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## Legal Education: The Last Academic Bastion of Sex Bias?

Nancy S. Erickson\*

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## Legal Education: The Last Academic Bastion of Sex Bias?

**Nancy S. Erickson**

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*Nancy Erickson, currently a professor of law at Ohio State University College of Law, specializes in sex-based discrimination and has a particular interest in women's legal history. As described in this article, she is directing a research project examining possible sex bias in the teaching of the first-year criminal law course. Currently, she is on a leave of absence in New York City, where she is the Richard J. Hughes distinguished visiting Professor of Law at Seton Hall University School of Law.*

Traditional legal education, as exemplified in the legal education I experienced as a student in the early 1970's, exhibited blatant sex bias in teaching methods, in casebooks and other materials used, and in the doctrinal law itself. With regard to the teaching of law, for example, women were rarely called upon for any cases other than rape and other sexual assault cases or "sexy" cases, except for "ladies day" when only women were called upon.<sup>1</sup> The professor often "played to the male audience" by making jokes at the expense of women.<sup>2</sup> When hypotheticals were presented in class, women were generally portrayed in traditional roles (e.g., secretaries, waitresses, housewives, librarians, elementary school teachers) and were completely absent from roles within the judicial system such as judge or attorney.

Casebooks and other materials also evidenced sex bias. "Playing to the male audience" was as prevalent in casebooks as it was in classroom teaching. Torts casebooks quoted Herbert's comment on the "reasonable man" standard: "In all that mass of authorities which bears upon this branch of the law, there is no single mention of the reasonable woman."<sup>3</sup> A property casebook stated: "[F]or, after all, land, like

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1. H. SCHWARTZ, *LAWYERING* 85 (1976); Erickson, *Review of Helene E. Schwartz, Lawyering*, 22 N.Y.L. SCH. L. REV. 391-392, n.5 (1976).

2. Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U.L. REV. 481 (1971) [hereinafter cited as *Ginsburg*].

3. A. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 16 (1930), *quoted in*

woman, was meant to be possessed.”<sup>4</sup> Adult women were often referred to as “girls,” particularly in sexual assault cases<sup>5</sup> (a phenomenon that can profitably be compared with the use of the term “boy” for adult Black males), and “sexy” cases were chosen for inclusion in casebooks when non-“sexy” cases would do just as well.<sup>6</sup>

A more subtle type of sex bias evidenced in traditional casebooks is failure to include, or superficial coverage of, issues of particular concern to women, such as marital property regimes in the property course or domestic violence in the criminal law course.<sup>7</sup> Lack of coverage is more difficult to recognize and criticize than biased coverage, especially when casebook authors can always rationalize lack of coverage on various grounds, particularly space limitations.

*Ginsburg, supra* note 2, at 482, who points out that it was quoted in W. PROSSER, TORTS 154 (3d ed. 1964) and C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 101 (2d ed. 1969).

4. C. BERGER, LAND OWNERSHIP AND USE (1968), *quoted in Ginsburg, supra* note 2, at 481.

5. *See, e.g.,* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 558, n. 68 (1972), referring to the murder and attempted rape victim in *People v. Goodridge*, 70 Cal. 2d 824 (1969) as a “girl;” *id.* at 358, referring to an attempted rape victim in *U.S. v. Short*, 4 U.S.C.M.A. 437 (1954) as a “girl.” In *Short*, the court itself often referred to the victim as a “girl,” but a casebook author should not trust the labels used by judges, especially when the case is not recent, and should look for evidence of the female’s age, and when in doubt should use the word “woman” or “young woman.” In *Short*, for example, the woman was employed (in a shop near where the incident took place), and there was no mention of statutory rape as opposed to forcible rape.

6. See just about any casebook, especially torts and criminal law.

7. In 1973, Professor Judith Younger wrote:

This subject [community property] and the larger subject of which it is a part — marital property systems and their relation to the status of women — are generally slighted in standard property casebooks. The material they offer may be so salted with jokes that it is trivialized or so general that it is inaccurate.

Younger, *Community Property, Women, and the Law School Curriculum*, 48 N.Y.U.L. REV. 211, 212 (1973).

Coverage of marital property in current casebooks may be an improvement over the coverage in 1973. Professor Joan Williams reports that all eighteen property casebooks currently in use cover marital property, although seven appear to do so superficially. She states, for example, the Dukeminier and Krier property casebook (1981) spends about sixty pages on marital property, including cases, notes, questions and problems.

Preliminary research for my criminal law project (*see infra* text accompanying notes 26-28) reveals that five out of seven major criminal law casebooks contain no materials on domestic violence.

With regard to sexism in the law itself, case law prior to *Reed*,<sup>8</sup> *Frontiero*,<sup>9</sup> *Craig*,<sup>10</sup> and other important United States Supreme Court equal protection cases was often clearly sex discriminatory. For example, some state statutes mandated different penalties for male and female defendants for the same crimes,<sup>11</sup> provided that husbands could recover for loss of consortium while wives could not,<sup>12</sup> and prohibited women from exhibiting the behavior of a "common scold," while the same behavior by a male was not penalized.<sup>13</sup> Casebooks and law teachers rarely questioned the validity of these laws.

The effects on women law students of sex bias in legal education are devastating but difficult to quantify. Words like anger, alienation and humiliation can give some idea of the reactions of women students but cannot tell us how many were deterred from going to law school, flunked out, dropped out, or were psychologically scarred by the experience.<sup>14</sup> The experience of being a woman law student was especially difficult when she was the only woman or one of a small handful. Her ability to eliminate sex bias in legal education or even to criticize it was limited.

As women began to go to law school in significant numbers in the early 1970's, however, attempts were made to correct the sex bias inherent in the traditional law school curriculum. In a panel discussion on treatment of women by the law, held at the annual meeting of the Association of American Law Schools on December 27, 1970, Ruth Bader Ginsburg, then a professor at Rutgers (Newark) Law School, gave a blueprint for needed changes in law schools:

Two jobs merit immediate attention: 1) the elimination from law school texts and classroom presentations of attempts at comic relief via stereotyped characterizations of women; 2) the infusion

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

9. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

10. *Craig v. Boren*, 429 U.S. 190 (1976).

11. *Compare Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968), holding such a statute unconstitutional with *Wark v. State*, 266 A.2d 62 (Me. 1970), *cert. denied*, 400 U.S. 952 (1970).

12. *See, e.g., Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (1968), *cert. denied*, 393 U.S. 1066 (1969) (constitutional challenge rejected).

13. *See State v. Palendrano*, 120 N.J. Super. 336, 293 A.2d 747 (1972), used in some criminal law casebooks to illustrate common law crimes.

14. For current studies of women law students, *see Elkins, On the Significance of Women in Legal Education*, 7 ALSA FORUM 20 (1983) and *WORLDS OF SILENCE: WOMEN IN LAW SCHOOL*, 8 ALSA FORUM, (1984).

into standard curricular offerings of material on sex-based discrimination. The second is the major assignment; the first is already under way as a result of sensitivity training given to law school professors by the increasing number of female students attending their classes and reading their materials.<sup>15</sup>

In her discussion of "the major assignment," she suggested "new infusions" into the traditional courses such as Constitutional Law, Tax, and Conflict of Laws, as well as the newer offerings such as Environmental Law and clinical courses.<sup>16</sup>

Efforts such as those of Professor Ginsburg led to the *Symposium on the Law School Curriculum and the Legal Rights of Women*, held at N.Y.U. Law School on October 21, 1972, under A.A.L.S. sponsorship. In its preliminary announcement of the *Symposium*, the A.A.L.S. urged that the teaching of sex-based discrimination not be confined to special courses but be diffused throughout the whole curriculum:

Basic substantive courses in the law school curriculum traditionally have omitted materials respecting the legal status of women. Students are informed that the Married Woman's Property Acts ended the common law submergence of a woman's legal existence into that of her husband's, but are not shown how the courts interpreted those Acts (and other laws) to perpetuate a state of second-class citizenship for women. It is not surprising that many law students erroneously assume that men and women are treated equally by the law. The fledgling lawyer, whether male or female, comes out of law school unprepared to grapple with problems of sex discrimination in the law or even to recognize them.

In law schools around the country, small groups of students and dedicated faculty members have developed Women and the Law courses to teach students who have a special interest in the subject of women's rights the ways in which the law affects women. But such courses reach only a small minority of law students. Unless information on the legal rights and disabilities of women is included in the most basic law school courses, the nation's law school graduates will continue to have scant understanding of the legal restrictions under which 53 percent of the population lives.<sup>17</sup>

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15. *Ginsburg, supra* note 2, at 481. Ginsburg is now a judge on the D.C. Circuit Court.

16. *Id.* at 482-87.

17. *AALS Symposium on the Law School Curriculum and the Legal Rights of Women* (1972), quoted in Wallach, *Review: Women and the Law*, 10 HARV. C.R.-C.L.

At the *Symposium*, legal scholars in the fields of property,<sup>18</sup> tax,<sup>19</sup> criminal law and criminal procedure,<sup>20</sup> employment discrimination law,<sup>21</sup> family law,<sup>22</sup> and constitutional law<sup>23</sup> made presentations and distributed papers concerning sex bias in their fields and suggesting how to incorporate previously omitted topics into the curriculum.<sup>24</sup>

Some changes in the law and legal education were made. Following the Supreme Court precedents referred to above, many sex-based laws were made sex-neutral. More women were hired on law school faculties, much sex bias in the teaching of law was eliminated or toned down, many schools introduced elective courses, seminars and clinics in sex-based discrimination to address topics omitted from the traditional curriculum, and some modifications were made in standard courses. However, more than a decade later, little is known about the extent to which efforts like the A.A.L.S. *Symposium* have affected the traditional law school curriculum. Have the topics omitted from the traditional curriculum been incorporated into the appropriate courses? Are newly surfacing gender-related issues being integrated into the curriculum in an ongoing fashion? Is material covered in a non-biased way?

It is ironic that sex bias in legal education has not been addressed when sex bias in almost every other discipline in the university has been investigated. Studies on sex bias in philosophy, psychology, history, English, sociology, anthropology, the arts, and the natural sciences abound.<sup>25</sup> Why have these studies not served as catalysts for sim-

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L. REV. 254 (1975).

18. Leo Kanowitz and Judith Younger.

19. Babette Barton, Grace Blumberg, and Carlyn McCaffrey.

20. Barbara Babcock and Linda Singer.

21. Kenneth Davidson and Susan Ross.

22. Herma Kill Kay, Robert J. Levy, Cynthia L. Atwood, and Kathryn Gehrels.

23. Ruth Bader Ginsburg.

24. To my knowledge, these papers were never published together, although some attendees took these materials to their home schools and placed them in their libraries. The Ohio State University College of Law, for example, bound them into six volumes. One of the papers was published separately the following year. Younger, *Community Property, Women, and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973). Others appear to have been incorporated, at least in part, into the three casebooks on sex-based discrimination that appeared shortly after the *Symposium*: B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION & THE LAW: CAUSES & REMEDIES* (1975); K. DAVIDSON, R. GINSBURG & H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASES, AND MATERIALS* (1974); L. KANOWITZ, *SEX ROLES IN LAW & SOCIETY: CASES AND MATERIALS* (1973).

25. See, e.g., J. GAPPA, & J. PEARCE, *REMOVING BIAS: GUIDELINES FOR STU-*

ilar studies of the law school curriculum? Are the law schools, as professional schools, so isolated from the university that these concerns have not touched us? Do law school professors and administrators assume that the courses in sex-based discrimination will suffice to address the issues? Do they assume that sex bias will wither away as time goes on, without directed attention to the issue? Or do they think that no problem of sex bias continues to exist?

The answer is probably a little bit of all of the above. I am sure that law school professors and administrators do not wish to condone or encourage sex bias in legal education. But neither have they been trained to recognize or to eliminate sex bias where it continues to exist. The typical law professor is busy with teaching, writing, and community service and has little time to make a thorough investigation of possible sex bias in his or her subject matter. It is a difficult and time-consuming inquiry, especially because there is not even a consensus as to what constitutes sex bias. Therefore, one investigating sex bias in the law school curriculum must to a certain extent be tentative about conclusions. Yet certain language usage and teaching methods are sex-biased under any definition. For example, the use of the generic "he" gives the impression that the whole legal system is still all male; no footnote or preface at the beginning of a law school casebook can modify the impression made over 500 or more pages of text. Likewise, "sexy" examples and cases used to "liven up the materials" are just as offensive now as they were in 1970 (this is not to say that these "sexy" materials are consciously used for that purpose; some cases and materials, in fact, have become "traditional," and casebook authors probably use them without thinking of their possible offensiveness).<sup>26</sup> More difficult are the issues of how teachers and casebooks should deal with sex bias in legal doctrines and how traditionally-omitted topics should be incorporated in the law school courses in which they belong.

Two current projects are directed toward improving legal education by identifying and correcting sex bias in the law school curriculum. These projects deserve the respect and assistance of all thoughtful and concerned law professors. Identifying sex bias in the law school

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DENT-FACULTY COMMUNICATION (1983) (sociology); G. LERNER, TEACHING WOMEN'S HISTORY (1981) (history). For other studies, see the bibliography in B. SCHMITZ, INTEGRATING WOMEN'S STUDIES INTO THE CURRICULUM: A GUIDE AND BIBLIOGRAPHY (1985).

26. My criminal law project, described in text accompanying notes 27-28 *infra*, is seeking to identify such materials.

curriculum will not accomplish anything unless individual law professors seek to use the results of these projects to improve their courses.

The first project is the Women and the Law Project of Washington College of Law, American University, headed by Ann Shalleck. This project held a Conference on Women's Rights and the Law School Curriculum on January 4, 1985, in conjunction with the AALS Annual Meeting, directed primarily toward teachers of sex-based discrimination courses. A second conference, held one year later, examined the integration of women's rights issues into the standard courses in the law school curriculum.



Treatment of domestic violence

I am the director of the second project, funded by an Ohio State University Affirmative Action award. It is entitled "*Sex Bias in the Criminal Law Course: Bringing the Law School Curriculum into the 1980's.*" With the assistance of Professor Nadine Taub of Rutgers Law School (Newark) as primary consultant, in addition to law students and experts in sex discrimination law and criminal law, I am examining whether, and, if so, the extent to which gender-related issues have become an integral part of the traditional first-year criminal law course as it is taught throughout the country. The study is designed to serve as a model for a comprehensive study involving the entire law school curriculum. Studies of torts, property, civil procedure, and contracts are already in the planning stages.<sup>27</sup>

27. Lists of interested teachers of these courses (and others) are being compiled,



The criminal law project is proceeding in three steps: a review of casebooks now being used in the first-year criminal law course; a survey of all law professors currently teaching the course; and a bibliography and a compilation of supplementary materials that may be of assistance to authors of criminal law casebooks when they are writing new editions of their books and to professors of criminal law who wish to compensate for inadequacies in traditional teaching materials. Included in the supplementary materials are materials that demonstrate how areas of importance to women can be used to illustrate significant concepts in criminal law generally.<sup>28</sup>

Progress so far on the criminal law project has revealed that eliminating sex bias in the law school curriculum will not be a quick and easy task. The process of investigating sex bias in the law school curriculum is not a superficial undertaking; it is one that requires wrestling with some of the most fundamental issues of all legal systems. It also promises to illuminate some of those fundamental issues in ways that will have a broad impact on legal education and the ways that we view the legal system.

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and some of these teachers are already beginning studies in their fields. For torts, contact Prof. Delores Donovan, San Francisco School of Law; for property, contact Prof. Joan Williams, Washington College of Law, American U.; for civil procedure, contact Prof. Elizabeth Schneider, Brooklyn Law School; for contracts, contact Prof. Mary Joe Frug, New England School of Law; and for all others, contact the author.

28. For a summary of the final report on the project, contact the author. For budget reasons, we will probably not be able to distribute copies of the full final report, bibliography, and supplementary materials free of charge; we will probably have to charge for the cost of printing. For the summary and a price list, send a stamped, self-addressed business-size envelope to the author at Ohio State University College of Law, 1659 North High Street, Columbus Ohio, 43210; Attn: Criminal Law Study.