Bradwell v. Illinois, 83 U.S. 130 (1872) and In re Goodell, 39 Wis. 232 (1875). But see In re Kilgore, 5 A. 872 (Pa. 1886).
8. See Epstein, supra note 2, at 50.
9. See infra Appendix A.
(A.B.A.) Commission on Women in the Profession estimated that women account for twenty-seven percent of American lawyers.\(^\text{11}\) The increased number of women leads to the understandable emphasis placed on gender roles. There are more women in law school and more female attorneys than ever,\(^\text{12}\) and hence an increasing amount of interest in the effects of law school upon women.

A. The History of Women-Oriented Law Schools

Brown’s article is not the first to suggest an all-women’s law school. In fact, such institutions existed nearly one hundred years ago. By examining the history of law schools whose mission was furthering women’s legal education, the reasons for maintaining law schools as co-educational institutions emerge. The history of women-oriented law schools proves that the success of such an institution is dubious and that the problems of the past still exist. The past casts doubt on the success of such a school today.

Portia Law School opened as the first all-women’s law school in 1908 in Boston. Portia began as an evening bar review course for two women and in 1922 was large enough to open a day school.\(^\text{13}\) The biggest challenge faced by Portia Law School was the increase in standards required for passing the bar and maintaining school accreditation. Early in its founding, Portia was responsible for the legal education of women in Massachusetts and posted a Massachusetts bar passage rate of sixty-five percent (compared to a forty percent passage rate of all students sitting for the bar).\(^\text{14}\) With more difficult standards implemented in 1936, including an oral bar exam, the passage rate dropped to only seventeen percent, whereas the male passage rate rose to forty-six.\(^\text{15}\) Such statistics cast doubt on Portia’s preparation of its students\(^\text{16}\) and injured its reputation.

\(^{11}\) See id.

\(^{12}\) See id. at 5; see also A.B.A. Sec. of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development: An Educational Continuum (1992) [hereinafter MacCrate Report].

\(^{13}\) See Morello, supra note 3, at 70.


\(^{15}\) See id.

\(^{16}\) That is not to say, however, the prejudice of the bar examiners is not to be considered a factor in the decline of passage rates, especially with oral exams. That topic, however, will not be considered for purposes of this note.
Portia remained an all-female law school until 1938, when its local counterpart, Suffolk Law School, first admitted women. Given the choice, females opted to attend the co-educational school at Suffolk. A greater number of women law students selected the educational opportunity of a law school that included both sexes, resulting in a decline in Portia’s enrollment. Economic conditions also affected law school attendance and forced Portia to admit men. The Great Depression led to scarce financial resources for Americans, making it difficult for men to afford education. Families that could afford tuition at professional schools prioritized the education of men over that of women, further reducing the number of potential law students. As a result of these two factors, Portia admitted men to remain economically viable. It eventually became the New England School of Law in 1969, which still exists today.

That Portia Law School no longer exists as a single-sex entity signifies that challenges exist for such an institution. It also calls into question whether the market for an all-female law school exists. Brown’s article neither addresses nor offers modern solutions to the problems that existed at Portia. The difficulties of maintaining an all-female student population large enough to support the institution and of creating a sufficiently rigorous academic environment must be resolved before another institution can successfully launch such an experiment again. Portia’s history should be examined, and its lessons taken into account before undertaking similar endeavors in the future.

Portia was the more successful of the single-sex legal education endeavors in Boston, but it was not the only attempt at an all-women’s law school in the city. In a similar venture, Cambridge Law School for Women opened as the female equivalent of Harvard Law School in 1916. It was founded by a professor at Harvard Law School, Joseph Beale, and despite support from several other law professors, the school closed at the end of its second academic year. Eleven students completed the first year, but by the conclusion of the second year, there were not enough students for the school to continue. Scholars have not pinpointed the exact reason for its rapid demise, but one contributing factor most likely was Cambridge’s requirement of a college

17. See Morello, supra note 3, at 70.
18. See Chester, supra note 14, at 11.
19. See id.
20. See id.
21. See Morello, supra note 3, at 70.
22. See id. at 69-70.
degree for admission (which Portia did not require). The school was too exclusive for an already small pool of female applicants, the majority of whom did not have the requisite education. Cambridge’s collapse provides the lesson that when founding an all-female school, there must first be a pool of future students who are both qualified and willing to attend. Otherwise, the effort is wasted.

To Give Them Countenance acknowledges that a pool of “strong” female students could be difficult to attract, but declares “[n]onetheless, many strong students would be attracted to a women’s law school.” Yet, Portia and Cambridge opened with the same belief and found it to be false. Brown provides no proof of future law students prepared to select an all-women’s law school instead of a co-educational experience. That such a school does not exist today indicates there may not be a demand or a market for such an institution. Brown fails to support her statement with empirical evidence or other proof. She stands to make the same mistake committed by those before her.

Another endeavor focused on the furtherance of female legal education was the founding of Washington College of Law (W.C.L.), in Washington, D.C. in 1896. Opened by Ellen Spencer Mussey and Emma Gillett in Spencer’s office, W.C.L. was never intended to be a single-sex institution. The first class consisted of three women, and a man joined their ranks in the second year. One reason for admitting men included the founders’ belief that “sex segregation grew out of the ‘separate

23. See id. at 70 (citing the marriage of the founder’s daughter, who subsequently lost interest in her legal education, as another possible factor in the school’s demise).
24. See id. at 69-70.
26. Id.
27. The “if you build it, they will come” philosophy works in baseball, but is a risky basis for the founding of an educational institution.
28. Granted, times have changed and legal education has been dramatically transformed. The problem of attracting students, however, likely still exists, especially given the doubts future students may have about a single-sex law school, including the lack of name recognition, the difficulty in raising funds, quality of faculty and fellow students, and the views of potential employers.
29. See Morello, supra note 3, at 73-74.
31. See id. at 647.
32. See id.
W.C.L. rejected the concept of separate but equal spheres; Mussey and Gillett believed a co-educational law school reflected their commitment to gender equality. The W.C.L. catalogue from 1898-99 stated that the men were on equal footing with the women, which followed their overall approach to the law. "In adopting a coeducational format, they chose not to follow the model of... women’s colleges... [and] aspired to demonstrate women’s equal intellectual acumen for the law by educating women alongside men." Although the domestic and professional spheres no longer serve as the rigid organizers of current society, the risk of reinforcing such stereotypes exists if women voluntarily segregate themselves from men because their needs are “different.” It was that view of “difference” that Mussey and Gillett were fighting, and which women who were, or are, the first in any circumstance have fought and continue to fight. W.C.L. was successful in eliminating the view that female education belonged in its own sphere and, as a consequence, in forging new ground for women. As women today seek to forge new ground in the law and alter their legal education experience, the successful method of educating both sexes on an equal level, as used in the past by W.C.L., should be considered and followed. Unfortunately, gender equality has not been fully achieved. Mary L. Clark reminds us, “Mussey and Gillett’s early successes in training women lawyers should serve as a courageous example and bolster law schools in their efforts to meet the goal of gender equality set forth by these women so long ago.”

Another reason for Mussey and Gillett’s adoption of a co-educational format was their mission “to prepare their female students for entry into a predominantly male profession” and to

33. Id. at 636. “Just as Mussey and Gillett rejected the separate spheres approach to the practice of law by working in fields that were not traditionally open to women, they rejected the separate spheres approach to legal education when they founded and presided over WCL.” Id. at 649-50.

34. See id. at 647.

35. See id. The W.C.L. 1898-99 catalogue explained in co-educational terms why legal education was important:

The reasons advanced as to the importance of men pursuing this study apply equally to women. Both are amenable to the law, and ignorance of the law excuses neither. Both are governed by the law in all business matters, including the descent of property. Both find the knowledge valuable either as a means of caring more advantageously for their own property or of earning a livelihood.

See id. (citing the 1898-99 W.C.L. catalogue).

36. Id. at 650.

37. Id. at 676.
"provide their female students with an opportunity to experience working with, and competing against, men." The founders of W.C.L. believed that for women to enter the mainstream of the legal profession, they must start their study of the law with men. Instead of segregating men from women, men were incorporated into the structure of W.C.L. on all levels, as administrators and faculty, as well as students.

The founders had additional reasons to espouse co-education besides their belief that the co-educational approach provided the best professional training. First, a co-educational student body made the school seem less radical and limited gender-based criticisms of the law school by male lawyers. It was easier for men to criticize and disregard a school that educated only women than it was to denounce a school that educated their own sex as well. Secondly, W.C.L. could avail itself of a broader base of students by admitting men. More students meant a greater tuition base from which to finance the school. Economically and politically, Mussey and Gillett recognized that admitting men was the best way to solidify the position of W.C.L.

Once again, when other law schools in the area began admitting women, the supply of female applicants decreased. This problem has plagued all three of the women-oriented law schools. Although economic factors could be blamed, the trend of declining numbers of students has historically led to the demise of the institutions and as the saying goes, history is doomed to repeat itself. The historic problem should be addressed as one of the largest obstacles to a single-sex law school, and although Brown acknowledges it as an impediment, she does not offer proof that the problem will or can be remedied.

Brown looks to history to support her argument but does not deal with the fact that history also illuminates the difficulties these institutions faced in the past—and will likely remain obstacles to such an institution today.

38. Id. at 651.
39. See id.
40. See id. at 653.
41. See id.
42. See id.
43. See generally id. Both Mussey and Gillett were established and respected in the Washington D.C. legal community, and they based the admission of men on their own experiences. Both women had moved to erase the boundaries of the different spheres and by admitting men, encouraged men to view gender as a way other than that dictated by the spheres.
44. See sources cited and accompanying text supra notes 3, 30.
45. See Brown, supra note 1, at 24.
W.C.L., although it admitted men, was committed to the legal education of women. It promoted this goal not only through the education of its students, but also by the use of female faculty, directors, and deans until 1947 (Mussey was the first female law school dean in the United States). W.C.L. created a law school that favored women but did not promote the stereotypes. W.C.L. achieved the best of both worlds—promoting women in the legal profession, but not excluding men. Women were prepared to work with men, having learned with and from them, yet at the same time the women were confident enough in their abilities to achieve an impressive list of accomplishments. If such an atmosphere could be created with successful results at the turn of the century, it should be possible to achieve the same environment in law schools today as well.

B. Women's Legal Sororities

Brown argues that a women's sorority could be enough to "create a space just for women" in law school. If this is the case, it seems that the formation of such organizations would remedy the gender problems that Brown believes a single-sex school is necessary to correct.

Looking at the history of legal sororities and their demise, the members of these women's organizations a few decades ago found the condition of women in the law improved. In fact, the improvement was enough to lead the members to question their own existence, the purpose of which was to encourage women to study law and to assist those engaged in that endeavor. The President of Kappa Beta Pi, an all-women's legal sorority, asked, "Do those now aspiring to the profession still need such help from other women? If there are men who also espouse this pur-

46. See Clark, supra note 30, at 661.
47. See generally id. Mussey and Gillett did not practice law in the typical female specializations, such as family law. Instead, they focused on international law and business law, which is still today viewed by some as a "more masculine" area of the law. See id. at 624, 627. The list of female "firsts" achieved by W.C.L. alumnae is impressive, proving that they entered territory previously not open to women, thereby shattering the stereotypes. The list of "firsts" includes: the first woman to be appointed National Bank Examiner, the first woman Assistant United States District Attorney in the District of Columbia, the first woman Assistant Solicitor of the Department of State, the first woman appointed as American Trade Commissioner, the first woman on the United States Board of Tax Appeals, and the first woman judge on the Supreme Court of the District of Columbia. See id. at 665 (citations omitted).
48. See Brown, supra note 1, at 8 (citing Litta Belle Hibben Campbell, A Tribute to the Founders of Phi Delta Delta, 51 PHI DELTA DELTA 19-20 (1973)); see also CHESTER, supra note 14, at 90.
pose, should these men be admitted to membership?" Even in 1973, women were not assured of the necessity of a legal sorority. Another such organization, Phi Delta Delta, voluntarily merged with the legal fraternity Phi Alpha Delta. Members of Phi Delta Delta referred to their new association as "a unified home." The members made the decision to join with Phi Alpha Delta and asserted their belief that they could continue their mission and achieve their goals while working with men and no longer excluding them. The merger of the two organizations proves that men and women were and still are associating and working with each other to further their mutual goal of improving the legal community. The merger of Phi Delta Delta and Phi Alpha Delta also stands as an example of male and female law students finding common ground to improve the law school experience, rather than perpetuating differences.

Women can establish a legal sorority whenever they wish. Currently, there are women's groups flourishing in law schools around the country. If women wish to establish such a group, they can choose to make it an informal association or create a formally recognized group that is part of a national organization. Approximately eighty percent of law schools have a women's organization. Because women now comprise one-half of the law students in the country, female students have easier access to one another than was possible when women comprised only one

49. Brown, supra note 1, at 9 n.32 (citing Mary Ellen Brickner, The Grand Dean Reports, 56 KAPPA BETA Pi Q. 142 (1973)).
51. Id. at 9 n.34 (citing Elizabeth Guhring & Margaret Laurence, Resume of Past Events (from Phi Delta Delta to Phi Alpha Delta), 51 PHI DELTA DELTA 88-89 (1973)). Brown called their vision of a unified home "naive," a view which arguably belittles the views of the women at the time, who must have believed they were making an informed decision. Id.
54. See Letter from Lara Hermann, President of the National Women's Law Student Association to Shannan Ball (Nov. 14, 1999) (on file with author).
percent of the law school student population. The opportunity to form informal groups—for studying, support, or both—is readily available and can provide women with the same sense of female fellowship as is achieved through a school-wide or even national organization. The initiative to form such associations rests with the women law students themselves.

Brown believes that a single-sex law school is necessary to create a place only for women within the physical confines of a law school and cites the importance of women creating their own "space" (even literally) in the law.\footnote{Brown, supra note 1, at 7.} However, the groups to which she refers succeeded in creating their own space at co-educational institutions. It is even possible for such groups to create "space" for women in the literal sense, as at Berkeley in the 1980s, where the women had their own lounge in which men were not allowed.\footnote{Interview with Father John H. Pearson, C.S.C., Professor of Law at Notre Dame Law School, Boalt Hall alumnus, in South Bend, Ind. (Sep. 8, 1999).} Women can create their own space by forming a women's group or even lobbying the administration to designate a certain area within the law school as their own, but do not need to separate themselves entirely from men for all aspects of their legal education. The space for which Brown strives can be achieved within the current system of legal education where men and women learn alongside each other. When women form their own organizations, they can derive their own sense of space and belonging, as well as reap the benefits of a co-educational institution. It may even be possible to use such organizations to establish some physical space for women, but not disassociate themselves entirely from space also occupied by male law students. This is arguably the more sensible route as it does not restrict women and allows co-educational interaction in the classroom, yet also enables women to find an area in which they are comfortable.

II. Experiences of Women in Legal Education Today: What Are the Present Problems?

A. The Findings Reported in Lani Guinier et al.'s 

* Becoming Gentlemen are Disputable 

*Becoming Gentlemen* was first a law review article\footnote{Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1 (1994).} and then a book\footnote{LANI GUINIER ET AL., *BECOMING GENTLEMEN* (1997).} by University of Pennsylvania law professor Lani Guinier...
and her colleagues. It stems from a study of students at the University of Pennsylvania Law School (Penn) conducted by the authors and serves as a report on the effect of legal education on women. The book argues that women are hindered in their academic performance. Brown relied heavily on Guinier's work to make the case for an all-women's law school.\textsuperscript{59} However, the book is based on a study of one particular school, at one particular time, the year 1994.\textsuperscript{60} Penn, it can be argued, is hardly a representative law institution but instead is an elite institution that does not represent the experiences of women at the nation's 178 other law schools. "[O]nly a few legal educators would look to Penn as 'typical.' It is precisely its elite character that makes Penn anything but typical."\textsuperscript{61} In a Law School Admissions Council (L.S.A.C.) report,\textsuperscript{62} Linda Wightman found that the difference in performance indicated by gender on which Guinier relies is not as dramatic at other schools.\textsuperscript{63}

Even Wightman's study, which highlights gender differences in law school performance, finds that the magnitude of difference in first year grades is not large enough to be considered of practical significance. Less than one percent of the variance in first year grades can be explained by gender.\textsuperscript{64} One-half of women earned first year grade point averages above the class

\textsuperscript{59} See generally Brown, \textit{supra} note 1 (citing Guinier et al. seven times in the article).

\textsuperscript{60} See \textit{Guinier et al.}, \textit{supra} note 58. The authors acknowledge that their findings "may not apply to other institutions of legal education which do not share Penn's history, traditions, dominant first-year pedagogy, and predominantly male faculty." \textit{Id.} at 109 n.1. However, their language and tone both suggest that Penn is indicative of all other law schools. Brown follows Guinier and also fails to differentiate among schools or acknowledge that experiences vary. Instead, she uses phrases such as "almost universally." Brown, \textit{supra} note 1, at 2.

\textsuperscript{61} See Catherine Pieronek, \textit{Review of Lani Guinier et al.'s Becoming Gentlemen}, 25 J.C. & U.L. 627, 630 (1999). Pieronek also notes, "By basing their discussion on the most negative experiences suffered by some women at one law school during one limited period of time, the authors fail to examine whether those experiences truly represent the norm of legal education or the norm of women's experiences in legal education." \textit{Id.}

\textsuperscript{62} Wightman, \textit{supra} note 7. The L.S.A.C. intended the report to be a response to the criticisms of the effect of law school on women. The report aimed "to provide data on a national basis to examine issues of gender differences in legal education that heretofore have been studied primarily on a small scale or within individual schools" and "to explore a variety of factors . . . in order to expand the definition of . . . characteristics and other variables that might be related to future academic performance in law school as well as overall satisfaction with law school." \textit{Id.}

\textsuperscript{63} See \textit{id.} at 12.

\textsuperscript{64} See \textit{id.} at 11, 26.
mean at their school. This does not support the argument that women are not performing well in the legal classroom and proves that women can and are doing well at co-educational law schools. Brown urges that the disparity in grades bolsters the case for single-sex legal education. The evidence does not fully support her premise. Rather, it proves that women are holding their own and, in many instances, outperforming their male counterparts.

In fact, women are not only succeeding, but excelling, as an examination of female performance at a wide variety of schools demonstrates. At the University of Illinois, women outperformed male students and posted overall higher grade-point averages than their male colleagues for 1994 and 1995. In those same years, women were “either doing equally well or over-represented” on the law review, Order of the Coif and moot court. During the academic year of 1994-95, women compromised a majority of students on the law review at Washington University. The trend has remained the same there. For the 1999-2000 academic year, fifty-three percent of the students at the University of Washington School of Law were female; fifty-six percent of the individuals on the Washington Law Review were female. An internal study at the University of Iowa Law School revealed that female graduates had similar grade-point averages and were equally as involved in law review and Order of the Coif as their male peers. Columbia University Law School determined that “as a group, men performed at a level predicted by their LSAT and their undergraduate grade-point average, whereas women were ‘slightly outdistancing’ their predicted academic performances.” Women’s representation in assorted “academic performance” categories, such as honors graduates, law review, and ranking was equal to male representation in the

65. See id.
66. See Brown, supra note 1, at 17.
68. See id.
69. See id. at 34.
72. See Grapevine, supra note 67, at 33.
73. See id. at 32 (citing Chiu-Huey Hsia, Men, Women Perform Equally Well, Study Says, Colum. Spectator, March 20, 1995, at 1, 5).
same categories at Brooklyn Law School. Women accounted for more than half of the students on the Fall 1999 Dean’s List at the Florida State University College of Law, whereas women comprised forty-seven percent of the student body. Similarly, at Notre Dame Law School, forty-one percent of the students for the 1999-2000 academic year were female, and an equal number of male and female members of the class of 2001 are on the Dean’s List. Turning to the masthead in this journal, reveals that twenty-one of the thirty-one Notre Dame Journal of Law, Ethics, and Public Policy members are women.

Law review membership at other schools also demonstrates the success women are achieving in law schools. Membership of a school’s law review, although the selection criteria varies from institution to institution, is generally recognized throughout academic and professional circles as a sign of success. Women at law schools around the nation are performing as well, if not better, than their male counterparts. At Ohio State, women comprised forty-six percent of the student body and the 1999-2000 law review was made up of an equal percentage of women. The Indiana Law Journal boasted forty-four percent female membership in 1999-2000, whereas forty-two percent of the law school student body was female. Females represented fifty-one percent of students at Emory University School of Law, and women there were doing quite well, making up sixty-eight percent of the 1998-99 Emory Law Journal members. The percentage of women on The Arizona State Law Journal exceeds the percentage

77. Interview with Anne Hamilton, Registrar at Notre Dame Law School, in South Bend, Ind. (Apr. 10, 2000).
78. Id.
80. See 60 Ohio St. L.J. mastheads (1999).
81. See 74 Ind. L.J. mastheads (1999).
82. See Indiana University School of Law, at http://www.law.indiana.edu (last visited Feb. 21, 2000).
84. See 78 Emory L.J. mastheads (1999).
of women students at the law school. Boalt Hall at the University of California, Berkeley School of Law also has a strong representation of women on the law review, with females accounting for fifty-six percent of journal members, while half the student body overall is female. Women make up forty-eight percent of the Texas Law Review, yet forty-five percent of all students are female. Forty-six percent of Yale students were female and that same percentage of women is found in the law review membership. Sixty-one percent of the students on the Boston College Law Review are female. Forty-nine percent of the students at Southern Methodist University School of Law in 2000 were female, the same percentage of the students who publish the SMU Law Review for the 1999-2000 academic year are female. In the same year the Washington and Lee University School of Law posted a female enrollment of forty-two percent, with their law review membership being forty-eight percent female. Although this list is not a comprehensive study of all law schools, it does represent a varied group of institutions, each with distinguishing characteristics. Yet, they all have one factor in common: female students are succeeding and proving that women’s law school performance is certainly not lagging behind those of their male counterparts. In fact, the evidence above proves that women are, at a number of schools, outperforming the men.

Brown suggests that an all-female law school is appropriate as a remedial measure, but the evidence discussed here sug-

86. See 87 CAL. L. REV. mastheads (1999).
90. See letter from Maggie Froneberger, Officer in Southern Methodist University College of Law Admissions Office to author (Feb. 23, 2000) (on file with author).
94. The statistics cover a wide variety of schools: from public to private, some religious, some not, and from different areas of the country. This article includes eighteen examples, ten percent of the A.B.A.-accredited law schools in the country, demonstrating that women's success is a trend throughout.
95. See Brown, supra note 1, at 25.
gests that no remediation is necessary. Brown’s portrayal of women as “injured” by the law school process is not supported by evidence from schools where women are succeeding, and instead of assuming the role of victim, women are playing the part of victor.96

Another gender difference in legal education upon which Guinier bases her thesis is that women seek “distinct qualities in professors and participation in class.”97 Pieronek argues, however, that this statement “is without significant support” because the survey respondents selected the same qualities that they believed to be most important and differed only slightly when selecting the third and fourth most important characteristics of a professor.98 The difference between women and men is not as dramatic as Guinier would have her readers believe. That men and women value the same traits as the most important characteristics in a professor indicates similarity between the genders.

In addition, Brown, Guinier, and others have argued that class participation is a more detrimental experience for women, with female students participating less frequently than their male counterparts.99 Even this is disputable because a sizable number of professors do not give students a choice in participation but require it. In classes where participation is voluntary, Pieronek points out that adult women students must at some point assume responsibility for their education.100 Yet, even though class participation by women is less than that of men, class participation has not been directly correlated to law school grades.101 If professors believed participation was so important, it should also be graded. Women are learning, succeeding in law school, and passing the bar without as much class participation as men. There is a conflict between commentators who agree with the Socratic method as properly preparing law students, and others who find it particularly harmful to women.102 One purpose of

96. See id. (claiming that the legal hurdles to an all women’s law school could be overcome “by stressing the remedial nature of its programs; because women currently are injured” by law school). Whether such an injury exists, and to what extent, is clearly debatable.

97. See Guinier et al., supra note 58, at 44.

98. See Pieronek, supra note 61, at 634 (arguing that because survey respondents selected the same most important characteristics of professors, women and men may be more alike than the authors think).

99. See Brown, supra note 1, at 11 n.42; Guinier et al., supra note 58, at 33 n.86.

100. See Pieronek, supra note 61, at 639.

101. See id.

102. 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,
class participation is preparation of students for appearing before a judge. When before a judge, unfortunately, kind, or even equal, treatment cannot be guaranteed. Men make up a large percentage of law school faculty, and they also constitute a large majority of the judiciary. In that sense, class participation is realistic. Women do not want disparate treatment, so they should accept the treatment as part of their professional training.

An alternative to an all-women's law school would be for a co-educational law school to adopt different means of teaching. The Chapman University School of Law adopted a "more humane" approach to legal education including smaller classes, mentoring and a less confrontational classroom approach. The goal of providing a supportive learning environment was inspired by feminists and the school found that not only were students happier, but the class participation of women increased dramatically when compared with the participation of women at Penn in Guinier's study. Interestingly, a higher percentage of men than women reported that they "never asked questions" in class. The study also showed that self-esteem increased for both women and men. From this, one can conclude that it is not just women who would benefit from alternative methods of legal education. Although prior studies argue that law school has a particularly detrimental effect upon women, the Chapman University Law School study shows that both sexes would benefit from a more supportive environment. The study indicates that it may not be adequate to say that just women are in need of a different experience. The findings of the Chapman study show that law school affects both men and women and questions whether women need to be singled out. The study also shows that feminist critiques can be considered and their suggestions implemented across the board, for both sexes, with success. Additionally, the results of the Chapman approach support the

103. See Grapevine, supra note 67, at 4 (reporting that men comprise 73% of the faculty at the nation's law schools).
104. See Mona Harrington, Women Lawyers: Rewriting the Rules 15 (1993) (noting that in 1993, 90% of the judiciary was male) (citations omitted).
106. See id.
107. See id. at 101.
108. See id. at 103.
findings of researchers that "the characteristics of the [law] school and its student body may contribute to equalizing the reported satisfaction of women and men students."109 Students have a choice regarding what law school they will attend. This decision can dramatically impact their performance and satisfaction, and that fact must not be ignored.

To Give Them Countenance points out that even if the numbers fail to indicate the dramatic difference in women’s law school experience, law school's effects on women’s psyche demonstrates the detrimental effect that legal education has on women.110 Yet, once again, there is evidence to the contrary. Wightman’s study found no “practical significance” in the level of satisfaction with the decision to go to law school or the law school experience between women and men.111 This is not to say that legal education is without psychological impact. Men, however, may also be impacted by their time in law school,112 and the effect is determined by the individual’s personal characteristics and experiences (often before law school), not solely by gender. Given the personal aspects, it is difficult to generalize in broad terms such as “male” and “female.” Doing so fails to recognize the uniqueness of the individual and the incredibly varied makeup of each gender.

Brown relies on the findings reported in Becoming Gentlemen as support for her theory that an all-women’s law school is needed as a remedial measure. Different schools post numbers that not only contradict Guinier’s findings but further prove that women are outperforming male law students.113 Because Guinier’s claims are disputable, Brown’s argument and the statistical basis for it are weakened.

110. See generally Brown, supra note 1. See also Guinier et al., supra note 58; Catherine Weiss & Louise Melling, The Legal Education of Twenty Women, 40 STAN. L. Rev. 1299 (1988).
111. See Wightman, supra note 7, at 36, 39-40 (finding that the difference in level of satisfaction is small and “does not meet the criterion for practical significance. These results appear to contradict recent studies chronicling women’s perceptions of alienation in the law school.”).
112. See Grapevine, supra note 67, at 21 (stating that some men may have a difficult time dealing with law school while a female classmate may handle law school without a problem); see also Epstein, supra note 2, at 62. Brown, supra note 1, at 4 (acknowledging that her proposal of an all-women’s law school “does little to help the men who suffer in traditional law schools in the very ways [she] describe[s] women suffering.”). It seems that this, too, could qualify as disparate treatment.
113. See sources cited and accompanying text supra notes 64-94.
B. Not All Law Schools Are the Same and Not All Women Have the Same Experiences

In examining the varied performance of women at different schools, the differences in law schools and that of individual students become apparent. Look at any law school web site, brochure, or bulletin: each school prides itself in highlighting what aspects make it unique. As previously discussed, Penn arguably is not indicative of the 180 accredited law schools in the nation. Brown's reliance on *Becoming Gentlemen* shows that her belief is based on experiences at one particular place at one particular time.\(^\text{114}\) Neither her findings nor Guinier's findings ring true for every law school. That is not to say women are treated equally at all schools. The A.B.A. Commission on Women in the Profession found that "barriers do not exist universally, nor are they present to the same degree at every school."\(^\text{115}\) A new book, *The Women's Guide to Law Schools*, highlights the differences for prospective female law students and finds that not all law schools display an unfair bias toward males. In addition, among the women who felt that their chosen law school failed to do all it could to be female-friendly, not one student regretted going to law school.\(^\text{116}\)

As pointed out in *The Women's Guide to Law Schools* and other publications, not all female law students experience different treatment from the treatment their male counterparts receive.\(^\text{117}\) Brown, Guinier, and others try to generalize the females' law school experience as being similar for all members of the gender. Such a claim, however, does not adequately consider the unique characteristics of each individual. "Obviously, not every woman will care about the same things."\(^\text{118}\) The approach adopted by Guinier also "dismiss[es] inherent differences among women."\(^\text{119}\) The generalization of women as a specific group with

\(^{114}\) "By basing their discussion on the most extreme of the negative experiences suffered by some women at one law school during one limited period of time, [Guinier et al.] fail to examine whether these experiences truly represent the norm of legal education or the norm of women's experiences in legal education." Pieronek, *supra* note 61, at 627.

\(^{115}\) *GRAPEVINE*, *supra* note 67, at 21. See also *LINDA HIRSHMAN, THE WOMEN'S GUIDE TO LAW SCHOOLS* (1999).

\(^{116}\) See *HIRSHMAN, supra* note 115, at 2.

\(^{117}\) See A.B.A. COMM. ON WOMEN IN THE PROFESSION: OPTIONS AND OBSTACLES 10 (1994) [hereinafter OPTIONS AND OBSTACLES]. See also *HIRSHMAN, supra* note 115.


\(^{119}\) Pieronek, *supra* note 61, at 627. She goes on to point out: by assuming that all women learn in the same way, in a way that is fundamentally different from men, the authors make the same
the same characteristics and capabilities could be considered a reason men did not let women into law a century ago. \(^{120}\) To reinforce that belief would not only harm the view of women as individuals but would also hurt the progress made by individual women.

C. Other Issues May Affect Students' Law School Experience as much as Their Gender Does

Grades vary more by ethnic group than by gender classification. \(^{121}\) Economic class issues and socio-economic factors can also dramatically impact a female student's law school experience. \(^{122}\) Both ethnicity and economic class will affect students at an all-women's school. It is therefore possible that the experiences of someone from a lower economic class or a female student who is an ethnic minority will have the same experience at an all-women's school as she would at a co-educational law school. Guinier's viewpoint may have been influenced by the fact that she is a minority, as well as a female (especially since the first chapter in the book is written in first person, and indicative of her encounters in the world of Ivy League legal education). \(^{123}\)

Identity consists of an amalgam of traits and characteristics; life experiences further shape that sense of self. To say that all women have the same experience denies individuality and differences within the gender. Conceivably, a female from an ethnic, lower class family would not have the same experiences at law school compared with that of an upper-class white female. In fact, she may not want to be grouped with the upper-class white woman, whose life she sees as radically different from her own. Racial or socio-economic differences could be more important take in their approach to reforming legal education that they assert the current system makes by failing to accommodate the different learning styles of an increasingly diverse law student population.

Id.

120. Women as a whole were seen as the fragile sex that belonged at home. The separate-sphere mentality was based upon generalizations about gender. See generally Morello, supra note 3, at 1-38.

121. Grapevine, supra note 67, at 24.

122. See Education and Gender Equality 136 (Julia Wrigley, ed. 1992) (recounting the undergraduate experiences of a woman from a lower-class background in an all-female class). Interestingly, Guinier et al. includes a footnote: "[s]imilar issues emerge somewhat differently in studies of the performance of working-class and poor women in law school." Guinier et al., supra note 58, at 130 n.86 (citations omitted).

123. She attended Yale as a student and has served as a professor at both Harvard University and the University of Pennsylvania.
than simply being male or female. A single-sex law school could not address all these factors and although Brown advocates the establishment of a school where women do not feel like outsiders, minority women or women from lower economic backgrounds may, in fact, still feel like outsiders among some of their classmates. In that respect, an all-women legal education would fail to address the concerns of those students.

An additional issue could be that students, sometimes for no apparent reason or a plethora of reasons, learn differently. Brown (once again following the theme of Becoming Gentlemen) uses language to suggest that all women learn by the same methods, despite footnotes and a few sentences at the end of the section admitting that such an assumption may be false. Different learning styles are also beyond the scope of this Note, although it is possible to say that the formation of a single-sex law school may not have the capability to accommodate the different learning styles of each individual student.

Students come to law school with their own identity, personality, and styles of learning. They have been shaped by their race, religion, upbringing, economic status, and their gender. Brown's article considers the effects of only one of those factors. Failure to consider the other aspects of the student demonstrates that Brown's view is too narrow. An all-women's law school cannot address every aspect that make up the individual.

III. WHY AN ALL-WOMEN'S LAW SCHOOL IS NOT THE ANSWER

A. Why Women and Men Need to be in the Same Classroom

"Law schools must teach by example. The concept of equal opportunity and precepts of gender neutrality should be instilled in the minds of future generations of lawyers."

If law schools segregate students on the basis of gender, neither male nor female students have the classroom as a realistic example of the views of the other sex in a legal context. There would be little precept of gender neutrality instilled in either group, simply because saying the genders are different and need

124. See Wightman, supra note 7, at 29 (The L.S.A.C. presented its results by ethnic group and the "data demonstrate[s] that significantly different results between women and men frequently are found within some but not all ethnic groups . . . . Combining the data would mask important differences in some instances, while in others it would suggest gender differences that do not hold universally."). Discussion of the impact of race and class on law school performance is beyond the scope of this note.

125. See, e.g., Guinier et al., supra note 58, at 57.

special accommodation counters the principle of neutrality. Even Brown acknowledges the danger of an all-women's law school "reinforc[ing] stereotypes and actually promot[ing] rather than fight[ing] women's subordination."127 Women have fought and continue to fight these stereotypes in the legal community. Brown admits that it would be possible for a court to find that an all-women's law school would be "based upon stereotypic notions about men, women and their respective abilities."128 If judges who are to strive for objectivity could determine that stereotypes were even one reason for the founding of such a school, many others could follow a similar (or even less educated) line of reasoning. Such a reinforcement of stereotypes does nothing to further the role of women in the law, or society in general.

Visibility of women in the classroom has been identified by the A.B.A. as a means of bringing about change in legal education. "It is only since female judges ascended the bench and women lawyers became visible in the courtroom that the reform movement to identify gender bias in our judicial system was launched."129 In a similar vein, one may argue that if women want to identify gender bias in the legal education system and reform the current system, women must be visible in the mainstream classroom. Not all women would choose an all-women's legal education, and the potential of decreased visibility of women in the classroom risks slowing the progress presently being made. Progress made in the classroom will carry over into the community of attorneys but that requires women to be visible, as the A.B.A. advises.130

Segregating women will not make women more visible, and it will not force men to deal with the issue of gender. If women segregate themselves, it sends a message that it is also acceptable to assume women alone will deal with gender issues and that it is acceptable to isolate women. Women have made strides by being in the classroom131 and their "substantial presence and growing role" has placed matters of concern to women on the agenda and "provoked serious re-examination" of the legal work place,

128. Id. at 26.
130. See id. at 12.
131. See generally Epstein, supra note 2, at 65-67 (Epstein noted "Ladies' days" signaled a specific day on which professors singled out the female students in class. As a result of female action reaction, such days are no longer tolerated or observed.).
including gender roles that had previously been ignored.\textsuperscript{132} Such a statement demonstrates how women have been integrated into territory that was previously all-male and changed the environment. If women segregate themselves from men, they risk perpetuating a female stereotype and their stereotypes of men. "[I]ndividuals who choose not to interact are . . . creating their own stereotypes or assumptions about others. These stereotypes, if unchallenged, will carry over into the work environment, continuing, rather than eliminating, workplace bias."\textsuperscript{133} Law schools should lead by example and serve as examples of institutions where men and women respect each other, learn from each other, and work together to achieve common goals. If law schools hold themselves out as something other than such an institution and emphasize the difference of their students on the basis of sex, they condone differential treatment because they themselves believe that women need to be seen as different from men, and not equal.

Women in the legal profession strive for equality.\textsuperscript{134} A separate school will not achieve such equality, but instead will highlight differences. "Separate but equal" is not equal, especially in terms of facilities.\textsuperscript{135} Although this assertion was made regarding the racial segregation of schools, the same reasoning applies to segregation on the basis of sex. By voluntarily segregating themselves from men in search of a remedial alternative,\textsuperscript{136} women will make it possible for men to dismiss all women and their feminist concerns (regarding both legal education and the practice of law) as belonging in their own sphere and unimportant to men. Such a viewpoint existed a century ago, but women over the past century have fought to eliminate it.\textsuperscript{137} In fact, women's concerns in regard to the legal profession are shared by men.

\begin{itemize}
\item \textsuperscript{132} MacCrate Report, supra note 12, at 13-14.
\item \textsuperscript{133} Options and Obstacles, supra note 117, at 10.
\item \textsuperscript{134} The MacCrate Report and several other A.B.A. publications highlight equal opportunity for women and freedom from gender bias as goals for the legal profession. The Committee on Women in the Profession strives to bring about these changes.
\item \textsuperscript{135} Brown v. Bd. of Educ., 347 U.S. 483 (1954). Although not relating to professional schools, Brown did relate to the educational environment. Chief Justice Warren wrote, "[s]eparate educational facilities are inherently unequal." \textit{Id.} at 495. Although \textit{Brown} pertained to involuntarily segregated public schools, a parallel can be drawn when dealing with any educational institutions that are segregated on any grounds, including race and gender.
\item \textsuperscript{136} See \textit{Brown}, supra note 1, at 25.
\item \textsuperscript{137} See generally Epstein, supra note 2 (providing an historical overview of the progress women have made in law schools around the nation).
\end{itemize}
Women are catalysts of change and can continue to have a positive impact on each other and their male classmates. Older female law students "blazed a path for older men as well to enroll in law school." This example demonstrates one way in which women law students have changed legal education. Another example is the recent surge of interest in public interest law. Such benefits to both sexes could be lost if women separate themselves from men. The benefits of both genders working together are present in many law schools. Students can change the classroom climate, regardless of sex, and women students can and do alter the law school experience for the benefit of all students, not only those of the same gender.

"[W]omen must first learn to relate as equals to others who are different. To do so requires that patriarchal consciousness and oppression, both external and internal, be challenged." As has been mentioned, women will most likely work alongside men, either as colleagues, clients, or adversaries. Women will have to argue before judges, the majority of whom are male. Law school is a professional school and preparation for the profession should include lessons in how to relate with other individuals in relation to the law. Although law schools are not responsible for the interpersonal skills of their graduates, it is the goal of law schools to produce good lawyers and part of being a good lawyer includes knowing how to relate to others in the context of a legal problem. Women or men who have not had dealings with the opposite sex, whether in class or extra-curricular activities, may not be sufficiently prepared for the real world experience.

140. See id. at 12-13, (The report states that women constitute a majority of students interested in public interest, but the men also interested in public interest work have benefited from women working to promote public interest. The combined effort of both sexes has brought about greater support for public interest at law schools.).
142. Education and Gender Equality, supra note 122, at 132.
143. See Unfinished Business, supra note 10, at 14 (noting that the Federal Judicial Center Office reported in 1995 that men comprised 78% of the federal judiciary, and state courts are even more male dominated).
144. This is also evidenced by the client counseling instruction offered at law schools and the A.B.A.-sponsored client counseling competition.
Although gender neutrality is a goal, that does not deny the fact that gender does play a role in an individual's perspective. To understand a male client relating the facts, to anticipate the arguments of a male adversary, or to determine the jurisprudence of a male judge, a female lawyer would be well served to have learned the law and the art of argument among men and women. It promotes a greater appreciation of different viewpoints, which is crucial in the law.\textsuperscript{145} "[L]egal education requires an exchange of ideas . . . [which is] often most meaningful when it occurs between those with differing views and life experiences."\textsuperscript{146} Women and men learn from each other in the law school classroom, and to learn from only one gender would not provide the same education\textsuperscript{147} and would deprive the students of a different viewpoint, which could be vital to successfully practicing law.\textsuperscript{148}

Finally, although there have been several studies considering the benefits of single-sex education at the primary and secondary levels, little evidence exists to prove that students would truly benefit from a single-sex professional education. The benefits of single-sex education are arguable,\textsuperscript{149} especially when viewed in the context of law school. To imply that the results of studies pertaining to children also apply to law students ignores a

\textsuperscript{145} "[W]ithout the perspectives of the less powerful in the discussion, the law will necessarily reflect the perspectives of the more powerful." Harrington, supra note 104, at 59. This is not to say that women are less powerful, but offer varied perspectives on the law, both in practicing it and making it.

\textsuperscript{146} Options and Obstacles, supra note 117, at 10.

\textsuperscript{147} Gender, Power, Leadership and Governance 260 (Georgia Duerr-Lahti & Rita Mae Kelly eds., 1995) ("[A] consistent scholarly focus on one sex . . . can lead to distorted understandings.").

\textsuperscript{148} As discussed above, the different viewpoints of fellow students help shape law students for the practice of law as a member of the bar. The awareness and consideration of the different perspectives is important for all attorneys but may be especially so for would-be trial attorneys who will be facing juries. Professor Patrick Schiltz requires all Evidence students to read Susan Glaspell, A Jury of Her Peers (1917). Glaspell originally wrote the story to allow women to sit on juries, and it shows that women see the world from a different perspective than men, which is not only helpful but sometimes necessary for discerning the truth. Though male students could be required to read it to see, as Professor Schiltz phrases it, that each individual comes to the courtroom with his or her own "baggage," it is arguably more helpful to see this truth demonstrated by the different observations offered by women in the classroom. See Patrick Schiltz, Evidence Syllabus (2000) (on file with author).

\textsuperscript{149} See generally Barrie Thorne, Girls and Boys Together . . . But Mostly Apart: Gender Arrangements in Elementary Schools, in Gender, Power, Leadership and Governance 115 (advocating a gender-neutral approach to education at all levels so that differences are not emphasized).
number of extrinsic factors, as well as the purpose of a professional education. Cynthia Fuchs Epstein argues:

[S]egregated schooling for women limits their access to the same educational and associational opportunities men have, and that arguments supporting segregation are based on unsound criteria . . . . [F]urther . . . whatever the intent or ideological underpinning of such arguments, they ultimately have a negative outcome for women's equality in society.  

She goes on to say that segregating women by forming a separate, sex-segregated institution (particularly in higher education) allows society to define women "unilaterally, stereotypically, and ideologically." Such a result contrasts with the aim of a professional education and the missions of our nation's law schools.

Although debates have raged for decades about whether or not law school exists as a professional training ground, the fact remains that law students do enter the professional legal world with a professional degree. Such emphasis on professional training does not exist at the elementary or even secondary school levels. As the authors of *The Chilly Classroom Climate: A Guide to Improve the Education of Women* argue, "an education appropriate for all students . . . requires the inclusion of women—at all levels, as subject matter, in texts, as teachers, and in student/teacher dialogue." A comprehensive discussion of the benefits and/or detriments of single-sex education is beyond the scope of this note. Although an important part of the discussion, it is sufficient to state that there are certainly arguments that women may not find an all-female classroom to be beneficial over attending classes with both genders and may even have, as Epstein and others believe, "overwhelmingly destructive consequences for women."  

B. Practical Problems

The founding of a law school is not an easy undertaking, and the obstacles to establishing a single-sex law school would be even more daunting. Recruiting could be difficult, both in terms

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151. *Id.* at 118.


154. Epstein, *supra* note 150, at 118. For further elaboration on the concept that women are not better off in all-female institutions, see *id.*
of professors and students. The difficulty of finding professors would be especially challenging. At the end of 1995, women constituted slightly more than nineteen percent of tenured law faculty, seventeen percent of law professors, and eight percent of law school deans. In 1996, women accounted for twenty-seven percent of law school faculty. Hiring professors from currently existing schools will lower the percentage of female faculty in those schools, thus hurting the feminist movement in a sense. The numbers of men and women who serve as professors and administrators in law school fail to reflect the equal numbers of women and men in current student bodies. Assuming that current female professors would comprise the pool of possible professors at the all-women's school, the already disappointing numbers of women faculty at existing law schools would drop even lower. Women (and men) who choose co-educational institutions would lose the benefit of having as many female professors, and women in the law school community as a whole would be damaged. The loss of female professors at one institution would harm the visibility of women in the classroom, the visibility of women in front of the classroom. If the faculty at the all-women's school was not comprised of all females, the issue of male domination in the context of learning the law would persist. Many current female faculty may not be willing to leave their current positions. Although a variety of reasons exist, some professors do not support the premise of the institution and would be unwilling to teach there. It would also be a professional risk for professors to go to an unknown and controversial institution, a risk they may not be willing to take. The school may not be able to recruit experienced female faculty, and Brown does not address this problem. Would male faculty be acceptable? Would women lawyers who have not taught before step into the academic arena? Brown does not examine the effects of such possibilities on either the founding of the school or the school's reputation if it did manage to open its doors.

Attracting students is another challenge to the founding of an all-women's law school. The new school would have to over-

157. Professor Barbara Babcock of Stanford and Mary L. Clark of Yale have publicly argued against the founding of an all-women's law school and participated in the debate about single-sex legal education at Mills College. See Brown, supra note 1, at 1. Cathy Pieronek, in law school administration at Notre Dame Law School, also expressed her doubts about single-sex education at the post-secondary level. See Pieronek, supra note 61, at 635 n.49.
come doubts of individuals in the legal world who believe that a balanced professional education includes interaction with both genders. One option is to arrange student exchanges from existing schools. Although Brown suggests that such exchanges are feasible and could boost the school’s reputation, it is conceivable that employers would be wary of the single-sex education regardless.

Brown believes that a classroom made solely of women would encourage class participation, but just because her fellow students are all women may not ensure that a female student will feel comfortable speaking in class. There is no way to guarantee that there will not be any intimidation or domination by classmates or the professor. Looking at past schools (such as Portia), meeting the accreditation standards was a challenge and could be difficult for a new law school starting from scratch.

Founding an all-women’s law school that would be respected would be an exceptional challenge. If the school is founded and is not respected, it could hurt women in law school. Not only would the school not be taken seriously, but also the efforts of women in the law could be trivialized along with it.

C. Legal Problems

1. How United States v. Virginia (VMI) Applies to the Proposition of an All-Women’s Law School

The United States Supreme Court has spoken on the issue of single-sex education at the college level both in United States v. Virginia (“VMI”) and cases before it. In VMI, the most recent case of this nature and the one with the highest profile (including much media coverage), the Court held that the Virginia Military Institute’s refusal to admit women violated the Equal Protection Clause of the Fourteenth Amendment. Using a heightened standard of review, and with the burden on the State, the Court found that the “proffered justification” for the sex segregation was not “exceedingly persuasive.” Differential treatment by institutions of higher education was held

158. See Brown, supra note 1, at 34.
159. See EDUCATION AND GENDER EQUALITY, supra note 122, at 133 (recounting the author’s experience teaching an all female class where “the feminist majority talked at, not with other students . . . effectively silenced non-feminist majority. Thus, rather than sharing ideas and learning from each other, students used knowledge to create a distinct hierarchy in the classroom.”). Although this is just one experience, it demonstrates that it is possible for a hierarchy to exist in a classroom regardless of the students’ gender.
161. See id. at 533.
unconstitutional in this instance, and the same conclusion could be applied to an all-women's law school (or any other all-female college or professional school). In fact, Justice Scalia said in his dissent: "The only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today." In discussing VM, Brown writes:

The Court suggested that generalizations about 'tendencies' of men and women must be scrutinized carefully, but the Court might view exclusion of men from a women's law school (a preference for women in a field historically dominated by men) differently from the exclusion of women from a military academy (a preference for men in a field historically dominated by men). Neither Scalia's statement nor the majority opinion of the Supreme Court supports this statement. The Court provides no indication that favoring one sex over the other is acceptable.

The Supreme Court in VM relied on Mississippi University for Women v. Hogan (Hogan),164 which it found to be directly on point. Hogan held that an all-women's nursing school could not have an admission policy that excluded all males because "archaic and stereotypic notions" cannot justify discrimination. The Court held that the only acceptable discrimination is that which furthers "important governmental objectives." Brown believes that because an all-women's law school would discriminate in favor of women in a field historically dominated by men,

162. See id. at 600.
165. See 518 U.S. at 559.
166. 458 U.S. at 724-25.
the Court would be willing to find in favor of the school.\textsuperscript{167} Perhaps she believes this because, in her opinion, evidence supports the view that women are harmed by the co-educational law school experience. As previously discussed, data exists to challenge that conclusion.\textsuperscript{168} If an all women's law school was founded, such an assumption of legality would require a sizable leap of faith and vote of confidence that the Supreme Court would agree with the argument.

The suggestion of an all-male law school would likely outrage Brown, Guinier, and many others; yet, Brown wants men to accept a school comprised entirely of women. Such a suggestion rejects equal treatment and in fact demands special consideration that by some persuasive accounts is not deserved. In fact, Brown bases her argument on the fact that an all-women's law school is justified as a remedial measure; whereas, an all-male law school is not.\textsuperscript{169} As previously discussed, this article rejects the premise that women law students are in need of remedial assistance.

Such an interpretation is unlikely given that in VMI the Court generally condemned gender stereotyping. It would not seem acceptable to let women discriminate (as Brown herself calls it) against men, yet not allow men to discriminate against women. Brown does not consider that an acceptable counterpart to the all-female institution and emphasizes that allowing all-male schools "further limit[s] opportunities for women in legal education."\textsuperscript{170} The Court found gender-based educational discrimination unconstitutional,\textsuperscript{171} not only discrimination by men. It sought to erase all gender-based limits on educational opportunities. Discrimination of any kind, not just reverse discrimination, will most likely not be tolerated by the Supreme Court.

2. Title IX

\textit{VMI} and \textit{Hogan} both concerned public institutions. As Brown writes, the possibility of an all-women's law school emerging out of a public institution is highly unlikely.\textsuperscript{172} As a private institution, however, the single-sex institution would still be sub-

\begin{footnotes}
\item[167] Brown, \textit{supra} note 1, at 25.
\item[169] See Brown, \textit{supra} note 1, at 29-30.
\item[170] See \textit{id.}
\item[172] See Brown, \textit{supra} note 1, at 26. In addition to the reasons already mentioned, a strong Equal Protection claim could be made against such an institution.
\end{footnotes}
ject to a claim under Title IX of the Education Amendments of 1972 (Title IX).173 Even Brown acknowledges that facially, Title IX fails to permit a single-sex law school.174 Her solutions of reinterpreting or rewriting the statute are implausible and impractical.

Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."175 The statute goes on to provide definitions. "For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ."176 The language of the title clearly states that no federal financial aid will be given to a school, including a professional school such as a law school, that discriminates on the basis of sex/gender. The language does not leave itself open for other interpretations and even cuts off Brown's argument with the provision:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area . . . .177

The fact that women equal one half of the lawyers or even law students in this country is not a justification under Title IX to treat men disparately and give women preference by forming a separate law school for women.

Brown argues that the courts should "reach beyond the language" of the statute, a position that robs Title IX of its meaning and challenges the precedent set by judicial holdings that were grounded in the text of the statute. Her reading of Title IX is ludicrous—courts quite possibly will refuse to ignore the text so that they may rely solely on the "intent" of the statute, and will be especially reluctant to do so when the intent is arguably reflected

174. See Brown, supra note 1, at 26-27.
in the language of the statute. For support, Brown cites Senator Birch Bayh, the legislation's chief sponsor, as stating that Title IX should cover graduate and professional schools because "[n]o one can argue that these schools have any justifiable reason to discriminate against one sex or the other." But this statement proves that the statute exists to eliminate gender discrimination at all educational levels. In fact, Senator Bayh's statements and evidence before Congress reveal his goal of achieving equality at all schools. Bayh provided no indication that law schools were to be treated differently from other institutions, nor did he give any reason to believe that the statute would exist to lessen equality within law schools. Brown's suggestion of an all-women's law school arguably directly violates the intent of Title IX as stated by Senator Bayh at the time of its enactment.

Brown would like an "exemption" for women's professional schools to allow them to discriminate, which violates the intended application of Title IX to any school receiving federal funds to further the goal of gender equity. It is possible that even if a court followed Brown's suggestion of ignoring the text and looked solely at the intent of Title IX, a single-sex law school would be found to violate the statute. The legislation exists to deter discrimination in education, and the argument for an all-women's law school disregards the law. Brown wants the courts to condone reverse discrimination by finding that it is acceptable for women to discriminate against men. Title IX, as anti-discrimination legislation, does not support this reasoning.

Brown argues in the alternative for an amendment to Title IX, an amendment that would defeat the original purpose of Title IX. In addition to the legislative history above, the language of the statute itself proves that the drafters did not enact the legislation to achieve the end Brown desires. Title IX reads, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." Brown advocates that a gender-neutral approach should be adopted instead. Yet, the text itself refers to "no person," a seemingly already gender neutral application; her suggestion of "gender neutral approach" is vague and undefined. Brown seems to

178. Brown, supra note 1, at 28 (citing 118 Cong. Rec. 5807 (Feb. 28, 1972)).
180. See Brown, supra note 1, at 27.
182. See Brown, supra note 1, at 29.
advocate an approach that allows institutions to ignore gender-based schools. Congress passed Title IX so that institutions receiving federal funds could no longer ignore gender, and to force them to ensure that women receive equal treatment. 183

Brown suggests an amendment to the statute so that Title IX would no longer apply to law schools specifically or to professional schools in general. (This is as detailed of a suggestion as she gives, however, failing to recommend specific text or look at the future application and interpretation of such an amendment.) This reasoning requests a "gender neutral" approach so a school may legally reject gender. Such incongruous reasoning does not appear logical or practical. To eliminate some specific category of schools may also step on the slippery slope that would erode the application of Title IX to other institutions. In addition, such an amendment could be passed by Congress, but the Congress has not done so yet; to infer that the law should be interpreted otherwise disregards the legislative history and intent. Brown's request for an amendment is in reality an attempt to undermine the legislation that could eliminate Title IX's application in all respects. Brown fails to consider the repercussions of such action.

Although she fails to view the broader picture of such an amendment's effects, Brown does acknowledge that it could affect legal education, in that it could enable the return of all-male law schools. This possibility would go against every principle behind Title IX, almost ensuring that such an amendment would never be acceptable. Title IX was passed to help counter male domination in the educational realm. To permit a reprise of such institutions would set back thirty years not only law schools but also academic and athletic programs that benefit from the legislation. 184

Title IX exists to prevent schools, such as the proposed all-women's law school, from discriminating against individuals on the basis of their gender; the goal of the legislation is evident in both the actual language and intent of the statute. Both of Brown's attempts to alter the interpretation or the text of Title IX itself would likely fail because they undermine the purpose of the statute and would counteract the positive effects that have been achieved under Title IX legislation. Brown requests permission to discriminate on the basis of gender. The Senate

declined to condone or support such actions twenty-seven years ago and will hopefully continue to do so.

**Conclusion**

This article has shown that the argument for a single-sex law school is weak, and there are many reasons for today's law schools to remain co-educational institutions. History teaches that there are obstacles for an all-women's law school to overcome, but it also provides W.C.L. as an example of equal legal education of women and men that was successful and produced accomplished alumnae. If women want to form sororities or women's groups within their law school classes, they may do so and that may bring some sense of belonging. The individual law student is a unique entity and his or her reaction and performance in law school may depend on a number of factors that are personal. To generalize into two broad categories of "male" and "female" fails to recognize the individuality of students, and how their experiences are personalized to them. Factors other than gender contribute to a student's identity and a student's response to the classroom environment can be determined by characteristics, such as ethnicity, economic class, and religion. In the same manner, students must take individual responsibility for their education.

Women are succeeding in co-educational law schools. Students learn from each other. To limit that learning and experience to only women would detract from their legal education. It would also fail to prepare women for working alongside men in the future. Women are not in need of a remedial alternative, but instead may need remedial help in the workplace if they attend an all-women's professional school that failed to prepare them for their place and obligations in the legal profession. Law schools would also be harmed by the loss of the female perspective and leadership provided by female students and faculty.

Title IX has helped bring about equal numbers in enrollment and should not be changed. The proposed interpretation of an amendment to the statute is not a viable alternative to today's system, but could be detrimental to the advancement of women. Women do not need a remedial alternative to today's law schools. Some women may need academic environments different from that of the school they chose, and those alternatives are available. Other women may see room for improvement at their institutions. The best way to address the gender issues in legal education is to work from within. By working from within the system, women will force men to deal with gender issues that
are not necessarily specific to females. Such issues may not pertain only to gender but also could be questions of equal rights, parental rights, child care issues and other topics affecting both men and women.

Sarah Berger was correct when she argued that legal education should be broadened and deepened in ways that respond less to the fact that "there's ladies here" than to the fact that there are professional obligations students are not being prepared to meet.\textsuperscript{185} Future lawyers face a myriad of issues relating to the practice of law (such as ethics) and also their lifestyles as a practicing attorney. Issues concerning women overlap those multiple areas, and in fact may be issues common to all attorneys, not only women. By improving the profession and preparing students to be the best possible attorneys, law schools will also change not only the law school environment but the practice of law as well. The benefits could be far-reaching. Working from outside the system would not have as dramatic or as widespread an effect. It would be easier for men to ignore women's concerns, which ultimately could be to the detriment of future attorneys.

The A.B.A. Commission on Women in the Profession's publication \textit{Don't Just Hear It through the Grapevine: Studying Gender Questions at Your Law School}, encourages law schools to take responsibility for the environment which they create. It urges institutions to form \textit{ad hoc} committees to examine gender issues, do a self-study, and then use that information to make changes in the first year curriculum.\textsuperscript{186} Women must assess their situation at law schools in the most objective manner possible before they can determine how best to bring about gender equality. The A.B.A. has urged that "[u]ntil women of influence lead the effort to implement permanent and pervasive changes in the profession, women will find themselves at the foot of the hill, forever pushing the same rock."\textsuperscript{187} Such a warning from members of the profession should be heeded; women must continue working to change the practice of law to represent their presence and important influence.

The options for doing so are numerous. First among the solutions is to hire more female faculty members: professors, deans, and administrators. In addition to giving all future attorneys a female perspective and fostering respect for women, such

\begin{itemize}
  \item \textsuperscript{185} Sarah Berger et al., "Hey! There's Ladies Here!", 73 N.Y.U. L. Rev. 1022 (1998).
  \item \textsuperscript{186} See \textit{Grapevine}, supra note 67, at 1, 18.
  \item \textsuperscript{187} \textit{Unfinished Business}, supra note 10, at 3.
\end{itemize}
hiring would also give women students female role models. W.C.L. is an example of how such a plan was successfully implemented.¹⁸⁸ Professors should take the initiative to make students feel comfortable speaking up in class, whether those students are male or female. Students should not be permitted to belittle the concerns of other classmates, be they male or female. Such action could make law school a more comfortable learning environment for all involved, regardless of gender. Teaching methods other than the strict Socratic method should be explored. Students would argue that law school has changed little since the introduction of the Socratic method, and so schools should examine whether a more modern approach reflects the different make-up of the student body, as well as the changes in the practice of law.

All of these are suggestions for a law school experiment that could address issues raised by women, such as Brown and Guinier, and improve the law school experience for all students, while at the same time not segregating men from women. "Separate but equal" is not equal, and women should assert their position as equals, in the law school classroom and in the profession as a whole. Therefore, to achieve these ends, law schools should remain co-educational.

¹⁸⁸ See generally Clark, supra note 30, at 675.