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A LETTER TO A FEMALE COLLEAGUE

ANITA BERNSTEIN¹

Dear S.,

How right of you to say that academia is the only line of work that measures success only in terms of what peers and colleagues say. Commerce has money; practicing lawyers have (intermittent) client gratitude and contests decided by nonmembers; artists have public attention; the physical healers have illness and wellness; politicians the ballot, and so forth. But in law teaching all we have are words from the mouths of law teachers to tell us how we've done. And I think you said this too: that because all we have are one another's words, we say mostly unkind things, to create a currency (because of scarcity) in our praise.

I am writing, then, in front of this backdrop we have painted: the setting we live in. Our problems are related, and separate. How and why can we stay in a line of work that so unnaturally puts us at the complete mercy of peers' words? And can we conduct our work with more generosity and less meanness toward our colleagues, while respecting the functions of harsh words? We are in a milieu mostly without firing, lost income, demotion, diverted customers, diminished sales, or unambiguous victims. The same conditions that create the pleasures of scholarly life also create its drawbacks. Freedom from the judgment of crowds and money has enslaved us to our peers; and thus we must denounce every lapse we see, quickly and in mordantly memorable phrases if we can. Otherwise, nothing will separate the offender from us.

I have been thinking about a response to what you have raised (*How ought we to live?*) and began with the reaction that maybe we ought to leave the problem to others, that is to say men, who after all invented monetarization and the mirror-image problem of exceptions to

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In an effort to reduce distraction, I have written this essay with only one footnote. Factual assertions, and some ideas, come from major writings in this area: CYNTHIA F. EPSTEIN, *WOMEN IN LAW* (1981); Marina R. Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or The Case of the Disappearing Women*, 61 *TEMPLE L. REV.* 799 (1988); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 *U. PA. L. REV.* 537 (1988); Donna Fossum, *Women Law Professors*, 1980 *AM. BAR FOUND. RES. J.* 903; Carl W. Tobias, *Engendering Law Faculties*, 44 *U. MIAMI L. REV.* 1143 (1980); Elyce H. Zenoff & Kathryn V. Lorio, *What We Know, What We Think What We Know and What We Don't Know About Women Law Professors*, 25 *ARIZ. L. REV.* 869 (1983).

monetarization like the academy. It wasn't women who built universities to run on scarcity, competition, and hierarchy, so why should we worry? When women have a half-share of the tenured jobs, presidencies, fellowships, and payroll disbursements of the universities, ask us again how to cure the ethical ill inside us. Until then, our mere presence does more than

No, that's not right or at least not the answer, I thought. And here's a beginning of a reply. Women in law teaching can work to improve the presence of women within the ranks of law professors and also to improve the quality of the entire endeavor. If we take this bigger-than-ourselves goal seriously, then we can find an analogy to the traditional teaching that happiness comes from devotion to an entity bigger than oneself. Similarly, we can rechannel our occupational harshness to insist on both feminism and high standards at our schools. When we have to, we must be hard on ourselves as individuals and as feminists. Worth a shot? Let me tell you more about what I mean.

First, I must say why I believe there is a woman-problem in law teaching, since so many people believe that the days of discrimination are over, or that it's an advantage in law teaching to be female. I've looked up the available statistics, and I think they demonstrate the existence of a problem: Women are wrongly underrepresented. Next, I want to play true-confessions and speculate about my own reasons for inaction and connivance in the presence of discrimination against women. And then I have in mind a partial list of improvements that women in law teaching ought to advocate. By improvements I mean change that would leave all of legal education better off.

I.

In the 1986-87 academic year (more recent data will be available soon) women made up twenty percent of full-time faculty, including legal writing instructors, visitors and head librarians. This number represents an increase from 13.7 percent in the 1981-82 academic year. Among untenured faculty in tenure track positions, in 1986-87 more than a third were women.

If these statistics sound encouraging, consider what they obscure. For instance, as we both know, women are especially underrepresented at most of the prestigious law schools, which set an example for all of American legal education. Legal writing, with its low pay, second-class faculty status, minimal job security and reduced opportunity to do research, has become a job for women: the reassuring twenty percent figure

includes a large ghetto. And of course the general increase from 13.7 to twenty percent covers up instances where individual schools are not improving.

Eighty percent of law school professors, even including the legal writing faculty, are men: why aren't we angry? How did we get so lulled? Somehow we have accepted the status of "perpetual first wave," in Marina Angel's term. We know the main excuse. Women are not visible in law teaching because "only recently" did they enter the profession. What pernicious tripe.

Proponents of the "only recently" argument ought to be ashamed of themselves. The reason women didn't go to law school in large numbers was that men locked them out of the occupation. In the nineteenth century, the way to be a lawyer was to be an apprentice to a man, and the best hope that women had of becoming apprentices was to marry what Donna Fossum called "egalitarian-minded spouses." Sounds familiar! The Supreme Court put Myra Bradwell in her place in 1869; the ABA wouldn't allow a women to join until 1918; Harvard refused to admit women until 1950; and only in 1972 did the ABA insist that a law school had to admit women in order to be accredited.

Despite this recently-conceded formal opportunity, women have never been assured fair treatment after receipt of their applications at the schools. Quotas and higher standards for women existed until the very recent past. (A personal memory: When my mother applied to Columbia Law School in 1948, she got a rejection letter saying that the school was saving places for the returned servicemen.) "Only recently," indeed, did the gatekeepers of the profession finally open the gate a little bit. And yet the image lingers: women just didn't want to join until the day before yesterday, and even now they're halfhearted.

A large number of women have been going to law school ever since the Vietnam draft, when the schools had to start taking them to keep tuition revenue coming in. What happened to that early generation, the class of 1971 and the years just following? Yes, we could name some tenured professors, partners in law firms and civic leaders. But to me, the picture looks like years of enrollment in law schools without the rewards that equally smart and motivated men have obtained.

The problem of women in law is largely the problem of women in education. The educational system in the United States is a story of girls and young women succeeding yet not moving forward at the same rate as men. A study by the Department of Education showed that girls earn

better grades than boys and that this pattern carries into college. For many years now more than half the college graduates have been women.

Then comes law school, and women begin to drop away from success and prestige. Most schools still admit first-year classes consisting of more than half men, and men are overrepresented in high-level law review positions, prestige clerkships (especially Supreme Court clerkships) and the partnership tracks of powerful law firms. By age forty or so, a woman and a man of approximately equal ability (or predictors, or whatever you want to call it) who started law school together have had totally unequal careers. No wonder, then, that we in legal education expect so little success for women. Fifty-odd percent of the population, twenty percent of the law professors. It doesn't seem so bad when anyone can see how much worse women are faring in their efforts to be partners or judges or lawyer-politicians.

It took the book *Backlash* to make the point that women aren't choosing voluntarily and freely not to have satisfying work. Some men have so much invested in this myth—I've heard it from Posner, among others—that I think we'll be living with it for a while. The defenders of our minority status are saying that women are choosing not to be law professors. Evidently women are adverse to status, a moderately good salary, the opportunity to be paid to learn instead of having to learn on one's own time, some flexibility in working hours, and the opportunity to influence the law through writing or speaking or teaching young people.

I hear this talk and I'm just amazed at how a partisan of rationality could be so convinced that a slightly different type of human being could revel in perversity. But how to respond? Insisting that women are rational seems to invite a debate on the subject. And I suppose it's boastful and rude to say you have a great job, one that any reasonable and thoughtful person would like, but I don't see any way to avoid it. If we could only get louder and less fearful, we could challenge the self-selection myth. Once we've eliminated the excuses, the truth would become plain: there are very few women in law teaching because this occupation discriminates against women.

I think we also have to take a stand against praise for incrementalism. Fifteen or so years ago a school needed two women faculty members to insulate itself against a charge of prejudice; now it needs about five or six. After three years in Chicago, *mirabile dictu*, I've seen the great University find a third and then a fourth female law professor to hire. Some statistics indicate doubling and trebling of various figures, as if every day in every way women were advancing in the legal academy. I

don't believe, however, that progress necessarily means sufficient progress. All deliberate speed, as a pace for curing injustice, got discredited a while ago. A wrong demands a remedy, not just a slow undoing or partial abandonment of a few egregious practices. What I have in mind as a remedy is a kind of affirmative action, I suppose, that starts with the individuals who ought to understand more and do more. You and I.

II.

I am affected by being a token, to the point where I almost believe that my minority status is ordained by nature. A practical defense would be to think Fifty Percent at all times. I have been trying to think Fifty Percent since I entered law teaching, and it's too easy to let the goal slip out of my thoughts.

"Since I entered law teaching" That's inaccurate, of course; I've had the same thought for many more years. By the time we apply for teaching jobs, it is very late. By then the culture has done its work, and even if the hiring process is absolutely fair, law schools will perpetuate the minority position of women. We must open up career prospects to girls and women while they have a little time to think about them.

Our own students would make a good starting point. Do you encourage the women in your classes to think about teaching law? I have declined to do so in the belief that here at a regional school it's futile to plant hopes. Sometimes students ask me about it and I tell them how they have to ace their courses and make law review and clerk and get an LL.M. at Harvard or Stanford and then compete for a few openings, probably away from Chicago. How discouraging. Think what would happen if we were willing to describe to our women students the pleasure of our work. Some of them would break through. Or at least they'd consider moving to a new city, as I did, if they were lured by the satisfactions of being a law professor.

As elite-school alumnae we could influence the feeder institutions. If, for instance, I were to double my Yale gift and include a note with the check about this goal—*What are you doing to promote law teaching as a career for women?*—I think I could keep the message bright. Occasionally I phone references for faculty candidates at Kent, and I've noticed that some people at national schools have served as references for men only. Next time I call one of them, I ought to ask why.

Law school is still late in the process. Earlier would be better. I could speak at high schools. I could write editorials addressed to young women. *Seventeen* magazine? *Sassy*? Television? Like most women

lawyers I don't have children, but I could take friends' daughters to work and let them sit in class, or bring them into my office. I could mail reprints to teenagers and consult with young women about how the law should be reformed.

I think the reason I've done so little is not that these efforts are corny and utopian. We *are* corny and utopian ourselves. I don't like all of the women I know who teach law, but women law professors are all idealists, as far as I can tell. Women go into academia in part to reach young people and change the profession. Being too busy to work for change isn't the answer either. No, I think I'm inert because I am a token, convinced at some level that minority status is right and Fifty Percent is wrong.

I connive at the exclusion of women in my world because I can't imagine half of my colleagues being women. You and I have been so quick to paste the label Queen Bee on any woman who doesn't advance the cause of inclusion. It's us, isn't it? But aren't we to be pitied as well as judged? Men are more highly valued than women in this country and at this time; and we know we have a good job in part because the job is dominated by men. One hardly needs the corroboration of salary to keep the point in mind. Having gone into law teaching, we know we're different from other women, and a sense of this difference becomes part of the way we see ourselves. The goal of promoting women in law teaching challenges our separateness. Encourage them all? Even the ones who aren't extraordinary? Yet men, of course, do not require off-the-charts deviance in their protégés.

The rise of academic feminism is explained in part by this discomfort, I think. When we are frightened by tough questions about real people, we can always duck behind this banner and appear to be part of a solution rather than in hiding. I don't mean to say that feminist legal theory isn't valuable scholarship—I think it's one of the great genres going—but it can't substitute for confronting issues of a nontheoretical nature.

And its proliferation raises the question of inaction. Basic insights of feminist theory have been expressed very well for years now, and so the scholar must veer further and further from real problems into new intellectual terrain. Harmless enough in, say, law and economics, but in feminism there's the danger of distraction and intellectualization. Scholars make their arguments to a handful of colleagues; the feminist cause gets bounded. And for men determined to keep women at the margin of

our occupation, what better update of family law or trusts and estates than this arcane subdiscipline?

The colleagues to admire, then, are the ones who resist both connivance and inaction: those who advance the cause of women in both scholarship and action. I was hoping to write this letter without using the phrase role model, but in trying to diminish my own defeatism and the connivance that goes with tokenism, I need to see other women who are not tempted to connive or who have come further in this effort. No need for names, or omission of names. It's not my place to praise or blame individuals; I am just trying to find a way to improve.

Which brings me to the other great triumph of tokenism, dividing and conquering. Because the effort to keep women minorities in law teaching has been somewhat successful with me, I have learned unconsciously to screen women from high regard: I've crossed women off on the pettiest of criteria. The token system has done its work when it convinces us that we deserve very few places.

If my own tendency has any general application, then I suppose women have to relate to one another somewhat as men do, in a way that isn't distracted by personal details. Feminist solidarity, as I envision it, shouldn't mean that we tiptoe around one another's feelings, or say bad scholarship is good because a woman wrote it. Instead I think we ought to regard one another as colleagues who deserve to be law professors and legal scholars but who might happen to take an unsound position. When we're criticized by a woman, we shouldn't feel peculiarly betrayed. Women law professors are very good by all measures; they can face analytical scrutiny and impersonal treatment.

III.

Now, when I say that feminist solidarity among women law professors can improve "the entire endeavor" of law teaching, I am alluding mainly to the unfair treatment women law professors receive and I know that this premise is controversial. Sex discrimination read to mean unequal treatment has long lapsed out of fashion in our circles. Many feminists, I think, have actually lost interest in the problem of unequal treatment. And nonfeminists are either frightened or tired of the whole subject. Nearly every publication I received from AALS circa 1990 harped on diversity. I have heard complaints that supraorganizations of legal academia (AALS, NALP, and so forth) have been obsessed with sex discrimination at the expense of other problems. But I do think unequal treatment warrants our continued interest.

Here are the problems I see. First I believe, on flimsy evidence, that women in law teaching are underpaid relative to men. I also think that students hold male teachers to a more lenient standard. I think that women students are more silent than men in the classroom—I doubt the protest, made mostly by men, that this silence doesn't exist or isn't a problem—and I think that enabling women students to have equal speech in the classroom would improve the future presence of women in law teaching and also in practice. There are too few women deans, a phenomenon I attribute to age discrimination and prejudice by faculties (including men and women) and university administrators against the very idea of a women boss.

Like a bad litigator, I've apparently started with my weakest claim. Who knows how much women and men are paid? What does it mean to be underpaid? Compared to whom? Many public law schools publish salaries, and I don't think these publications have revealed any scandalous disparities. Is any worker underpaid by her employer, given her freedom to reject the salary offered? Well, I don't purport to be writing you a letter that satisfies the demands of empiricism. I want to press this issue because I believe that the salary difference is real and also important.

In the workplace American women have never achieved pay equity. I've read that the only occupations where women earn more than men are modeling and prostitution. Numerous studies disprove the myth that women are doing something wrong at work, such as refusing transfers to new locations. It just doesn't seem probable that salary-setters in legal education would be immune from the pervasive belief that women do and should have less income than men. As a good liberal, I believe that this notion can be fought with moral education (which is why I am bothering to write about it) but this education must confront the conviction that women work cheap.

Justifications come so easily. It's not gender we're rewarding, say the apologists, it's seniority—even though women lack seniority because of discrimination. Or productivity can be the criterion—men in law teaching apparently publish a bit more than women, although both sexes are not exactly prolific—despite the additional burdens that most women faculty are expected to carry. Advanced degrees in fields other than law can boost salary, but only if they are in areas in which men are over-represented; and I also suspect that women face additional obstacles on the way to a Ph.D., like parental prejudice against paying for graduate school, sexual harassment, and unsubtle bigotry generally. The percent-

age system for raises looks neutral but it's regressive, favoring those who start with higher base salaries.

My private-school bias leads me to think that the cure isn't more disclosure of salaries, or more empirical research into the underpayment of women. Rather I would want to see disclosure of salary criteria. We should expect administrators to tell us why they pay for certain characteristics and not others. If they are behaving in a principled fashion, they will be able to explain the correlation between a rewarded trait and the mission of the law school.

Next I want to talk about students, because I think that any polemic that demands more fairness in legal education cannot omit the way law schools relate to students. Putting aside the controversy over whether students discriminate against women in evaluation questionnaires—the evidence is mixed, but it tends to support this view—I have noticed that students generally seem to presume that a male instructor is knowledgeable and competent, whereas a female instructor doesn't benefit from that presumption. It's not hard for a man to refute his favorable presumption, and students are quite willing to respect a woman, but the sexes start out on unequal ground.

Another student issue that's worth mentioning here is the silence of women in the classroom. In my classes, the men volunteer at a much greater rate and appear to feel more comfortable speaking in a large room. I am certain this pattern exists in most large classes. The problem perpetuates itself. Women start out in silence and then feel pressure to say something extraordinary when they do speak. Meanwhile men are practicing at oral advocacy, becoming more confident, taking up a greater share of the class hour.

Both of these problems are the result of years of exposure to the culture. We academics are with these students for only a few years of their lives; we can't undo the past or redesign the world into which our students graduate. We can, however, work to elevate the status of women in each law school. For instance, we can keep in mind the probable student belief that women professors have weaker credentials than men and are hired for the sake of affirmative action. Different responses to the problem would be warranted in different situations. We could make it a point to talk each other up. We could assign work by women law professors in our classes, without making a big political deal of it. We could become familiar with code words: everyone knows "strident," but what are the new ones?

It's also fair to remind students, and others, that the profession isn't

a wide-open meritocracy. I've learned to ask "What do you mean?" when students tell me that so-and-so is "brilliant" or that he knows everything. I think I should tell students about a few things I know—the study that found that scholarly papers were less likely to be accepted for presentation at the MLA annual meeting if they indicated a female author (most law reviews still won't read manuscripts blind); another study that found that chairmen of psychology departments who were given résumés identical except for name and sex decided that more men were suitable for tenure-track positions; and that men have great control over who gets book publication contracts, grants, co-authorship opportunities, places on a speakers' panel, prizes, offers to visit at another school, on and on. But reminding students shouldn't be overdone, and the feminist speaker has to find a cool tone. It's all by way of setting the record straight rather than whining.

Another way to promote the presence of women in law teaching is to make them deans. The job is virtually closed to women. Baffling, because law professors often say that dean traits are completely different from professor traits. Therefore you'd think that the people who exclude women from law teaching and begrudge them recognition would want to see women as deans. But I suppose there's some flaw in that reasoning. (Law firms often cut off women litigators from trial opportunities by claiming that women lack an open style of aggression that could intimidate an adversary; but in the big corporate firms, where the best work in a litigation department consists of taking depositions—a technique that calls for good listening, an ability to draw out the deponent, and a kind of subtle aggressiveness—men take the depositions. Stereotypes will never work to our benefit.) That only a dozen or so deans in the country are women demonstrates prejudice and injustice.

Wherever dean vacancies occur, I'd bet you'd find a good internal prospect who is a woman. The so-called national search that most schools undertake has some elements of waste as well as a possible bias against women, who may be less mobile than men. (Remarkably little evidence exists for that proposition, by the way.) Law faculties looking for deans should consider the talented administrators and leaders among their women colleagues as well as the set of candidates, mostly men, on the national market for a deanship that year. Becoming dean is a natural promotion for a woman professor who does a large amount of unacknowledged administrative work and service. Make her a dean, and much of that she does without credit will be revealed, because the dean can't do those other things. And perhaps she'll improve the lot of women below. It's unfair to expect radical change from a handful of female

deans in the country, but I would think that doubling or tripling their numbers nationwide would give them more power.

Let us not tolerate the slur that women deans aren't good for the bottom line. From what I've read about fundraising, women are well suited to it and will become even more so. I understand that donors to universities now tend to want substance and answers to questions, rather than the infamous old-fashioned techniques that featured liquor. Most women would raise money for their schools by the former method, I think, if only because they've lacked access to good-old-boy circles. State legislators who review proposed budgets have probably sobered up too, and would work well with a substance-minded dean—or so I hope.

As I mentioned, I think age discrimination has something to do with the reluctance to appoint women deans. Look through the directory of law teachers and see how few women professors were born before the postwar baby boom. Even if you believe the "recent" line of apology, the number of senior women law professors ought to be higher than it is. It's evident to me that men are hiring younger women—perhaps because they find them cheaper to pay, more manipulable, and more attractive—and that the women who are hired are going along with the pattern, perhaps because it appears to be in their interest and because they don't feel connected to older women.

Prejudice against older women is unjust; it is not in the long-term interest of younger women faculty members; and generational conflict among women, if it exists, should be resisted. I think that younger women in legal education should support the interests of older women, especially those who are openly committed to feminism. (Some women professors are less committed than others, of course, but I think the Queen Bee stereotype is generally unfair.) It's so tempting to use Soia Mentschikoff as the standard: but look at all the male deans in the country. Women in law teaching should give themselves a break.

IV.

In the beginning of this letter I said I hoped to find a way to conduct the work of teaching law with more generosity and less meanness, while respecting high standards. I think that working for feminist change can provide this way. Feminist law professors are not engaged in special pleading for ourselves and our cronies. There isn't even a clear "we"—and I plead guilty to the academic charge of having used that word loosely. I feel completely free of venality when I demand more money

and power for women law professors, who have a claim in justice for all of the good things available to law teachers.

More generosity in our line of work will come from a wider appreciation of the talents that are germane to teaching law. The increased presence of women and racial minorities has already expanded the conventional definitions of scholarship and teaching. Gay and lesbian consciousness among law professors has enriched the study and improvement of the law. I'm naive enough to think that this new mixture of different people will foster mutual appreciation and open-mindedness rather than a mean competition among subgroups or a backlash, because the people who are the sources of diversity are generally pretty good at their work. With a more varied population of faculty members, law schools might become better able to distinguish good elitism from bad. And a large influx of women into facilities would promote this variety.

To veer sharply from left to right: I respect market forces. The pool of applicants for teaching jobs is smaller than it should be because of the discouragement of girls and young women from careers in law teaching. More applicants, *ceteris paribus*, means better law professors. I think there is plenty of room for improvement in the overall quality of law teaching and research and I think that protectionism is in part to blame for the gap between actual and ideal law teaching.

When half of all law professors and deans and major donors are women, I think that the lot of each woman law professor will be simpler and freer of conflicts. In this time before Fifty Percent, all women faculty have to spend time thinking about gender, not knowing for sure whether gender is at the core or the periphery of their work as scholars and teachers. The next century will be full of legal problems that need resolution: perhaps what we now regard as women's issues will be pre-eminent among these problems; perhaps feminism will declare victory and disappear into a larger consciousness. Either way, I see a future where women will work best when their efforts are integrated. Right now tokens have to divide their time between fulfilling conventional expectations and challenging those expectations—a wasteful shuttle that restrains the progress of legal education.

Women will be free to criticize one another without feeling as though they might be wounding a fragile and rare source of contribution. As I've said, I have seen feminist law teachers hesitate to criticize one another. This reticence is a powerful alternative to the belligerent style of some men, who attend academic talks or presentations with the goal of outshouting or outscoring a featured speaker. With more women in law

teaching, this male style will recede, I hope. At the same time, women will benefit from the virtues of belligerence: its challenge and (ideally) its separation of ideas from persons. A synthesis of high standards and supportiveness could come about.

I see improvement also in the nurturing of rights-consciousness among women law professors. If I bother to care about another woman's inadequate salary, I imagine I will develop awareness about what it means to be a contributing faculty member. When I worry about the way law schools have taken millions of dollars of tuition from young women and their families and then delivered second-class status at school and in the profession, I will naturally go on to worry about whether schools deliver good value for tuition generally. I think it's because I'm a feminist that I take seriously the idea of reverse discrimination against white males (even though I have never seen an instance of it in law practice or teaching). Not everyone thinks that more rights-consciousness is a good thing, but if you've enough of a liberal to buy it, then you ought to support an increased feminist presence in law schools.

Looking over this letter, I see a prescription of hard work, self-criticism, hawklike attention to other people's salaries and opportunities, earnest liberalism and eternal vigilance. But when I think about women in law teaching, I don't feel grim. We have great jobs, and if we can keep alert to the task of improvement, then we can say we deserve the privilege of being law professors. And we would have happiness without complacency.

Yours, A.

