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Which Wave are You? Comments on the Collected Essays from the Seminar "To Do Feminist Legal Theory"

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WHICH WAVE ARE YOU? COMMENTS ON THE COLLECTED ESSAYS FROM THE SEMINAR "TO DO FEMINIST LEGAL THEORY"

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I. INTRODUCTION

I feel honored to have my work included with that of the students in the seminar *To Do Feminist Legal Theory* and also with the comments of so many distinguished critical scholars and law teachers. The notion at the heart of this project, in the imagining of it and in its execution, is exciting. It is as if Maria Grahn-Farley sent me an invitation to an adventure. How could I refuse so tempting an offer? I am traveling in roughly the same direction and I am so happy to have company for a piece. I had grown weary of my own obsession, my preoccupation and search— ongoing, never-ending— for the best strategies to use to teach students who are, as one of the contributors to the issue describes herself – those who come late to "formal education."

These are essays in which women law students begin to grapple with what I will call Big Ideas. Most people go through life without coming into contact with the written exposition of Big Ideas. Try talking to your bus driver about a dialectical approach to individual and group rights; ask the grocery store clerk what he or she thinks about essentialism; or ask the local bar tender what he or she thinks about the reproduction of hierarchy. And the response you would get from the ordinary person on the street is not much different from the response of most of my recent law students. At best, they would consider these issues irrelevant; at worst, they would be absolutely hostile.

So the first reaction I had to these papers was one of grateful surprise. Here are student s who were willing to struggle with material that is over their heads. I have been there often enough—reading in philosophy or psychology or anthropology. I flounder about grasping for something that will keep me afloat while I paddle towards a distant shore, the domain of

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some other discipline. I know that even if I were make it to dry land, I would not be able to ask for directions because I do not speak the language. It takes time to learn the vocabulary and the grammar of a different discipline. And so it is when law students venture out into the world of feminist theory. Where else could these students begin but with an attempt at translation, relating the ideas in the material they were reading to their own experiences and what they know of how the law works in the lives of ordinary people.

I was pleasantly surprised for other reasons as well. Recently I had begun to have doubts. I thought it might be impossible in the current political climate to be a radical teacher. By "radical," I mean a person who teaches students to think about ways to change the world to make it more just. The work of the students in this seminar suggests that I might be wrong. I was worried that the women teachers of my generation had lost focus, or motivation, or the skills that we need to do consciousness raising, an integral and important part of the work of changing the world. If the next generation of law teachers is as committed as Maria Grahn-Farley, I guess I can stop worrying.

I have one concern that remains. What can I, what should I, ask of these students? If I take as a measure of past success the very presence in the academy of men and women who formerly would have been excluded, what is it that I owe them? If I am a law teacher, is it my job to make sure that they are fully acculturated? If so, can I do it in a way that sustains their critical perspectives? Should it matter to me at all if they embrace wholeheartedly and with profound relief the values and beliefs that kept them down but now promise to lift them up?

If I am still passionate after all these years about my work as a person who writes about and teaches the law, it is because I believe in a project and an ideology that rejects hierarchy, redefines merit, embraces the politics of inclusion. I have a vision of a just society. The conception of justice I subscribe to is both restorative and redistributive. I suppose then that my political viewpoint is close to that of the students who have written these pieces. The students in this seminar are a radical law professor's dream. At least I do not have to deal with the issues of denial and self deception, but that does not mean my views and the views of these students are entirely consistent on all points. Heaven forbid.

As I said earlier, these papers remind me of what it was like to be back at the beginning of the process, to engage with a text that was challenging and to try and understand what that text was about. To understand your own oppression, you must first tell your own story. Eventually the search for justice takes you beyond your own story to the story of others, and then on to read, hopefully to understand and to "do" theory. The question for me, though, as a teacher and as one who has been invited to comment on the

student essays, is what does it mean for me to "do feminist theory" in this context, in an essay written in response to student essays? Should I point out and praise the achievements of the students or should I use this opportunity to engage the students, to problematize the material, to challenge their assumptions, their data or even their analyses?

I have chosen what I think is a compromise. I will do the latter, but I have also chosen to do it in a way that I hope the students will receive, will perceive, as praxis, as a way of doing feminist theory. I have written my comments in a particular form, in a genre associated with feminist sensibilities, in a style that is meant to engage, not to trump, the arguments they have advanced. My comments are epistolary, anticipatory, an opening gambit.[1]

There is some risk involved in this. I could be accused of acting like your mother. The possibility that I might be, at least in a structural sense, your mother, has been soundly rejected by Third Wave feminists.[2] Third Wave feminists complain about "maternalism" and cry foul when their acts and attitudes are measured against ideals and standards that were created by—well, their mothers or at least those in their mothers' generation.

I was a little like a Third Waver at one time, taking feminism for granted; not worrying too much about whether we were all on the same page at the same time. Then about ten years ago or so, I was shocked to discover an incipient rebellion by young women against ideas very central to Second Wave feminism. The young women students at my own law school woke me up, administering a metaphorical pinch in the form of a mass meeting in the school auditorium protesting *against* proposed sexual harassment guidelines supported by women faculty. We, the women faculty, were accused of being "maternalistic."

After the fact I heard that some of the men on the faculty had been discussing the proposed guidelines in their classes. The men who were reputed to have held these "teach-ins" were also the people most opposed to the guidelines. The crux of the problem in the end was the provision dealing with faculty/student sexual liaisons. As one of my male colleagues argued, prohibiting these relationships, even if the proscription was limited to the time when a student was in a class or under the supervision of a faculty member, interfered with the market for mates. This cogent analysis came from a man who was already married and, we might assume, not in the

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[1] The genre in which I write is called an epistolary essay. "If the letter presents itself as an appropriate genre for a type of confidential message – the essay, in the opinion of a large percentage of feminist criticism – would be the genre most conducive to feminist sensibilities." Maria Concepcion Bados Ciria, *Barbara Jacobs, Gendered Subjectivity and the Epistolary Essay, in* THE OTHER MIRROR, WOMEN'S NARRATIVES IN MEXICO, 1980-1995 (Kristine Ibsen, ed.1997)

[2] *See generally* JENNIFER BAUMGARDNER AND AMY RICHARDS, MANIFESTA, YOUNG WOMEN, FEMINISM, AND THE FUTURE (2000).

market for a mate. He might have been motivated by a concern for his unmarried, junior colleagues or for young women students who were languishing in the unmarried state. Interestingly enough, no one accused him of the sin of paternalism.

Given my previous experience, I think it would be reckless and foolhardy for me to set about this task, involving as it does an attempt to communicate inter-generationally without worrying about the misunderstandings that might arise. I fear that I will suffer the same fate as Phyllis Chesler, the author of *Letters to a Young Feminist.* She was accused of adopting a tone in her book that is "the voice of the archetypal embarrassing mother, the one who is supremely out of touch with her kids and does not even realize it."[3] That comment made me a little uneasy.[4] I try to be candid and passionate in my writing but what if it is received or perceived as strident or pompous or—heaven forbid—even a little pedantic or self-righteous? A "Letter to An Older Feminist," the response to Chesler, contained a general admonition. "You're not our mothers."[5] Would it be all right if we agree up front that I am not your mother? But what tone is proper for someone who is not only older, but also a person who calls herself "teacher?"

So while I consider this a fan letter to you, the women students who wrote these articles, I also want to warn you now that I am about to engage with you about some of the ideas you have presented in your essays. I want to know if you saw what I saw and where our visions part company. I want to ask you questions that might take you beyond mastery of specific material, the attempt to understand what the writers of feminist theory said in particular articles and books; beyond the painstaking effort to learn how to employ the language of theory. I want to engage you in a conversation about the Big Ideas themselves, about the internal inconsistencies, the critiques that could be offered of these critiques. We all have much to gain from this process—hearing each other's voices, stories, and thoughts about the meaning and the uses of theory. I hope you learn as much reading what we have to say as we learned reading what you have said.

II. THEMES IN THE THEORY: TO WEAVE A FEMINIST THEORY

What came through most clearly to me in the collection of essays was the persistence of themes or patterns, whatever the connection with the

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[3] *Id.* at 232

[4] *Letter to An Older Feminist, in* JENNIFER BAUMGARDNER AND AMY RICHARDS, YOUNG WOMEN, FEMINISM, AND THE FUTURE 233-34 (2000). The label refers to feminists who invoke "guilt or gratitude" in critiquing the work of young feminists. *Id.* at 397-98 n.43. I have to acknowledge as a mother that both emotions are useful tools in manipulating recalcitrant children, teens and even adult children. But I also wonder whether these strategies would be necessary if rebellion were not the preferred method of achieving independence.

[5] *Id.*

world of the law – legal doctrines, statutes, law school training, or legal employment – explored in a particular essay. Words seem insufficient to describe the effect of the repetition, variation and interplay of these themes in all the articles. I wished for the skill of a visual artist so that I could create a design, an image or a pattern, woven as a spider might, with intricate variations and connections between disparate ideas.

The essays all touch on the question of what it means to be a woman: the physical attributes or properties of being a woman, the way in which womanhood is constructed, the way in which women are represented and "embodied" in the law, the control women have over those representations, the ambivalence or contradictions that make it hard to define feminism.

Ms. Alexeeva, you worry about the standards applied to women lawyers and the image of women lawyers in the media.[6] You believe that Ms. McBeal's character is "over feminized."[7] She is not logical, but intuitive and empathic; not a positivist or processuralist, but a moralist.[8] Her desire for motherhood either keeps her off balance or, once it is achieved, it "disempowers" her.[9] You focus on the trope of craziness that runs through the show, the theme of feminine ambivalence (real or mythical?) about the possibility of combining work inside and outside of a home.[10]

Ally McBeal's frivolous and comedic insanity is light years away from the question of the insanity of another woman caught up in the glare of the media, Andrea Yates. Ms. Galanti, do you honestly believe that Andrea Yates was forced to portray herself as mentally ill because, as the quote you include from Dorothy Roberts states, "the law does not recognize the stifling social conditions" that drove her to kill her children?[11] The law rejected her claim of insanity, but do you? Can we agree that some social conditions cause sane people to commit crimes but at other times, those same social conditions might actually produce mental illness?

Andrea Yates beckons us, inviting us to move beyond the biological explanations, the hormonal imbalances of post partum depression or psychosis. Post Partum psychosis pairs desire and revulsion in the performance of the biological and the social imperatives of motherhood. Biological explanations are an easy way out, not for the defendant who might think it useful in neutralizing arguments about fault and immorality, but for the community that side steps responsibility for all injuries – to dead

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[6] *See* Victoria Alexeeva, *Images of Women Lawyers: Over-Representation of Their Femininity in Media*, 9 CARDOZO WOMEN'S L.J. 361 (2003).

[7] *See id.* at 362.

[8] *See id.* at 363.

[9] *See id.* at 375.

[10] *See id.*at 364.

[11] *See* Marie Galanti, *The Andrea Yates Trial: What is Wrong with this Picture?*, 9 CARDOZO WOMEN'S L.J. 345, 347(2003).

children and infanticidal mothers and the families that in the end lose both.

These two essays, one dealing with a fictional character, one with a fictionalized character, explore the fissures and fractures that have emerged around the role of women as "mother" in the dominant culture in the United States. How different then are the discussions of motherhood found in your essay, Ms. Laird, which is concerned with the relationship between women and their children in the creation and maintenance of gay and lesbian families.[12] And Ms. Mertz, although your essay is also concerned with the social conditions that lead to violence, to what could be a criminal act, the exoneration of the woman defendant in that case is all tied up with the expectations society has for women who are mothers.[13] And then, of course, there is Ms. Erlich, who has seen, up close and personal, how these expectations interfere with the employment and the career aspirations of women lawyers.[14]

We are come full circle, back to Ally McBeal. The history of the struggle by women to develop an "alternative epistemological foundation" acknowledges the biological differences between men and women but it also can be seen as a struggle to "separate womanhood from maternity;" a struggle to refute the "relegation of women to maternity."[15] How much of what we learn in preparation for marriage and motherhood is connected to the virtues of womanhood? We have decided—or some of us have—to reaffirm rather than abandon in our professional careers the talent for empathy, the reliance on intuition, the skills of a care-taker, the ability to nurture others. We do this although these skills are associated with the roles that women are expected to play, roles that keep them out of the market, out of the professions, out of the world of politics and public discourse. But we reject the politics that confine us and these skills only to marriage and maternity.

Or maybe Ally McBeal is all about sex. Critics of Ally McBeal's short skirts have noted with some trepidation what seems to be the singular preoccupation with sex in the "riff of Calista Flockhart."[16] Ms. Javidan, the sexuality of women, of girls, is the subject matter of your essay on child

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[12] *See* Elisa Laird, *The Law is Straight and Narrow, How American Courts Define Families*, 9 CARDOZO WOMEN'S L.J. 221 (2003).

[13] *See* Jacqueline Mertz, *Women Of Color—What Their Voices Teach Us*, 9 CARDOZO WOMEN'S L.J. 205 (2003).

[14] *See* Ekee Erlich, *Caution: Men at Work*, 9 CARDOZO WOMEN'S L.J. 409 (2003).

[15] Mary Louise Pratt, *"Don't Interrupt Me," The Gender Essay as Conversation and Countercanon, in* REINTERPRETING THE SPANISH AMERICAN ESSAY (Ed. Doris Meyer) (discussing the 19th century essay *La Mujer* by Gomez de Avellaneda).

[16] Regina Austin and Elizabeth Schneider, *Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 24 (2001) (comment by Elizabeth Schneider)

pornography.[17] And could Ms. Laird talk about the tragedies of lesbian women deprived of custody of their children without noting that courts have used the lesbian women's sexuality in determining the best interests of a child in custody disputes?[18] If, as Regina Austin has noted, "repression and suppression ..are hardly formulas for challenging stereotypes,"[19] how do we embrace our new found liberation and still argue that images of our own sexuality are demeaning, degrading, humiliating? We are not, Ms. Gentry, as you point out, "exclusively sexual beings" but neither are we asexual.[20]

The distinction sometimes drawn between sex and sexism is too facile. Part of sexism is the fear of women's sexuality, or the fear on the part of men of their own sexuality, of the effect women have on them. So while women want to preserve the right to fend off unwelcome sexual advances and unwanted sexual intimacy, does the concession that we are sexual beings make strict liability for sexual advances untenable? Where you come out on this issue might vary in the different generations of feminist—first, second and third waves of women seeking liberation in their own ways.

Once we get beyond the physical differences between men and women and what these differences can or should mean, we are left with the question of other differences – race, ethnicity, sexual orientation, class, and age. Ms. Dayton, you have written about and against the hegemonic approach to violence against women, the one issue where feminists would like to declare victory, at least with respect to public perceptions and legislative reform.[21] What are the significances of the differences in communities of women? How do they affect our ability to understand each other, work together and seek solutions to the problems that confront us individually, collectively as women, or collectively as members of other subordinated communities?

III. FEMINIST CONTRADICTION: EMBRACING AND ESCAPING MATERNITY AND SEXUALITY

I found myself wandering around the essays, addressing my remarks to the authors of the essays that provoked an emotional, intellectual and ultimately a written response on my part. It should not be a surprise as a woman of color, as a black woman, I would begin with the article about the benefits of listening to the women of color. Ms. Mertz, we learn early on that

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[17] *See* Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237 (2003).

[18] *See* Laird, *supra* note 12.

[19] Austin & Schneider, *supra* note 16, at 17.

[20] *See* Diane Gentry, *Title VII Limitations—Keeping the Workplace Hostile*, 9 CARDOZO WOMEN'S L.J. 393, 407 (2003).

[21] *See* Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281 (2003).

you have experienced violence at the hands of a man.[22] In your case, the man was black. In Yvonne Wanrow's case, he was white. What connects you to Yvonne Wanrow is this experience of male violence. In this concern with male violence, you and Elizabeth Schneider, whose work you engage, have something in common.[23] Elizabeth Schneider advanced a theory in the defense of Yvonne Wanrow that won her client's freedom; an argument that made sex bias the central issue of the case.[24]

Schneider maintains that rights discourse is dialectical, moving between the opposition that is set up between individual and collective rights, mediating the opposition or perhaps even erasing this opposition.[25] The victory of Yvonne Wanrow, the vindication of her right to protect herself and her children, was a victory for all women. The group whose rights were advanced was women, not Indian women and certainly not American Indians.

American Indians believed Yvonne Warnow's case was about race and ethnicity as much as it was about gender. American Indian narratives and discourse reference self-determination and international law, sovereignty and the status of people like Leonard Peltier as political prisoners.[26] What story could or should Elizabeth Schneider have told that would have presented the case for Yvonne the American Indian? Would it have resolved itself into a dispute over jury instructions or the composition of the jury?

Beyond that, the trial of Yvonne Wanrow illustrates the central paradox of feminism. You say yourself that what you are struggling for is to be "respected as equals." Equality is a contested term. Defining equality is a central feature of contemporary political struggle. Wanrow's defense did not ask for absolute neutrality in the treatment of men and women. It asked the law to recognize the differences between men and women—in their roles in life, in their physical prowess, in their biological imperatives. Yvonne's narrative illustrates all three: she was acting on a biological or social imperative in protecting her children, she was resisting the hyper-sexuality of a deviant male; she was evening the odds given the physical differences between them in relative weight and strength.

Personally, I believe that differences matter. There is no real equality in a world in which differences in wealth, power, status, as well as biological differences, are ignored. To ignore them is to condemn subordinated groups to a life with no possibility of real justice. Whenever we (feminists) decide to point out the inequalities that exist between a woman and a man

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[22] *See* Mertz, *supra* note 13.
[23] *See id.*
[24] *See id.*
[25] *See id.*
[26] *See id.*

or women and men, however, it should be done self-consciously with a lot of thought about the consequences of that choice.

Yvonne Wanrow's case is not your case. When you talk about understanding the perspective of women of color, do you realize how deeply ambivalent we are about surrendering men of color to the United States legal system? That's what Jessica Dayton is trying to tell you.[27] The systemic nature of racial discrimination may put us at odds with white feminists seeking solutions in the punishment of men. Feminists of color may recognize the injustice of the punishment, not in the particular case, but as a general rule.

To find common cause with women of color, you have to get beyond or behind the general rule. And even then we have to consider what there is beyond the issue of violence by men against women, that binds one woman to another, one group of women to another. When I finished your article, I wanted to know more – more about the confusion and the contradiction you reference at the beginning of the paper. Feminists engage with contradiction. We unearth it, examine it, dissect it, reassemble it, and finally, we learn to live with it.

All of these articles deal with the contradictions of feminism. The contradictions pit sexual dimorphism against the socially constructed woman and man with consequences that percolate into every nook and cranny of human society. Does the human reproductive system with which we are born have anything to do with desire, with identity, with love? What is sex and what does it mean? Is it a form of human expression that should be protected at all costs, a resource that can be exploited for economic gain, a source of power over other humans, a means to an end—the construction of meaningful relationships as couples or as families?

Before there was Sex in the City, there was Ally McBeal. Unlike you Ms. Alexeeva, I never thought Ally McBeal was about lawyers or the law. It was a show that used fantastical notions of law to say something about the way society deals with sex – transsexuals, transvestites, gay and straight relationships, bisexuals, obsessive love.[28] I was not disturbed by Ally McBeal's wardrobe or her bumbling in court. No one could have been more incompetent in court than the character Richard Fish and no one more

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[27] *See* Dayton, *supra* note 21.

[28] The official Ally McBeal website has summaries of all of the episodes from five seasons. I went hunting for some I had seen. In Boy to the World, Stephanie, a transvestite but possibly also a transsexual, is arrested for solicitation and defended by Ally McBeal. In You Never Can Tell, Ally and Georgia pretend to have a lesbian relationship. Oddball Parade features a lawsuit by employees against an employer and one of the plaintiffs is a transvestite. In another the character Ling has a mud wrestling club and in this episode it is the male character and partner who asserts that men are the captives of their "dumb stick." Anyway, you get the idea. *See* http://www.allymcbeal.com/theshow/ (last visited October 3, 2002) [hereinafter Ally McBeal Website].

inexplicably successful than his partner, John Cage.[29] These two male characters are both misfits with obsessions and compulsions that cripple them emotionally. They are neither better lawyers nor better human beings than Ally McBeal, but they are the named partners in the firm. That does mean something.

I frequently was disturbed by the story lines in the show—women contesting laws that protect women, women mud wrestling to entertain men, women defending shock jocks who insult women, women sexually harassing men. If the story lines were subversive, it was because they suggested that we do not need feminism anymore or perhaps that feminism or some conception of feminism is slightly out of touch with the lives of contemporary women.

None of this is inconsistent with Third Wave feminism. There is in the literature of Third Wave feminists a suggestion that the "wisdom" and "rhetoric" of old fashioned feminism is only appropriate in those places where the "basic assumptions about the importance of equality" are not shared—like Utah and Ireland.[30]

If Ally seems slightly schizophrenic, a less than fully integrated human being, then she is a perfect metaphor for Third Wave feminism. If First Wave feminists wanted a chance to prove they could do what men could do and do it better, and Second Wave women abandoned the notion of formal equality to valorize women's skills and values, much as Francis Olsen has done with her critique of the home/market or private/public dichotomy, Third Wave feminists have gone much further in creating symbolic inversions, appropriating traditional images of women and turning them inside out and upside down.[31]

But these new strategies, or at least some of them, appropriate for a world in which the "basic assumptions about equality" prevail, do not fit well in the world where Andrea Yates lives. Women who are feminists, whatever Wave we reference, want to be free from the demands of people like Russell Yates, Andrea Yates' husband; from his insistence and her belief that womanhood is performed in a particular way.[32] Feminists, however, also want to be free to be employ strategies that are considered 'feminine" in the classroom, in their scholarship, in their lives. How do you suggest we contest the hierarchies that make you feel, Ms. Alexeeva, that giving Ally McBeal, the

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[29] *See generally id.*

[30] BAUMGARDNER & RICHARDS, *supra* note 2 at 246-47.

[31] Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

[32] Here I must acknowledge the book by Sylvia Ann Hewlett, CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN (2002), which some critics would call retrograde in its suggestion that professional women might be better off looking for husbands instead of promotions or advancement in their careers.

law partner, a child, is "equivalent to demoting her to associate . . . ?"[33]

Feminists talk about sex in terms of an opposition between the value we place on freedom or security. Why would we ignore the issue of power? Sex is about the power of men, through money or violence, to have women available to them. But sex is also about the power of women over men. It is also about the fact that men are often think with their 'dumb stick' as Ling Lui would say.[34] Why wouldn't women be ambivalent about relinquishing sex as a source of power or material wealth when we are not yet secure in our access to alternative avenues to both? It is unfair for a boss to ask us to sleep with him in order to get a promotion, but is it inappropriate for a woman to seduce a man to get a promotion? Most of us would say yes principally because this transaction is like a bribe and we are complicit in our own objectification.

Feminism is rooted in our bodies, in what our bodies can do, whether it is sex or childbirth, in our enjoyment of our bodies and our need to protect or defend the integrity of our bodies. We could conceive of feminism as the struggle to be liberated without being exploited, to feel pleasure without inviting unwanted pain, to preserve autonomy and economic self-sufficiency without surrendering to the commodification of our bodies. It is hard to find the lines between these states of being let alone draw them. Maybe there are no bright lines, only slippery slopes.

We know that there are women, and girls, who sell their bodies. Ms. Javidan, you make the argument that children, girls and boys, I suppose, are victims of the pimps and the johns.[35] However, you also argue that the law that criminalizes the behavior of child prostitutes ignores economic imperatives, survival strategies used by the least well off members of society.[36] Prostitution is a career of last resort for these runaways and abused children. I assume this is not an argument that relies on notions of freedom, autonomy, choice or voluntariness to defend prostitution, although I am not quite sure of your intent. I wonder sometimes if anyone else sees the irony in the juxtaposition of arguments about economic exigency and those that reference freedom, choice and voluntariness as a reason for legalizing prostitution.[37]

Given the circumstances of most sex workers, even those who are adults, how should we discuss prostitution? You say laws that prohibit

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[33] *See* Alexeeva, *supra* note 6, at 366.

[34] *See* Ally McBeal Website, *supra* note 28.

[35] *See* Javidan, *supra* note *17*.

[36] *See id.*

[37] Margaret Radin suggests that acknowledging the absence of voluntariness in this situation creates a "double bind" where both commodification and non-commodification can seem harmful to the oppressed. Margaret Jane Radin, *Response: Persistent Perplexities*, 11.3 KENNEDY INST. OF ETHICS J., 305-15 (2001).

prostitution are expressions of the obsessive concern on the part of men with the sexuality of women.[38] If we give women control of their own sexuality; give them the power to buy and sell their own bodies, does that end the obsession or just acknowledge its existence? Would there be a demand for prostitutes if men were not obsessed with the sexuality of women?

This is not just an article about prostitution, however, it is an article about children and that alters the analysis. We have drawn a boundary line, by operation of law, between childhood and maturity. It is as artificial as most other boundaries that are the artifacts of humankind. Maturity, a normative concept, not a measure of human development, changes with time, place and position. In the United States, middle class and upper middle class people have extended the age of dependency (and thus immaturity) well into the twenties. Even if we adopt as our point of departure the more general notion of who is grown and who is not reflected in laws defining the age of consent and capacity, the responsibility of minors may vary. Teenagers might be short on judgment, but some of them are capable of strategic behavior and many have more than their fair share of hormones and/or desire. We make nubile young women objects of fantasy in popular culture, but we condemn adults who act on that fantasy. We ignore the sophistication, and perhaps the desire, of sexually active minors. We ignore, appropriately I think, their capacity for seduction. It is appropriate sometimes to operate on the basis of a general rule, even though we know there are exceptions. The relationships between older men and underage women (and men) are often coerced, by physical or psychological means. In these unequal relationships, marked not just by gender differences but also by age differences, the power of sex seldom overcomes the power of a fist or flattery.

You argue that child prostitutes have committed no crime because minors do not have capacity to enter into contracts, including a contract for the sale of their bodies. This is not consensual sex; this is coerced sex and should be treated like statutory rape. Importing contract theory into the analysis is problematic. Capacity or the lack of it, in the contractual sense, gives a minor the right to disaffirm contracts. It does not turn the contract into a crime. An infant's assent is suspect, both because we assume that as a class minors are imprudent, impetuous, uninformed and that they are vulnerable to predatory adults. The law places a power in the hands of the minor, the power to perform and the power to repudiate transactions with adults. Would you do the same? Capacity has nothing to do with our ability to punish those who entice children into this profession and those who extract a profit from their labor or those who physically abuse them. In

[38] *See* Javidan, *supra* note 17, at 253.

those cases, most of the time it would be the pimps not the patrons whose behavior would most likely be criminalized.

Most of us do not wish to bear witness to the acts of desperate people directed at themselves or at others. The "speech" of those who are beggars frighten us. The economic transactions of those who work illegal markets breed violence that spills over into our communities. The "quality of life" policing spawned by the 'broken window' thesis is anathema to anyone who believes in and cherishes civil liberties.[39] Even so, the demands of neighborhoods to be free of sex transactions honestly felt to be immoral, unhealthy and a terrible life lesson for children, is complicated by issues of race and class. Even if prostitution is legalized, do we disagree with the proposition that we would not wish such a life on our own children?

I agree with you, however, that the solution is not enhanced penalties for prostitution or what you call the "broken window" legislation. The solution might be a change of venue —moving these troubling transactions onto Main Street; into public venues, into the neighborhoods of soccer moms. I doubt, though, that this would provoke a reexamination of the policies that create and sustain these markets or that direct certain populations and not others into the labor market of this illicit, underground economy.[40] The reaction might well be even more Draconian penalties and more people locked up in prisons for the major part of their lives.

Sex as work, sex at work, is that what feminism is all about? Partly. We have moved away from the attempt to de-sex ourselves, from dressing in ways that make us more like the men around us, from concealing our differences, including the physical changes that occur during pregnancy. This affirmation of difference has complicated the discussion of merit and the demand for equal treatment in the workplace. Ms. Alexeeva, you quote Francis Olsen for the proposition that the "feminization" of markets results in a reassertion of hierarchy.[41] No matter how hard we work, the values that are associated with women will be ranked lower than those associated with men. The solution, you suggest, is to find some middle ground, some traits or talents that are gender neutral, possessed in equal measure by men and women, and to use them in defining merit, in judging quality.[42] You have

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[39] Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Window Theory, and Order Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998)

[40] *See* Radin, *supra* note 37 at 308.

[O]ut of respect for the dilemma that the rapaciousness of the power structure has created for the poor, are we obligated to tolerate their decisions to sell as long as we are not able to change the power structure that creates their dilemma? . . . Dissolving the dilemma involves massive wealth redistribution, and I have no idea how that could be accomplished.

Id.

[41] *See* Alexeeva, *supra* note 6, at 371.

[42] *See id.*

chosen "[43]intelligence, education, ethics, hard work and dedication." Would that it were that easy. Each of these terms, which appear so blessedly neutral, is contested.

There is an interesting essay by Mary Louise Pratt which I read first for some confirmation of my intuition that epistolary essays reflect a feminist sensibility. What I found was a wonderful discussion of the work of Victoria Ocampo, an Argentinean writer whose work I recommend, without having read it, solely on the basis of Mary Louise Pratt's description and recommendation, to Maria-Victoria Castro. Ms. Castro, *la mujer Argentina que usted eres*, was formed not just by church and state, or symbols like the tango or icons like Evita, but also from the intellectual traditions established by writers like your namesake, Victoria Ocampo. Ocampo's work, *La Mujer y Su Expresion*, provides the title for Pratt's essay, "'Don't Interrupt Me' the gender essay as conversation and countercanon."[44]

I digress now, in the text rather than in a footnote, to tell you the story of this title because it is relevant to our discussion of difference and the definition of merit. Pratt relates an anecdote Ocampo includes a telephone call she overheard in Berlin. A businessman from Argentina was calling home and he began his conversation with his wife in Buenos Aires with the phrase "*No me interrumpas.*" Ocampo took this comment as the starting point for an examination of the relationship between men and women and the differences in their styles of communication. Ocampo wrote " I believe that for centuries all conversation between men and women, as soon as they enter on a certain terrain, begins with a 'Don't Interrupt Me' on the part of the man. Until now, the monologue seems to have been his preferred form of expression."[45] Pratt then contrasts Ocampos own style with the one Ocampo criticized. " Ocampo's female *pensadora* (thinker) on the other hand, knows the world through dialogue and mediation. 'Interrupt me' she says to her listeners. '[T]his monologue does not please me. It is to you I wish to speak, not to myself."[46]

Pratt's essay is about the "androcentrically constituted" canon of "Latin American Essay."[47] "No one," says Pratt, " disputes the pivotal role played by feminists in opening up this inquiry and upholding it against harsh and relentless attack."[48] Just as literary scholars and teachers have tackled the question of merit in reconstituting the literary canon, women in the legal academy have also had to struggle against entrenched, self-justifying and

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[43] *See id.* at 375.
[44] Pratt, *supra* note 15.
[45] *Id.* at 13.
[46] *Id.* at 20.
[47] *Id.*
[48] *Id.* at 12

exclusionary definitions of merit. Those who do feminist theory have a choice to make. We can promote a concept of equality that acknowledges the accomplishments of women who did and are doing those things that are considered meritorious or valuable according to established criteria — criteria selected without the participation of subordinated communities, including women. Or we can take on the values themselves, challenge the criteria of selection, propose new or different criteria, startle our male colleagues with the possibility of a counter canon. This redefinition of merit is not as easy as it seems. What you propose, Ms. Alexeeva, is a gender neutral standard, qualities shared by men and women in equal measure.[49] But there is no agreement on the meaning of any of these terms. What is intelligence? What does it mean to be ethical?[50] What is hard work and who is dedicated? How do you measure each of these traits?

I and the other law professors of my generation – I have been at this almost twenty years, believe it or not, have been fighting this battle for quite a while. And it is here, in my discussion of your article Ms. Mesa, where I find myself responding with the most passion.[51] There are reasons for this. Like a Third Wave feminist, I find myself challenging some of the received wisdom on the problems confronted by women in law school. Or perhaps I am reacting to hegemony, the attention that is paid to the critique of law school offered by white women or women from elite institutions.[52] It is here

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[49] *See* Alexeeva, *supra* note 6.

[50] As a starting point for this discussion, we might have to reference Carol Gilligan's work on gender and moral reasoning. *See also* the interesting debate growing out of the most recent corporate scandals. Anita Hill, *Insider Women with Outsider Values, See also Lynn Smith, Are Women Indeed the Fairer Sex?*, N.Y. TIMES, June 6, 2002, at A31; *Whistleblowers Give Rise to Debate about Gender and Ethics*, THE ORLANDO SENTINEL, July 7, 2002, at 5. (discussing relevance of "outsider values" to Sherron Watkins memo to Enron Chair describing accounting improprieties). We could add a partnership dissolution case that has become a standard in Business Associations or Business Organizations classes: Bohatch v. Butler & Binion, 977 S.W.2d 543 (1998) (woman partner who reported "puffing" of charges to a client could be expelled because partners need to be able to trust one another).

[51] *See* Autumn Mesa, *A Woman's Climb Up the Law School Ladder*, 9 CARDOZO WOMEN'S L.J. 379 (2003).

[52] The elite schools that have been studied include University of Pennsylvania, Stanford, Yale and Berkeley. *See* Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L & WOMEN'S STUD. 37, 62 n.3 (1997). When studies were conducted at non-elite schools or in classrooms with a woman or a minority faculty, the experience of women students and minorities changed significantly. "In the two non-elite law school classes taught by female professors, women students participated at nearly equal or slightly higher levels than did men. . . . Interestingly students of color participated at high levels in classes taught by professors of color." Elizabeth Mertz, *Teaching Lawyers About the Language of the Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91 (2000). Why this should surprise anyone, I am not sure. In fact, Morrison Torrey, Jennifer Ries, and Elaine Spiliopouloset admit that a sense of confidence/inclusion that promotes classroom participation by women and minority students is costly for the faculty member. "[T]here is a headwind against female faculty which is recognized primarily by female students: 18% of men and 48% of women agreed that female faculty have a heavier burden to prove their competence." Morrison Torrey, et al., *What Every First Year Law Student Should Know*, 7 COLUM. J. GENDER & L. 267 (1998).

that I chose to take my stand, running the risk that I might be branded a renegade or an "unfeminist."

IV. FEMINIST APPROACHES TO LEGAL EDUCATION

I have a working hypothesis. It is that most of the elite law schools attended by feminists who write about legal education had very few students of color and virtually no faculty of color. When they write about legal education, when they dispense advice to young women entering law school, I wonder about their audience. Does it include women of color? Does it extend to the women of color standing at the front of the classroom? Can they imagine a classroom inhabited by working class white males, first generation immigrants, older men and women beginning a second or third career? There is a commitment to diversity at elite institutions, but not a diversity that courts 'non-traditional' students. If you are not teaching at the top twenty law schools, you probably see a lot of non-traditional students and as you know, Ms. Mesa, a classroom that has a great deal of "diversity" can be quite challenging for a feminist.[53]

I have spent my life wishing and working for a world where the judgments about value are not skewed by the existence of hierarchy, where advantages gained through wealth are not treated as though they were earned through hard work or innate talent. Those who fight for inclusion, for greater or wider distribution of resources like education, have had some success. An old cliché says that we should be careful what we wish for. Success created its own set of problems.

Most of the change has come through expansion in the number of law schools, not from any fundamental change in the patterns that predominate in elite institutions. Anyone who has been in law teaching for some time can list the schools that did not exist when he or she began teaching. The pie is larger and people who once were denied knowledge even of the existence of the pie now compete for slices. Is the pie of uniform quality? The system of tiers and law school ranking would suggest not.

No one bristles more at the existence of this ranking than law professors and legal institutions like the American Association of Law Schools and the American Bar Association. And yet we all know it means something. At a minimum it signals a difference in the resources available to students and faculty at particular institutions. With apologies to all involved, Houston is not Harvard and Stetson is not Stanford. No one knows this better than those of us who teach at the lower ranked schools.

The measure rankers really care about is selectivity – how much competition is there to enter your school, how many students does the

[53] *See generally* Torrey et al, *supra* note 52.

school reject, what are the credentials of the students who attend a school? Ranking creates the illusion of scarcity, encouraging competitive behavior on the part of students and educational institutions. The competition is not about education. It is about prestige and status. Students all want a perfect LSAT score for this will gain them entry into the most elite schools and law schools want the student with the perfect LSAT score for this will transform the school into an elite institution.

The reality is you don't need a perfect score to get into law school. There are many law schools that take students who do not have perfect scores. There are many adverse consequences and pathologies that flow from ranking, but it has not discouraged the expansion of legal education. The bottom tier law schools, though stigmatized, are still profitable.

Too many of my students come to law school with the belief that they really are not qualified to be lawyers. They come into law school for the credential, which they mistakenly believe is a guarantee of financial security and social status. They want to grab the prize and leave quickly before someone discovers the error – they were let in by mistake and they have been impersonating lawyers. Their aspiration is simply to take that degree and go off to do real estate law, collection work or get part time jobs in local government. Some of the recent scholarship on the performance of women in elite law schools suggests that in their under-valuation of their own work, these women law students might have more in common with my students than they do with the men at their own law schools.[54] What might this mean, both for the women at elite institutions and for my own law students? A commitment to difference invites an examination of those things we have in common with other subordinated communities.

We also operate in a political economy that resists the democratization of education. Law schools in the bottom tiers are hemmed in by the objective standards that are used to measure their worth. There is not much that can be done about the stats that measure the quality of the students entering the school, but there is a struggle by lower tier schools to change output. Output no longer means students who have a sense of social justice, who are committed to doing public interest law or to changing the world. Output is measured almost exclusively in terms of the bar passage rate.

I support this process of democratization of education. But the students do not have as much faith in the process as I do. And this is one of the real differences between upper and lower tier schools. The students in the upper tier schools believe they are smart, even though there are quite a few who are not. And the students in the lower tier schools think they are not smart,

[54] *See* Fandra Farber & Monica Rickenberg, *Under-Confident Women Men: Gender and Sense of Confidence in a Simulated Negotiation,* 11 YALE J.L. & FEMINISM 271 (1999).

although many of them are.

In a world in which worth is measured by the score on a standardized test, the temptation to regiment education, to march students through the classes that are tested on the bar, to emphasize coverage rather than skills, is inexorable. And in the regimented law school, there is not much room for the kinds of discussions that went on the seminar that Maria Grahn-Farley taught.

If we abolish hierarchy, though, we will not have abolished difference. In the end, we must decide on the meaning we will assign to such differences. The sex based differences, skin color differences, cultural differences, age differences, and the differences that are created by disparity in the distribution of wealth, age, knowledge and expertise.

I part company with anyone who suggests that my students are my equals. I am trained in the law; they are not. I have spent twenty years reading cases, researching and writing articles, thinking about the issues I raise with them in classes. They have knowledge that I do not share, insights that can add a valued dimension to our discussions of the law and society.

I think it would be a waste for me to spend my time mopping floors in our school, although it might be an object lesson for some of my colleagues who have never done and therefore do not value physical labor. I agree that physical labor is undervalued, but I do not agree that "book learning" is less valuable than physical labor – not in our world as it is presently constituted or in any ideal world which I could imagine. This is my response to those who display their ignorance, purposeful or otherwise, of the history of black people by arguing that black people don't value education. How could a people who had to break the law to learn to read and write,[55] had to fight to attend schools,[56] and then the fight to get the same quality of education for white and black children[57]—how could we not value education?

So the question I am posing here is not academic, but personal as well as political. In the classroom where we do feminist theory, is it appropriate to demand respect, not just the respect that is owed by one human being to

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[55] A Circuit Court in Kentucky quotes from Kent's commentaries on the laws in Georgia, Virginia, Alabama and Louisiana which not only punished slaves but also freed men from learning how to read or write and white men or women from teaching them either. United States v. Rhodes, 27 F. Cas. 785 (C. Court, D. Ky. 1866). In a case challenging the terms in a will emancipating the slaves of one George M. Waters, the court considered whether the testator could arrange to have his slaves liberated in some other place if it was illegal to do so in Georgia. The court reasoned by analogy and noted that the penal laws against teaching slaves did not have extraterritorial application either. Cleland v. Waters, 19 Ga. 35 (S. Ct. 1855)

[56] My favorite case both because it takes place in the "north" and because the irony of it appeals to me is Enos Van Camp v. Board of Education of the Incorporated Village of Logan, 9 Ohio St. 406. (S. Ct. Ohio, 1859) (black children entitled to attend only separate schools from white children and it did not matter that there was no black school or that the children of petitioner were more than ½ white, they could not attend the white school).

[57] Brown v. Bd. of Ed., 348 U.S. 483 (1954).

another, but the respect that might be owed to one who is an elder, one who has achieved, one who might have knowledge or even wisdom? The demand for respect is not subordinating. It is not a claim that an individual or group is innately inferior or superior. When achievement expressed as status becomes ossified, inflexible and arrogant, there is a claim that is subordinating. And while the patriarchy that subordinates women sometimes resides in the front of the class, at others it occupies the back bench.

The differential in knowledge that places me at the head (sometimes the side and even the rear) of the classroom is real and significant. This differential, this inequality, has ethical implications. It is the ethical dimensions of teaching that have presented the greatest challenges over the years. I reject hierarchy, but I know also that I cannot give my law students the education they would receive at Harvard. They have not had all the advantages of Harvard students. I have to start someplace else, but it is not necessarily the same place the students think they should start. Ethically I am compelled to think about what I am doing in the classroom. What do I want to teach my students?

We argue for a redefinition of merit, one that is broader and more inclusive. We reject the exclusive reliance on objective standards that can be manipulated and that are skewed towards the skills and credentials most frequently found among upper class white men. And yet I cannot abandon, as a lawyer or as a teacher, the knowledge I gained from Patriarchy. I know this also is a matter that is contested. A feminist critique says we only replicate that which we seek to eradicate. My answer to that is simply that I wish to be heard. The law, as Lucinda Findley has noted, is "a powerful, authoritative language, one that insists that to be heard you try to speak its language."[58] To be absolutely truthful, I am furious when I construct a traditional legal argument only to find that the proponents of reason and logic have abandoned the field, taken the path of least resistance, a pure assertion of power without regard to law, or a pure appeal to emotion, an attribute formerly associated with women.

What use of a critical perspective if there is nothing to see? "This is how bad the law would be if I were to let you see how the law really works." Still, it is not easy teaching doctrinal competence from a critical perspective. I was reading a book by two Third Wave feminists who described Take Back the Night events on undergraduate campuses as an "entry point to political consciousness."[59] I wonder whether such thresholds exist only outside of the classroom or if it is possible to create such an event, to sustain this event, for

[58] Lucinda M. Finley, *Breaking Women's Silence in the Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 906 (1989).

[59] BAUMGARDNER & RICHARDS, *supra* note 2, at 243.

the course of semester, a year or three years of law school?

Mostly I worry that Cheryl Hopwood and Barbara Grutter, class representatives in suits to dismantle affirmative action, are more than an aberration.[60] I worry that they are the future, the women who exist beyond the Third Wave. How much hope is there anyway for a political movement that cannot say its own name out loud?[61] There are too many women who reject the label, too many women frightened by the adjective 'militant', which appears in tandem with feminist whenever the word is used by its enemies, and there are too many women who worry about satisfying criteria of merit that are politically suspect. A new political sensibility separates teaching from scholarship, theory from practice.

If we are working on a shared project, if we are going to do feminist theory, altering the law from the inside out, we have to teach our students how to be experts. We have to show them how to use this expertise in subversive ways – in ways that challenge hegemony, subordination, social injustice. Perhaps we need to think about this. What does it mean to demand proficiency in the skills that constitute 'expertise' in the law?

I ran across an essay that describes the process by which various professionals become experts. Anders Erickson describes the method of

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[60] Barbara Grutter has been described as a

> fortysomething mother of two who had married at 19. She was returning to school 18 years after getting her undergraduate degree from Michigan State University, where she had paid her way by working at clerical jobs. After graduating, she had worked at the managerial level in several companies and then had started a successful consulting business that has allowed her to work at home and to attend to her children at the same time.

Shikha Dalmia, *The Diversity Defense*, THE WKLY STANDARD, Mar. 26, 2001, at 26.

Cheryl Hopwood was also an older student. She was thirty-one when she applied to law school. She had a 3.8 GPA, but she earned these grades first at a junior college and then as an accounting major at California State University in Sacramento. Ms. Hopwood was married to an air force officer, the mother of a child with cerebral palsy and she either had a father who died when she was young or she lived with her mother after her parents were divorced or both. *Compare* Sam Howe Verhovek, *For 4 Whites Who Sued University, Race is the Common Thread*, N.Y. TIMES, Mar. 22, 1996, at 6 *and* Pedro E. Ponce, *Hopwood on Hopwood, Affirmative Action's Reluctant New Icon*, LEGAL TIMES, Apr. 18, 1996, at 21.

Ms. Hopwood worked her way through high school and college and at one point, she seemed to be arguing, that she was just as disadvantaged as the minority students who were admitted to University of Texas Law School. An interview with Ms. Hopwood that appeared in Rolling Stone Magazine is quoted in the New York Times article: "Affirmative action should be used to help disadvantaged people of whatever background. You can find injustice anywhere. The fact that I have one severely handicapped child and another died is an injustice. But nobody's helping me." Verhorek, *supra* note 61. While this sounds like a case for expanding, not eliminating affirmative action, I am pretty confident this is not what the Center for Individual Rights, a "libertarian" public interest law firm had in mind when it represented Hopwood and Grutter.

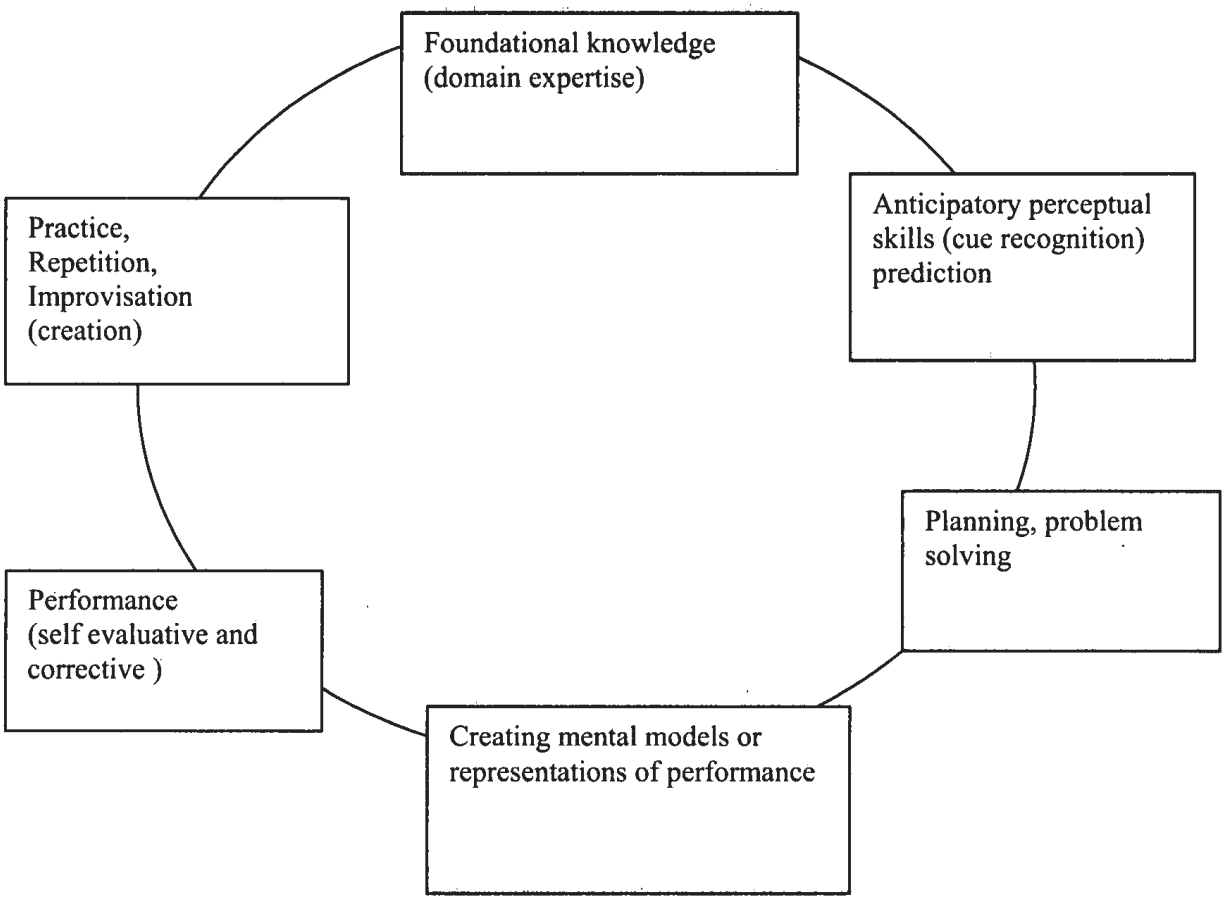
[61] *See* Austin & Schneider, *supra* note 16, at 23-25 (women at fundraiser performance of the Vagina Monologues claim they are not feminists). The conclusion of another woman law professor is that "the label 'feminism' is often a barrier to learning an constructive communication." Cheryl B. Preston, *This Old House: A blueprint for Constructive Feminism*, 83 GEO. L. J. 2271, 2285 (1995).

study used by experts as "deliberate practice."[62] One aspect of or task in deliberate practice is a process of comparison where the novice makes note of the disparities between his or her performance and that of an expert. Deliberate practice is the attempt to close that gap, to reach the level of competency that is demonstrated by the expert.

A lot of people, some of them feminists, have criticized the Socratic method. It has been criticized, as you know Ms. Mesa, as a method that perpetuates hierarchy. From my perspective, the Socratic method is simply a way of teaching in which legal experts model for students the very skills that the students need to develop. I am the expert, which is not a claim of infallibility or omniscience, but a description of a status that is relative to that of the students, who are novices. This recognition of difference is not an excuse to humiliate or degrade students. The student and the teacher must share a common objective, the goal of moving the student from the status of novice to that of expert.

[62] K. ANDERS ERICSSON, ATTAINING EXCELLENCE THROUGH DELIBERATE PRACTICE: INSIGHTS FROM THE STUDY OF EXPERT PERFORMANCE IN THE PURSUIT OF EXCELLENCE THROUGH EDUCATION (ed. By Michael Ferrari 2002)

Figure 1



In Figure 1, I have summarized the characteristics of expert performance described by Dr. Ericsson. In the classroom, we are engaged, for the most part in teaching students the domain knowledge and practicing the next two stages in performance—anticipatory perceptual skills (prediction) and solving a problem through reasoning and planning. In order to recognize and understand legal cues, in order to understand how one plans or strategizes with respect to those cues, we give our students texts with judicial opinions. The cues are imbedded in these opinions. The judicial opinions are also the first examples they have of problem solving and the performance aspects of law practice including the use of rhetoric. The case method is instrumental in teaching students two critical steps in the performance of law. What they also need and what we do not do well, usually, is to provide them with opportunities to practice cue recognition, prediction and planning as well as performance.

There is resistance by students I care about to the idea of reading, to the centrality of reading in the practice of law that I find deeply disturbing. I could give lots of examples from the recurrent complaint that the "cases are too long" to the student who wanted to pass when called on because the "case was too hard." I had a student a couple of years ago who complained that an article I assigned in an anthropology and the law seminar was so long that by the time she got to the end, she forgot what the beginning said. But the most recent example was the comment by one student on his or her evaluation of my class that I spent a lot of time "reading from the book." What I did was to take students to that part of the case where the court set out a rule or a standard, the "magic words" that are repeated over and over again in later cases. I felt some distress at this comment. Students spend a fortune on secondary materials, choosing to rely on Case Notes or Legalines or the Westlaw Service Briefit. I do not understand this phenomenon. More than that, this knowledge reinforces my sense of crisis with respect to the literacy of law students.

And then I remembered something from my past. I was a summer clerk at a law firm in Texas and I wrote a brief on adverse possession for one of the associates in the litigation department. I read all the relevant case law and in my argument, I used the language of the courts. The language of the courts, the "elements of proof" were quite colorful. Since they were repeated in virtually every case I read, I thought it important to include them in my legal analysis. Some time later, I heard from the associate for whom I had done this work. He told me that he edited my work and removed the language he thought was hyperbole. He then admitted that he was surprised (and impressed) to find the very language he edited out of the brief in the decision of the court.

The associate became a partner and he is, by every measure that exists,

a successful trial lawyer. I marveled at his incredulousness about the importance of words back then just as I now marvel now at my students' disinterest in the art of reading cases.

For me rejection of the written word is apostasy, a betrayal of those who were deprived of literacy to keep them enslaved and of those whose first act of rebellion was to teach or to learn how to read. I cannot imagine a feminist theory that does not care about words, about the ideological content of texts and the importance of contestatory writing. This is what sustains me in the face of criticism that is debilitating, especially when feminist theory, narrowly defined, is the weapon used in the attack.

Reading the essay on training experts gave me a reason for insisting that students read cases. Those of us who have been teaching for a while are familiar with the litany that is recited by first year law students. It goes, " I understood that case perfectly before I came to class but now I am totally confused." It is as if the student asserts " I once was smart but now I am dumb." And who is responsible for this deficit, this movement from certainty to confusion? All that has happened is that the student has been shown both the ways in which her performance is deficient and a proper way to proceed to read that material. The confusion of the student has to do with the difference in the reading competencies of students and faculty and to the failure of the students to grasp the significance of this difference—its importance in providing a standard, a learning goal and strategy that is immediate and concrete. What we need is some method for explaining this cognitive strategy to students; an explanation of the meta-cognitive, the process of thinking about the way the student is thinking about the cases or the statute.

In teaching them the foundational knowledge, I can still provide opportunities for students to see the unfair and subordinating way that current categories, taxonomies, rules and standards operate. We have a choice when it comes to choosing cases or supplemental materials. My choice is literature, but there are other ways in which the stories that are "de-contextualized" can be re-contextualized in the classroom. I can ask my to read cases that are "other centered." I can give them cases that provide me with an opportunity for embellishment – for minor forays into history and politics. If their goal is assimilation, they will be further along after my class than they were before they began it. Along the way they will have learned something of the radical traditions that exist in mainstream culture – the class consciousness that fueled agrarian movements like the Iowa Cow War, the struggle of women for legal status separate and apart from that of their fathers and husbands, and fight by gays and lesbians after Stonewall to live in outside the closet.

If I am plagued with doubts about my compromise, my assertion of the

right to transgress established norms in the classroom and in my scholarship while I hold my students to a standard of proficiency that seems very white and very male, I can also be subversive in the problems I give them to solve—problems where the power relationships between men and women challenge their expectations, or where the student must construct a legal argument on behalf of a woman who has or is experiencing the subordinating power of patriarchy.

This is not a complete response to my concern about acculturation. I struggle with the knowledge that in teaching, even with the embellishments and digressions I permit myself, I am complicit in this process of acculturation. I am asking my students to read cases both as a entry point to political consciousness and for the purpose of gaining expertise. The experience of cognitive dissonance is not theirs alone. And then to compound my sin, their expertise will be measured not by some alternative set of criteria, by a counter canon of my own devise, but by the very criteria I consider suspect.

Yet I know there is a place, after the expert has mastered the accumulated knowledge of his field, when there is room to improvise, to criticize and to create. That is where I want to take my students, but I know I can only go part of the way with them. The least exciting part of the trip involves lengthy discussions of things like the difference between mistake and misunderstanding in contract law. But who knows when that distinction could be to good effect to undo some contractual relationship that is unequal and oppressive? In the end, their expertise will depend on their ability to engage in deliberate practice, to examine and criticize their own performance and to push themselves to do ever more difficult tasks. And their ability to do theory, any kind of theory, will depend on their ability to use what I have given them in ways that only they can imagine.

V. CONCLUSION

The students in the seminar To Do Feminist Theory were engaged in a project that accelerated the learning process and gave them a glimpse at what lies ahead in that last stage in the learning and problem solving process. They were asked to solve a problem. If the problem, writ large, is the subordination of women, what will it take to end subordination, how can legal theory be used/reconstituted to achieve this and how should laws be changed, applied, interpreted in accordance with this feminist theory of law and social justice?

What they and I have learned is that doing feminist theory has many different dimensions involving many possible and contested meanings. The essays in this symposium are illustrative of this point. Our willingness to live with uncertainty may make Third Wave feminists of us all. In the process of

transformation, however, we have also learned that uncertainty is not incoherent. To understand uncertainty, we have merely to abandon the false security of absolutes and the confinement of dogma.