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Tanisha Makeba Bailey

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# THE MASTER'S TOOLS: DECONSTRUCTING THE SOCRATIC METHOD AND ITS DISPARATE IMPACT ON WOMEN THROUGH THE PRISM OF THE EQUAL PROTECTION DOCTRINE

TANISHA MAKEBA BAILEY \*

## I. INTRODUCTION

This article attempts to construct arguments that will expose the Socratic Method's disparate impact upon women law students, and lay a path to constitutional redress under the equal protection doctrine. This will be done in three steps. Firstly, this article will examine the historical pattern of discrimination against women in American law schools for the past one hundred and thirty years. Secondly, through the presentation of both testimonial and statistical evidence of the disparity in classroom experience, grades, and grade-based opportunities, an enhanced view of the severity of the discrimination women face will emerge. Finally, I argue that the disparity itself will substantiate an equal protection claim against this pedagogical practice in many state-funded universities. This article will demonstrate the need for constitutional scrutiny, which will ultimately serve to eliminate this final, sexist vestige from the body of the American legal education system.

In constructing this argument, I am reminded of the words of womanist<sup>1</sup> writer Audre Lorde, who wrote:

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\* J.D. Candidate, University of Maryland School of Law, 2003. I would like to thank Professor Barbara Bezdek who inspired me two years ago to "add [my] voice to the legal landscape." Her call for creativity in legal thinking inspired this article. I would also like to thank Dr. Heather Neff for her unwavering friendship and support that has guided me throughout my life and especially this journey through law school. Finally, I would like to thank Mr. and Mrs. Bernadin Bailey and the members of my family for their ever-constant love, belief, and support.

1. Alice Walker defines Womanist as:

Womanist 1. From *womanish*. (Opp. of "girlish," i.e., frivolous, irresponsible, not serious.) A black feminist or feminist of color. From the black folk expression of mothers to female children, 'You acting womanish,' i.e., like a woman... 2. *Also*: A woman who loves other women, sexually and/or nonsexually. Appreciates and prefers women's culture, women's emotional flexibility (values tears as natural counterbalance of laughter), and women's strength. Sometimes loves individual men, sexually and/or nonsexually. Committed to survival and wholeness of entire people, male and female. Not a separatist, except

[S]urvival is not an academic skill. It is learning how to stand alone, unpopular and sometimes reviled, and how to make common cause with those others identified as outside the structures in order to define and seek a world in which we can all flourish. It is learning how to take our differences and make them strengths. For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.<sup>2</sup>

Herein, Lorde disputes the possibility of using the tools created by white male oppression<sup>3</sup> to dismantle its extended manifestations of sexism and racism.<sup>4</sup> Lorde proposes that in order for effective change to take place, all vestiges of oppression must be dismantled.<sup>5</sup> She argues that true change cannot be acquired through the very constructions of oppression that characterize the paradigm. Lorde thereby illustrates the impossibility of building a completely new structure, when it is rooted upon the antiquated foundations of the past.<sup>6</sup>

This analysis can be applied to the Socratic Method in legal pedagogy. The use of this patriarchal teaching strategy as a means of adequately conveying information to the female legal mind becomes

periodically, for health. Traditionally universalist... 4. Womanist is to feminist as purple to lavender.

DEIRDRE MULLANE, *CROSSING DANGEROUS WATER: THREE HUNDRED YEARS OF AFRICAN-AMERICAN WRITING 722* (Deirdre Mullane ed., 1993) (quoting excerpts from ALICE WALKER, *IN SEARCH OF OUR MOTHER'S GARDENS: WOMANIST PROSE* (Harvest Books 1984)).

2. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 112 (Nancy K. Bereano, ed., The Crossing Press 2000) (1984).

3. Lorde describes the concept of white male oppression, as follows:  
Somewhere on the edge of consciousness, there is what I call a *mythical norm*, which each one of us within our hearts knows 'that is not me.' In America, this norm is usually defined as white, thin, male, young, heterosexual, Christian, and financially secure. It is with this mythical norm that the trappings of power reside within this society.

*Id.* at 116.

4. *Id.* at 113. Lorde proffers that the manifestations of patriarchy and oppression include for example racism, sexism, homophobia, classism. She argued against its appearance in the realm of "white feminism," and describes the manifestation of any form of patriarchy within the feminist realm as, "a diversion of energies and a tragic repetition of racist patriarchal thought." *Id.*

5. *Id.* at 110.

6. *Id.* at 110-11 (questioning, "What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow perimeters of change are possible and allowable.").

oxymoronic. The use of the Socratic Method creates two issues: whether such a strategy can be effective when it was crafted during a time when women were not allowed to study in American law schools, and whether a system based on exclusion and inequality<sup>7</sup> can be expected to reap academic excellence in those very students it excluded.

Lorde's paradigm provides a scope through which these issues may be viewed, and resolved in the negative. Implementing male-constructed and male-centered teaching tools<sup>8</sup> in an attempt to educate the feminine legal mind handicaps the female student and creates an environment where women's academic excellence is severely impaired.

Used as a teaching methodology for over a century in American law schools, the Socratic Method has stripped thousands of women of equal treatment and equal opportunity to education.<sup>9</sup> While its promoters contend the Method is intended to empower all law students with the knowledge of the law, I argue that this teaching strategy is built upon fear, humiliation, and intimidation. It hinders the academic development of women by maintaining a denigrating psychological atmosphere of silence, and adversarial competition. Taken together, these factors place female law students at a disadvantage to their male counterparts.

This article will expand the dialogue on the impact of the Socratic Method on women law students, through the application of the Fourteenth Amendment's equal protection doctrine.<sup>10</sup> In so doing, it will develop an argument refuting the propriety of the Socratic Method's use as a form of hegemonic pedagogy. The Socratic Method is an inefficient teaching strategy with devastating aggregate effects upon women law students.<sup>11</sup> Therefore, in the spirit of Audre Lorde's paradigm of the Master's Tools, I argue that it is impossible to be academically constructive on a platform that is intellectually destructive to half of those it means to educate.<sup>12</sup>

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7. *See infra* Part IV.

8. *See infra* Part II.

9. *See infra* Part IV.

10. U.S. CONST. amend. XIV.

11. *See infra* Part IV.

12. American Bar Association, Division of Legal Education, *at* <http://www.abanet.org/legaled/femstats.html> (last visited Feb. 1, 2003).

## II. HISTORY OF WOMEN IN LEGAL EDUCATION

The historical interaction between law schools and women has been an exclusionary one, laced with over a hundred years of denigration and marginalization. The first woman on record to receive a law degree in the United States was Ada Kepley from Union College of Law in Illinois (Northwestern) in 1870.<sup>13</sup> The following quote exemplifies the sentiment toward women participating in the law, as expressed by the Court of Common Pleas of Hennepin County, Minnesota in 1876:

Women train and educate the young, which forbids that they shall bestow that time and (early and late) labor, so essential in attaining the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . old fogyism. . . . It arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession.<sup>14</sup>

Or similarly the words of Supreme Court Justice Joseph Bradley:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.<sup>15</sup>

Sentiments like this pervaded the male-dominated legal community in regards to women's access to legal education and

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13. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (The University of North Carolina Press Chapel 1983) (tracing the general history of American law schools and its pedagogy).

14. *United States v. Va.*, 518 U.S. 515, 543 (1996) (quoting the Court of Common Pleas of Hennepin County, Minn.) [hereinafter *VM*].

15. *Bradwell v. Ill.*, 83 U.S. 130, 131 (1873).

practice during the nineteenth and early portions of the twentieth century.<sup>16</sup>

Another example could be seen in a 1925 report on Columbia University that explained its resistance to enrolling women law students because, "If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!"<sup>17</sup> This quote epitomizes the sexist exclusion of women from early legal institutions. Consider also that many of the nation's Ivy League colleges did not admit women until well into the middle of the twentieth century.<sup>18</sup> As one Yale alumnus stated, "In theory I am in favor of [women] studying law and practicing law, provided they are ugly."<sup>19</sup> These excerpts typify the resistance that women encountered in their early quest for law school admission and participation. It is in this atmosphere of exclusion and animus that the Socratic Method was born.<sup>20</sup>

### III. DEFINITION: WHAT IS THE SOCRATIC METHOD?

In order to dismantle the Socratic Method, it is first important to construct a working definition of this methodology. Denotatively, the term Socratic means "of Socrates or his method of trying to arrive at the truth by asking questions."<sup>21</sup> This definition refers to the ancient Greek philosopher Socrates who lived from 469-399 B.C.E.<sup>22</sup> Socrates' philosophy extolled the idea of moral primacy<sup>23</sup> and the

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16. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 49 (Anchor Books 1981) (1983) (stating, "Women were notably absent from American legal education for its first one hundred years.").

17. *VMI*, 518 U.S. at 543-44 (referencing the remarks of the administration at Columbia in the early 1900's.).

18. STEVENS, *supra* note 13, at 84.

19. *Id.* at 83.

20. See *infra* Part III. See also STEVENS, *supra* note 13, at 83 (stating that Langdell himself opposed the admission of women).

21. THE AMERICAN HERITAGE DICTIONARY 775 (3d ed. 1994).

22. PLATO, *THE LAST DAYS OF SOCRATES* 8 (Hugh Tredennick trans., Penguin Books 1969) (1954).

23. Socrates was committed to the primacy of the soul or character in living the best human life. Knowledge was central to that commitment, and hence philosophy, as the quest for moral knowledge, was also fundamental. Moreover, Socrates was convinced that the best character and knowledge were closely tied to right conduct, and that harmful or unjust action was self-destructive.

CLASSICS OF MORAL AND POLITICAL THEORY 1-2 (Michael L. Morgan ed., Hackett Publishing Company 1992).

commitment to knowledge as an integral part of moral goodness.<sup>24</sup> In order to excavate the knowledge within each person, he employed a strategy of questioning that would lead the student to his own answer.<sup>25</sup>

This strategy was later adopted and extended by Harvard Professor and Dean Christopher Columbus Langdell in 1870.<sup>26</sup> Langdell's implementation of the Socratic Method in its new legal incarnation is described as a cooperative system of learning.<sup>27</sup> In this model, Langdell explored with his students the underlying rules of the cases that his students were required to prepare for that day's lesson.<sup>28</sup> The lesson began with one student reciting the facts and the law of the case.<sup>29</sup> Langdell's strategic questioning was designed to both elicit and stimulate responses from the class.<sup>30</sup> The students and the professor engaged in a verbal dialogue from which a complete understanding of the cases and their governing principles would arise.<sup>31</sup>

This method of case study and skillful questioning changed dramatically in its one hundred and thirty year evolution and it bears

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24. *Id.* at 8.

25. *Id.* at 9. Socrates implemented the technique of question and answering. He believed that his role as teacher was not to give the answer but to bring it out of his pupil through the skill of questioning. "He frequently insisted that he is not a teacher: that he merely possesses an intellectual skill . . . which enables him to help others to bring their thoughts to the birth." *Id.*

26. Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 349-350 (2001).

27. Langdell began his actual teaching by having each of the cases, which the students had to study carefully in preparation for the class, briefly analyzed by one of them with respect to the facts and the law contained in it. He then added a series of questions, which were so arranged as gradually to lay bare the entire law contained in that particular case. This stimulated questions, doubts, and objections on the part of the individual students, against whom the teacher had to hold his ground in reply. Teacher and pupils then, according to Langdell's design, work together unremittingly to extract from the single cases and from the combination or contrasting of cases their entire legal content, so that in the end those principles of that particular branch of the law which control the entire mass of related cases are made clear.

David D. Garner, *Socratic Misogyny? – Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 BYU L. REV. 1597, 1599 (2000) (arguing for reform in the use of the Socratic Method in legal education) (citing JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 12 (1914)).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

slight resemblance to its classical beginnings.<sup>32</sup> Today, the Socratic Method is the leading form of pedagogy in legal education.<sup>33</sup> Yet, modern instruction is less cooperative-based than Langdell's original model. It now resembles a masochistic interplay of domineering, and at times evasive, professors attempting to inform humiliated, and silenced students.<sup>34</sup> As David Garner comically, yet accurately, describes, "[T]he Socratic method has often been described in terms of 'Socratic kung fu.' Advocates of the method . . . tout the Socratic method as a form of 'ritualized combat,' a 'civilized battle,' a 'boot camp' of sorts, in which professors utterly 'destroy' students by making 'friendly assault[s]' on their answers."<sup>35</sup> This description highlights the brutal manner in which law professors interrogate their students, and the debilitating effects of this humiliating tactic. What this caricature fails to adequately convey is the gravity of this effect on women law students. As will be demonstrated, the Socratic Method impairs the ability of women law students to perform and excel academically, leading to a crippling of their long-term performance in terms of grade-based opportunities.

#### IV. EVIDENCE: GENDER AND DISPARITY

The adverse impact of the Socratic Method on female students exists in startling contrast to the impact on their male counterparts. In comparison to male law students, female law students report greater deficiencies in areas ranging from lower levels of class participation<sup>36</sup> and confidence,<sup>37</sup> to overall mental states and depression.<sup>38</sup> In addition, there exists a further anomalous relationship between female students entering law school. Women achieve higher grade point averages than men before entering law school, but receive lower

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32. See *id.* at 1600-01. Garner describes the current structure of the Socratic Method as follows:

[T]he modern Socratic dialogue resembles a game of 'hide the ball' in which the professor asks questions that he knows the answers to while his students do not. The object of the game is to produce the answer that the professor thinks is correct. If the student fails to answer correctly, personal humiliation follows in various forms.

*Id.*

33. Schwartz, *supra* note 26, at 349-50.

34. Garner, *supra* note 27, at 1601.

35. *Id.*

36. See *infra* Part IV A-B.

37. See *infra* Part IV A-B.

38. See *infra* Part IV A-B.

academic scores upon completing law school.<sup>39</sup> Through testimonial excerpts from a variety of sources, women's experiences in legal education will be catalogued. The testimony enhances and personalizes the argument against the oppressive atmosphere created by the endemic sexism pervasive throughout legal education, as proffered by the Socratic Method.<sup>40</sup>

#### *A. Testimony: Silenced by the Socratic Method*

In 1970, Alice D. Jacobs conducted one of the first studies on the treatment of women in law schools, surveying both men and women law students at two universities.<sup>41</sup> She found that, although men and women performed academically identically in both their undergraduate and law courses, women participated less than men.<sup>42</sup> While this early study did not explicitly measure the role of the Socratic Method on women's silencing, similar findings would later be directly linked to the Method's effects with more detrimental outcomes revealed than those found by Jacob.

In 1988-89, a study at Berkeley Law School concluded that the Socratic Method adversely affected women.<sup>43</sup> The Berkeley study found statistical evidence of the silencing of women and concluded that professors used the Socratic Method as a means of forced participation and humiliation.<sup>44</sup> In many recent studies, the most commonly reported result of the Socratic Method is the comparatively lower level of classroom participation on the part of women law

39. Richard K. Neumann, *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 320-21 (2000). Neumann found that in the academic year 1997-1998, women entering law school held an undergraduate GPA (UGPA) of 3.16 compared to male law students who earned an average G.P.A. of 3.06. *Id.* at 320 tbl.6. "In each of these years [1993-98] the average female UGPA was 0.09 or 0.10 of a grade point higher than the male average." *Id.* at 320. He stated that, "While 53.9 percent of men earned first-year grades at or above the mean at their school . . . only 50.6 of women earned comparable standing . . . .) *Id.* at 321.

40. The use of narrative voice in legal scholarship is a tool used to personalize and deconstruct hegemonic tools. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Daniel A. Faber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

41. Alice D. Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 J. LEGAL EDUC. 462 (1970).

42. *Id.* at 470 (stating, "[A]lthough women perform very well academically, it was observed that they consistently interact less frequently than men in the classroom. They volunteer or are chosen to answer questions much less frequently than men.").

43. Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 24-25 (1990).

44. *Id.* at 37-38.

students.<sup>45</sup> This phenomenon has been attributed to several sources within the legal pedagogy, including the use of the Socratic Method and the adversarial atmosphere it fosters within the classroom.<sup>46</sup>

In her groundbreaking book *Becoming Gentlemen*, Harvard Professor Lani Guinier chronicles the effects of this male oriented structure at the University of Pennsylvania.<sup>47</sup> Guinier explores the effects of this inherently sexist institution on the total welfare of women engaged in the pursuit of the law. As she explains:

In training students to think of the process of asking and answering questions as an opportunity to put someone on the spot to demonstrate how little that person knows, or to identify important hidden assumptions, conversation is valued for its adversarial style. . . . To the extent this occurs, the technique of Socratic teaching . . . looks to many women like ritualized combat. . . . Many men told us that is in fact the way they see law school participation, as an exchange of verbal retorts. You win when you silence your opponent.<sup>48</sup>

Guinier correctly characterizes the oppressive atmosphere created by the Socratic Method. She describes the antagonistic environment that results in a silencing, from which women law students suffer the greatest disparity.

The basic precept of the Method is its reliance on class participation as the vehicle through which knowledge is disbursed.<sup>49</sup>

45. LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE* 28 (1997). See also Jacobs, *supra* note 41; Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); 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 (1988); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988) [hereinafter Banks I]; Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. U. L.J. 527 (1990) [hereinafter Banks II]; LINDA F. WIGHTMAN, *WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN* 1 (1996); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117 (2000).

46. GUINIER, *supra* note 45, at 12-13.

47. *Id.*

48. *Id.* at 13.

49. Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 43 (1997) (stating, ". . . [T]he Socratic Method is a pedagogy characterized by self-discovery, in which the student learns to approach legal problems through a dialogue guided by the law teacher.").

The verbal back-and-forth between the professor and the students ideally creates a stimulating atmosphere through which the law can be exposed in its entirety.<sup>50</sup> If this process does not engage women law students, their academic growth will be stunted.

First-hand accounts of the Socratic Method's harsh effects are particularly enlightening.<sup>51</sup> The following testimonials are statements from female law students describing their experiences. These testimonials serve to verify the debilitating effects of the Socratic Method in the legal classroom.

### Testimony #1: Silencing

“Law school is the most bizarre place I have ever been . . . [First year] was like a frightening out-of-body experience. Lots of women agree with me. I have no words to say what I feel. My voice from that year is gone.”<sup>52</sup>

### Testimony #2: Silencing

“Within my first few months at law school, I became overwhelmed by the maleness of law school. Law school felt formal and stiff and unyielding. . . . For me, the result of this atmosphere was a silencing of myself.”<sup>53</sup>

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50. Garner, *supra* note 27, at 1604.

51. [M]any feminist narratives contain an epistemological claim. The “scientific rationality” that prevails in our society – and in our legal argumentation – privileges universality, statistical significance, and logical deduction as ways of knowing about the world. Experiential narratives are significant not only for the substantive message they convey but for the way they claim to know what they know. Feminist narratives present experience as a way of knowing that which should occupy a respected, or in some cases a privileged position, in analysis and argumentation.

Abrams, *supra* note 40, at 976 (demonstrating the importance of narration in critical feminist theory).

52. GUINIER, *supra* note 45, at 28.

53. Bowers, *supra* note 45, at 120.

### Testimony # 3: Oppressive Atmosphere

“Jeannie, a woman who rarely talks, suddenly joins the discussion and begins a long and complex narrative. Her narrative is intensely personal. It touches on her past, her struggle for independence, her religious training, her relationship with her father and husband, and her difficulties being a “law student.” It is through this intricate, intersubjective structure that she perceives and relates to the jurisprudential discussion raging around her. . . . Suddenly feeling the sting of critical incomprehension from her classmates, she abruptly concludes with an anxious giggle, a murmur about being unsure of whether she made sense to anyone and an apology for not being able to better articulate her point.”<sup>54</sup>

### Testimony #4: Psychological Debilitation

“During the first year of law school, I felt alienated and silenced. But most of all, I was surprised I felt this way. I loved college and I fully expected to love law school. I guess I should have been more prepared for how law school would make me feel. Unlike most students, I was aware of the feminist critique of law. And yet I did not connect this critique of “law” with law “school.” School to me was a place where critiques like these were made and debated, where people were critical, where basic assumptions were questioned, where ideas were created and challenged. Law school, however, was much more like “law” than “school.”<sup>55</sup>

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54. K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1145-46 (1985).

55. Bowers, *supra* note 45, at 119.

### Testimony #5: Psychological Debilitation

“Speaking from my own experience, law school makes me feel as if I am trapped in a mental straitjacket. And it makes me feel as if I am in danger of losing the intellectual courage I possessed as an undergraduate.”<sup>56</sup>

#### B. Grade Disparity

Given the lower rate of female class participation within the first year of law school, it is not surprising to note that in many law schools there exists a disparity between the grades of first-year women law students and their male counterparts.<sup>57</sup> This irony is further demonstrated in the knowledge that most women surpass men in pre-law school academic performance.<sup>58</sup> The gap between the undergraduate grades and grades during law school is stunning. The question then becomes, what happens to women law students while in law school that so significantly impairs their academic performance?

I argue that the adversarial atmosphere fostered by the Socratic Method has a destructive ripple effect, which radiates from the initial silencing of women law students<sup>59</sup> to psychological despair,<sup>60</sup> and culminates in lower academic performance.<sup>61</sup> Women’s lower academic achievement then translates into the loss of opportunities to engage in other areas of the legal education process that could enhance future job opportunities such as law review, moot court, and Order of the Coif.<sup>62</sup> This ripple effect extends into women’s post-law school

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56. Cheryl M. Herden, *Women in Legal Education: Feminist Analysis of Law School*, 63 REV. JUR. U.P.R. 551, 552 (1994).

57. Neumann, *supra* note 39, at 321 (stating, “It thus appears that as a group women get better grades than men in undergraduate school and worse grades than men in law school. Wightman’s data ‘suggest that many women are not performing as well as they could be or should be in the current legal education environment.’”).

58. *Id.* at 320.

59. Taber, *supra* note 45, at 1220 (stating, “. . . women . . . are silenced by subtle aspects of traditional legal education that deny the importance of their personal feelings and beliefs.”).

60. GUINIER, *supra* note 45, at 52 (describing that “Many express deep feelings of alienation from their backgrounds, passions, and communities.”).

61. *See infra* notes 75-80.

62. Bowers, *supra* note 45, at 140-41 tbl.7-8 (2000) (demonstrating graphically the gap between male and female representation on Order of the Coif and Honor Graduates respectively).

life, effecting career opportunities and wage earning capacity.<sup>63</sup>

One of the first studies to expressly call for the removal of the adversative teaching method from university curricula was the Yale study.<sup>64</sup> After interviewing a small group of women, and detailing their experiences, the authors of the study poignantly concluded that in law school “women don’t exist, and aren’t worth noticing if they try to exist.”<sup>65</sup> These words call attention to the powerful effects the Socratic Method perpetuates by silencing and excluding women from full and equal participation in legal education.

Also published in 1988, a study of Stanford University law students and graduates extended the Yale study in scope and empirical support.<sup>66</sup> The Stanford study concluded there was a preference by more men than women for the Socratic Method.<sup>67</sup> Similarly, in 1988, Professor Taunya Banks completed a study on the experiences of women in legal studies.<sup>68</sup> The findings supported conclusions made in prior studies. The study specifically found that “forty-seven percent of those surveyed reported that one or more of their professors used offensive humor, most of which was sexist in nature.”<sup>69</sup>

In 1994, the Gender Issues in Law Schools Committee of the Ohio Joint Task Force on Gender Fairness commissioned a study (the

63. Bowers’ study took place at the University of Texas School of Law, researching a period of over thirteen academic years at the University of Texas. Discussing the impact of gender-based grade disparity, Bowers wrote:

The larger gender gap in grades after the first year, however, should be of particular concern. First-year grades are crucial. This is because so many awards are based, at least in large part, on first year grades. For example, first year grades help determine whether a student becomes a law review member, where a student clerks after her second year, and which (if any) judicial clerkship a student receives. These are all experiences that significantly shape a student’s career or define her range of options. Thus, the greater disparity in GPAs after the first year has a harsh impact on women – harsher than if the difference in average GPA was greater at graduation.

*Id.* at 138.

64. Weiss & Melling, *supra* note 45, at 1357-59.

65. *Id.* at 1337.

66. Taber, *supra* note 45, at 1238-39. The Stanford study surveyed both students and recent graduates. The student respondent group totaled 343 students, 54.8 percent of which were male and 45.2 percent of which were female. *Id.* at 1232.

67. *Id.* at 1239.

68. Banks I, *supra* note 45, at 140.

69. *Id.* at 144. Banks I again identified the disparity in class participation between men and women. *Id.* at 141. In 1990, Banks conducted a second study, which reinforced the findings of the first study, particularly in regards to the silencing or low level of class participation by women law students. Banks II, *supra* note 45, at 530.

“Ohio study”)<sup>70</sup> on the Socratic method and its effect on women law students. Like its predecessors, the Ohio study recognized low levels of class participation by female law students<sup>71</sup> and gender-bias on the part of law professors.<sup>72</sup> In this study eighteen percent of women reported feeling devalued by their professors in comparison to a mere two percent of their male counterparts.<sup>73</sup> Strikingly, forty-one percent of the women surveyed reported greater feelings of mental inadequacy in law school than prior to entry, as compared to only 16.5 percent of men.<sup>74</sup>

The 1996 Law School Admission Council (LSAC) recently analyzed the effects of legal pedagogy relative to women and found a definitive connection between lower grades and the Socratic Method.<sup>75</sup> The LSAC report stated, “women who did worse than predicted in law school ‘had a larger percentage of their classes taught using the Socratic method.’”<sup>76</sup> Similarly, a 2000 study at the University of Texas concluded that “law school themselves are contributing to the lower female performance.”<sup>77</sup> Although the study purported not to examine the specific reasons why the disparity existed, it corresponded with the conclusions of a study at the University of Pennsylvania (the Penn study),<sup>78</sup> stating:

The radical explanation, exemplified by the Penn study, argues that the way to increase female performance in law school is to change the structure of law schools. This line of thought would eliminate or greatly curtail the use of the socratic method in law schools; it would change the whole way law is taught.<sup>79</sup>

These words are highly significant, given that they expressly identify the Socratic method as the chief factor in women’s

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70. Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender in Nine Law Schools*, 44 J. LEGAL EDUC. 311 (1994).

71. *Id.* at 314.

72. *Id.* at 326.

73. *Id.*

74. *Id.* at 328.

75. WIGHTMAN, *supra* note 45, at 1.

76. *Id.* at 99.

77. Bowers, *supra* note 45, at 164.

78. GUINIER, *supra* note 45.

79. Bowers, *supra* note 45, at 163.

underachievement in law school.<sup>80</sup>

The following tables graphically detail the gender discrepancy between male and female law students.<sup>81</sup> The first table shows the gender differentials in undergraduate G.P.A.<sup>82</sup> The second table shows the gender differentials in LSAT scores for that same academic year.<sup>83</sup> The third table shows the gender differentials in class rank during each of the three years of law school.<sup>84</sup>

#### Undergraduate G.P.A.

Academic Year	1993-94	1994-95	1995-96	1996-97	1997-98
Female	3.13	3.13	3.15	3.16	3.16
Male	3.03	3.04	3.06	3.06	3.07
Female Differential	.10	.09	.09	.10	.09

#### LSAT Differential

Academic Year	1993-94	1994-95	1995-96	1996-97	1997-98
Female	151.5	150.6	150.7	150.7	150.7
Male	153.2	152.4	152.6	152.4	152.0
Male Differential	1.7	1.8	1.9	1.7	1.3

#### Percentage of Students in Top Fiftieth Percentile of Law School Class

Academic Year	First Year	Second Year	Third Year
Female	42.8	43.2	43.9
Male	53.8	55.2	54.7
Male Differential	11.0	12.0	10.8

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80. Richard Neumann discussed similar conclusions on the debilitating effects of the Socratic method. Neumann, *supra* note 39. Neumann compiled national statistics regarding female law students, which supported the conclusions in the previous studies regarding the contrast between the undergraduate grades earned by both sexes and law school grades. The study stated that:

[A]s a group women get better grades than men in undergraduate school and worse grades than men in law school. . . . The larger grade differentials noted in the Penn and Texas studies and the lower law review participation at the producer schools both hint that the pedagogical environment may be worse for women at the top-ranked schools than in legal education generally.

*Id.* at 321-22.

81. *Id.* at 320.

82. *Id.*

83. *Id.*

84. GUINIER, *supra* note 45, at 38.

These tables dramatically illustrate the essential argument of this article. The fact that women consistently academically outrank men prior to law school admission, and then during law school their grades become grossly disproportionate, reflects the egregious effects of the Socratic Method. The loss of access to an equal education is perpetuated through this pedagogy. This disparity cries out for a more humane approach in presenting information to students – specifically women law students.<sup>85</sup> Though many professors have implemented modified versions of the Socratic method, it remains the dominant form of teaching in law schools across the country, holding almost half of its student body hostage to its tyrannical effects.<sup>86</sup>

#### V. PROPONENTS OF THE SOCRATIC METHOD: EXPOSING THE FLAWS

Professor Jennifer Rosato of the Brooklyn School of Law is a leading advocate of the Socratic Method. Rosato claims that its pedagogical benefits far outweigh any minimal impact it may have upon women law students.<sup>87</sup> Rosato bases her observation largely on her personal experience as a law professor.<sup>88</sup> She argues that the

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85. Because law school's educational mission is so intertwined with the goal of selecting students for entry into a competitive profession, much of its pedagogy, including examination formats, is designed to rank students. The idea is that those who succeed in this highly competitive and individualistic culture will do well as lawyers. As a result, the law school valorizes sorting, rewards people who think fast but not always those who think deeply, and relies upon uniform rules and standards that may appear to treat all students the same but do not necessarily develop each student's true potential. We conclude that law schools such as the one we studied not only reflect or reproduce larger sets of social stratification they create and legitimize them.

*Id.* at 2.

86. "Notwithstanding . . . complaints [leveled against the Socratic Method] the Socratic Method continues to be the primary pedagogy used by law school teachers." Rosato, *supra* note 49, at 37.

Although law teachers generally have salutary educational goals and some individual law teachers have intuited and developed insightful experimental instruction, law school instruction as a whole, remains locked in an instructional methodology of dubious merit. That method characterized here as the Vicarious Learning/Self-Teaching Model, has persisted since Christopher Langdell's tenure at Harvard Law School in the 1870's.

Schwartz, *supra* at note 26, at 349.

87. Rosato, *supra* note 49, at 39.

88. *Id.* at 43. Rosato relies heavily upon her personal observations as a law professor in defending the Socratic Method. For example, she states, "As a legal educator and feminist

Socratic Method is not to blame for the denigration reported in the various studies done on its effects.<sup>89</sup> Rosato lists several other factors that contribute to the oppressive atmosphere that women experience including inappropriate conduct by professors and students,<sup>90</sup> and a lack of institutional support for women law students.<sup>91</sup> She argues that these particular factors, not the Socratic Method, are primary contributors to law school's denigrating atmosphere.<sup>92</sup>

Rosato attempts to characterize the factors causing women's negative law school experiences as simply attributes of law school, rather than direct effects of the Socratic Method. Such a distinction is naïve. The atmosphere of ridicule and denigration identified by Rosato is an extension of the environment the Socratic Method creates.<sup>93</sup> The encouragement of competition, and adversarial interactions construct an environment where ridicule and offensive remarks are allowed to thrive.<sup>94</sup> Therefore, while Rosato and other proponents attempt to mitigate the Socratic Method's role in creating this atmosphere by identifying collateral effects, its centrality in constructing the silencing and denigration cannot be ignored.

Further, Rosato characterizes the Socratic Method as one of self-discovery, wherein students learn to approach legal problems through guided dialogue.<sup>95</sup> She has even argued that it is an empowering method of learning for all students because it is based on participation.<sup>96</sup> Rosato cloaks the lack of participation by female students in benign terms, by characterizing the silencing as moments wherein female students are silently participating in the discussion by following the dialogue, and thinking about what questions they could ask and answer themselves.<sup>97</sup> However, she provides little empirical

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who regularly uses the Socratic Method, I think that radically changing its use at this time would be a mistake." *Id.* at 49.

89. *Id.*

90. *Id.*

91. *Id.* at 52-53.

92. *Id.* at 53.

93. Garner, *supra* note 27, at 1598. "[Scholars] have joined students who have 'attacked the Socratic method as infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values.'"

94. *See id.* at 1601.

95. Rosato, *supra* note 49, at 43.

96. *Id.* at 43-44.

97. *Id.* at 44 (stating, "Other students are participating silently in the discussion by following the dialogue, and are thinking about which questions they could ask and answer themselves. It is as if all are players in an exciting game with their hands on the buzzers, ready to respond at a moment's notice.").

evidence to rebut over thirty years of studies demonstrating the profound detrimental effects of the Socratic Method on female law students.<sup>98</sup> Her arguments rely on her experiential observations as a law professor, and dismiss the existing research without any countervailing support of her own to support her contentions.<sup>99</sup>

Another supporter of the Socratic Method, Professor Elizabeth Garrett, maintains that the Socratic Method teaches students the skill of public speaking.<sup>100</sup> Garrett also argues that the Socratic Method is the most effective means of teaching large groups of students, while ensuring that the students take active roles in securing their understanding of the information.<sup>101</sup> As she argues:

A teaching strategy which includes calling on students without giving them prior notice is one of the best ways to foster critical thinking for all members of such a large group. No student is certain before class whether she will be called on to discuss difficult issues or to respond to answers provided by one of her colleagues. She must therefore pay close attention to the discussion between the professor and other students so she will be ready to play a meaningful role. Moreover, the Socratic method places some responsibility on students to think about the questions silently and participate actively on their own; the element of surprise provides a powerful incentive for them to meet that responsibility.<sup>102</sup>

This line of reasoning typifies proponent's views of the Socratic Method.<sup>103</sup> It characterizes the method in benign terms, as a means of keeping students in a state of surprise or on their academic toes. These arguments focus on the ideal version of the Socratic Method, one in which students are actively engaged in an interrogative process that will lead them to uncover all aspects of the law.

The reality is that the Socratic Method is more similar to the combative analogies previously described than to this ideal.<sup>104</sup> The

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98. See generally Rosato, *supra* note 49.

99. *Id.*

100. Elizabeth Garrett, *Becoming Lawyers The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 199, 202 (1998).

101. *Id.* at 201-02.

102. *Id.* at 202.

103. See Rosato, *supra* note 49; Garrett, *supra* note 100.

104. Garner, *supra* note 27, at 1601.

arguments in favor of the Socratic Method do not take into account the abusive manner in which the questions are often asked.<sup>105</sup> They do not fully appreciate that students are put on the spot and burdened with the need to respond quickly, while fighting the pangs of anxiety and fear that characterize the moment.<sup>106</sup> They also do not reflect the nature of the atmosphere as ripe for an adversarial encounter, extending from the instructor to the student and manifesting itself in an oppressive learning environment.<sup>107</sup> Finally, they do not consider that this adversarial atmosphere results in the disproportionate silencing of women law students,<sup>108</sup> precluding them from effectively participating in the banter that is supposed to lead to understanding.<sup>109</sup> The Socratic Method ultimately denies women equal access to learning by fostering an adversarial atmosphere. This adversarial atmosphere then translates into silencing, lower participation, and ultimately, lower grades.

David Garner explores the Socratic Method in relation to feminist criticism, which holds that women receive a different education than men.<sup>110</sup> He does not advocate for the abolition of the Socratic method, but rather puts forward that it should be modified.<sup>111</sup> Garner outlines three factors in favor of maintaining the Socratic Method despite feminist criticism.<sup>112</sup> He explains that it teaches basic skills,<sup>113</sup> it benefits both economic and time concerns,<sup>114</sup> and its maintenance avoids the perception that women are incapable of being successful at what is inherently a male-model teaching strategy.<sup>115</sup>

Garner's third point is an argument commonly advanced in favor of the Socratic Method. Proponents of this view maintain that discarding the Socratic Method does little more than give support to the idea that women are incapable of succeeding under traditional

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105. *Id.* at 1601-02.

106. *Id.*

107. *Id.*

108. Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 *UCLA WOMEN'S L.J.* 81 (1996) (cataloguing the positive effects of a more humane approach to legal education). "A growing body of studies and critiques examines the negative impact the traditional law school environment has on women and minority students. This research revealed that law school negatively impacts women regarding self-esteem, class participation, mentoring, and alienation." *Id.* at 81.

109. *Id.* at 83.

110. Garner, *supra* note 27, at 1648.

111. *Id.* (stating, "The solution, however, is not to scrap the method entirely, but rather to transform it to reflect the changing nature of what it means to be a lawyer.").

112. *Id.* at 1635.

113. *Id.* at 1635-36.

114. *Id.* at 1636.

115. *Id.* at 1637.

models of learning.<sup>116</sup> They argue that women are educationally multifaceted, and able to learn under a host of modalities including traditional models like the Socratic Method.<sup>117</sup> Proponents posit that the suggestion that women cannot achieve under traditional forms of pedagogy feeds into age-old stereotypes that have foreclosed women from positions of power.<sup>118</sup> They argue that by adopting more women-friendly teaching methods, law schools will actually disadvantage women by lending credence to gender stereotypes.<sup>119</sup>

This argument is inherently flawed. Those advocates of the Socratic Method who recognize and even admit its adversative nature only bolster the argument in favor of disposing of it. Their argument implies that to admit women are being systemically handicapped is to admit that the nature of women is fundamentally ill-equipped to deal with the rigorous demands of the pedagogy.<sup>120</sup> The extension of such an idea is itself reliant on dangerous stereotypes and exaggerated logical leaps. Arguing against the use of the Socratic Method simply recognizes that an unfairness in legal education exists against women. It is not a construction of the idea that women are mentally inferior to men. It is not an admission that women are incapable of responding to its challenging demands, as is evident by the thousands of successful female law students.<sup>121</sup> It is, however, the recognition that in order for true equality to take shape, it is necessary to reconstruct the field so

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116. Rosato, *supra* note 49, at 39-40.

117. The Socratic method is the most effective pedagogy for allowing women students to become proficient in the primary language of doctrinal legal analysis. Even if it could be demonstrated that the Socratic method negatively affected women, I fear that accommodating women students by adopting more “women-friendly” teaching methods would send a dangerous message that women law students cannot withstand the rigors of the Socratic method and thus do not belong in the law school classroom, the courtroom or the boardroom. That message would prevent women from realizing their potential as law students and lawyers by indulging stereotypes that have previously prevented women from advancing in the profession.

*Id.*

118. *Id.* at 54.

119. *Id.*

120. [E]ven if it could be shown that the Socratic Method negatively affects women students, as some of the current studies suggest, the Socratic Method should not be circumscribed simply to accommodate women. To do so only patronizes women law students and reinforces the view still held by some that women do not belong in law school or the legal profession – or at least not at the highest levels of achievement.

*Id.* at 58.

121. Neumann, *supra* note 39, at 314-15 (demonstrating statistically how women are treated in ABA-approved law schools).

that it incorporates teaching strategies that do not adversely impact one group and advantage another. Abolishing the Socratic Method does not mean that women of themselves are handicapped in their ability to think legally. It means that this teaching strategy creates an academic impairment in women that, prior to its use, did not exist.<sup>122</sup>

Proponents of the Socratic Method fail to focus on the silencing, fear, intimidation, and other psychologically debilitating aspects created by the Socratic Method.<sup>123</sup> They also fail to question why women should be subjected to this type of academic torture. The response that it is merely to prove that women have greater mental endurance than their male counterparts, and are able to succeed despite of these effects, is insufficient. Imagine the possible academic performance, if the mental energy required to adapt to the Socratic Method was re-channeled into the actual process of learning the law.

#### VI. ENVISIONING A "PORTIA METHOD": AN ALTERNATIVE PEDAGOGY

Judith Fischer, an Assistant Professor of Law at Chapman University School of Law researched the revolutionary effects of a more humane approach to legal study than that put forward by the Socratic Method.<sup>124</sup> In 1994, the university announced the founding of its new law school in a more supportive atmosphere of high idealism, and professionalism in a humane learning environment.<sup>125</sup> The concept of a supportive atmosphere is more extensively defined by the study as one that rejects the "false dichotomy that rigorous study and

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122. *Id.* at 321.

123. Many women reveal their alienation from law school by participating only rarely in class. As academics and various organizations study the impact of gender on the law school experience, one of the most persistent observations is that women speak in class less frequently and more briefly than men do. This silence contributes to a destructive cycle: if women are disproportionately silent in the classroom, they can reinforce their own feelings of exclusion and incompetence. Silence in the classroom may not only affect the students' feelings about law school but also impair their performance on exams as well. To the extent that discussion and Socratic dialogue in the classroom enable students to practice skills of legal reasoning and argument, women's disproportionate silence could mean that they are getting fewer or more abbreviated opportunities to hone their skills.

Jennifer Gerarda Brown, *To Give Them Countenance: The Case for a Woman's Law School*, 22 HARV. WOMEN'S L.J. 1, 11 (1999).

124. Fischer, *supra* note 108, at 82.

125. *Id.* at 95.

nurturing are mutually exclusive.”<sup>126</sup> The university relied on the writings of William Kullman and Carrie Menkel-Meadow who defined a supportive learning atmosphere as “the ethic of care.”<sup>127</sup> This ethic of care is comprised of five basic tenets: (1) tempering the excesses of the Socratic Method and using alternative methods of teaching; (2) distributing more handouts; (3) giving more exercises, practice examinations, and other feedback; (4) building better relationships among students and faculty; and (5) hiring more women and minority professors.<sup>128</sup> Chapman University took a series of steps to emulate this more supportive atmosphere, including the hiring of a diverse faculty, which included a high ratio of women and minority professors.<sup>129</sup> Chapman also hired a large number of women for administrative positions at the law school.<sup>130</sup> After the new hiring practices went into effect, the university’s faculty was comprised of fifty percent women and twenty-one percent minorities.<sup>131</sup> The university took a revolutionary stance on its educational approach. It restructured its academic program to include mentoring programs, individualized tutoring, outlining classes, rearranging high anxiety courses like first year writing and research by gradually introducing such courses into one-unit, pass-fail classes, decreasing student-faculty ratios to 18:1, and limiting class size to sixty-five students for substantive courses and twenty-one students for skills courses.<sup>132</sup>

The Chapman Study powerfully demonstrates that women and minorities fare better under this environment than at other law schools that implement more adversarial types of pedagogy.<sup>133</sup> Fischer compared the Chapman data to the data accumulated by the Ohio study.<sup>134</sup> Chapman University’s female participation rates were double that of Ohio.<sup>135</sup> In the area of self-esteem in the Chapman study women reported a markedly higher percentage of feeling that

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126. *Id.* at 89.

127. *Id.* at 89 n.43-44 and accompanying text. *See also* Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61, 78 (1988); William F. Kullman, *Feminist Methodologies in the Law School Classroom: Listening for a Change,* 4 TEMP. POL. & CIV. RTS. L. REV. 117 (1994).

128. Fischer, *supra* note 108, at 89-90.

129. *Id.* at 95.

130. *Id.*

131. *Id.*

132. *Id.* at 95-96.

133. *Id.* at 99.

134. *Id.* at 102.

135. *Id.* at 99.

their values were respected than the Ohio percentages.<sup>136</sup> The area of greatest promise is in relation to grade performance. In a supportive environment, like that fostered at Chapman University, startling statistical evidence surfaces. At the end of their first year at Chapman, the women's grades were actually higher than the men's grades.<sup>137</sup> This result is compelling when compared to other law schools where women, who start out academically equivalent to their male counterparts, receive significantly lower grades than the men in the first year of law school.<sup>138</sup>

The Chapman University model powerfully illustrates the effects of a supportive approach to legal instruction on women. It adds to the arguments in favor of abandoning the adversative teaching model, and the development of similar humane approaches to legal education.

## VII. BUILDING AN EQUAL PROTECTION ARGUMENT

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."<sup>139</sup> These words from the Fourteenth Amendment of the United States Constitution were adopted in 1868.<sup>140</sup> Historically, this Amendment was incorporated to protect newly freed African-American slaves from unfair state action and discrimination.<sup>141</sup> The scope of its initial protection has been protracted to include other groups whose classifications by state actors for different treatment was suspect, extending from race through gender, alienage, and legitimacy.<sup>142</sup>

The argument against the sexist pedagogy of the Socratic Method finds a basis in this constitutional principle of equality. In order to make an effective argument on the basis of gender discrimination under the Fourteenth Amendment, one must satisfy three factors: (1) the recognition of a suspect class, in this case gender; (2) coupled with discriminatory impact that has been statistically

136. *Id.* at 103.

137. *Id.* at 105.

138. *Id.* The author relies on statistics discussed in the Penn Study. *See supra* note 45.

139. U.S. CONST. amend. XIV, § 1.

140. U.S. CONST. amend. XIV, § 1.

141. Gerald L. Neuman, *Constitutional Equality: Equal Protection, "General Equality" and Economic Discrimination From a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 282 (1999) (explaining, "The Fourteenth Amendment was then adopted in 1868 to ensure a degree of federal control over the rights of individuals in the states.").

142. *Id.* at 281-82.

demonstrated; and (3) discriminatory intent on the part of the state actor.<sup>143</sup>

The application of the Fourteenth Amendment's equal protection doctrine must be premised on a discriminatory state action.<sup>144</sup> The Fourteenth Amendment does not regulate the actions of private individuals.<sup>145</sup> The Supreme Court defines a state action simply as an act sanctioned or authorized by the state.<sup>146</sup> Therefore, in seeking remedies under the equal protection doctrine, the suit will be most effective when brought against state-funded universities.

In establishing the state action, the issue of academic freedom and freedom of expression bears discussion at this juncture. In relation to the Socratic Method, freedom of expression becomes a competing constitutional principle in regard to gender discrimination. It could be argued that it is unconstitutional to ban the Socratic Method as a teaching strategy, as such a ban violates the right to free speech and academic freedom. The Association of American University Professors defines academic freedom as protecting the university's four principles of freedom.<sup>147</sup> The university may determine "for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>148</sup>

Traditionally, the Supreme Court has insulated academic instructors from the label of state actors or agents in proceedings brought under the First Amendment.<sup>149</sup> The Court has held that

143. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979).

144. U.S. CONST. amend. XIV, §1 (stating, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

145. *Civil Rights Cases*, 109 U.S. 3, 6 (1883).

146. [C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.

*Id.* at 17.

147. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third Essential Freedom*, 45 STAN. L. REV. 1835 (1993).

148. *Id.*

149. See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (stating, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'").

academic freedom requires safeguarding from state intrusion. As it iterates in *Keyishian v. Board of Regents*:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedom is nowhere more vital than in the community of American Schools.<sup>150</sup>

However, the right to academic freedom is not an absolute one,<sup>151</sup> and the abolition of the Socratic Method does not constitute a violation of the First Amendment. This is so because, while the Court has historically protected the right to free speech and academic freedom,<sup>152</sup> it has also recognized the substantial constitutional interest in protecting against gender discrimination, as proscribed by the Fourteenth Amendment.<sup>153</sup>

In *United States v. Virginia* (“*VMI*”), the Supreme Court reaffirmed its overarching commitment to protection from gender discrimination even against academic pedagogies.<sup>154</sup> In *VMI*, the Court struck down a form of sexist pedagogy that excluded women from participating in a “state-supplied educational opportunity [in which] they [were] fit to engage,”<sup>155</sup> solely because of their gender.<sup>156</sup> The Court denied Virginia’s right to discriminate against women through a teaching methodology – the adversative method – that was based entirely on stereotype and sexist tradition.<sup>157</sup> The Court stated:

Virginia maintains that these methodological differences are ‘justified pedagogically,’ based on ‘important differences between men and women in learning and developmental needs,’ ‘psychological and

150. *Keyishian*, 385 U.S. at 603.

151. *United States v. Va.*, 766 F. Supp. 1407, 1409 (W.D. Va. 1991).

152. *Id.*

153. U.S. CONST. amend XIV; *see also* *United States v. Va.*, 518 U.S. 515, 532 (1996) [hereinafter *VMI*] (“ . . . the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women . . .”).

154. *VMI*, 518 U.S. at 549, 550-51.

155. *Id.* at 551.

156. *Id.*

157. *Id.* at 549.

sociological differences' Virginia describes as 'real' and 'not stereotypes.'<sup>158</sup>

....

It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit, a decree that will 'bar like discrimination in the future.'<sup>159</sup>

In *VMI*, Virginia raised the defense of academic freedom by arguing that VMI's adversative method of teaching was a legitimate contribution to diversity in the Virginia higher education system.<sup>160</sup> They argued that excluding women is substantially related to their mission of educational diversity.<sup>161</sup> However, the Court rejected this argument, finding that Virginia's claim was based upon stereotype, and struck down VMI's single-sex educational policy.<sup>162</sup>

Through its language, the Court propels itself across the hurdle of academic freedom, and declares its commitment to gender equality. The Court does so in two ways – by reiterating its commitment to equality in education, and through the creation of a remedy that is not temporally or substantively static. Its remedy can be applied and extended to all "like" forms of gender discrimination in the educational arena.<sup>163</sup> Therefore, this language offers a means of overcoming the principle of academic freedom while simultaneously dismantling similar types of sexist pedagogies, including the Socratic Method.

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158. *Id.*

159. *Id.* at 549-51.

160. *Id.* at 524.

161. *Id.* at 549.

162. *Id.*

163. *Id.* at 551.

## VIII. GENDER AND THE STANDARD OF REVIEW

One of the foremost cases to establish the standard of review for gender cases is the 1971 Supreme Court case of *Reed v. Reed*.<sup>164</sup> *Reed* set the level of constitutional scrutiny for gender discrimination at the rational basis standard.<sup>165</sup> This standard requires the state to show that its action was “reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.”<sup>166</sup>

There are three tiers of scrutiny currently employed by the Supreme Court in equal protection cases, the rational basis standard, intermediate scrutiny, and strict scrutiny.<sup>167</sup> Of these three tiers, the rational basis standard offers the lowest level of protection.<sup>168</sup> *Reed* added a crucial brick to the foundation of constitutional review for gender discrimination, in that it provides for the minimum rational basis protection against inequality. *Reed*, more importantly, was the first time that the Supreme Court struck down a sex-based regulation based upon the equal protection doctrine.<sup>169</sup>

Two years later, in *Frontiero v. Richardson*,<sup>170</sup> the Court considered the possibility of giving gender discrimination cases the same standard of review as warranted by allegations of racial discrimination.<sup>171</sup> The Court was asked to consider the constitutionality of federal statutes that required women military service members to prove their spouses' dependency in order to obtain increased benefits.<sup>172</sup> By a plurality of the Court, Justice Brennan, along with Douglas, White, and Marshall, held that cases involving sex as a suspect classification were subject to strict scrutiny.<sup>173</sup> This decision, however, never gained a majority of the Court, and later cases would solidify the standard of review for cases involving gender

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164. *Reed v. Reed*, 404 U.S. 71 (1971).

165. *Id.* at 75-76.

166. *Id.*

167. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 628-33 (13th ed. 1997).

168. *Id.*

169. 404 U.S. at 75. See also Carol Pressman, *The House that Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311 (1997).

170. 411 U.S. 677 (1973).

171. *Id.*

172. *Id.*

173. *Id.* at 688 (stating, “With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”).

discrimination at intermediate scrutiny.<sup>174</sup>

The clearest articulation of intermediate scrutiny, prior to *VMI*, is found in *Craig v. Boren*.<sup>175</sup> The Supreme Court in *Craig* set the level of protection for cases involving gender discrimination at intermediate scrutiny.<sup>176</sup> Interestingly, the increased scrutiny was implemented on behalf of a male petitioner.<sup>177</sup> In *Craig v. Boren*, the Court markedly departed from its holding in *Reed* by announcing a new standard under which issues of gender discrimination are to be reviewed.<sup>178</sup> The Court reformulated that standard as intermediate review, stating, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>179</sup> Subsequent rulings since *Craig* have upheld the intermediate standard of review as the level for gender discrimination.<sup>180</sup>

In the 1982 decision *Mississippi University for Women v. Hogan*,<sup>181</sup> the Court moved one step closer to applying the strict scrutiny standard to a gender-based classification.<sup>182</sup> Justice O’Connor’s opinion required the state to carry the burden for demonstrating an “exceedingly persuasive justification” for classifications along gender lines.<sup>183</sup> The “exceedingly persuasive” language was a stronger articulation of the intermediate standard of review than previously stated in *Craig*.<sup>184</sup>

In *VMI*, Justice Ginsberg, writing for the Court, reiterated the “exceedingly persuasive” language in her analysis of the intermediate scrutiny standard, stating “[f]ocusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court

174. Centennial Panel, *Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER & L. 1, 7 (1997).

175. *Craig v. Boren*, 429 U.S. 190 (1976). The articulation of the intermediary standard articulated in *Craig* would be extended in *VMI*. See *infra* text accompanying notes 188-93.

176. *Id.* at 197.

177. *Id.* at 192.

178. *Id.* at 197.

179. *Id.*

180. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

181. 458 U.S. 718 (1982).

182. *Hogan*, 458 U.S. at 723. In a 5-4 ruling, the Court struck down a state-supported university’s policy for excluding qualified men from being admitted to the school’s nursing program. *Id.*

183. *Id.* at 731.

184. Compare *id.* (stating the relationship between the classification and the State’s objectives must be “exceedingly persuasive,” indicating an increased level of scrutiny), with *Craig v. Boren*, 429 U.S. 190 (1976) (stating the relationship must be “substantially related”).

must determine whether the proffered justification is 'exceedingly persuasive.'<sup>185</sup> Justice Scalia in his dissenting opinion in *VMI* branded this language "strict scrutiny."<sup>186</sup> He noted that the analysis prior to this decision was the "substantial relation" test stated in *Craig*.<sup>187</sup> Some legal scholars have agreed with Justice Scalia that the standard of review set in *VMI* was the heightened standard of strict scrutiny.<sup>188</sup>

The Court in *VMI* reemphasized that the standard of review for classifications involving gender is the intermediate standard.<sup>189</sup> However, it raised the burden of proof to a level almost tantamount to strict scrutiny by increasing the demands of the state to sustain its classifications.<sup>190</sup> This posture exposed the Court's commitment to the dissolution of pedagogies that deny women equal access to education.<sup>191</sup> It provided that the state alone carries the demanding burden of proving the "exceedingly persuasive" connection between the policy and the gender classification.<sup>192</sup> Further, the Court gave several guidelines to instruct the state on how to demonstrate this exceedingly persuasive connection.<sup>193</sup> It maintained that the state "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>194</sup>

It is the equal protection doctrine that provides the lens through

185. *United States v. Va.*, 518 U.S. 515, 533 (1996).

186. *Id.* at 571 (Scalia, J., dissenting) (stating "... The United States urged us to hold in this litigation 'that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities based on their sex.' ... The Court, while making no reference to the Government's argument, effectively accepts it.").

187. *Id.* at 568.

188. Justice Ruth Bader Ginsberg, for the Court, applied super-heightened scrutiny to governmental gender classifications, requiring states to demonstrate an "exceedingly persuasive justification" for discriminatory policies. This standard represents an enhanced intermediate standard of review more exacting than that articulated in *Craig v. Boren*. Furthermore, while classifications based upon gender or illegitimacy traditionally have triggered heightened scrutiny, in *Virginia* the Court has distinguished gender challenges as triggering even higher scrutiny.

Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?* 23 J. CONTEMP. L. 475, 500 (1997).

189. *VMI*, 518 U.S. at 532-33. See also Colling O'Conner Udell, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 541 (1996).

190. See Smith, *supra* note 188, at 500.

191. *VMI*, 518 U.S. at 549-51.

192. *Id.* at 533.

193. *Id.*

194. *Id.*

which the Socratic Method's disparate effects can be constitutionally examined. The constitution's basic principles of fairness and equality protect citizens from unfair discriminatory practices on the part of the state.<sup>195</sup> While this ideal does not eviscerate the state's ability to balance the interests of its citizens, it eliminates the state's right to invidiously discriminate.<sup>196</sup> If the state laws apply disproportionately to one group without at least a rational basis for its enactment, then that law will not survive constitutional scrutiny.<sup>197</sup> This section explores these formulations specifically in regards to gender classifications. *Personnel Administrator v. Feeney* articulates the formula for proving gender discrimination under the equal protection doctrine.<sup>198</sup> In *Feeney*, female non-veterans brought suit against the State of Massachusetts, arguing that a state statute giving an "absolute preference" for civil service positions to veterans ultimately excluded women from consideration for employment.<sup>199</sup> In its reasoning, the Court identifies two key factors in establishing a prima facie case for equal protection violations involving gender – discriminatory impact and discriminatory intent.<sup>200</sup>

#### A. Proving Impact

Disparate impact is a significant factor considered by the Court in finding an equal protection violation. This concept has undergone a series of metamorphoses before reaching its present-day meaning. *Yick Wo v. Hopkins*<sup>201</sup> is a seminal case in relation to the disparate impact requirement.<sup>202</sup> It was one of the earliest cases to articulate the significance of the disparate impact requirement as proof of an equal protection violation.<sup>203</sup> In *Yick Wo*, the Court struck down a San Francisco ordinance that governed the operation of laundries in wooden buildings.<sup>204</sup> The Court found that the law, though facially

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195. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 214-15, 217 (1991) (exploring a "limited history of modern equal protection."). See also U.S. CONST. amend. XIV, §1.

196. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

197. *Id.* (stating that "When the basic classification is rationally based, uneven effects upon particular groups with a class are ordinarily of no constitutional concern.").

198. *Id.* at 274.

199. *Id.* at 259.

200. *Id.* at 274.

201. 118 U.S. 356 (1886).

202. *Id.*

203. *Id.* at 373-74.

204. *Id.*

neutral, was applied disproportionately to adversely affect Chinese applicants.<sup>205</sup> Justice Matthews stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."<sup>206</sup>

These words establish the significance of discriminatory impact in the presence of facially neutral laws.

Similarly, the Socratic Method appears facially neutral as applied to gender discrimination. It is a pedagogical strategy used to educate both male and female law students. It is a teaching tool that has been in place in American law schools for well over one hundred years.<sup>207</sup> Advocates of the Socratic Method cite benefits for both male and female law students, including contentions that it is the most efficient and economic means of educating law students, it promotes active learning, it furthers awareness of the complexity of the law, and it enables students to be self-taught by taking a hands on approach to their studies.<sup>208</sup> Therefore, the Method satisfies the neutrality test and would likely be treated as gender neutral on its face. However, as with the statute in *Yick Wo*, despite appearing facially neutral, the Socratic Method has a disparate impact on female law students. The adversative nature of the Method creates a combative atmosphere, which leads to silencing, which then leads to lower academic performance.<sup>209</sup>

The Court would likely find that the Socratic Method has a disparate impact on female law students. Extensive studies detail and empirically support the understanding of the disproportionate effect of this method on the academic performance and achievement of women law students.<sup>210</sup> These studies have detailed the damaging effects of the Socratic Method on women law students, including its silencing

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205. *Id.*

206. *Id.*

207. Schwartz, *supra* note 26, at 350.

208. *See supra* text accompanying notes 100-02.

209. *See supra* text accompanying notes 59-61.

210. *See supra* Part IV.

effect, antagonistic atmosphere, and the resulting lower academic scores.<sup>211</sup>

The disparate impact prong of the equal protection doctrine is satisfied by almost thirty years of study on the Socratic Method demonstrating its damaging effects on women in law school.<sup>212</sup> The recognition of its stifling effects on female law students coupled with its detrimental academic effects resulting in lower female representation on law reviews, moot court, and Order of the Coif;<sup>213</sup> the possibility of long term detrimental effects on future career options and status;<sup>214</sup> to the psychologically debilitating effects disproportionately reported by female law students;<sup>215</sup> all demonstrate the need for reform and elimination.<sup>216</sup>

### *B. Proving Intent*

Discriminatory intent is the second significant factor considered by the Court when reviewing a potential equal protection violation. *Feeney*<sup>217</sup> is the foremost case to construct this two-fold formula of discriminatory impact plus intent in gender cases.<sup>218</sup> In its analysis, the Court articulated the grounds that would govern the intent standard in cases involving gender discrimination under the equal protection doctrine.<sup>219</sup> The Court crafted a two-part test to determine whether an intent to discriminate against women existed.<sup>220</sup> The first part of the test questioned the gender neutrality of the statutory classification.<sup>221</sup> The second part questioned, if the statute was not overtly or covertly discriminatory, whether the adverse effect reflected

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211. *See supra* Part IV.

212. *Feeney*, 442 U.S. at 260 (recognizing the significance of impact in proving an equal protection claim, but balancing impact with the intent to discriminate requirement.). *See also* Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 336 (1986) (stating, "When an equal protection claimant challenges a facially neutral statute, often the only evidence of discrimination is a statistical showing of adverse impact upon a particular class alongside a government procedure susceptible to abuse.").

213. *Bowers*, *supra* note 45, at 140-41 tbl.7-8.

214. *Id.*

215. *Brown*, *supra* note 123, at 11.

216. *Worden*, *supra* note 54, at 1148-49.

217. 442 U.S. 256 (1979).

218. *Id.* at 273.

219. *Id.*

220. *Id.* at 274.

221. *Id.*

invidious gender-based discrimination.<sup>222</sup> In its reasoning, the Court articulated the role of state intent in a “because of” rather than an “in spite of” paradigm. As it explains:

It would . . . be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.<sup>223</sup>

The “because of” level of proof requires the plaintiff to show that the government was not only aware of the foreseeable discriminatory effect, but that the government chose this action because of the discriminatory impact.<sup>224</sup>

The Court reasoned that to maintain a gender-based equal protection claim, even in the face of the most dramatic showing of de facto discrimination, the plaintiffs must establish the intent of the state to purposely discriminate.<sup>225</sup> It characterized the foreseeability of discrimination, on an otherwise neutral statute, as an inference that does not “ripen into proof.”<sup>226</sup> The Court set the intent bar incredibly high, and in applying this rationale it held against the female non-veteran plaintiffs.<sup>227</sup> The Court maintained that the statute did not

222. *Id.* The court stated that “impact provides an important starting point,” in identifying invidious discrimination. *Id.* Other factors considered were gleaned from the formula articulated in the *Arlington Heights* decision. Those factors include the historical background of the decision, the sequence of events leading up to the challenged decision, departures from the normal procedural sequence, and the legislative or administrative history. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977).

223. *Feeney*, 442 U.S. at 278-79.

224. *Id.*

225. *Id.* at 274.

226. But in this inquiry – made as it is under the Constitution – an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

*Id.* at 279 n.25.

227. *Id.* at 280-81.

discriminate against women, but against non-veterans, a group that includes both men and women.<sup>228</sup> The Court reasoned they lacked the evidence to satisfy the requirement for discriminatory intent, stating that impact alone does not provide enough evidence to support an equal protection claim.<sup>229</sup>

Through *Feeney*, the Supreme Court elevated the burden of proof to plaintiffs seeking redress under the equal protection doctrine in gender discrimination cases.<sup>230</sup> In its honing of the intent standard, the Court provided that, in order to maintain a claim under this doctrine, a plaintiff must demonstrate a prima facie showing of both intent and impact.<sup>231</sup> The *Feeney* Court discusses this standard and its application to gender discrimination cases, maintaining that the foreseeable effects of disparate impact provide some evidence of discrimination but do not compel such a result.<sup>232</sup>

Applying the *Feeney* level of proof for intent to the Socratic Method poses a significant and almost impenetrable barrier. This is because the intention of state universities is not to overtly discriminate against women law students. The surge in the female law student population nationally attests to the acceptance of women's presence in legal education.<sup>233</sup> However, the nature of the discrimination involved with the Socratic Method is subtly covert. It is the outcome of a form of pedagogy that was constructed at time when women were not allowed to attend law school.<sup>234</sup> The audience intended for the Socratic Method was largely white, male law students.<sup>235</sup>

The glimmer of hope for this argument rests in the understanding that, given the thirty years of research calling for its elimination and detailing its inefficiency, the Socratic Method still

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228. *Id.*

229. *Id.* at 275 (stating, "Just as there are cases in which impact alone can unmask an invidious classification . . . there are others, in which – notwithstanding impact – the legitimate noninvidious purposes of a law cannot be missed. This is one.").

230. 442 U.S. 256 (1979).

231. *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

232. *See supra* note 225.

233. A CURRENT GLANCE OF WOMEN IN THE LAW, COMMISSION ON WOMEN IN THE PROFESSION, AM. BAR ASSOC. (2000) (citing FIRST YEAR ENROLLMENT IN ABA APPROVED LAW SCHOOLS 1947-2000, LEGAL EDUCATION DIVISION, AM. BAR ASSOC., available at <http://www.abanet.org/legaled/femstats.html> (last visited Apr. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

234. STEVENS, *supra* note 13, at 56.

235. *Garner*, *supra* note 27, at 1599 (stating that Langdell developed the case method in the early 1870's); *see also* STEVENS, *supra* note 13, at 82 (noting that the first woman did not attend law school until 1876).

remains the dominant form of legal pedagogy.<sup>236</sup> This foreseeability on the part of state law schools provides a sliver of relief to those trying to meet the otherwise stringent intent requirement. The Court in *Feeney* discussed the significance of foreseeability.<sup>237</sup> As it questions, "Where a law's consequences are that inevitable, can they meaningfully be described as unintended?"<sup>238</sup> The Court answers in the negative, and forecloses this possibility with the injection of the "because of" requirement.<sup>239</sup> Therefore, in order to sustain an argument against the use of the Socratic Method it must be demonstrated that law schools implement the Socratic Method because they intend to discriminate against women, and not merely because discrimination is a foreseeable possibility.

This intent requirement would impede the application of equal protection doctrine to women seeking protection from gender discrimination as engendered by the Socratic Method. The intent strand becomes a significant hurdle, and the possibility of overcoming it is tenuous if not impossible.<sup>240</sup> For while the damaging impact of the Socratic Method has been well established and documented, thereby satisfying the impact prong, under *Feeney* arguments against it strain to identify a discriminatory intent on the part of law school administrators and educators. The argument in favor of the Method touts its educational benefits, not any overt intent to discriminate, as the reason for its implementation.<sup>241</sup> In addition, even in the face of the damaging effects of the Socratic Method on its female students, the Court's reasoning in *Feeney* would relegate this foreseeability to a mere inference "that does not ripen into proof."<sup>242</sup>

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236. See sources cited *supra* note 86.

237. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 278 (1979).

238. *Id.*

239. *Id.* at 279.

240. Some opponents to the intent requirement have argued that this standard creates a right without remedy. As one opponent argues, "By forcing the victims of entrenched discrimination in this country to establish the motives of institutional actors, either directly . . . or inferentially through heightened evidentiary requirements . . . the Court has defined the rights of these victims in such a manner as to preclude effective remedies." Samuel Issacharoff, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 *YALE L.J.* 328, 350 (1982).

241. *Garner*, *supra* note 27, at 1648.

242. *Feeney*, 442 U.S. at 279 n.25.

## IX. EQUAL PROTECTION AND THE SOCRATIC METHOD: MAKING THE ARGUMENT

While the standards put forward by *Feeney* dim the likelihood of a successful equal protection claim against the Socratic Method, this section details another strategy under the equal protection doctrine that offers some remedy for overcoming the barrier to proving intent.

The *VMI* decision delivers a powerful blow to state-sponsored pedagogies that discriminate against women.<sup>243</sup> It offers an opportunity for redress, and aids in overcoming the rigidity of the intent standard. The Supreme Court provided another position from which “all forms of sexist pedagogy” may be attacked.<sup>244</sup> The Socratic Method conforms to this characterization. Under the reasoning in the *VMI* decision, attempts by proponents to merely assert the benefits of the Socratic Method would falter when balanced against the detrimental effect of this teaching style on the female law student.

In *VMI*, the United States brought suit against the Commonwealth of Virginia, alleging that it violated the equal protection clause of the Fourteenth Amendment by maintaining a military college exclusively for men.<sup>245</sup> Virginia argued that the adversative model of education employed at the Virginia Military Institute’s was a unique teaching strategy that could not be maintained if women were allowed to enroll.<sup>246</sup> The Court ruled that excluding women in order to offer men a unique educational opportunity was unconstitutional under the Fourteenth Amendment.<sup>247</sup>

The Court reasoned, “[i]nherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>248</sup> The Court opposed the use of inherent differences between men and women as a means of denying either sex an equal opportunity.<sup>249</sup> Therefore, the Court applied the stringent “exceedingly persuasive” standard in formulating its holding in *VMI*.<sup>250</sup> This standard is demanding and it requires the state to show

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243. 518 U.S. 515 (1996).

244. *Id.* at 550-51.

245. *Id.* at 519.

246. *Id.* at 524 (arguing, “VMI’s school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was ‘enhanced by VMI’s unique method of instruction.’”).

247. *Id.* at 519.

248. *Id.* at 533.

249. *Id.*

250. *Id.* at 532-33.

that the challenged action serves an “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>251</sup>

In applying this rule to the Socratic Method, a means of offering constitutional redress emerges, as the similarities between VMI’s adversative pedagogies and the Socratic Method are striking. This symmetry bolsters the extension of the Court’s ruling in *VMI* to the sexist nature of the Socratic Method. For example, VMI’s adversative model is also referred to as the doubting model, because it “dissects the young student and makes him aware of his limits and capabilities . . . .”<sup>252</sup> Proponents of the Socratic Method have identified a very similar objective. Rosato identifies the pure nature of the Socratic Method as intended by Socrates himself was to construct a dialogue between the educator and the student.<sup>253</sup> The goal of the instructor was to “facilitate the student’s inquiry by first exposing the student’s ignorance and then encouraging him to answer more questions that would enable him to obtain the necessary knowledge on his own.”<sup>254</sup> This equation highlights just one of the similarities between these two adversative pedagogies.

Another similarity between these two methodologies is evident in the reliance on humiliating and denigrating tactics to further knowledge. For example, VMI’s adversative model accomplishes this through a hierarchical or “dyke” system wherein a senior classman is assigned to an entering classman referred to as a “rat.”<sup>255</sup> The senior classman is responsible for indoctrinating the “rat” or freshman into the stringently enforced honor code system.<sup>256</sup> While the mechanics of law school do not explicitly provide for such a hierarchy, many of its female members have indicated a similar sense of denigration, and humiliation in the classroom.<sup>257</sup> They have reported troubling instances ranging from offensive comments by instructors and male classmates to the humiliation of the abusive use of the Method in the classroom.<sup>258</sup> As the Stanford study highlighted in examining the silencing of women law students, women fail to participate in class out of fear or out of a general unwillingness to engage in the showmanship

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251. *Id.* at 533.

252. *Id.* at 522.

253. Rosato, *supra* note 49, at 41.

254. *Id.* at 42-43.

255. *VMI*, 518 U.S. at 522.

256. *Id.*

257. *See supra* Part IV.

258. *See supra* Part IV.

called for in the Socratic Classroom, and some who begin to participate stop because they feel uncomfortable or unwelcome.<sup>259</sup> The study further stated that the alienation resulting in women's silence in the classroom was often caused by professors who ignored or trivialized points made by women, and later gave credence to the same ideas when expressed by men.<sup>260</sup>

It is compelling to note that one of the pivotal moments in the *VMI* case occurred during oral arguments, when Paul Bender attorney for the United States analogized the Socratic Method's adversative model to that of VMI. He posited:

What if a State set up a State law school in 1839, all for men, because at that time only men could be lawyers, and over 150 years it developed an extremely adversative method of legal education, the toughest kind of Socratic teaching, tremendous time pressures, tremendous pressures in exams, tremendous combativeness by the faculty, tremendous competitiveness among the students, and developed a reputation for that.

....

And then as women came into the legal profession and started to apply to the school, to ask it to change its admission policy, the school made a judgment that most women really wouldn't be comfortable in this environment, and the faculty would have trouble cross-examining them in the same way they cross-examine men, and other students would have difficulty relating to them in the same competitive way and so it is better not to let women into the school.

What we'll do is, we'll set up a new women's law school, and it won't have the tough Socratic Method, it will have a much warmer, a much more embracing environment, and it won't have large classes with a lot of pressure, it will have seminars, and it won't have tough exams, it will have papers, and things like that ---

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259. WEISS & MELLING, *supra* note 45, at 1335.

260. *Id.* at 1336.

(Laughter.)<sup>261</sup>

The Courtroom erupted in laughter at the absurdity of such a proposition. However, it was this very line of reasoning and this analogy that compelled the Court to ultimately side with the United States against the sexist pedagogy of the Virginia Military Institute.<sup>262</sup> Further, it is the very types of humane approaches that Bender proffered as an exaggeration for which numerous studies call in order to secure the equal treatment and opportunity of women law students.<sup>263</sup>

The Socratic Method as implemented in many state universities becomes the equivalent of unequal access to an educational opportunity in which women are fit to engage.<sup>264</sup> As the second Banks study concluded, “[t]oday’s women may have access to education, but they do not receive an equal education.”<sup>265</sup>

Further support for the conclusion that the Socratic Method violates equal protection is found in the Court’s reasoning in *VMI*, where Virginia’s main argument was based on pedagogical grounds of segregation.<sup>266</sup> It maintained that the segregation itself was part of its unique pedagogy.<sup>267</sup> Virginia also argued that single-sex education serves an important governmental and educational objective.<sup>268</sup> In this sense segregation was not just the physical status, meaning the absence of women, but it *was* the teaching strategy.<sup>269</sup> The Court explicitly struck at this sexist pedagogy by holding that it prevented women from having access to an education in which they were fit to engage. Thereby the Court created an avenue by which other sexist and

261. *United States v. Va.*, 1996 U.S. Trans Lexis 9, 19-20 (1996). Judging by the oral argument of the VMI case, we seem, unfortunately, not to have advanced far beyond Justice Bradley in our assumptions that good lawyering requires masculine qualities. Arguing for the United States, Paul Bender analogized VMI to a traditional Socratic Method law school with large classes and issue spotting exams, and VWIL to an all female law school with a nurturing teaching style and seminar papers, on the assumption, apparently shared by a majority of the Court, that only the former would adequately prepare students. *See also* Mary Anne Case, *Discrimination and Inequality Emerging Issues ‘The Very Stereotype the Law Condemns:’ Constitutional Sex Discrimination Law As a Quest For Perfect Proxies*, 85 CORNELL L. REV. 1447, 1470 n.118 (2000).

262. *See* Case, *supra* note 260, 1470 n. 118 (describing the Court’s agreement with Bender’s analogy between VMI and the Socratic Method).

263. *See supra* Parts IV, VI.

264. *United States v. Va.*, 518 U.S. at 515, 551 (1996).

265. *BANKS II*, *supra* note 45, at 528.

266. *VMI*, 515 U.S. at 549.

267. *Id.*

268. *Id.*

269. *Id.*

adversative pedagogies including the Socratic Method could be attacked. As it stated,

Virginia maintains that these methodological differences are ‘justified pedagogically . . . .’<sup>270</sup>

. . . .

State actors controlling gates to opportunity . . . may not exclude qualified individuals based on “fixed notions concerning the roles and abilities of males and females.”<sup>271</sup>

. . . .

Equal protection principles, as applied to gender classifications, mean State actors may not rely on overbroad generalizations to make judgments about people that are likely to . . . perpetuate historical patterns of discrimination.<sup>272</sup>

The Court is simultaneously putting forward the premise that sexist pedagogy proffered by state actors will not survive constitutional scrutiny, while also speaking to the unacceptable interweaving of historical forms of discrimination into current pedagogical strategies. Analogously, the Socratic Method as a teaching tool finds its basis in sexism and exclusion, and its continued implementation in state universities conforms to those parameters the Court rejects in *VMI*.

The Court’s posture in this case explicitly secures the right of equal access in the field of education for women. It lays a solid foundation that, if extended, can be used as an analogous argument against the Socratic Method and all forms of sexist pedagogies to protect against its disparate impact upon women law students.

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270. *Id.*

271. *Id.* at 541.

272. *Id.* at 541-42.

## X. CONCLUSION: A REINVENTION OF THE MASTER'S TOOLS

The Socratic Method is the primary tool for legal education in law schools throughout this country. Based on antiquated, male-centered pedagogy, it has served to alienate and exclude a significant portion of the American law student body. The stifling effects of the Socratic Method are characterized by the construction of a tyrannical, humiliating educational experience for many law students, but with particularly debilitating effects to female law students. The culminating consequences of this method radiate from its central silencing, and extend into the psychological, and ultimately extra-curricular career enhancing opportunities for women studying law.

While it is unlikely that the arguments proffered against the Socratic Method will be sustained, and there are many hurdles to be overcome before it ripens into a cause for judicial review, it is my hope to provide another lens to reshape and re-contextualize the ways in which information is put forward to the thousands of women law students. The call for constitutional review heightens the urgency of reform, subjecting the Socratic Method at least to revision, and modification. Thirty years of research calls for a new way of conceiving of education in ways that speak to women's humanity and not women's humiliation. A more humane approach could be achieved by implementing the Chapman "ethic of care," which includes using alternative methods of teaching, giving more exercises, practice examinations, and other feedback, building better relationships among students and faculty, and hiring more women and minority professors.<sup>273</sup>

The Constitution provides a vehicle through which relief can be sought, and the current case law speaks in support of this dismantling. Justice Ginsburg, in her delivery of the Court's opinion in *VMI*, poignantly calls attention to this remedy, when she says, "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."<sup>274</sup> Through the equal protection doctrine, a means for the reinvention of the hegemonic pedagogy of the Socratic Method is available, and a remedial provision constructed in order to dismantle this final vestige of "the master's tools" from the body of legal education.

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273. See *supra* Part VI.

274. *VMI*, 518 U.S. at 557 (recounting the words of historian Richard Morris).

