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## Discursive Disparities

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# Discursive Disparities

Nancy Leong<sup>\*</sup>

## ABSTRACT

Both within and beyond the legal profession, men write more than women. Men publish more books; the books men write are reviewed more often in the most widely read forums; men write more of the reviews; men dominate the opinion pages of major news outlets; men write more of the articles in the most widely read magazines; and more men blog on the most widely read websites. Even on Wikipedia—widely hailed as a cyber-utopia open to anyone—more than 85% of entries are primarily authored by men. This is true also in the legal realm. Men write more judicial opinions. Men author more legislation. Men write more briefs—both for parties and as amici—before the Supreme Court. Men write more law review articles, and their articles are published in more prominent journals. Indeed, the disparity in legal scholarship begins in law school, where men publish a disproportionate percentage of student notes.

This Essay begins by suggesting several explanations for the gender disparity in the amount of discursive space men and women occupy. It then examines the consequences of that disparity. It first emphasizes the harms to women that the disparity causes, with an emphasis on the legal profession. Such harms include economic loss, damage to career, and diminished public influence. These harms are serious in themselves. Perhaps more importantly, however, the discursive gender disparity means that men's words dominate public discourse, and to control discourse is to control reality. When men's words, thoughts, ideas, and arguments constitute the overriding public narrative, the result is that men determine the texture of daily life on matters both trivial and grave. The result of the discursive disparity is that male discourse exercises a disproportionate influence on our collective consciousness.

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The Essay concludes with preliminary suggestions for interventions to ameliorate the discursive disparity.

## I. INTRODUCTION

*“What knowledge have we of anything, save through our own minds? All happenings are in the mind. Whatever happens in all minds, truly happens.”*<sup>1</sup>

Men dominate our public discourse. They disproportionately occupy our forums of communication, including books, news sources, magazines, and blogs. The same is true within the legal realm, where men write far more judicial opinions, appellate briefs and other legal documents, scholarly publications, and legal commentary.

But should we care?

This Essay answers that question in the affirmative, arguing that the gender disparity in discursive participation harms women. Concretely, the disparity has negative consequences for women’s lives, careers, and personal well-being. More broadly, the disparity distorts our discourse by conforming that discourse to male perspectives. Language, I will explain, constructs reality. And when men dominate forums of communication, their linguistic dominance translates to a disproportionate influence on the perceived nature of the world we live in.

I wish to make one important matter clear at the outset. This Essay is avowedly anti-essentialist.<sup>2</sup> I do not attribute any particular perspective to men, nor to women. Rather, my point is that men and women have different experiences with society as a direct result of their respective genders; that over time those different experiences lead, in the aggregate, to some differences in perspectives and opinions; and that across the realm of discourse, a disproportionate number of male contributors means that the discourse will differ in tangible ways.

This Essay proceeds in three parts. Part I describes the discursive gender disparity as an empirical matter, cataloging the many forums currently dominated by men. Part II examines the consequences of the discursive disparity, first as a theoretical matter, and then within the specific context of the law and legal discourse. Part III considers ways of adjusting discourse—both legal and cultural—as a means of mending gender inequity.

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<sup>1</sup> GEORGE ORWELL, 1984 248 (1949).

<sup>2</sup> See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

## II. THE DISCURSIVE DISPARITY

This Part traces the gap between the amount of discursive space that men occupy and the amount of discursive space that women occupy. I begin with a brief survey of discourse generally, and then focus on the disparity within the law and legal context.

### A. In the World

The relationship between gender and authorship has made the news recently. Perhaps unsurprisingly, however, no one has examined that relationship systemically—that is, most studies and articles have reported on a single forum in which women are underrepresented rather than the underrepresentation of women in most forums in which people *write*.<sup>3</sup>

With that said, it is worth a brief overview of the studies and reports cataloging the scarcity of women as authors in a range of forums. Women author fewer articles in general print news sources.<sup>4</sup> Women author fewer columns in widely-read opinion forums.<sup>5</sup> Women author fewer novels reviewed in the most well-known book reviews.<sup>6</sup> There are fewer women bloggers, and the most well-known bloggers are primarily men.<sup>7</sup> Some influential blogs remain entirely male in their permanent authorship.<sup>8</sup> Even on Wikipedia, widely hailed as a cybertopia readily accessible by anyone, women author only thirteen percent of entries.<sup>9</sup>

We are so accustomed to this discursive disparity that, for the most part, we do not notice it. We do not think about the fact that the only two women on the *New York Times*' opinion page are Maureen Dowd and Gail Collins; it is simply a fact. The Modern Library Association announces a list of the "100 Best Books" that includes only

<sup>3</sup> See *infra* notes 4-10 (listing examples describing forums in which women are underrepresented).

<sup>4</sup> Amy King, *The Count 2010*, VIDA, <http://vidaweb.org/the-count-2010> (last visited Oct. 12, 2011).

<sup>5</sup> See, e.g., James Rainey, *A Very Public Opinion Exchange*, L.A. TIMES (Mar. 11, 2005), <http://articles.latimes.com/2005/mar/11/entertainment/et-estrich11>; Dahlia Lithwick, *Girl Fight*, SLATE (Mar. 16, 2005, 5:04 PM), <http://www.slate.com/id/2114926/>.

<sup>6</sup> Laura Miller, *Literature's Gender Gap*, SALON (Feb. 9, 2011, 7:01 AM), [http://www.salon.com/books/laura\\_miller/2011/02/09/women\\_literary\\_publishing](http://www.salon.com/books/laura_miller/2011/02/09/women_literary_publishing).

<sup>7</sup> Kara Jesella, *Blogging's Glass Ceiling*, N.Y. TIMES (July 27, 2008), <http://www.nytimes.com/2008/07/27/fashion/27blogger.html> (explaining that while fourteen percent of men blog, as compared to eleven percent of women, the most well-known bloggers according to recent rankings by Techcult and Forbes are almost entirely men).

<sup>8</sup> See, e.g., THE VOLOKH CONSPIRACY, <http://www.volokh.com>. As of February 8, 2013, all twenty-one of the blog's contributors were men.

<sup>9</sup> Noam Coan, *Define Gender Gap? Look up Wikipedia's Contributor List*, N.Y. TIMES, Jan. 30, 2011, <http://www.nytimes.com/2011/01/31/business/media/31link.html>.

eight books by women<sup>10</sup>—a list that is distributed in high school classrooms across the English-speaking world—and there is little protest in response.<sup>11</sup> The gender disparity in discourse is taken as a given—simply something that is real about the world.

The discursive disparity is so prevalent that it permeates areas where we do not even recognize it. I could offer many examples, but given the brevity of this essay, consider just one. Even our naming conventions divest women of discursive space. A presumption remains that women *should* change their last names upon marriage to a man—indeed, a 2009 study found that 70% of Americans believe this should be legally required.<sup>12</sup> To be clear, I am not at all opposed to a woman making that choice. I think that everyone ought to do with their names what they wish—both men and women, and both after marriage and otherwise.<sup>13</sup> But there are many stories of women pressured into the choice by their husbands or families. A name is often in itself a communicative act<sup>14</sup>—and usurping control of another’s name is a method of silencing.<sup>15</sup>

My hope is that this admittedly brief survey of the gender disparity in various forms of discourse and communication is sufficient to persuade the reader that it exists in the world generally. I next turn to the specific realm of the law.

## B. In the Law

The discursive gender disparity extends to the realm of law and legal discourse. We often hear that women are now half of all law students,<sup>16</sup> but a gross disparity remains within most segments of the pro-

<sup>10</sup> *Modern Library's 100 Best Novels*, MODERN LIBRARY, <http://www.modernlibrary.com/top-100/100-best-novels/> (last updated 2013).

<sup>11</sup> Certainly some commentators noted the homogeneity of the list, but googling the list brings up very few criticisms. Rather, we find blog posts by bibliophiles pledging to read the entire list, or teachers debating which selections are appropriate for their classes.

<sup>12</sup> Jillian Berman, *70% Say Brides Should Take Husband's Name*, USA TODAY, (Aug. 11, 2009), [http://usatoday30.usatoday.com/news/nation/2009-08-11-change-name\\_N.htm?csp=34](http://usatoday30.usatoday.com/news/nation/2009-08-11-change-name_N.htm?csp=34).

<sup>13</sup> Nancy Leong, *What's in a Name? For Married Women, a Lifetime of Effort*, FEMINIST LAW PROFESSORS BLOG (Jan. 28, 2011), <http://www.feministlawprofessors.com/2011/01/whats-married-women-lot-work/>.

<sup>14</sup> Consider, for example, people who *change* their names—the new name often communicates something about the person’s place in the world. Jessica Steinhauser, for example, gained fame, success, and wealth in the porn industry only after she changed her name to Asia Carrera, thereby invoking stereotypes of Asian female sexuality for profit.

<sup>15</sup> For example, women with ethnically-identified last names sometimes speak of their sense of identity loss upon changing their name to match that of a husband of another race.

<sup>16</sup> This does not appear to be true for women who attend the top fifty schools, as ranked by *U.S. News and World Report*. Research spanning 1999-2009 found that women comprised only 47% of the student body at these schools. Jennifer Mullins & Nancy Leong, *The Persistent Gender Disparity in Student Note Publication*, 23 YALE J.L. & FEMINISM 385, 392-93 (2011).

fession. It exists within the judiciary: only three of the nine Supreme Court justices are women; 51 of 162 federal appellate judges are women, or about 31%; and approximately 30% of federal district court judges are women.<sup>17</sup> This means, of course, that only about a third of judicial opinions are *by* women—that is, are direct contributions by women to judicial discourse.

The disparity is likewise present in litigation. Women author fewer merits briefs before the Supreme Court.<sup>18</sup> They are only 15% of the partners at big law firms,<sup>19</sup> who contribute to external legal discourse through representation and litigation, and to internal legal discourse by shaping the culture of the firm.<sup>20</sup>

Disparities also permeate legal education. Only 37.3% of tenured and tenure-track professors are women.<sup>21</sup> But this disparity grows even greater when we examine the written work that originates from the legal academy: only 32% of law review articles are by women, and the disparity is even more significant at the “most prestigious” law reviews, with women publishing 20.4% of articles in those venues.<sup>22</sup> The same disparity troubles student note publication: my previous study of every student note published over ten years at the “top fifty” law schools found that women published only about a third of the student notes in question.<sup>23</sup> Other research has found that women participate less frequently in class, making the aural experience of law school one sounding primarily in male voices.<sup>24</sup> And the

<sup>17</sup> *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S LAW CENTER (Jan. 15, 2013), <http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1>; see also *Federal Bench Gender Snapshot*, THE THIRD BRANCH, [http://www.uscourts.gov/News/TheThirdBranch/10-10-01/Federal\\_Bench\\_Gender\\_Snapshot.asp](http://www.uscourts.gov/News/TheThirdBranch/10-10-01/Federal_Bench_Gender_Snapshot.asp) x (last visited Feb. 9, 2013).

<sup>18</sup> Tammy A. Sarver, Erin B. Kaheny & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238, 242 (2008) (finding that from 1993-2001 women were only 25.52% of attorneys listed on Supreme Court merits briefs, and that women argued only 13.91% of Supreme Court cases).

<sup>19</sup> BARBARA M. FLOM, REPORT OF THE SEVENTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (Oct. 2012), available at <http://nawl.timberlakepublishing.com/files/NAWL%202012%20Survey%20Report%20final.pdf>.

<sup>20</sup> Eli Wald, *Glass-ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2247-49 (2010).

<sup>21</sup> *2008-2009 AALS Statistical Report on Law Faculty*, ASS'N OF AM. L. SCH., available at <http://www.aals.org/statistics/2009dlt/gender.html>.

<sup>22</sup> See Minna Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the 'Top Ten' Law Reviews*, 31 WOMEN'S RTS. L. REP. 385, 398 & fig. 4 (2010).

<sup>23</sup> Mullins & Leong, *supra* note 16, at 398.

<sup>24</sup> Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 45-47 (1994) (finding that women felt more alienated than men by the Socratic method and were consequently less likely than men to speak in class, and finding that this silence contributed to women's alienation from the law school experience); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal*

materials—at least during the first year curriculum—tend to consist almost exclusively of writings by men.<sup>25</sup> For example, most seminal judicial opinions are by men—unsurprisingly, since there have only been four women Supreme Court Justices in history, and the first was not appointed until 1981.<sup>26</sup> Collectively, these various factors combine to make law school a place that—while not wholly exclusive of female perspectives—is nonetheless dominated by male discourse.<sup>27</sup>

### III. CONSTRUCTING REALITY

Language constructs reality. We know this intuitively and recognize it when we see it. George Orwell's *1984* famously communicated the idea that whoever controls language controls reality.<sup>28</sup> The oppressive government in that novel asserted the power to command that  $2+2=5$ —the ability to instill belief in what is patently false reveals the ultimate ability to control reality.<sup>29</sup> As the protagonist Winston is told during one torture session: “There are three stages in your reintegration. . . . [t]here is learning, there is understanding, and there is acceptance” of the Party’s assertion of what is true.<sup>30</sup>

If language constructs reality, then those who control the discourse also control what is real. It follows that when discourse is disproportionately male, that male perspective constructs our perceptions of reality. This Part explores this insight, first as a theoretical matter, then within the realm of the law.

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*Forces in Legal Communication, Pedagogy, and Discourse*, 5 MICH. J. RACE & L. 847, 879–85 (2000) (describing women’s experiences with classroom silencing); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J.GENDER, SOC. POL’Y & L. 511, 522 (2005) (examining legal education at Harvard Law School); Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299, 318 (2003) (examining legal education at Columbia Law School); Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 403-17 (2006).

<sup>25</sup> Given that most first year casebooks focus on the “seminal” cases in traditional doctrinal subjects, and that most of the seminal cases were decided before 1981, these cases are by and large authored by men.

<sup>26</sup> That Justice was Sandra Day O’Connor; she has since been followed by Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

<sup>27</sup> Of course, this varies a great deal from one institution to the next. For example, in my longitudinal examination of student note publication, some law reviews showed massive disparities in the number of notes published by women and by men, while others showed no disparity at all. Mullins & Leong, *supra* note 16. Likewise, some schools have nearly equal numbers of men and women on faculty, while others display a marked disparity.

<sup>28</sup> GEORGE ORWELL, 1984 259 (1949).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 216.

### A. Performance Through Language

The philosopher of language, J.L. Austin, introduced the idea of “performative utterances”—that is, statements that do not merely describe facts about the world, but that when uttered under certain circumstances are tantamount to performing a certain kind of action.<sup>31</sup> For example: “I now pronounce you husband and wife.” The words are not merely descriptive of the world; when uttered at a wedding ceremony, they actually create change.

Closer to home, consider the following phrase in a judicial opinion: “Counsel for the defendant did not raise the argument.”<sup>32</sup> The phrase is more than merely descriptive. It is critical: counsel should have raised the argument. It is performative: because counsel did not raise the argument, the court will not consider it. And, of course, it is predictive: because counsel did not raise the argument, the defendant will not prevail upon it. Taken in context, then, this simple declarative sentence embodies far more about the world than the raw meaning of its individual words.

The gender disparity in discourse thus has significance beyond the actual words and statements that men disproportionately communicate.

### B. Legal Realities

What are the consequences of the discursive disparity? Certainly there are tangible consequences for women’s lives and careers. A woman excluded from legal academia cannot make her opinions heard by courts, commentators, advocates, and fellow academics. A woman who is driven away from blogging by cyber harassment loses the visibility and exposure to her career that a robust online presence generates.

In the aggregate, these harms are concrete. Women’s careers may stagnate; they may suffer economic loss over a lifetime; they may never have the same opportunity for public influence as their male counterparts; they may find themselves unhappy in their legal careers; they may leave the legal realm altogether. These consequences are easy to see.

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<sup>31</sup> See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975).

<sup>32</sup> I do not detail here Austin’s complex and fascinating theory of “illocutionary acts,” as distinct from other kinds of speech acts, or the notion of an “illocutionary force.” The basic notion that speech may be constitutive rather than merely descriptive will suffice for present purposes.

But there are also consequences beyond the fates of individual women, or even women as a group.<sup>33</sup> The disparities I discussed in Part I(B) unsurprisingly add up to a collective acknowledgment that men's views are more audible, more pervasive, and more influential than women's. For example, a poll run by *Legal Affairs* included only three women in a list of the twenty most influential legal thinkers, and the seven legal scholars on the list were all men.<sup>34</sup> The result is that men disproportionately control legal discourse, and, hence, legal realities and legal outcomes. Moreover, the law touches every aspect of daily life—by its absence as well as its presence. Thus, when men's words, thoughts, ideas, and arguments constitute the overriding public narrative, the result is that men determine the texture of daily life on matters both grave and trivial.

Let me offer a few more concrete examples. Women who do not author briefs do not have the opportunity to persuade courts of their perspectives.<sup>35</sup> Women who do not write articles—who were often women who did not write student notes—do not become law professors, and thus lose the opportunity to influence courts, commentators, students, and fellow academics with their ideas. Women who do not blog lose the opportunity to reach, influence, and persuade a broad, generalist audience with their opinions and insights. Women who leave the practice of law after a few years of frustration and disappointment do not become law firm partners, leaders in the public interest world, or members of the state and federal judiciaries, and thus lose the platform that these prestigious positions would provide.

The net effect is that the discursive disparity I have described results in a suppression of women's ideas and views. Of course, I do not claim that such views are altogether suppressed. But I worry that they are drowned out, or given insufficient time, in a discursive world that is numerically dominated by men.

#### IV. DIMINISHING THE DISPARITY

The discursive disparity within the legal profession could be lessened in two ways: women could write more, or men could write less. I

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<sup>33</sup> Of course, I do not mean to trivialize these individual and group harms. I do, however, want to call attention to a consequence that I think is vastly under-discussed—the harm to discourse itself.

<sup>34</sup> *Who Are the Top 20 Legal Thinkers in America?*, LEGAL AFFAIRS, <http://www.legalaffairs.org/poll/> (last visited May 29, 2013).

<sup>35</sup> As I noted in the Introduction, I am not suggesting that women have a single unitary perspective on any issue. My point is that men and women have different experiences with society as a direct result of their respective gender; that over time those different experiences lead, in the aggregate, to different perspectives; and that over the course of many legal briefs we would expect these different perspectives to yield different arguments.

am more inclined to the former approach and will focus on that approach here, while adding a couple of thoughts about the latter at the end.

As to how we could inspire more participation in discourse by women, we might do so in two ways. One suite of interventions would remove barriers to entering the discourse for women. The other would create incentives for women to enter existing discourses, perhaps in spite of those barriers.

As to the former, legal mechanisms may help us. We ought to consider carefully the various obstacles that prevent women from achieving equal voice within the profession. This might require a more expansive notion of what constitutes discrimination within the workplace and its long-term consequences on women's lives. A woman who has experienced sexual harassment at a law firm, for example, is unlikely to linger long enough to make partner.<sup>36</sup> Many of my colleagues have proposed what I see as sensible amendments to current workplace law governing gender discrimination.<sup>37</sup> In my view, we ought to include discursive impediments as one consequence of sexual harassment and hostile work environments, both in constructing the substantive doctrine itself and in considering appropriate damages and other remedies.

Likewise, a range of scholars have examined the phenomenon of cyber harassment and the way that it excludes women from the world of online discourse.<sup>38</sup> Scholars have proposed ways of regulating cyberspace to make it safe for women to speak in online forums.<sup>39</sup> While my project here is not to weigh in on the merits of the various proposals, surely one way to balance online discourse is to deploy tort and criminal law to improve the safety of online environments for women who wish to share their ideas there.

A cultural, rather than legal, shift to online civility will also lessen the discursive disparity. Recent commentary has wondered why we are so impolite to one another online.<sup>40</sup> Beyond legal interventions, websites could voluntarily adopt civility codes as a condition of par-

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<sup>36</sup> See, e.g., Joyce S. Sterling & Nancy J. Reichman, *So, You Want to be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 *FORDHAM L. REV.* 2289 (2010).

<sup>37</sup> Such scholarship is voluminous; I list only a small sample here. See, e.g., Susan Grover & Kimberley Piro, *Consider the Source: When the Harasser is the Boss*, 79 *FORDHAM L. REV.* 499 (2010); Kerri Stone, *Why Women Who Submit to Supervisory Sexual Harassment are Faring Better in Court Than Those Who Say No . . . And Why They Shouldn't*, 20 *YALE J. L. & FEMINISM* 25 (2008).

<sup>38</sup> See, e.g., Danielle Keats Citron, *Cyber Civil Rights*, 89 *B.U.L. REV.* 61 (2009).

<sup>39</sup> *Id.*

<sup>40</sup> Elizabeth Bernstein, *Why We Are So Rude Online*, *WALL ST. J.* (Oct. 1, 2012), <http://online.wsj.com/article/SB10000872396390444592404578030351784405148.html>.

ticipation. This would not make cyberspace as a whole safe for women. But it would create safe environments—perhaps many safe environments—where women’s views could be heard.

The latter mechanism—reducing the discursive disparity by facilitating participation by women—is more difficult because it is more difficult to envision how the law might intervene. That is, one cannot legally *require* women to write more. An interesting thought experiment involves statutorily requiring a certain level of gender diversity in written content by all publications with a minimum level of circulation. Of course, the First Amendment challenges would likely render such a regime legally untenable. But nothing would prevent publications from voluntarily adopting what cannot be required by statute.

Finally, I wonder whether one way of increasing participation in discourse might be discourse itself. Awareness is sometimes enough to produce positive change. Admittedly, my evidence is only anecdotal, but as I have presented my work on the gender disparity in student note publication before various law reviews, several young women have told me that as a result of the presentation they felt increased motivation to produce publishable scholarship during their legal career. Perhaps the simple act of paying more attention to the disparity might lead to its diminishment.

## V. CONCLUSION

The full participation of women in the discourse that constructs our lives and our realities is a prerequisite for true substantive equality between men and women. I hope that our lifetimes will see the dissipation of the gender disparity in discourse. I believe that talking about that disparity—as we have done at this symposium—is the first step.