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## Still Not Behaving Like Gentlemen

Ann Bartow

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# Still Not Behaving Like Gentlemen

Ann Bartow\*

## I. INTRODUCTION

Eleven years ago, during my final semester of law school, I learned quantitatively what I had known experientially and anecdotally all along: law schools are less welcoming to women than to men (or at least my law school was), and women were less likely to thrive and succeed there. The research I performed, with the estimable Lani Guinier<sup>1</sup> as my faculty adviser, was the genesis of a project that ultimately resulted in the publication of a law review article entitled *Becoming Gentlemen*:

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\* Assistant Professor of Law, University of South Carolina School of Law. The author would like to thank the *University of Kansas Law Review* for soliciting and editing this article. Thoughts and anecdotes contained in this article were presented at the *University of Kansas Law Review* 2001 Symposium, "Women and the Legal Profession: The Past and the Future," in Lawrence, Kansas on March 29, 2001. As with everything I write, this Essay is dedicated to Jim McKenney and Casey Bartow-McKenney. It is also dedicated to the brilliant and courageous Lani Guinier, who inspires my soul but bears no responsibility for the goofy parts, and to the memory of the late Rosemary Nelson. Rosemary Nelson was a human rights attorney murdered on March 15, 1999, in Northern Ireland, apparently by violent cowards who resented her talent, compassion, and effectiveness. At the risk of rendering the dedication portion of this article lengthier than the article itself, here are a few words about Rosemary Nelson written by one of her grieving colleagues:

Rosemary Nelson was an ordinary lawyer serving all sides of the community. We hear this constantly and it is, in part, true. But she was also an extraordinary lawyer. This was most obvious in her relationship with the people of the Garvaghy Road. She was competent and professional in her defence of human rights, in her belief that the law and the police should work for people rather than against them. But she was also emotionally committed to the cause of justice . . . . She cared deeply and passionately about the rights of her clients. She didn't have to stay out night after night on the Garvaghy Road when the area was under siege. She didn't have to run the gauntlet of racist, sexist and sectarian abuse she received for her work. She didn't have to travel with the Garvaghy Road Residents Coalition to meet with Tony Blair. She didn't have to sit through endless sessions with the Parades Commission. But she did all these things. Despite the belief of some legal professionals who insist that all lawyers should be dispassionate and neutral, this did not make her a bad lawyer—it made her a great lawyer.

Robbie McVeigh, *Rosemary Nelson and the Garvaghy Road*, at [http://www.garvaghyroad.org/rosemary\\_nelson.htm](http://www.garvaghyroad.org/rosemary_nelson.htm) (June 12, 2000). One can learn more about Rosemary Nelson's life and death at <http://www.rosemarynelsoncampaign.com>.

1. Professor of Law, Harvard Law School. She was on the University of Pennsylvania School of Law faculty from 1988 to 1998.

*Women's Experiences at One Ivy League Law School*,<sup>2</sup> and later a book, *Becoming Gentlemen: Women, Law School, and Institutional Change*.<sup>3</sup>

The original title of the article, or at least of the paper I wrote back in the spring of 1990, was *Not Behaving Like Gentlemen*. I chose this in reaction to remarks made by a Penn Law professor then teaching Professional Responsibility: in the guise of reassuring his students, he announced that while it was important to understand and follow the various rules and codes dedicated to preserving the ethics and morality of the legal profession, the bottom line was that all we really needed to do to be honorable lawyers was "behave like gentlemen."<sup>4</sup>

To this day, it is hard to overstate the effect these words had on me, at the time an impressionable first-year law student coming off an exceedingly wearisome first semester of law school.<sup>5</sup> Even then I had a fair idea about the great repugnance with which powerful men could react to women who attempted to behave like gentlemen, only to be labeled pushy broads, hostile and abrasive, lesbians (regardless of their sexual orientation), poor team players, or "too old, too unattractive, and not deferential enough to men."<sup>6</sup> When the initial shock of the comment began to subside, I tried to picture myself in a coat and tie, opening doors for others with a polite "No, after you." I knew that wasn't what the professor meant when he advised us to behave like gentlemen, nor did he mean earning "Gentlemen's Cs" on exams, always giving an athletic opponent the benefit of the doubt, nor being discreet about sexual relationships. He was instead urging us to emulate in mind, body, and soul the mores, customs, and practices of successful white male attorneys

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2. Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) [hereinafter Guinier et al., *Becoming Gentlemen: The Penn Study*].

3. LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997) [hereinafter *BECOMING GENTLEMEN*].

4. Lani Guinier tells a similar story describing a professor who would greet his students with an affectionate "Good morning, gentlemen." He admonished the women in the room not to feel excluded because in his mind they too were "gentlemen." *BECOMING GENTLEMEN*, *supra* note 3, at 85.

5. Many of my colleagues described similar reactions, and several of us approached the faculty member to make him aware of our reactions to his words. He assured us that he understood our concerns, but reportedly continued to give the same "behave like gentlemen" admonishment for several more years, and only stopped when a faculty member took him to task for it.

6. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985) ("Craft states that Shannon also told her she was being reassigned because the audience perceived her as too old, too unattractive, and not deferential enough to men."); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989) ("[I]n order to improve her chances for partnership, Thomas Beyer advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'").

that he admired. I was despondently certain that I could not even comfortably identify, no less imitate, the range of gentlemanly views and behaviors this professor was urging us to adopt.

I don't know if he consciously excluded me and others of my gender from his articulated and doubtlessly internalized view of model upright attorney conduct. I only knew that I was not and was never going to be a gentleman, so I would have to figure out what constituted good and ethical lawyering for myself. I had also received a pointed reminder that my gender made me different, an outsider, despite the fact that thirty-eight percent of my classmates were women.

## II. THE HEGEMONY OF HARD DATA

### A. *Grades Get Attention*

Research for *Becoming Gentlemen* uncovered (among other things) the actual numerical grade differential between male and female law students at the University of Pennsylvania Law School after we were given access to aggregate (and thoroughly anonymous and redacted) student transcripts. The accomplishment disparity, however, had been in plain sight all along: women students were underrepresented in every law school organization in which membership was linked to academic performance, such as the law review, the moot court board, and Order of the Coif;<sup>7</sup> graduation honors were similarly disproportionately received by males.<sup>8</sup> Prestigious clerkship placements, and jobs at top law firms are also generally linked to law school grades, but the law school's placement office refused to provide any data to support or rebut anecdotal and observational evidence that these prized opportunities were also going predominantly to men. Women were underachieving year after year, and either no one noticed, or no one particularly cared.<sup>9</sup> It wasn't until "hard data" was mined, evaluated by a statistician, and on the verge of being released to the public that it pierced the law school's institutional radar.<sup>10</sup>

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7. *BECOMING GENTLEMEN*, *supra* note 3, at 41.

8. *Id.*

9. *But see id.* at 42 (noting some male students' intuitive realization of a gendered performance differential).

10. I don't claim any overarching omniscience on gender issues; until Penn Law Professor Barbara Woodhouse pointed it out to me, I hadn't noticed that with one exception all of the oil

Subsequently, many of the men who have discussed *Becoming Gentlemen* with me point to the numerical grade and honorific information as the most (and in some cases only) worthwhile part of the article to them, because it “proved” gendered phenomena that would otherwise be too nebulous to quantify, or to acknowledge and take seriously. Survey data about self-doubt, depression, and crying was dismissed as uninteresting, and the anecdotal data derived from focus groups as completely worthless, because it was simply edited but unadorned narrative.

Many self-described “traditional” legal scholars express discomfort with narrative scholarship, but as one woman law professor has asked: “[W]hy should that be when the casebooks are made up with the facts of cases, which are in effect little stories? You use little stories to teach moral lessons—that is exactly what the Bible has been doing for centuries—but many men haven’t quite connected that some feminist scholarship does the same thing.”<sup>11</sup> Oddly, sometimes it is viewed as permissible to use anecdotes to buttress an assertion, as long as one is quoting to someone else’s little story, which is therefore accompanied by a footnote with citation. Recently, in the context of preparing for publication an essay I authored on a “high technology” subject, several student editors objected to my inclusion of a four sentence description of my family’s television watching habits as a way to illustrate a broader contention about the manner in which end users access and use copyrighted content when it is made available on a flat fee basis. The student editors felt that, while cable television usage provided a worthwhile exemplar, mentioning my family compromised the scholarly tone of the piece. With apparent sincerity and no detectable sarcasm, they suggested it would be preferable for me to quote someone else discussing the television watching habits of another family, because something about me making the story personal detracted from its validity.<sup>12</sup> “It’s as if you are telling the story just to make your point,”

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portraits hung around the law school were of white males. The sole exception was a portrait of a woman whose only connection to the law school was that she had been related to someone who had donated a large sum of money to the school.

11. LORRAINE DUSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 105 (1996) (quoting Professor Marina Angel of Temple University School of Law). See generally Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141 (1997) (analyzing and discussing the extent to which scholarly legal writings are narratives); Jane B. Baron, *Resistance to Stories*, 67 *S. CAL. L. REV.* 255 (1994) (considering the criticism of law-as-narrative scholarship).

12. The view that credibility is compromised when an author personalizes commentary is not limited to legal scholarship. See, for example, Jack Shafer, Commentary, *The Post’s “Weird and*

remonstrated one of the students. That was indeed what I was doing, and (as the astute reader may have already noticed), is exactly what I am doing here.

To the extent it got everyone's attention, the role that *Becoming Gentlemen* played in exposing a concrete and quantifiable gender-linked accomplishment gap was useful and worthwhile. However, the "soft data" in the study are important in their own right and may do a better job than the numbers of isolating specific causes of, and suggesting effective cures for, the gender gap. My own observations and experiences related to gender and the legal profession are simply little stories which, when welded together, form the figurative engine that drives me to do what I can to empower women who do not behave like gentlemen. While I argue below that the comprehensive collection and periodic analysis of more hard data might be very helpful in keeping track of certain trends in legal education, my admittedly subjective perceptions and the sincere narratives of respected colleagues will always be important to me, whether or not they are supported (or even supportable) by hard data. Frankly, I believe this is true for everyone, whether or not they are willing to acknowledge the importance of "little stories" to their perceptions of themselves and the world.<sup>13</sup>

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*Appalling" Ombudsman*, SLATE (Apr. 10, 2001), at <http://slate.msn.com/code/PressBox/PressBox.asp?show=4/10/2001&idMessage=7470>, which comments on *Washington Post* Ombudsman Michael Getler's criticism of *Post* national reporter Michael Grunwald for expressing personal opinion in a book review:

Getler subscribes to the old-school view that journalistic credibility *rises* whenever a writer suppresses what he thinks about the subject at hand and *falls* whenever he abandons the pure stenography of who, what, why, where, and when. The old-school fealty to journalistic "objectivity" helps explain why all too often Page One of the *Washington Post* reads as if somebody has unfurled a sheet of gauze over it, muffling the sights and sounds of the world. Reading the *Post* many mornings is enough to convince you that you've developed cataracts.

The perverse thing about Getler's old-schoolism is that neither he nor anybody at the *Post* would have looked askance if Grunwald had attributed the "weird and appalling" observation in his book review to somebody else on the campaign trail, somebody less knowledgeable or perceptive than Grunwald. The paper's ethical guardians wouldn't have flinched, either, if Grunwald had sourced the observation to a "highly placed Clinton campaign official." They wouldn't have taken him to task if he had successfully prompted one of his campaign sources with a leading question such as, "So, Bob, have you found the Clinton campaign to be weird and appalling?" Old-schoolism also prevents Getler from investigating Grunwald's weird and appalling claim, for which there is ample evidence in the review.

*Id.*

13. Richard Neumann has asserted that "[w]e are not objective observers of ourselves, and when asked to explain why we have done what we have done, we tend to think up rationalizations

Several articles about women in law schools that briefly predated *Becoming Gentlemen* focused on gender issues other than grade-based academic accomplishments,<sup>14</sup> and, in my opinion, this was at least part of the reason that the scholarly works got little attention from mainstream legal educators. The students involved in collecting the information and writing the articles felt that something was wrong (or at least deserved scrutiny) at their law schools, but apparently did not have access to information about grades.<sup>15</sup> At a minimum, *Becoming Gentlemen*'s contribution was to draw attention to the possibility of gender-linked disparities in academic accomplishments because most scholarship following the publication of *Becoming Gentlemen* addresses law school success (as measured by grades or grade-related achievements) in some manner.<sup>16</sup>

And yet, if that is the article's only legacy, it is distinctly unsatisfying. Collecting hard data to demonstrate the achievement gap was relatively simple: assembling comparable numbers in support of any particular method with which to *close* the gap will not be. This is not to suggest that the answers aren't out there. Many legal educators work hard to develop inclusive pedagogies, actively mentor students who are members of outsider groups, and otherwise leave students free to become

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consistent with the principles we want to be associated with." Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 351 (2000). It is admittedly difficult to gauge or quantify the impact of "little stories" on myself, let alone my colleagues in legal education.

14. See generally Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1990) (studying gender differences at Boalt Hall School of Law in 1988); Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988) (surveying current Stanford students and a sampling of alumni regarding their experiences in law school or the legal profession, their experiences "reasoning about legal issues with moral overtones, and their experiences of role strain, stress, and psychological distress"); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (documenting class participation rates by gender and the experiences of twenty women students in the Yale Law School class of 1987).

15. In the Boalt Hall study, quantitative data about grades and class rank was solicited from study participants; however, the researchers "were interested in these numbers as a means rather than an end." Homer & Schwartz, *supra* note 14, at 24-25. The 1986 study at Stanford asked study participants to self-report how they felt about their academic performance and whether they had been elected to Order of the Coif. Taber et al., *supra* note 14, at 1238-43.

16. See generally Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 518 (1996) (replicating the methodology of the Penn Study); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117 (2000) (studying the experiences of women law students at the University of Texas).

lawyers on their own terms,<sup>17</sup> but until hard data links such innovations to higher bar passage rates, increased institutional prestige, or larger alumni donations, they may never be widely adopted or even attempted. Many successes and failures cannot be proven mathematically.<sup>18</sup>

Reliance on hard data may have other detrimental effects if the relevant hard data shows that women are succeeding at those aspects of law school that can be measured numerically. Professor Jean Love has written that in an interval in which there was no discernible achievement gap at the University of Iowa College of Law, many female students enrolled there still felt it was a "hostile educational environment."<sup>19</sup> Another study, conducted at Brooklyn Law School, found that female students achieved as well as men, but women voluntarily participated less in classroom discussions and had higher rates of anxiety and depression than their male peers.<sup>20</sup> Without "hard data" measurably documenting or validating their discontent, they risk having their concerns disparaged as baseless whining.

Professor Love's article sets out a framework for collecting what she describes as "'Hard Data' Regarding Status of Women Students," "'Soft Data' Regarding Status of Women Students" and "Data Regarding Educational Environment" in the form of "Twenty Questions" (actually more like fifty-three questions) that a law school can ask itself.<sup>21</sup> Many other surveys can be found throughout the literature.<sup>22</sup> In 1998, the

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17. See, e.g., Gerald F. Hess, *Monographs on Teaching and Learning for Legal Educators*, GONZ. L. REV., spec. ed. 2000, at 63; Arturo López Torres & Mary Kay Lundwall, *Moving Beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching*, GONZ. L. REV., spec. ed. 2000, at 1.

18. It has been my observation that some legal educators view only students who graduate with honors, as "successes," while others derive their greatest satisfaction from seeing struggling students ultimately graduate and pass the bar. "Success" and "failure" are not necessarily objectively definable even when grades and honorifics are tabulated.

19. Jean C. Love, *Twenty Questions on the Status of Women Students in Your Law School*, 11 WIS. WOMEN'S L.J. 405, 410 (1997) (noting harassment directed at female students by their male peers, and the fact that female students could go "through the entire first year of law school without taking a class from a female professor").

20. Garrison et al., *supra* note 16, at 520.

21. Love, *supra* note 19, at 412-15.

22. See generally LINDA F. WIGHTMAN, LAW SCHOOL ADMISSION COUNCIL, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN (1996) [hereinafter LSAC STUDY]; Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 U.C.L.A. WOMEN'S L.J. 81, 90-94 (1996) (studying Chapman University School of Law); Guinier et al., *Becoming Gentlemen: The Penn Study*, *supra* note 2; Bowers, *supra* note 16; Homer & Schwartz, *supra* note 14; Taber et al., *supra* note 14; Weiss & Melling, *supra* note 14.



American Bar Association's Commission on Women in the Profession reprinted my *Becoming Gentlemen* survey, along with several others, in a publication entitled *Don't Just Hear It Through the Grapevine: Studying Gender Questions at Your Law School*.<sup>23</sup> It also reported the results of a variety of studies, which are as stunning in what they omit as in what they reveal: non-elite law schools are apparently far less likely to have a quantifiable hard data achievement gap between male and female students.<sup>24</sup> (I use the word "apparently" because data can be manipulated or selectively aggregated, as will be described in Part II.B). The absence of a cognizable performance gap may give non-elite law schools reason to assume that their female students either cannot complain about the law school environment, or can be ignored or neutralized if they do. Most elite law schools, however, can't even pretend not to have a gender-based achievement differential.<sup>25</sup>

*B. Lies, Damn Lies, and Hard Data*<sup>26</sup>

While I was enrolled at the University of Pennsylvania Law School, then-Dean Colin Diver publicly came out with the astonishing statement that one-third of the Penn Law faculty was female. I immediately sat down with a faculty directory, and then actually walked around the law school counting people in their offices, but I could not make this compute: it looked to me as though less than fifteen percent of the faculty was female. I eventually figured out that part of the discrepancy could be explained by the fact that the dean and I were using different criteria for what it meant to be "counted" as a faculty member. He was counting a female library director, a female faculty member on leave (meanwhile, the law school where she was visiting was also counting her

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23. ABA COMM'N ON WOMEN IN THE PROFESSION, DON'T JUST HEAR IT THROUGH THE GRAPEVINE: STUDYING GENDER QUESTIONS AT YOUR LAW SCHOOL 36-92 (1998) [hereinafter GRAPEVINE].

24. *Id.*

25. See *id.* at 32 (citing Chiu-Huey Hsia, *Men, Women Perform Equally Well, Study Says*, COLUM. SPECTATOR, March 20, 1995, at 1, 5). The *Grapevine* cites the Columbia study as ascertaining that "as a group, men performed at a level predicted by their LSAT and their undergraduate grade-point average, whereas women were 'slightly outdistancing' their predicted academic performances," but does not reveal whether women were proportionately represented at the top of their classes, and says nothing about the proportion of women on the law review, inducted into the Order of the Coif, etc. *Id.*; see also Neumann, *supra* note 13, at 322 (noting that available research suggests that "the pedagogical environment may be worse for women at top-ranked schools than in legal education generally").

26. "Lies, Damn Lies, and Statistics" is a line variously attributed to Mark Twain and to the former British Prime Minister, Benjamin Disraeli.

as a female member of *its* faculty), and a woman who had accepted an offer to join the faculty, but had not yet actually done so (and, as events transpired, never did). I did not add these women to my tally, as I did not count anyone who was not teaching full-time on the premises, male or female. Correspondingly, the dean was not including full-time but non-tenure-track "teaching fellows," in his tabulation (who all happened to be male), while in accordance with my criteria (again, individuals with faculty offices who were teaching two classes each semester), I counted them. Both of our counts were "correct" within the "what-is-a-faculty-member" paradigms we had constructed, but our results were radically disparate.

In a similar vein, anyone who follows the law school rankings performed by entities such as *U.S. News & World Report* and the *Princeton Review* can't help noticing the wide variations over time in data reported about particular law schools.<sup>27</sup> One wonders: did Law School X really improve its job placement statistics by thirty percent in a single year, or did it simply reconfigure what it meant for a student to be "hired," suddenly tabulating any job a student accepted whether it was in the legal field or not?<sup>28</sup> Radical fluctuations in self-reported student/faculty ratios, per-student spending levels, and other purported quantitative measures can also be observed over time, without any indication as to what is driving the changes, or how the statistics are derived. Data can always be manipulated and reframed, and arguably correct, but meaningless unless carefully and specifically placed in context.<sup>29</sup>

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27. See generally Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn't Want to Be Compared to Time and Newsweek—or The New Yorker*, 60 OHIO ST. L.J. 1097 (1999) (noting serious flaws in ranking methodologies and cautioning against over-reliance on such measures).

28. Anecdotally, some law schools would even count a law student working as a supermarket clerk as "placed," which may help explain why so many law schools claim job placement rates far in excess of the bar passage rates of their students.

29. A few law schools have been accused of intentional deceptions. See, e.g., Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar. 1998, at 50, available at <http://www.abanet.org/journal/mar98/03fschol.html> ("There is, for instance, the little-noted scandal in which a number of law schools gave inflated figures to *U.S. News* that differed from those they submitted to the ABA's accrediting offices. Calculatedly or not, numbers submitted to the magazine helped the schools in the rankings."); see also Press Release, Carl C. Monk, Executive Director, Association of American Law Schools Calls on *U.S. News & World Report* to Stop Ranking Law Schools; Study Challenges Validity of Magazine's System (Feb. 18, 1998), at <http://www.aals.org/ranknews.html> (announcing press conference where Monk denounced *U.S. News & World Report's* law school rankings); Educ. & Soc. Sci. Library, Univ. of Ill., Urbana-Champaign, *Rankings Caution & Controversy*, at <http://www.library.uiuc.edu/edx/rankoversy.htm> (last updated Dec. 7, 2000) (discussing criticism of academic rankings); *Unfair System: Magazine Law School Rankings Based Too Much on*

### III. MY COLLEAGUES AREN'T BEHAVING LIKE GENTLEMEN

#### A. *Women Seem Different From Men*

During her investiture, United States Supreme Court Justice Ruth Bader Ginsburg said:

Justice Sandra Day O'Connor recently quoted Minnesota Supreme Court Justice Jeanne Coyne, who was asked: Do women judges decide cases differently by virtue of being women? Justice Coyne replied that, in her experience, "a wise old man and a wise old woman reach the same conclusion." I agree, but I also have no doubt that women, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge Alvin Rubin, described as "a distinctive medley of views influenced by differences in biology, cultural impact, and life experience." A system of justice will be the richer for diversity of background and experience. It will be poorer, in terms of appreciating what is at stake and the impact of its judgments, if all of its members are cast from the same mold.<sup>30</sup>

When I told Lani Guinier that, upon graduation, I was going to practice intellectual property law, she literally doubled over with laughter because she thought I was kidding her. Based on the work I had done for her, and my extracurricular activities at the law school, she expected me to pursue some area of gender or civil rights law. She had, earlier in the conversation about my future, generously offered me assistance in what would no doubt be an arduous search for a public interest job, as such positions were few in number and blisteringly competitive. But, as the reader has no doubt already ascertained, my contribution to the "distinctive medley" described by Justice Ginsburg in the above passage, is largely the resonating beat of my own drummer. I've been an outsider since I enrolled in the college preparatory curriculum at my high school; my immediate ancestors were farmers and factory workers, neither of my parents attended four-year colleges, and, to quote a favorite cousin, "any day I'm not a cashier at Wal-Mart is a good day."<sup>31</sup> I'm free from the bonds of parental or societal expectations to follow my legal muse, and I

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*Reputation*, STATE NEWS, Feb. 25, 1998, at [http://www.stateneews.com/editionsspring98/022598/op\\_edit.html](http://www.stateneews.com/editionsspring98/022598/op_edit.html) (criticizing rankings' over-reliance on reputation).

30. Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161, 1174 (1994).

31. The impact of economic class on law students, legal education, and the profession is, in my opinion, radically under-researched and under-appreciated. But see Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (1997) (reviewing RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996)).

like intellectual property law; it is what I most love to teach, and my primary area of scholarship. I'm not an expert in gender law, and my interest stems largely from the fact that I have collected a lot of empirical evidence about what it means to be a female law student, attorney, and law professor.

I have a reasonably good memory, and could tell the reader a lot about my experiences in grade school, in high school, in college, at my law firm, and so forth if it would be of interest, which I suspect it would not. My recollections of law school, however, are a lot spottier, and I can't help thinking that certain lobes of my brain actively repress things for the greater good—my mental health. I loved college; throughout my undergraduate years at Cornell University I grew both emotionally and intellectually. No one viewed me as a troublemaker, and I made a lot of friends, many of whom I seem to be retaining for life. Law school was far less enjoyable, and if it wasn't for Penn's Women's Law Group and (then) Penn Law faculty members Lani Guinier,<sup>32</sup> Susan Sturm<sup>33</sup> and Barbara Woodhouse,<sup>34</sup> I'm not sure I would have made it through. I know that the friendship and support of strong, caring women<sup>35</sup> has been crucial to my success, such as it is.

Once, during my first few months as an associate at a large law firm, I overheard a partner counseling another new attorney about how to succeed at the firm. After delivering the usual guidance about working hard and seeking assignments from powerful and well regarded colleagues, he offered a few suggestions to the young associate about how he should conduct his social life, such as improving his golf game, showing his face at firm mixers, and playing on the firm softball and basketball teams if (and only if) he had athletic prowess to contribute.

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32. Now at Harvard.

33. Now at Columbia.

34. Permanently relocating to the University of Florida Levin School of Law in Fall 2001.

35. I have received an enormous amount of assistance and support from many different women in legal education over the years, but the following (in addition to Lani, Susan and Barbara, mentioned above) deserve special recognition: Marina Angel and Amy Boss at Temple University School of Law, Liz Brandt, Joanne Henderson and Maureen Laflin at the University of Idaho School of Law, Vernellia Randall, Andrea Seielstad and Susan Brenner at the University of Dayton School of Law, and Kimberly O'Leary at the Thomas Cooley School of Law. Thanks and kudos also to my four full-time female colleagues at the University of South Carolina School of Law: Kim Diana Connolly, Lisa Eichhorn, Marie Reilly, and Robin Wilson—what we lack in numbers we make up for in style. In addition, Kay Butler is a valued colleague here each fall. Finally, many thanks to Anne Deibert at McCutchen, Doyle, Brown & Enersen, a fantastic lawyer who will be a terrific addition to legal academia if she ever decides to join us.

One of his most emphatic pieces of advice was something along the lines of, "And whatever you do, don't get mixed up with the party crowd." My internal reaction to this comment was to wonder, "Where is this party crowd and how can I meet them?" I enjoyed playing softball, but knew I wasn't a talented enough hitter or fielder to do my legal career any good. Living in a brand new city had me feeling stressed and lonely, and spending what was inevitably limited free time with the few friends I'd made was a highlight of my existence. In fact, one of the reasons I chose to join that particular law firm was the fact that so many of the associate attorneys were friendly, and acknowledged socializing with each other informally (as contrasted with the sort of forced, career-related socialization that law firm life often requires). I had worked as a summer associate at a different firm where that was not true; where the prevailing view was that after working with colleagues all day, it was probably better to get as much distance from them as possible on nights and weekends. That firm, located in Philadelphia, was not a happy place.

The "party crowd" at the San Francisco firm I joined after law school turned out to be a large, loose affiliation of attorneys who gathered in large groups to celebrate each other's birthdays, weddings, and babies, and in smaller groups to exercise, shop, and hang-out—all the things that friends do together. Men were often included, but the primary group organizers were women; wonderful, strong, interesting women I was (and am) proud to call friends. As the partner's comments foreshadowed, however, these women were largely unsuccessful at making partner. What the partner apparently hadn't figured out, however, was that few of us expected (or, in some cases, particularly wanted) to make partner.<sup>36</sup> We knew that reconciling family

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36. Women are making progress and now hold 14.7% of partnership positions at firms with more than 250 attorneys. *Steps Forward: A Look at Some California Law Firms' Diverse Partner Classes for 2000*, CAL. L. (Jan. 31, 2000) (discussing a National Association for Law Placement survey, *Perceptions of Partnership: The Allure and Accessibility of the Brass Ring* and recent partnership data from California's largest law firms), at <http://www.callaw.com/supps/new-partner/stories/cal.html>. However, my female law school colleagues haven't "made partner" as frequently as our male cohorts across law firms; as a result, we don't have the status of, nor do we earn as much as, gentlemen. We joined large firms to get great work, great training, great pay, and great experience, which many of us took with us to later jobs that better enabled us to have families. I know a few women who are happily "of counsel" at large law firms. They get good work while working reasonable hours. By and large, clients prefer the work of these women over what is typically produced by junior associates, because their years of experience and familiarity with clients enables them to produce a better product on a faster timetable, which usually means they are cheaper as well. Attorney turnover is expensive and disruptive, so one would think that large firms would love to have as many long-term "of counsels" as possible. However, giving attractive projects to "of counsel" lawyers leaves less good work available for associates, which can cause them to leave. The

responsibilities with the demands of a large law firm might well prove beyond our capabilities.

It has also been my experience that women seem to know more personal information about each other than men. I was at an Intellectual Property conference a few months ago, and found myself sitting at a table with a male faculty member of a foreign law school, the particular foreign law school where a male acquaintance of mine was spending the year as a visiting professor. I asked him if he had met my acquaintance, and he responded enthusiastically that he had: indeed, they played tennis together several mornings each week. "How are his children doing?" I asked, wondering how his school-aged sons were adapting to what was doubtlessly a very radical change in culture and scenery.

He looked momentarily startled, and then glared at me: "His children?" he inquired incredulously, "I wouldn't know anything about that. All we do is play tennis together a few workday mornings each week. We certainly don't discuss family matters." As the conversation at the table turned to other topics, I wondered if it would be possible for me to play tennis with someone multiple times a week for several months without learning almost everything there was to know about her children, not to mention large blocks of information about her spouse, her finances, and possibly even her parents, siblings, and pets, if any. She'd accumulate a wealth of data about my family and me too, and in relatively short order.

Finally, I'm not the only person who thinks that, as a general matter, women are different from men. Some law school administrators seem to bank on that fact. Identifying information has been redacted in this anecdote, to protect the innocent (and untenured) from the guilty, so let's make it a hypothetical: there are two entry-level professors at a private law school who are hired simultaneously. Both are well-qualified, but one has an advanced degree, a slightly better academic record from law school, and a longer list of publications. Which one was paid more? Can you guess, or would you prefer to withhold judgment until you

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economic model on which most large firms are based requires entry-level attorneys to bill hours at prodigious rates so that they can pay for themselves as quickly as possible and start turning a substantial profit for the partnership in the mid-level years of their quests for partnership. Profitability depends upon a Ponzi-like pyramid of young lawyers scrambling towards a pinnacle few can reach: unhappy associates who leave too soon threaten this model. It is therefore, in my opinion, relatively good news that women now hold 24.4% of "of counsel" positions at large law firms. *Id.*

know which one was the woman? You're smart if you do, because she was being paid \$12,000 less than her slightly-less-qualified-by-traditional-notions colleague. When she approached her dean about the pay differential, she was informed it was because her colleague was a better negotiator. "But you told me that my salary was as high as you could go, your final offer," she sputtered. "Would you have accepted that sort of representation at face value on behalf of a client?" he reportedly mockingly retorted.

*B. Women Are Also "Intra-Genderly Diverse"*

While we were in college, a close friend took a semester off from her studies to work for a prominent feminist women's organization. She enjoyed most of her time there very much, and apparently did good work, because she was one of only two students selected to help host the visits of several prominent women who would be speaking at a symposium in a large East Coast city. In fact, she was assigned to be the "point person" for a very prominent feminist whose name the reader would recognize. My friend was very excited about this opportunity, but at the end of her day of "hosting," looked positively deflated. It seems that the speaker, whom my friend picked up at the airport, accompanied to lunch at an outstanding restaurant, and escorted on an extensive museum-and-shopping expedition, had what in popular parlance might be called a "diva moment." Unfortunately for my friend, the referenced diva moment had been an extended one, lasting for over six hours, the entire time my friend was in contact with her. My friend learned, as we all eventually come to realize, that just because you adore someone's writings and ideas doesn't necessarily mean that you are going to find her likeable (or even tolerable) in person.

Last fall, I received a hand-addressed invitation to a light luncheon honoring and welcoming newcomers to the University of South Carolina from an organization that denoted itself the University Women's Club. One of the things that struck me as slightly odd about the engraved invitation was the fact that after the prefix "Mrs." the designated hostess used her husband's first as well as last name; another was a postscript stating that "babysitting was available by request," as the function was being held in the middle of the day, when most "newcomers" with children would otherwise be teaching, and would therefore probably have childcare lined up already. However, offering babysitting is a wonderful courtesy in any context, so I noted the postscript with favor.

When I reached the function I saw many faces familiar from new faculty orientation programs I had previously attended. As I met new people, among the first questions one or the other of us generally broached was "What is your field?" The answer to that question the fourth or fifth time I asked it was "I don't have a field. My husband is the new Offensive Coordinator for the football team." As it turns out, a number of wives of members of the University athletic staff were present.

The woman chairing the meeting introduced herself by saying, "My husband is a doctor, and after being married to a doctor for forty-nine years, why, it's like I'm a doctor too, because after all this time I know just about everything he does, and sometimes when patients call, they would rather talk to me than him." She explained that later in the meeting all the newcomers would introduce themselves and state where they were from, and what had brought them to the University. She began addressing the next topic on her agenda, but then interrupted herself to announce with glee that the new dean of one of the University's schools was in attendance. She drew a very startled and sheepish looking woman to the center of the room and said, "This is the new dean I wanted to introduce to you. Her husband thinks he's the new dean, but she's really the new dean. Mark my words; she'll be the one really calling the shots. She'll be the real dean, the behind-the-scenes dean." The flustered woman began to explain that she was actually an academic in her own right, but was soon cut off by the announcement of another elderly woman, who exuberantly proclaimed that while it was wonderful to know that the wife of a new dean was on the premises, "Everyone needs to be aware that we have the wife of a new vice president in our midst!" The blushing, discomfited wife of the new vice president was then introduced, and the fact that she was also an academic was similarly glossed over.

Eventually, all the newcomers introduced themselves. Most of us were new faculty members, but it became clear that the actual members of the University Women's Club were predominantly wives of faculty members, coaches and administrators, and my impression was that their status within the group was linked to the prestige of their husbands' positions. They were all exceptionally kind to the academics present, but it was clear they didn't expect us to join their membership rolls. I'm not sure if they looked down on us for pursuing academic careers of our own, or thought that we looked down on them because they hadn't. They seemed very nice, but also very different from me.



Meanwhile, on the other side of the spectrum (or perhaps from a different planet altogether), it is with a great deal of both consternation and amusement that I sometimes read the ravings of academics from disciplines other than law who seem to exist in a very different scholastic universe than mine. For example, celebrity academic Camille Paglia writes tirades against misguided, doctrinaire feminists who are (in her view) taking over and destroying higher education,<sup>37</sup> and I can't help wondering if she has ever spent five minutes in a typical law school, where female faculty members who have even small amounts of power and influence can be rare.<sup>38</sup> She certainly does her best to undermine other female academics with generalized diatribes that in my estimation are not applicable to legal education. In one instance, she printed a letter in her "advice column" from a female graduate student who, purporting to speak for her peers as well, expressed a preference for male faculty mentors, opining:

I am not the only female grad student I know who has just about given up seeking out women professors as mentors. Instead, we find ourselves turning to men in their 40s and 50s who have developed the capacity to be warm, nurturing and enthusiastic, who don't feel the need to denigrate our work or capabilities, who can be critical without being harsh, politically savvy without being craven and have a sense of decorum that enables them to be solicitous without being intrusive or infantilizing.

Perhaps older male professors feel free to be supportive because of the comparative security of their positions, or because we don't push their buttons or threaten them the same way we might threaten older women, or because they frankly like us and in some cases are attracted to us. Perhaps we are naive to expect a certain level of warmth and regard from any professor, and are doubly naive to expect it from women professors simply because they are women. Perhaps bitterness and academia go together, and we should be surprised to encounter professorial warmth regardless of gender. Perhaps we just haven't met the right woman yet.

Some women professors seem amazingly bitter, and their hostile behavior could even be called abusive, which is very sad and kind of frightening.<sup>39</sup>

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37. See generally CAMILLE PAGLIA, *Junk Bonds and Corporate Raiders: Academe in the Hour of the Wolf*, in *SEX, ART AND AMERICAN CULTURE* 170 (1992) (reviewing and criticizing DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE* (1990), and JOHN J. WINKLER, *THE CONSTRAINTS OF DESIRE: THE ANTHROPOLOGY OF SEX AND GENDER IN ANCIENT GREECE* (1990)); CAMILLE PAGLIA, *The M.I.T. Lecture: Crisis in the American Universities*, in *SEX, ART AND AMERICAN CULTURE*, *supra*, at 249, available at <http://gos.sbc.edu/p/paglia.html>.

38. See DUSKY, *supra* note 11, at 89, 91-93, 113-14 (discussing gender bias in legal education).

39. Camille Paglia, *Warning! Mentorship Land Mine Ahead!*, *SALON* (Jan. 27, 1999), at <http://www.salon.com/it/col/pag1/1999/01/27pag1.html>.

Paglia's response included the following:

I am fascinated by your remarks about the "bitterness" of women professors. Thanks to pork-barrel affirmative action, many of today's prominent women professors have been overpromoted way beyond their talents in the elite schools. Perhaps at midlife they've begun to see the limitations of their own work and realized that they've feathered their nests with tatty turkey plumes.<sup>40</sup>

Paglia and her correspondent are entitled to their opinions, which certainly add unique dimensions to the discourse, and serve as reminders that women academics are far from homogeneous.

*C. My Role Models Don't Behave Like Gentlemen*

On more than one occasion I've heard speeches made by successful women lawyers and judges who reached their lofty ranks at times and/or in places that can only be described as "against all odds." Many tell very similar stories in which they describe experiences they had as law students, interviewing for law firm employment or clerkships, with male senior attorneys or judges who told them point blank that they weren't interested in hiring a woman. Each woman then describes how she refused to be offended or put off, instead using gentle humor and perhaps a bit of flirtatiousness to disarm His Honor or His Augustness and eventually convince him to award her the position sought. I suppose the message is supposed to be uplifting—they overcame gender-based discrimination and the women in the audience can too. Often, the audiences laugh and applaud vigorously, charmed much in the same way those men must have been. Yet, the conclusions to these stories are often unsatisfactory, as they are often missing an important component: a happy "I persevered and look where I am now" ending is lovely for the speakers themselves and inspiring in a limited way, but what was the legacy they left behind? Did they convince their dubious employers that women were just as competent and worthy as men? Or, did they leave an impression of being singular, unique, not like other women? Did they breach a dam, such that a flood of women were hired in their wakes? Or were they simply "special," outliers and tokens?<sup>41</sup>

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40. *Id.*

41. The "Queen Bee" syndrome is a term used to describe women who seem to prefer environments with few women. See, e.g., DUSKY, *supra* note 11, at 90.

For some women, Sandra Day O'Connor may have been the original female Supreme Court Justice, but Ruth Bader Ginsburg was the first woman to ascend to the Court who was one of us.<sup>42</sup> Civil rights attorney Elaine Jones<sup>43</sup> provoked a sea of raucous, knowing laughter when she described her happiness at Ruth Bader Ginsburg's elevation to the Supreme Court bench at the AALS Annual Meeting in New Orleans in January of 1999 and how much it meant to her as a lawyer and a person. As I remember her address, she explained that her civil rights organization had recently won an age discrimination case involving a white female and the after-acquired evidence rule, and her reaction upon taking the case was to think: "This is wonderful, because I've got someone who really understands issues of gender and the workplace on the Supreme Court. Justice Ginsburg understands those issues. Ruth Bader Ginsburg gets it. She gets it. And then she explains it to Sandra Day O'Connor."<sup>44</sup>

Elaine Jones is not the only attorney to observe that the presence of Justice Ginsburg changed the atmospherics of the Supreme Court. Reporter and Stanford Law School graduate Dahlia Lithwick, who covers the Supreme Court for *Slate*, an online magazine, has written:

Each morning before oral argument at the Supreme Court, a number of attorneys are sworn in as members of the Supreme Court bar. The entire exercise is one of rote formalism. The attorneys are introduced, they stand, routine sentences are spoken, an oath is sworn, Chief Justice William Rehnquist admits them all to the bar. They sit. Oral argument begins.

Because the swearing in is an exercise in repetitive stage business, most of the justices use these four minutes to flip through the briefs before them, or to whisper among themselves, or to slug water and peer around the room. But I

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The queen bee syndrome? It is an attitude coming from the one or two women who succeeded in their profession a decade or two ago that says, "I made it when it was really hard, and now I enjoy being one of the few women who did, and I'd like to keep it that way, so not only am I not going to help you, I might even sabotage you." It happens in business. It most certainly happens in law school. The queen bee types are usually women who emulate males in style and scholarship. They are not known feminists. They don't rock the boat or argue for more women or minorities on the faculty.

*Id.*

42. For the record, then-Judge Ruth Bader Ginsburg's reaction to Justice O'Connor's elevation to the Court (while she herself sat on the U.S. Court of Appeals for the District of Columbia) was to label it "[t]he brightest signal of the changed complexion of our profession." Ruth Bader Ginsburg, *Women's Work: The Place of Women in Law Schools*, 32 J. LEGAL EDUC. 272, 273-74 (1982).

43. Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

44. Elaine R. Jones, Address at the Association of American Law Schools Annual Meeting (Jan. 8, 1999) (as recalled by author). She made a similar point in a speech at the University of Virginia School of Law. Elaine R. Jones, Address at the University of Virginia (Sept. 24, 1998), at <http://www.virginia.edu/uvanewsmakers/newsmakers/jones.html>.

can aver that after a year of watching this process, Justice Ruth Bader Ginsburg has never once failed to look at every attorney as their name is being called. She never fails to bestow a huge smile—like a mamma bird with a worm—as they are sworn in.

For anyone who enjoys the sarcophagus quality of the high court—the feeling that nothing has ever lived or loved or shed a tear in that room—the notion of a justice beaming down upon the new admittees to the bar like a proud mother hen probably doesn't sit well. Oliver Wendell Holmes most likely wasn't all about sunshine on the bench. But my guess is that for the men and women being sworn in on any particular day, the recognition on the part of just one justice that they are more than just the daily veal in the life of this court is worth something. It's one of the few human moments you'll witness in there.<sup>45</sup>

I don't know if Ruth Bader Ginsburg has read those words, and if so, how she feels about being compared to “a mamma bird with a worm” or “a proud mother hen,” which in context seem vaguely intended to be complimentary, though in a sexist, stereotypical sort of way.<sup>46</sup> Someone less obsessed with avian similes might say that Justice Ginsburg emanates warmth and caring as well as brilliance, which would certainly be my descriptive terms of choice based on the opportunities I have had to observe her. Indeed I aspire, admittedly with very limited success, to be more like Justice Ginsburg in tone and temperament, but I would find a “bird mother” label (in the unlikely event it was invoked to describe me) somewhat insulting. It is not an appellation I have seen, or expect to see, applied to a male Supreme Court Justice.

#### *D. I'm Not Behaving Like a Gentleman*

Since I began teaching<sup>47</sup> I must have been told one hundred times that I do not look like a law professor. Sometimes people simply tell me point blank that I just don't look like a law professor. Others relate this

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45. Dahlia Lithwick, *Chicago's Big Bird Bath*, SLATE (Oct. 31, 2000), at [http://slate.msn.com/court/entries/00-10-31\\_91626.asp](http://slate.msn.com/court/entries/00-10-31_91626.asp).

46. At least Lithwick spared readers allusions to “nesting,” “clucking,” or “ruffled feathers.” Lithwick seems obsessed with the procreative abilities of both female Justices, once writing about O'Connor: “She frequently interrupts attorneys mid-sentence and will readily cut them off with follow-ups like ‘just answer the question,’ if she thinks they are avoiding the point. She is that parent you dread encountering if you are three minutes late for curfew.” Dahlia Lithwick, *On the Court with the Brethren*, at <http://www.oxygen.com/read/archive/essay/000509essay.html> (last visited Mar. 2, 2001).

47. I began my academic career as an Honorable Abraham Freedom Teaching Fellow & Lecturer in Law at Temple University School of Law in August, 1995.

more indirectly by asking me when I expect Professor Bartow to be back in the office, or inquiring how long I have been Professor Bartow's research assistant. Delivery people and technicians will walk by a dozen faculty offices and directly past actual support staff (who apparently look more like law professors than I do) to stop by my desk with boxes, envelopes, toner cartridges and messages. Students I haven't had in class will look through me, or ask me if I know when Professor X's office hours are, or request a copy of Professor Y's syllabus or course handouts. Students who never saw actor John Houseman portray Professor Kingsfield seem to expect law professors to look like him.<sup>48</sup>

Even after law students morph into full-fledged attorneys, they seem to hold tight to their preconceived notions of what law professors should look like. The day we closed on our house in South Carolina was fiercely hot and stunningly humid, so my husband chose to wear shorts and a casual short-sleeved shirt. I opted for a more formal outfit comprised of professionally cut linen separates. Had he been interested, the attorney running the closing on behalf of the seller could have learned both of our occupations by reviewing the voluminous files that our purchase of a newly constructed home had generated. Instead, he chose to proceed on the assumption that my husband was in charge, and I was a pea-brained irritant. He was extremely condescending when I attempted to ask questions about the transaction, and on two occasions prefaced his answers to my inquiries with the phrase, "Let me see if I can put this in terms that you would understand."

Even when law students know that I am a faculty member, they treat me differently from my male colleagues. One afternoon not long ago I encountered a student standing nervously outside the faculty lounge. She was waiting for a professor who was inside having a casual conversation about baseball with a colleague. "Do you think he'll be out soon?" she asked me, anxiously, "his office hours started twenty minutes ago, and I have an appointment." "Well, they're talking about sports, so I wouldn't count on it," I joked. "Could you get him for me?" she asked. Our law school is a friendly, laid back place, and students walk into the Faculty Lounge any time they need to place something in a faculty mailbox, or to collect the mail for a student organization. "Go ahead in yourself; he won't bite and even if he does I'm pretty sure he's had his shots," I

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48. Professor Kingsfield was a Contracts professor in the book *The Paper Chase*. See JOHN JAY OSBORN, *THE PAPER CHASE* (1971). In 1973, Kingsfield was brought to life by actor John Houseman in a movie based on the book. See *THE PAPER CHASE* (Twentieth Century-Fox 1973).

replied, but again my attempt at humor fell flat. She looked pale and terrified, but finally took a few halting steps toward the professor she needed to speak with. I was fairly certain she wouldn't have solicited a male professor to fetch a faculty member for her, but she'd asked me without hesitation, and she had clearly expected me to do it. She viewed me as "approachable," which is hardly a negative perception, and perhaps "helpful" (even though ultimately I wasn't), but also as somehow different from male faculty members.

Extensive data from a range of studies<sup>49</sup> has persuasively demonstrated that women participate less frequently than men in classroom discussions.<sup>50</sup> Other data strongly suggests that women students are dissatisfied with classroom speaking opportunities, and view their own rates of participation as inadequate.<sup>51</sup> As one observer has written, "[t]o achieve a successful learning environment, teachers must create a good rapport with students while maintaining strict control of the class."<sup>52</sup> One of my frustrations as a teacher is that while I can make students speak, I can't make them want to speak, or force them to volunteer. On other occasions, I can't seem to get students to stop speaking.

I'd already taught for several years before beginning my current position at the University of South Carolina, and thought that I had a fairly good sense of my strengths and weaknesses in the classroom. For example, I was born and raised in New York, which is at least partly responsible for the fact that I speak fairly rapidly. Any evaluative comments about my "fast talking" are accurate, appropriate and duly (if ruefully) noted. I knew when I joined the South Carolina faculty that my speed of verbalization might be especially jarring in a culture in which the native speakers tend to be slow and deliberate.

I thought I knew where my classroom difficulties would lie, but I was unprepared for a group of thirty-one students who began calling out comments and questions without raising their hands or waiting to be

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49. E.g., Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998); see also sources cited *supra* notes 14, 16, 22, 23.

50. E.g., Lovell Banks, *supra* note 49, at 141-43; Mertz et al., *supra* note 49, at 45-61.

51. See Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (1998) (noting "first-year women expressed discomfort with their low rate of participation," while "third-year women were no longer distressed by their virtually unchanged level of class participation").

52. Sarah E. Thiemann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17, 22 (1998).

recognized, interrupting me, and sometimes each other. At first I tried to be nice about it, explaining that I loved the enthusiasm that was impelling them to participate at will, but that order and organization required the raising of hands. The shouting out continued. I consulted numerous senior colleagues, to see if I was running my classroom differently from theirs. All of them claimed to similarly require students to be recognized before speaking, and one correctly pointed out that even faculty members raised their hands at faculty meetings and waited for the dean to call on them. Several advised me to simply ignore students who blurted out comments, which I tried, to no avail. When I ignored them, several students simply increased the volume of their spontaneous interjections.

I tried polite firmness, telling errantly vocalizing students that I needed them to please raise their hands before participating, thanks, it would be much appreciated. I tried to appeal to their sense of fair play, explaining that speaking without waiting to be recognized was unfair to their colleagues, and tended to silence people who might otherwise make worthwhile contributions. Nothing worked. Finally, in desperation, after a chronic offender shouted out an answer before I was able to call on someone else who was attempting to politely volunteer yet again, I turned to him and said very deliberately, "Your answer is correct, but the fact that you shouted it out while other students had their hands in the air was very, very rude." There was a stunned silence, but for the most part, the shouting out ceased from that moment forward. What follows are comments I later received on my course evaluations from seven of the thirty-one students in the class:

"Her insistence on 'hand-raising' interfered with class dialog."

"Ridiculously strict about raising hands."

"She spoke too fast; snapped at students who didn't raise hands."

"Obsessive Compulsive Disorder on raising hands."

"The raising hands thing is kind of silly, but I like the anecdotes."

"The raising hands before speaking thing would be better suited to a larger class. With a class this small [thirty-one students], discussion is easier if people feel more free to voice opinions less formally."

"Requiring students to raise their hands when responding to questions is counter-productive and discourages students from participating in class discussions. In short, it is stupid."

I can't report the gender of the students who made these comments, because course evaluations are anonymous.<sup>53</sup> I can, however, reveal the predominant gender of the "shouter-outers" (as I came to call them): male. None of this breaks down easily into the "hard" data so many observers demand, but I can at least report observationally that to the extent "gentlemen" speak without being recognized, and interrupt the professor and their colleagues with shouted comments, my female students are markedly less likely to behave like gentlemen.

Like many women, as is no doubt apparent from the anecdote above, I sometimes struggle for respect in the classroom. It is hard to know how much of this is attributable to gender, as opposed to other factors such as my teaching style and the unique vagaries of my own personality. One male faculty member reportedly was startled by the "prove-it" atmosphere he felt in the classroom of a female colleague when evaluating her for tenure; it was as if the students were waiting in ambush to catch her in a mistake.<sup>54</sup> So many women law professors tell similar stories that it is hard not to assume a gender connection, and yet I've also heard male colleagues describe in-class challenges to their authority, when students seem to be unilaterally staging a game show of their own devising, "Stump the Professor." Do women law professors get disproportionately disrespected, or are they simply more willing to talk about it openly? Both are strong possibilities and perhaps not mutually exclusive.<sup>55</sup>

#### IV. FEMALE LAW STUDENTS ARE STILL NOT BEHAVING LIKE GENTLEMEN

##### A. *Academic Success at Elite Law Schools: Hard Times for Women. Despite Hard Data*

Women enter law schools as a group just as they move into other academic settings, with "significantly higher grades but lower

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53. Out of a concern for anonymity, course evaluation comments are aggregated and type-written onto a clean form by law school support staff before faculty members are allowed to see them. As a result, I can't even make a guess about the gender of the commentators, nor can I correlate these remarks with satisfaction (or lack thereof) with other aspects of the class.

54. DUSKY, *supra* note 11, at 112 (quoting Professor Lillian BeVier).

55. See generally Kathleen S. Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23, 29-36 (1989) (discussing classroom hostility toward female law professors).



standardized test scores than their male classmates.”<sup>56</sup> As one group of legal academics noted, law schools are unique: “whereas in every other graduate field, women do better than men—despite scoring lower on standardized admission tests—in law school, women do less well on the standardized test for admission (LSAT) and less well in their courses.”<sup>57</sup>

A 1988 survey conducted at Berkeley’s Boalt Hall School of Law found that a majority of female student respondents were dissatisfied with their grades, while a majority of male students expressed satisfaction with their academic performances.<sup>58</sup> Data collected at the University of Pennsylvania Law School dating back to 1990 demonstrates a gender-based achievement gap among law students, and as far as I am aware, this gap has not closed.<sup>59</sup>

In 1993-1994 the University of Chicago conducted a study on gender that analyzed grades, and assessed attitudinal and experiential differences between female and male students. Information about the grade gap was never made publicly available, but the law school did disclose that women students were more anxious and less confident than men, and less satisfied with the law school environment: about a third wished they had attended a different law school, while only eighteen percent of the men felt that way.<sup>60</sup> Ten percent of the men thought they might be in the top five percent of their classes, but not a single woman believed this about herself.<sup>61</sup> Later research found that women were grossly underrepresented on the *University of Chicago Law Review*.<sup>62</sup>

Columbia University “studied the proportion of women and men at the Law School who had achieved academic honors relative to predictions based on undergraduate GPAs and LSAT scores” in 1995.<sup>63</sup> An associate dean reported that “as a group, men performed at a level predicted by their LSAT and their undergraduate grade-point average,

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56. Sarah Berger et al., “Hey! There’s Ladies in Here!!,” 73 N.Y.U. L. REV. 1022, 1034 (1998).

57. *Id.* at 1044; LSAC STUDY, *supra* note 22, at 12; Neumann, *supra* note 13, at 321. See generally William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000).

58. Homer & Schwartz, *supra* note 14, at 30.

59. I contacted the Penn Law dean and certain faculty members and none were willing to comment for attribution.

60. GRAPEVINE, *supra* note 23, at 29 & n.87.

61. *Id.* at 30.

62. Morrison Torrey et al., *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & L. 267, 287 (1998) (citing Linda Hirshman’s research, which found only thirty percent of the members of the *University of Chicago Law Review* were women despite the fact that women comprised forty-four percent of the student population).

63. GRAPEVINE, *supra* note 23, at 32.

whereas women were 'slightly outdistancing' their predicted academic performances," but it is not clear that this means the study didn't find a gender-related achievement gap.<sup>64</sup> Women tend to score lower on LSATs than men,<sup>65</sup> so the fact that women are simply achieving "academic honors relative to predictions" or even "'slightly outdistancing' their predicted academic performances" (don't you love academic lawyer-speak?) doesn't mean there isn't a grade gap. The vagueness and "lawyerliness" of the disclosure, and the fact that (to my knowledge) the hard data was never publicly reported, certainly raise questions.

Also in 1995, Linda Hirshman determined that women students were proportionately underrepresented on law reviews at a majority of the "top twenty" law schools.<sup>66</sup> The most extreme differential she found was at the University of Southern California School of Law. (This is the school those of us at the University of South Carolina like to call the other, lesser-known USC).

In the fall of 1997, after hosting a lecture by Lani Guinier, Duke Law School announced that it "ranks high in its climate for women students," citing a poll in which it was ranked first among the nation's elite schools for cultivating an atmosphere in which women can excel.<sup>67</sup> A Duke representative asserted that women were well represented on the school's law review, on the moot court board, and in student government.<sup>68</sup> The reported high percentage of women involved with honorifics linked to grades was encouraging, but the fact that only forty percent of the student body was female was less so, and whether or not a gender-based grade gap existed was not addressed at all. While it is heartening to see some Duke women rising to the tops of their classes, one hopes that the remaining female students are not bunched together at the bottom. Without comprehensive grade data, it is impossible to know whether all women at that law school are performing at levels comparable to the men.

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64. *Id.*

65. LSAC STUDY, *supra* note 22, at 14 & n.5; Torrey et al., *supra* note 62, at 286.

66. Torrey et al., *supra* note 62, at 287-88 (citing Linda R. Hirshman, *Law Schools Where Women Can Excel*, GLAMOUR, at 122 (Sept. 1995)); see also Neumann, *supra* note 13, at 344-45 (discussing research comparing the percentage of female law students to the percentage of females who make law review).

67. Richard Runyan, *Duke Law School Ranks High in its Climate for Women Students*, DUKE ALUMNI MAG. (1997), <http://www.law.duke.edu/alumni/fal97mag/dirranks.htm>.

68. *Id.*

The spring of 2000 brought publication of *Women at the University of Texas School of Law: A Call for Action* by Allison L. Bowers.<sup>69</sup> She opens her article with these compelling words: "No one in her right mind (at least one who is just starting her career) would start a legal paper with the word 'feminist.' I didn't know that before I started law school, but I do now."<sup>70</sup> Bowers, a 1999 graduate of the University of Texas School of Law, relates an experience during an early Contracts class that caused her to stop volunteering for the entire remainder of her first year of law school:

We were discussing the *Baby M.* case. The argument was made that the man and the woman in this case were equal biological contributors to the fetus. I raised my hand and pointed out that this was not true; that the gestator also makes a separate biological contribution; thus, the biological contribution of the gestator and the egg donor combined (in this case they were the same person) was greater than that of the sperm donor. . . . The whole class of one hundred gasped, and all turned to look at me. . . . The professor pointed out that the law regarded both parents' [rights as equal] and asked if I remembered that from the readings.<sup>71</sup>

Bowers recounts noticing that women students spoke less than men in classes; that there were perilously few female tenured faculty members; and that thirty-eight men but only twelve women were selected for law review that year.<sup>72</sup> The data collected by Bowers demonstrates a chronic gap in male and female student performance at her law school that has not narrowed over time or with the admission of greater numbers of women to the law school.<sup>73</sup>

Examining Bowers's article, to use a phrase Yogi Berra is reported to have coined, was like *déjà vu* all over again. Reading her courageous and well-written article gives one the disheartening sense that bringing gender balance to law schools (no less courts and law firms), is a giant, endless, multifaceted do-it-yourself renovation project staffed with far too few laborers. *Becoming Gentlemen* apparently didn't make much of an impression on the University of Texas School of Law at an institutional level, which left a student to uncover and report its gender gap. This, in conjunction with the stunning public silence from most elite law schools on this subject, seems to suggest that law schools will

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69. Bowers, *supra* note 16.

70. *Id.* at 119.

71. *Id.* at 119-20 (footnotes omitted).

72. *Id.* at 120.

73. *Id.* at 160-61.

ignore gender inequities until they are practically hit over the head with "hard data," and even then all they may do is act wounded and pretend that the mere passage of time will be curative (or at least silencing).

Somehow, mainstream legal educators must be made to see the picture that a disparate group of articles and surveys paints: women who can outperform men from kindergarten through college *and* in non-law graduate programs cannot even equal them in law school, and passively admitting more female students does not tear down the institutional obstacles to their success. This is a serious problem, because law school grades can impact graduates for their entire lives, and yet elite law schools do not seem to be addressing it.<sup>74</sup>

### *B. Useful Data from Unexpected Places*

A feature article in the *Atlantic Monthly* made a big splash recently by announcing that, contrary to the assertions and propaganda of the interest groups like the Association of American University Women, the American education system disadvantages boys, rather than girls. Evidence the author cited included empirical data which purportedly demonstrated that girls earned better grades than boys in primary and secondary schools and also, increasingly, in college,<sup>75</sup> which they are reportedly attending in proportionately larger numbers than their male counterparts.<sup>76</sup> Much of the article's analysis relies on a controversial and well-publicized study conducted by University of Alaska psychology professor, Judith Kleinfeld.<sup>77</sup>

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74. See, e.g., Neumann, *supra* note 13, at 322.

The grade gap is undoubtedly more pronounced at some law schools than others. Until many schools are individually studied with the kind of statistical analysis found in the Penn and Texas studies, we can only guess about the kinds of schools where the pedagogical environment has a destructive effect on women. The larger grade differentials noted in the Penn and Texas studies and the lower law review participation at the producer schools both hint that the pedagogical environment may be worse for women at the top-ranked schools than in legal education generally.

*Id.* (footnote omitted).

75. Christina Hoff Sommers, *The War Against Boys*, THE ATLANTIC MONTHLY, May 2000, <http://www.theatlantic.com/issues/2000/05/Sommers.htm>; see also Judith Kleinfeld, *The Myth That Schools Shortchange Girls: Social Science in the Service of Deception*, at <http://www.uaf.edu/northern/schools/myth.html> (1998) (reviewing numerous indicia of academic performance and concluding that the educational system disadvantages males more than females).

76. Sommers, *supra* note 75.

77. Kleinfeld, *supra* note 75.

I do not have the expertise or information to evaluate and render scholarly judgment about the accuracy of Kleinfeld's data or the overarching conclusions she draws from it, but it seems clear that (like all of us) she has an agenda: hers seems to be emphasizing the importance and reliability of yardsticks by which girls measurably outperform boys, and minimizing or explaining away benchmarks indicating performance gaps that disfavor females. For example, she asserts that the fact that "boys . . . get consistently lower grades in school even though they score just as high or higher than girls on many standardized tests of achievement" is strong evidence of school-based bias against boys.<sup>78</sup> She does not discuss the alternative possibility that this phenomena could demonstrate test-based bias against girls.

Kleinfeld highlights her assertion that women now earn more bachelor's and master's degrees than men,<sup>79</sup> which is logically correlated to statistics she cites which indicate that "in 1996 there were 8.4 million women but only 6.7 million men enrolled in college."<sup>80</sup> However, she does not explain her seemingly anomalous and counterintuitive finding that women subsequently earn less than half of all doctorates.<sup>81</sup> She trumpets data showing African-American women far surpassing the educational accomplishments of African-American males as evidence that African-American males are the group the education system is "really" failing,<sup>82</sup> without mentioning the alarmingly high rate at which young African-American males are incarcerated,<sup>83</sup> which, one would assume, negatively impacts their ability to attend and succeed in schools (which, it should be noted, may indeed be failing them for any number of reasons).

Assuming for argument's sake that Kleinfeld's data is accurate, there are many ramifications that actually support some feminist critiques of legal education. If girls are indeed outperforming boys in elementary school, perhaps it is because elementary schools have become women's worlds, overwhelmingly populated and dominated by women. Perhaps repelled by low pay and even lower prestige, men do not seek elementary

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78. *Id.*

79. *Id.*

80. Sommers, *supra* note 75 (citing U.S. Department of Education figures).

81. Kleinfeld, *supra* note 75 ("American women received 45 percent of the doctoral degrees awarded to American citizens.").

82. *Id.*

83. See generally Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23 (1994).

school teaching positions in large numbers.<sup>84</sup> In addition to doing most of the actual teaching, over time women have become elementary school administrators in large numbers as well.<sup>85</sup> If women predominantly (or in many cases almost exclusively) set the policies and tone of an educational institution, it shouldn't surprise anyone if girls (women-in-training) thrive, and boys experience a bit of friction. The girls have plentiful and (hopefully) diverse mentors and role models of the same gender, while the boys do not. The boys may feel as isolated and excluded as women law students do when law faculties are overwhelmingly male.<sup>86</sup>

According to Kleinfeld, "[t]eachers think girls are smarter, like being around them more, and hold higher expectations for them."<sup>87</sup> Female teachers very well may favor the students who are most like them,<sup>88</sup> as the tendency of all people to follow this pattern and view people with similar backgrounds and genders most positively is a well-documented phenomena in many contexts. Elementary school boys in primary schools run by women thus may face the same unappealing choices women encounter in male-dominated educational institutions: the boys can decide to emulate the deeds and styles of conduct with which the girls find favor, or they can resist "behaving like girls," which may resound to their detriment, impairing their ability to thrive and succeed in a female-oriented environment.<sup>89</sup>

Ultimately, Kleinfeld's data may support the importance of diversity in educational institutions. Male elementary school students may very well benefit from the presence of more male teachers, for the same

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84. See NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 1999, tbl.68 (2000), at <http://nces.ed.gov/pubs2000/digest99/d99t068.html> (table prepared June 1997) (showing that seventy-three percent of elementary and secondary teachers were women).

85. Recent data shows that thirty-five percent of elementary and secondary school principals are women. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 1999, tbl.88 (2000), at <http://nces.ed.gov/pubs2000/digest99/d99t088.html> (table prepared Nov. 1996).

86. E.g., BECOMING GENTLEMEN, *supra* note 3, at 65; Bowers, *supra* note 16, at 120; see Neumann, *supra* note 13, at 325 tbl.9 (reporting percentage of female law professors from 1992 to 2000).

87. Kleinfeld, *supra* note 75.

88. But see MYRA & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 3, 5, 43 (1994) (stating that teachers of both sexes inadvertently favor male students).

89. A friend, the mother of two rambunctious elementary school-aged boys laments what she perceives as the undue importance that teachers place on the ability of children to sit or wait in line quietly. She asserts that her sons' school is run on "Girls' Rules."

reasons that female law students would benefit from the presence of larger numbers of women on law school faculties.<sup>90</sup>

I have heard the following anecdote so many times that I consider it an "urban legend," though it may have actually happened: an enlightened mother takes her son exclusively to female medical professionals. The boy's pediatrician, his dentist, and even his dog's veterinarian are women. One day someone asks him if he wants to be a doctor when he grows up, and his plaintive response is, "Doctor? That's a girl's job." Though practical and numeric female dominance of law school faculties seems like a remote danger at present (to say the least), it is worth noting that my goal is simply parity, so that both men and women look like (and are) law professors, and the job itself is ungendered. However, Professor Richard Neumann has recently published a study of law school faculties<sup>91</sup> in which he concludes that there is little cause for optimism about the prospects for significant increases in the numbers of female law professors nationwide, noting:

Among full professors, women's progress is steady—about one percentage point per year—but the percentages are still so low that at this rate of gain women would not constitute a third of teaching full professors until about the year 2010 and would not constitute 40 percent of teaching full professors until about 2017.

The higher percentages of women among associate and assistant professors are *not* grounds for optimism that the current rate of growth can be increased. First, assistant professors as a group are too small a proportion of the whole to constitute a serious pipeline. . . . [A]ssistant professors together are only 9 percent of the teaching professoriat and even less than that when professorial deans and law library directors are added to the numbers in the table. Nearly three-quarters of the teaching professoriat are now full professors. There simply are not enough women at the assistant professor level to have a substantial effect in the future on the associate and full professor percentages. Second, . . . women appear to be gaining tenure at lower rates than men. If that continues, the population now at the assistant professor level will become less female as it moves through the process of contract renewals and tenure candidacies. In fact, the high female percentage of assistant professors . . . implies . . . that men are being disproportionately hired as associate professors and women as assistant professors.<sup>92</sup>

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90. See *infra* note 106 and accompanying text.

91. Neumann, *supra* note 13.

92. *Id.* at 325-26.

### C. Socrates and Socialization to Law

One of the possible avenues of future inquiry raised in *Becoming Gentlemen* was a reevaluation of the manner and extent to which the Socratic method was used in law school classes.<sup>93</sup> Astoundingly, this was seen as a radical suggestion even by people who ultimately agreed with the sentiment.<sup>94</sup> Perhaps this is because observers have drastically disparate views of what is meant by the term Socratic method, and some conflate the term with any method of teaching that includes calling on students who have not affirmatively volunteered to speak. Harsh and continued questioning of students with little if any lecturing, drawing of conclusions, or opportunities for students to ask questions might alternatively be viewed as the Socratic method, or as *abuse* of the Socratic method, depending upon the viewpoint of the beholder.<sup>95</sup>

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93. BECOMING GENTLEMEN, *supra* note 3, at 72.

94. *E.g.*, Bowers, *supra* note 16, at 163.

95. Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2D 199, 202-03 (1998) (reviewing LAM GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997)) (giving a description of the Socratic method that makes it sound "eminently reasonable," yet later acknowledging that "the teaching style can be misused"); see Torrey et al., *supra* note 62, at 280-81.

The law school adaptation of [the Socratic method] is to ask questions of students to force them to ultimately infer generalities from specific questions about specific cases. Although not integral to the process, legal education has incorporated elements of hostility, competitiveness, and humiliation into what is, essentially, an abuse of the method.

*Id.*; see also Deborah L. Rhode, *Kicking the Socratic Method and Other Reforms for Law Schools*; CHRON. HIGHER EDUC., Jan. 26, 2001, at B15, <http://chronicle.com/week-ly/v47/i20/20b01501.htm>. Professor Rhode explains:

Under conventional Socratic approaches, the professor controls the dialogue, invites the student to "guess what I'm thinking," and then inevitably finds the response lacking. The result is a climate in which "never is heard an encouraging word and . . . thoughts remain cloudy all day." For too many students, the clouds never really lift until after graduation, when a cram course for a bar review, offered by a commercial vendor, supplies what legal education missed or mystified.

The highly competitive classroom environments of many law schools can compound the confusion. All too often, the search for knowledge becomes a scramble for status in which participants vie with each other to impress rather than inform. Combative classroom styles also work against cooperative collaborative approaches that can be essential in practice.

That is not to suggest that Socratic techniques are entirely without educational value. In the hands of an adept professor, they cultivate useful professional skills, such as careful preparation, reasoned analysis, and fluent oral presentations. But large-class Socratic formats have inherent limits. They discourage participation from too many students, particularly women and minorities, and they fail to supply enough opportunities for the individual feedback and interaction that are crucial to effective education.

*Id.*



One academic psychologist has written:

Law schools are the most recent front in the battle over which sex dominates the classroom. Reviewing this field of combat [one] concludes that the following charge could be correct: Men may indeed talk more than women in some law school classes. On the other hand, verbal combat in the classroom socializes law students for verbal combat in the courtroom.

Not all students preparing to be lawyers, whether men or women, may find the intellectual thrust and parry of the Socratic method a congenial form of discourse. If their law school classes did not prepare them for such verbal combat, important both in the courtroom and in negotiations, then the schools would indeed be shortchanging the many women preparing to be lawyers.<sup>96</sup>

This observer would be astonished to discover how little courtroom interactions and strategic negotiations have in common with either a typical law school classroom experience, or anything resembling "verbal combat." Indeed, she probably would be surprised even to learn how little time typical attorneys spend in courtrooms or in strategic negotiations. In addition, she might be startled to learn that classes most directly geared toward preparing students to perform in courtrooms, such as clinical courses and trial advocacy programs, are those least likely to use a Socratic pedagogy exclusively (if at all).<sup>97</sup>

My goals in *my* doctrinal classes<sup>98</sup> are to have the students engaged and interested in the subject areas and the materials I choose to cover. I call on them to encourage, inspire (or in some cases, provoke) them to prepare for class, and to help them think critically about the cases and reading assignments I have selected. Their answers to my questions help me assess whether or not they are comprehending the course material (and at what level), so that I can adjust the direction and tempo of my teaching accordingly. These are clearly not the motivations of a judge or of opposing counsel, either in court, or while negotiating a settlement.

Moreover, it is my hope that my students come to class to learn, rather than to prove or win anything. I am aware that they don't always relish being called on, and sometimes feel embarrassment or frustration

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96. Kleinfeld, *supra* note 75 (citation omitted).

97. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27 (1996) (finding that the Socratic method was used less in skills courses than in basic first-year courses and substantive upper-level courses). See also Kimberly E. O'Leary, *Evaluating Clinical Law Teaching: Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method* (unpublished manuscript draft on file with the University of Kansas Law Review).

98. Sometimes referred to as "stand-up" courses, by doctrinal courses I mean those subjects generally taught in a traditional classroom setting.

when they can't provide a correct answer. I try to blunt the horror somewhat by only spending a few minutes with each student, and by trying to foster a bit of "we're-all-in-this-together" team spirit. I also pause at frequent intervals to give students an opportunity to ask questions of me, and try to project how emphatically I want them to grasp the material I am presenting. For these reasons, I do not consider myself a "Socratic" teacher, though many law students will so label any professor who calls on students, as distinguished from instructors who simply lecture, and from those who exclusively seek volunteers to answer any questions that are posed.

A female law professor at an elite law school has suggested that participating in classroom discussions may provide "an invaluable opportunity to learn and improve [the] indispensable skills" of "present[ing] ideas to groups, defend[ing] those ideas, and propos[ing] solutions to legal problems."<sup>99</sup> Indeed, she has asserted that her iteration of the Socratic method provides students with the opportunity "to develop their analytical and oral advocacy skills" in "an atmosphere of relatively low stakes."<sup>100</sup> Yet, after alluding to the expressed desire of some law students for "safe space" in which to learn, she concluded: "If the respondents were using the term to mean a place where people can articulate their opinions without thinking about them critically or being forced to reassess their values and principles, then no law school classroom should be safe."<sup>101</sup>

In other words, this professor seems to believe that her role in the law school classroom is to make students think critically about their opinions, and to force students to reassess their values and principles in the guise of leading them to "truth." It seems quite probable, then, that the students in her classes who hold opinions, values, and principles most disparate from her own might be those who are most rigorously "forced to reassess" and "made to think critically," and are therefore least comfortable in her classroom.

Not everyone may see the same "truths" that a professor does, regardless of how rigorously they have prepared for class. Indeed, many students believe that "the Socratic method often leads students not to

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99. Garrett, *supra* note 95, at 204.

100. *Id.*

101. *Id.*

their own conclusions but to the teacher's own views."<sup>102</sup> When students are uncomfortable in a classroom environment, their ability to absorb information plummets.<sup>103</sup> Connecting these dots suggests that students with opinions, values, and principles different than this professor are at greatest risk of performing poorly, and I imagine this analysis could be extrapolated to many law professors and students. Outsiders who refuse to conform their views to mandated "truthful" perspectives face failure, and these outsiders are often women.

## V. CONCLUSION: A CHALLENGE TO ALL LAW SCHOOLS

### A. *The Challenge*

I write these words a full eleven years after undertaking the research that led to *Becoming Gentlemen* with an awareness that there have been many changes in legal education over the past decade, but with a morose certainty that neither my cohorts from my law school days nor current women law students are behaving like gentlemen, and they are suffering for it. Though I'm reluctant to embrace the hegemony of "hard data," the discourse on gender and legal education would benefit greatly from transparent and consistent disclosure of many categories of information. Law schools need to regularly compile and release accurate gender-keyed grade data, so that gender-based achievement gaps can be recognized and tracked. Information about bar passage and honorifics should be tabulated, and honest, straightforward, and frequently updated data about faculty composition should similarly be made available. When law schools are willing to release data in standardized form, law school applicants can make informed decisions about where they are more likely to feel comfortable and succeed, and even more critically, individuals administering and controlling law schools may be motivated to address challenges that the data illustrates. Interested legal educators from a wide range of viewpoints (and with a wide range of agendas) can (and no doubt will) disagree about what the data collections show, what they mean, and what, if anything, ought to be done about gender-related discrepancies, but at least regular doses of good information can

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102. Torrey et al., *supra* note 62, at 282. Those who react negatively to some permutations of the Socratic method may do so "because they are resistant to what they perceive as 'narrow-mindedness' in an approach where the professor is always right." *Id.*

103. Thiemann, *supra* note 52, at 22.

establish a starting place from which to probe the limits of the problems, and to experiment with cures.

And so, this is my challenge to every law school in the nation: *Compile, analyze and release (so that others can evaluate) accurate grade, honorific, faculty composition, and placement data.* This data collection won't take that long, it will provide an invaluable measuring tool, and to the extent anything alarming is uncovered, isn't it better to know? As one law professor has observed: "No school has an excuse for failing to do a gender/grades study now. Registrars' records have become so computerized that at many schools the relevant data could be produced in short order."<sup>104</sup> Data should be compiled and released regularly with honesty and forthrightness that will set good examples for our students.

The fact that Penn Law got a lot of focused bad press after publication of *Becoming Gentlemen*, while being arguably no worse (and possibly marginally better) a place for women to study law than other elite law schools, was truly unfortunate. Similarly, the University of Texas School of Law may currently be smarting from whatever adverse publicity Allison Bower's recent article has brought that institution. While both law schools brought the pertinent published critiques upon themselves, neither deserves to be pejoratively singled out. On the contrary, the schools most deserving of harsh criticism are those that collect grade and achievement data but are unwilling to release their findings, and those that don't bother collecting such information at all. If all law schools reported the same data, unless their information differed greatly from the information released by peer institutions, they would not appear aberrational, and would have less incentive to react defensively. One would hope that this would free up the energy and resources necessary for positive endeavors.

Anyone who suggests that things will improve with time must be regarded with suspicion, as asking women to "wait things out" is a rather convenient mechanism for avoiding dealing with a problem indefinitely. Often, it has been suggested that the continued matriculation of large numbers of female law students will eventually close gender-based achievement gaps. As Allison Bowers eloquently pointed out, however:

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104. Neumann, *supra* note 13, at 322.

Neither time nor increasing numbers of women in law school appear to be narrowing the gap in male and female performance in law school. Educators, therefore, cannot wait for time or increasing numbers of women to solve the problem of low female performance in law school. Educators must intervene and take positive action to create an atmosphere where female law students can achieve their potential.<sup>105</sup>

The fact that women can out-achieve men from kindergarten through college and in non-law graduate programs clearly demonstrates that women themselves are not the problem, and evidence shows that passively admitting more female students does not tear down the institutional obstacles to their success. In addition, research supports the theory that a scarcity of women faculty members can cause a sense of alienation among female law students,<sup>106</sup> yet unless a law faculty is hiring and retaining women at rates disproportionate to men, the number of female law professors at a male-dominated institution is unlikely to be growing quickly, if at all.<sup>107</sup>

*B. One Final Observation: Monitoring and Managing the Consequences of Information*

One day I found myself lunching with a group of humanities professors, who, aware of my profession but unaware of my connection to the survey and article, informed me that whenever their female students expressed interest in attending law school, they advised them to read *Becoming Gentlemen*. This, they enlightened me, "usually did the trick," by which they meant that the book convinced the students to stick with the liberal arts, rather than pursuing legal educations. I found this exchange quite devastating; the intent of the study and all that came after it was to improve the law school experience for women, not to discourage them from enrolling at the University of Pennsylvania in particular, or more importantly, in law school generally. Alternatively stated, *Becoming Gentlemen*, and most of the similar scholarship that predated or followed it, was predicated not on disgracing or dismantling

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105. Bowers, *supra* note 16, at 161.

106. E.g., Lovell Banks, *supra* note 49, at 138-39; Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 326-28 (1994); see also Linda Hirshman, *Men, Women & Law School*, CHI. TRIB., May 22, 1997, at 31, 1997 WL 3551294 ("[W]omen made law review at the elite national law schools at much higher rates where the permanent academic faculty was more than 20 per cent women.").

107. See *supra* text accompanying note 92.

law schools, but on improving them by identifying problems, positing solutions, and encouraging additional research.

Women aren't behaving like gentlemen. We aren't about to start anytime soon, and sooner or later legal education must find a way to eliminate the "behaving like gentlemen" prerequisite for flourishing at, and feeling comfortable in, law schools. Increasing the numbers of female law students will not change institutions enough to allow women to succeed and thrive in law schools; however, it doesn't hurt either and has many benefits for the legal profession.<sup>108</sup> For this reason, it is critical to frame debates about the gender gap in ways that will not discourage talented and energetic female students from enrolling in law schools: these are the women who can ultimately help transform the profession, and no action should be taken that would jeopardize increasing their numbers in the future.<sup>109</sup> Moreover, it is especially imperative not to drive away the feminists. As Professor Jennifer Gerarda Brown has noted,

[T]he profession as a whole, and law schools in particular, won't change as quickly if the malcontents go elsewhere.

Women who don't like law school, who chafe and struggle with the status quo, are often the ones who emerge to change the face of the law. Some of them come back to teach law with the conviction that they will do it differently.<sup>110</sup>

Part of our mission must be to attract and nurture as many future colleagues as possible.

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108. In fact, the fact that women continue to enroll in law schools in large numbers is cause for great optimism for the profession as a whole.

109. See Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, Mar. 26, 2001, <http://nytimes.com/2001/03/26/business/26LAW.html> (noting that women comprised 49.4% of students who started law school last fall); Jennifer Jacobson, *Women Are Poised to Surpass Men in U.S. Law-School Admissions*, ABA Reports, CHRON. HIGHER EDUC., Mar. 27, 2001, <http://chronicle.com/daily/2001/03/2001032706n.htm> (same).

110. Jennifer Gerarda Brown, *A Guide to the "Goodies,"* JURIST: LEGAL EDUC. NETWORK, at <http://jurist.law.pitt.edu/lawbooks/revfeb00.htm> (reviewing LINDA R. HIRSHMAN, *A WOMAN'S GUIDE TO LAW SCHOOL* (1999)).