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REMARKS ON WOMEN'S PROGRESS IN THE LEGAL PROFESSION IN THE UNITED STATES*

The Honorable Ruth Bader Ginsburg†

My remarks concern the progress women lawyers and judges have made in the United States during my lifetime. I will refer to my own experiences, the large changes I have witnessed, and my hopes and expectations for the future. I will start with a note on the generation before mine.

My mother would have been a wonderful lawyer. She was a woman of great intelligence, a prolific reader, a caring, resourceful individual. She was the fourth child born into a family in which seven children survived into adulthood; she was the first in her family to be born in the United States, just four months after her mother's arrival in New York, as an immigrant from a part of the Austrian Empire now in Poland. My mother completed secondary school education at age 15 (more than two years earlier than most young people in the United States), constantly earning top grades. She went immediately to work, contributing part of her earnings to the support of her eldest brother, who was attending a fine University. She may have had dreams of University education for herself. She certainly had them for me. She died before I completed secondary school but knowing I would attend Cornell University in New York State, the school her brother had attended. She probably did not think I would next attend the Harvard Law School, for Harvard did not begin to admit women until September 1950, the academic term following her death. She surely did not dream I might one day be a judge on a United States court, for there had been only one female, life-tenured federal appellate judge in the entire history of the United States prior to 1950. (That woman was Florence Allen, from the State of Ohio. She was appointed to the United States Court of Appeals for the Sixth Circuit by President Franklin Delano Roosevelt in 1934.¹)

* These remarks were presented at the Oklahoma Bar Association Women in the Law Conference in Tulsa, Oklahoma, on August 28, 1997. They are published here substantially as delivered. To aid the reader, footnotes have been added.

† Associate Justice, Supreme Court of the United States.

1. See Ruth B. Ginsburg & Laura W. Brill, *Woman in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281, 281-84 (1995). The first woman to serve on a federal trial court was Burnita Shelton Matthews, appointed to the United States District Court for the District Court for the District of Columbia by President Truman in 1949. See *id.* at 284-85.

I entered Harvard Law School in 1956, one of nine women in a class that numbered over 500. My daughter attended that same law school in the late 1970s as one of over 100 women. Today, there are at least twice that number of women students at the Harvard Law School. I transferred to Columbia Law School in 1958 and received my law degree from that school in 1959. No woman taught classes as a member of the Harvard or Columbia Law School faculty when I was a student. In 1972, I had the good fortune to become the first woman to hold a tenured position at Columbia Law School. In 1987, my daughter, Jane C. Ginsburg, joined the Columbia faculty, one of several women teaching law there. Today, her classes are filled by almost as many women as men, and she holds an endowed chair in Literary and Artistic Property Law. I am very proud of her. We are the first mother/daughter to have served on any law faculty in the United States.

Now travel with me from New York City to Washington, D.C., to my current place of work, but back to a day in the U.S. Supreme Court long before my time, way back to the year 1853. Sarah Grimke, a great feminist and anti-slavery lecturer from South Carolina, was in Washington, D.C., that December, and wrote this to a friend describing her visit:

Yesterday, visited the Capitol, went into the Supreme Court, not in session, was invited to sit in the Chief Justice's seat. As I took the place, I involuntarily explained: "Who knows, but this chair may one day be occupied by a woman." The brethren laughed heartily, nevertheless, it may be a true prophecy.²

Today, no one would laugh at that prophecy.

My savvy, sympatique colleague and counselor, first woman appointed to the U.S. Supreme Court, Justice Sandra Day O'Connor, confirms a report familiar to students who attended law schools in the 1950s, even in the 1960s. Justice O'Connor graduated from Stanford Law School in 1952 in the top of her class. Our Chief Justice, William Rehnquist, was in the same class, and he also ranked at the top. Young Rehnquist got a Supreme Court clerkship—then, as now, a much sought-after job for young lawyers. No opportunity of that kind was open to Sandra Day. Indeed, no private firm would hire her to do a lawyer's work. "I interviewed with law firms in Los Angeles and San Francisco," Justice O'Connor recalls, "but none had ever hired a woman before as a lawyer, and they were not prepared to do so."³ (Many firms were not prepared to break that bad habit until years after the U.S. civil rights legislation of the mid-1960s made it illegal.)

Women constitute close to 30% of President Clinton's appointees to the federal bench, 62 women out of 213 total appointments as of August 1, 1997, according to the White House numbers.⁴ A critical mass, social scientists might

2. Letter from Sarah Grimke to Sarah Wattles (Dec. 23, 1853) (Weld-Grimke Papers, William L. Clements Library, University of Michigan).

3. PETER W. HUBER, SANDRA DAY O'CONNOR: SUPREME COURT JUSTICE 33 (1990).

4. These figures were supplied by the Clinton Administration in August 1997.

say. Are we really there? Well, not quite, I was reminded just last Term when our Acting Solicitor General three times called me Justice O'Connor, and the same slip was made by a distinguished advocate, Harvard Law School Professor Laurence Tribe. The National Association of Women Judges, anticipating that such confusion might occur, presented Justice O'Connor and me with T-shirts the month after my appointment. Hers reads: "I'm Sandra, not Ruth"; mine, "I'm Ruth, not Sandra." (Task forces on gender bias in our state and federal courts, I might add, have helpfully revealed the existence of often unconscious prejudice; gender bias studies have promoted those who work in our courts to listen to women's diverse voices, then to accord women's inquiries and proposals the respect and attention customarily accorded questions and ideas advanced by men.⁵)

Returning to decades past, the few women who braved law school in the 1950s and 1960s, it was generally supposed, presented no real challenge to (or competition for) the men. What were those women, after all, a distinguished law professor commented at a 1971 Association of American Law Schools meeting, "only soft men." The idea was that women would devote themselves *not* to paying clients represented by law firms, or to top jobs in corporations and government, but to serving the poor and the oppressed, the truly needy—those who lacked the wherewithal to pay for legal services.

It was true in the 1950s and 1960s, and remains true today, that many women lawyers are sympathetic to, and active in, humanitarian causes, but so are the best men—the ones who care about the community and world our children and grandchildren will inhabit, men who join their sisters in seeing women's rights as vital to human rights. And the women in the law I encounter surely are not "soft men."

May I take some minutes now to speak of my days as a law teacher, from 1963 to 1972 at Rutgers, New Jersey's state university, and from 1972 to 1980 at Columbia University in New York. I was the second woman ever to teach at Rutgers Law School. Rutgers was ahead of the trend, for up till 1963, barely a dozen women had ever taught on any U.S. law faculty across the country.

Did I get equal pay on my appointment at Rutgers in 1963, the very year the Equal Pay Act became the law of the land in the United States? Emphatically "No." The good Dean of the Law School carefully explained about the state university's limited resources, and then added it was only fair to pay me modestly, because my husband had a very good job. (Some seven years later, I was part of a large class of women faculty members who filed a claim against Rutgers University to enforce the law. Each member of that class eventually received an enormous increase in salary, in settlement of the Equal Pay claim.)

My second year at Rutgers, something wonderful but worrisome happened to me—I became pregnant. I was then on an annual contract. Would it be renewed if I revealed my condition? I feared it would not. (Ten years earlier,

5. See, e.g., Ruth B. Ginsburg, *Foreword to the Report of the Special Committee on Gender, Prepared for the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1651 (1996).

when my first child was born, it was understood I would leave work—at the Social Security Office in Lawton, Oklahoma—and not come back.) So I said nothing, but borrowed clothes from my ever supportive, one size larger mother-in-law. With her wardrobe at my disposal, I managed to make it through the spring semester. After the last class that semester, I drove home from New Jersey to New York in the company of three of my colleagues, and announced there would be one more in my family when school opened in the fall. (By then, the renewed contract was in hand.)

In the last years of the 1960s, new kinds of complaints began to trickle into the New Jersey affiliate of the American Civil Liberties Union. The Executive Director of the New Jersey ACLU cast about for someone to handle the new complaints, and had the idea of inviting me—because I taught Civil Procedure (and therefore knew something about how courts operate), and because I am a woman. Who were the new complainants? I will mention a typical few.

There was Eudoxia Awadallah, who taught typing and stenography at a secondary school in the vicinity, and was told even before her pregnancy began to show that she must go on maternity leave immediately. (Maternity leave, you should understand, was then a euphemism in the United States—it was unpaid, and there was no guaranteed right to return to work. If and when the school district wanted you back, the school would call.⁶)

Nora Simon was another. She had been honorably discharged from military service in the U.S. Army when she became pregnant. Some years later, she sought to reenlist. But her pregnancy, she discovered to her dismay, counted as a "Moral and Administrative Disqualification" for reenlistment.

Then there was a complainant who worked at the Lipton Tea Company. She wanted to sign up for health insurance for her entire family because the package of benefits at her work place was more generous than the one offered by her husband's employer. Married women, however, could get group insurance only for themselves, not for their spouses or children.

Princeton University was running a wonderful summer program to introduce local elementary school students to math and science in an appealing way—an enriched on-campus July and August program, with follow up for several school years thereafter. The program was called Summer in Engineering; it was opened to 11-and 12-year-old *boys*. Girls could not be included, the University said, because girls distract boys from their studies.

Around 1970, women students at Rutgers Law School whose consciousness of sex discrimination had awakened at least as much as mine, young women encouraged by a vibrant movement in the United States for racial equality, asked for a seminar on Women and the Law. I went off to the library. There, in the space of a month, I read every U.S. court decision *ever* published involving women's legal status, and every U.S. law journal commentary on point. That was not a very taxing undertaking. There were not many decisions, and com-

6. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974).

mentary was slim. There was probably less altogether than today accumulates in six months' time.

I was engaged in preparing materials for the seminar when the Legal Director of ACLU's National Office, Melvin L. Wulf, visited Rutgers. The U.S. Supreme Court had just agreed to review an Idaho state court's judgment in a case called *Reed v. Reed*.⁷ The complainant, Sally Reed, was the mother of a teenage boy who, in a tragic occurrence, had used his father's gun to commit suicide. The parents were separated and Sally Reed wanted to take charge of her son's belongings—to be appointed administrator of his death estate. But the father was appointed instead, pursuant to a State of Idaho statute that read: As between persons "equally entitled to administer" a decedent's estate, "males must be preferred to females." The ACLU had filed the request for Supreme Court review in Sally Reed's case, and I asked if I could write the brief on the merits. *We* will write the brief, the Legal Director of the ACLU said, and so we did, with the grand aid of students from Yale, New York University, and Rutgers. (I learned in that venture how important it is to include men in the effort to make women's rights part of the human rights agenda. Without the understanding of all humankind, as I see it, the effort cannot succeed.)

One of the students who worked on Sally Reed's brief helped me put together an appendix of statutes that treated women specially, a true sign of the time, a sampling of laws of the kind that then riddled the statute books of the U.S. and all 50 states. I will read just two samples from the appendix we submitted to the Supreme Court. First, a provision that derives from Napoleon's Code: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."⁸ Second, also typical: "Every person who maliciously . . . disturbs the peace . . . [by] us[ing] indecent language within the presence or hearing of women or children . . . is guilty of a misdemeanor."⁹ That close association of women with children as persons not fully adult harks back to days before women were allowed to vote.

Sally Reed's petition proved the turning point case, the first time in the history of the United States that any law ordering differential treatment of women and men was declared unconstitutional. After that 1971 decision and until 1980, the year I became a U.S. Court of Appeals judge, the business of ridding the statute books of laws of the kind collected in the appendix to Sally Reed's brief consumed most of my days.

7. 404 U.S. 71 (1971).

8. R.S. § 2494, codified at IDAHO CODE ANN. § 32-902 (repealed 1974).

9. Crimes and Punishment Act § 112, Stats 1850, ch. 99, as amended by Code Amdts 1877-78, ch. 299, § 1, codified at CAL. PEN. CODE § 415 (repealed 1974). This provision surfaced in a famous First Amendment case. Paul Robert Cohen was convicted for violating § 415 when he walked through a corridor of the Los Angeles County Courthouse wearing a jacket that bore the words "Fuck the Draft." In upholding Cohen's conviction, the California Court of Appeal ruled that these words were clearly offensive and fell below accepted norms of behavior, "at least when paraded through a courthouse corridor containing women and children." *People v. Cohen*, 81 Cal.Rptr. 503, 506 (Cal. Ct. App. 1969), *rev'd sub nom. Cohen v. California*, 403 U.S. 15 (1971).

In the affirmative action wave that hit colleges and universities in the United States at the start of the 1970s, during President Nixon's first term, I received an invitation to join the law faculty at Columbia University, and was pleased to switch to a school close to my home in New York City. My very first month at Columbia, in September 1972, the University sought to save money in the housekeeping department. Columbia sent lay off notices to 25 maids—and not a single janitor. (Maids were women, janitors were men, but their jobs were not vastly different.) I entered that fray, which happily ended with no layoffs, and, as I recall, the union's first female shop steward.

Hardest of my extracurricular activities for my Columbia University and Law School colleagues to bear was the litigation that followed after a tea at the home of Madame Wu, world-celebrated professor of chemistry. The tea took place on a clear winter day in the mid-1970s; the invitees were all the senior women at Columbia University. (Eleven women had achieved that rank by the mid-1970s, compared to over 1000 men.) One of the 11, Carol Meyer, Professor at the School of Social Work, wrote about the meeting years later. She was more than a little suspicious when she received the invitation, which came from me. "Women meeting together? Was this to be a cell meeting of some kind," she wondered.¹⁰ What we discussed, primarily, was the sex differential then part of the University's retirement plan, under which women received lower monthly retirement benefits because, on average, women lived longer than men.

Eventually, a case charging unlawful discrimination was filed, with some 100 Columbia women—teachers and administrators—as named complainants. In a parallel case, one from California, the U.S. Supreme Court settled the issue, in favor of the women.¹¹ Several—probably most—of my Columbia Law School faculty colleagues would have voted the other way, but their spirited discussions helped me sharpen a friend of the court brief filed on the winning side. In that matter, as in many others—I recall particularly an earlier episode involving a request to extend health benefits to cover pregnant employees—I was shielded from accusations of disloyalty to the University by law school deans and colleagues who, although they did not inevitably agree with me on the merits, recognized the value of having the question fully aired.

Moving fast forward to more current times, I will comment on a large problem—one that many in this audience, no doubt, have encountered. An American Bar Association report published in 1990 expressed concern that lawyers in commercial practice in the United States may be losing their sense of perspective and ethics, under relentless pressure to produce business and billable hours.¹² The report noted the attendant tug on young lawyers to cut back on family involvement, but it ended on an upbeat note. The reporters expressed hope that the increasing participation of women in the profession

10. Carol H. Meyer, *On Feminism in Action: The First Activist Feminist I Ever Met*, 9 AFFILIA 85 (1994).

11. See *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

12. See AMERICAN BAR ASS'N, *THE STATE OF THE LEGAL PROFESSION* 22, 33-35 (1990).

would have an ameliorating effect. They suggested that, by persistently raising the crucial issues of family and workplace, of leave time for parents and workplace affiliated day care facilities, women lawyers could take the lead in bringing sanity and balance to the profession. In this regard, sisters-in-law need the aid of their brothers-in-law. These issues, as I said earlier, must become human issues, not just "women's issues."¹³

To illustrate my point, travel back with me again, this time to another incident in the mid-1970s, when I was teaching at Columbia Law School and trying to manage a full docket of sex equality cases in or headed toward the Supreme Court. Leading the list were cases on women's service on juries,¹⁴ and their right to the same Social Security coverage accorded men.¹⁵ The incident concerned my son, then a spirited ten-year-old. You know the kind—challenging as a youngster but now, at age 32, a genuinely fine human. In my son's early school years, there were calls from the head of the school, almost monthly, requesting a meeting with me to discuss my lively child's most recent escapade. One afternoon, when I felt particularly weary, I responded: "This child has two parents. Please alternate calls for conferences." After that, although I observed no quick change in my son's behavior, the telephone calls came barely once a semester. There was more reluctance to take a father away from his work, much more reluctance. There still is.

But as women join men in diverse fields of endeavor, as lawyers, judges, engineers, bartenders, computer programmers, we are discovering that personality characteristics for both sexes span a wide range. Harvard President Neil L. Rudenstine, at a Radcliffe College Convocation in March 1994, expressed what we are coming to appreciate: "We [now] know that talents of all kinds—analytic, creative, athletic, argumentative, and entrepreneurial—are distributed in essentially equal portions—and an infinite variety of combinations—among women and men alike."¹⁶

Immodest aspiration is as evident in some women as it is in some men. Caring for one's family, on the other hand, sharing in bringing up children or attending to elderly parents, cooking dinners, helping to keep the house in order, no longer mark a man as strange. (To the abiding appreciation of my daughter, son, and now grandchildren, meals at our house, some 17 years ago,

13. In 1992 the Commission on Women in the Profession of the Association of the Bar of the City of New York commissioned a study of the impact that changes in the economy and the legal profession had on women lawyers. The study noted that, despite steady progress, the increase in the number of women partners and women in firm management was slight to minuscule and concluded that this low increase resulted not simply from stereotyping or from the pressures that women face to make family life their first priority, but also from "the lack of supports and encouragement women encounter within the firms and from their families." Cynthia F. Epstein et al., *Report—Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 438-40 (1995).

14. See *Healy v. Edwards*, 363 F.Supp. 1110 (E.D. La. 1973), *vacated and remanded*, 421 U.S. 772 (1975), *dismissed as moot on remand*, No. 73-688 (E.D. La. Sept. 8, 1975); *Duren v. Missouri*, 439 U.S. 357 (1979).

15. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

16. Neil L. Rudenstine, Radcliffe Convocation Speech (Mar. 19, 1994) (unpublished document, on file with *The University of Tulsa Law Journal*).

were taken completely off Mommy's track—she has no talent for the job—and switched to Daddy's—he has indeed mastered the art.)

Yes, large problems remain. Largest of all, raising young children continues to present more trying psychological and logistical obstacles for women than for men. To paraphrase a representative of the Women's Legal Defense Fund in Washington, D.C., commenting on the reality in some quarters: "A woman who does less than everything for her child is seen as a terrible mother; a man who does more than nothing is praised as a wonderful father."¹⁷

A leading Washington, D.C., lawyer who attended Harvard Law School in the 1960s, Judith Richards Hope, described the lives of her generation of women lawyers this way: "We worked, we married, sometimes we divorced, we served our communities, had children, served their schools, tried to do it all, have it all, be it all; never forgetting, particularly, that we were supposed to be living greatly in the law, and that we were, in fact, just trying most of the time to stay alive."¹⁸

Theoretical discussions are ongoing today, as they have been for decades—particularly in academic circles—about differences in the voices women and men hear, or in their moral perceptions. When asked about such things, I usually abstain—or fudge. Generalizations about the way women or men are—my life's experience bears out—cannot guide me reliably in making decisions about particular individuals. At least in the law, I have found no natural superiority or deficiency in either sex. In class or in grading papers from 1963 until 1980, and now in reading briefs and listening to arguments in court for over 17 years, I have detected no reliable indicator of distinctly male or surely female thinking—or even penmanship.

Let me conclude on a high note. A long distance has been traveled from the 1950s to the 1990s, and I am optimistic that the trend toward shared roles for men and women, at work and at home, will continue. And I am heartened by a 1990s University of Michigan survey, undertaken by Professor David Chambers,¹⁹ showing that of all lawyers graduated from that fine law school, women with children are the most content. They are beleaguered, the survey report noted, but they are also satisfied. "They enjoy their family lives. They enjoy their jobs. And to the extent each causes stress, each also provides respite from the other."²⁰

Last year, in a tribute to Justice Sandra Day O'Connor, United States District Judge Kimba Wood, of the Southern District of New York, said that Justice O'Connor's appointment to the U.S. Supreme Court was a "momentous"

17. See Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 239 (1982).

18. Remarks of Judith R. Hope at the investiture of Judith W. Rogers as Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit (transcript on file with *The University of Tulsa Law Journal*).

19. See David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, L. & SOC. INQUIRY 251 (1989).

20. *Id.* at 282.

event.²¹ But Sandra's greatest achievement, Judge Wood added, is one from which you and I have benefitted and now have the responsibility to further advance—to make women's participation in all manner of legal work not “momentous,” but “commonplace.”²²

21. Kimba M. Wood, *A Tribute to Sandra Day O'Connor*, in 1996 ANN. SURV. AM. L. xlviii, xlviii.

22. *Id.* at li.

