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# ESSAY

## LADY LAWYERS: NOT AN OXYMORON<sup>®</sup>

Judith L. Maute\*

### I. INTRODUCTION

Twenty-five years ago while clerking for a large law firm in another state, a senior partner approached me with a little smirk on his face and said: “Lady lawyer . . . is that an oxymoron?” The late, great Justice Alma Wilson also used the term to highlight the challenges encountered by pioneer women lawyers, who had to work harder and be better to achieve the same stature as their male counterparts. She quipped, “to be a lady lawyer, you need to go to school four years.”<sup>1</sup>

#### A. *Honoring Those Who Have Gone Before Us*

Perhaps because women were then a true minority in the profession, the early pioneers were more closely scrutinized and sometimes deemed lacking in the gentler aspects of “true womanhood.” Indeed, in his famous concurring opinion sustaining Illinois’ decision to deny Myra Bradwell’s petition for admission to practice law, Justice Bradley of the United States Supreme Court said:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the

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1. E-mail from Donita Douglas, Okla. B. Assn., to Judith L. Maute, Prof., Univ. Okla. College L., *Quote* (Oct. 21, 2002) (copy on file with author).

family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.<sup>2</sup>

In a project led by Court of Criminal Appeals Judge Reta Strubhar, the Oklahoma Bar Association (“OBA”) Standing Committee of Women in Law is gathering biographical information for a planned book on Oklahoma’s first women lawyers. Some, like Julia Ann Shook, Minerva Elliott, Anabel Fleming Thomas, and Jean Everest, were true pioneers, admitted to practice in the nineteenth century when Oklahoma was a territory.<sup>3</sup> A few counties did not have a woman lawyer until the 1980s.<sup>4</sup> As the state approaches its centennial, it is fitting to honor those who have gone before us.

### B. *Changing Demographics*

No longer can it be said, even in jest, that “lady lawyers” are an oddity or contradiction in terms. They are entering the profession in record numbers. Women first entered law schools in significant numbers in the early 1970s. In 1971, five percent of newly admitted lawyers were women.<sup>5</sup> In 2000, women constituted about forty-nine percent of entering law school classes nationwide, and were expected to be the majority in 2001.<sup>6</sup> While there are clearly regional variations, Oklahoma is part of this demographic trend, with women comprising at least forty percent of the students at each of the three law schools in the state.<sup>7</sup> At present, women constitute twenty-five percent of active members in the OBA.<sup>8</sup> For the last two years, forty-five percent or more of new admissions to the Oklahoma bar were women.<sup>9</sup> The University of Oklahoma College of Law has graduated close to 2,000 women since it began in 1909.<sup>10</sup>

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2. *Bradwell v. Ill.*, 83 U.S. 130, 141 (1872) (Bradley, Swayne & Field, JJ., concurring).

3. Reta Strubhar, *Women Lawyers* (unpublished draft) (copy on file with author).

4. *Id.*

5. Barbara A. Curran & Clara N. Carson, *Supplement to the Lawyer Statistical Report: The U.S. Legal Profession in 1998*, 1991 Am. B. Found. 2.

6. Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. Times A1 (Mar. 26, 2001).

7. Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Leg. Educ. 313, 353-57 (2000); E-mail from Deborah Case, Registrar, Univ. Okla. College L., to Judith L. Maute, Prof., Univ. Okla. College L. (Nov. 21, 2002) (copy on file with author) (stating that for the period between fall of 1996 and fall of 1998, Oklahoma City University, the University of Tulsa, and the University of Oklahoma law schools had, respectively, forty percent, forty-two percent, and forty-four percent women in their student bodies. At the time this article was going to press, forty-eight percent of the student body at the University of Oklahoma College of Law were women.); R. Darcy et al., *2002 Oklahoma Bar Association Membership Survey Report*, 73 Okla. B. J. 3393, 3402-03 (2002).

8. Letter from Charlotte Nelson, Admin. Dir. of the Bd. of B. Examiners, Okla. B. Assn., to Judith L. Maute, Prof., Univ. Okla. College L. (Apr. 16, 2001) (copy on file with author) (stating that of 14,631 active members of bar, 3,705 are women); Darcy, *supra* n. 7, at 3402.

9. Letter, *supra* n. 8.

10. E-mail from Kara King, Alumni Rel., Univ. Okla. College L., to Judith L. Maute, Prof., Univ. Okla. College L. (Apr. 11, 2001) (copy on file with author).

This article briefly explores three issues. First, it considers the possible implications of this momentous demographic change on the practice of law. Second, it surveys some of the professional advancement of women in the Oklahoma bar and judiciary. Finally, it identifies several areas where further attention is warranted, both to advance the principle of equality and to improve the quality of living in the law for all its practitioners.

## II. POSSIBLE IMPLICATIONS

Increased numbers of women lawyers could bring about significant changes in the legal profession. Perhaps it will mark a dramatic shift in the profession's prestige, earnings, and manner of practice. Some commentators suggest the influx of women will bring a fuller range of values into legal discourse, including greater focus on compassion and an ethic of care. Because women typically still carry greater domestic responsibilities, it may increase demand for family-friendly workplace policies.

The term "pink collar ghetto" is used to describe job categories filled primarily by women with low occupational status and earnings.<sup>11</sup> In United States occupational history, when previously male fields such as clerical work and telephone operators reached a tipping point with more female than male entrants, the fields experienced a loss in status and earning power.<sup>12</sup> It has been suggested that this phenomenon is occurring in some areas of the law.<sup>13</sup>

Portia, in Shakespeare's *Merchant of Venice*, argued that mercy should temper justice.<sup>14</sup> In the legal profession, there has been a tendency for "male created forms or values to control."<sup>15</sup> Some feminist theorists contend that increased numbers of women lawyers will expand value choices in the legal profession and, to the extent that they can, may possibly produce different legal outcomes.<sup>16</sup> Controversial gender theorist Carol Gilligan has offered different explanations as to why men and women's value choices diverge. One interpretation that can be taken from Gilligan's work is that the moral development of boys and girls diverges at about age twelve, with boys inclined to view conflict resolution from a hierarchal, rights-oriented perspective, and girls

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11. See Neumann, *supra* n. 7.

12. Anemona Hartocollis, *Justice Is Blind. Also, a Lady*, N.Y. Times WK3 (Apr. 1, 2001) (quoting Malcolm Gladwell). *But cf.* Paul Weiler, *The Wages of Sex: The Use and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1793 (1986) (finding concentration of women in job has "relatively small influence" on earnings). See *Women's Work, Men's Work: Sex Segregation on the Job* 8 (Barbara F. Reskin & Heidi I. Hartman eds., Natl. Acad. Press 1986).

13. See e.g. Jo Anne Durako, *Stop the Presses: Gender-Based Differences Discovered in the Legal-Writing Profession*, 7 Scribes J. Leg. Writing 87 (1998); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117 (1997); Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Feme Covert to Notaire Covert*, 31 John Marshall L. Rev. 703 (1998).

14. Act IV, Scene 1, ll. 180-81 (John Russell Brown ed., 7th ed., Harv. U. Press 1959) ("The quality of mercy is not strain'd; It droppeth as the gentle rain from heaven.")

15. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39, 50 (1985).

16. See e.g. *id.*; Robin West, *Caring for Justice* (N.Y.U. Press 1997).

tending to seek relational compromises and avoid win-loss, rights-based solutions.<sup>17</sup> If one subscribes to this gender theory, the demographic changes may portend further shifts away from traditional adversarial conflict resolution and towards negotiation, mediation, and other techniques that seek to preserve and improve existing relationships, to expand remedial outcomes beyond the traditional zero-sum, absolute payment of money by loser to winner, and to achieve outcomes that meet the parties' underlying concerns beyond money judgments.<sup>18</sup>

Much academic and professional literature in the last decade addresses the rhetorical question, "Is the law male?" This question probes the extent to which concepts of gender permeate the fabric of the American legal system. These ideas are admittedly controversial. The most traditional legal theorists subscribe to positivistic views that legal rules are fully ordered, rational, and regularly applied, and that the neutral principles of law are unbiased, equally applicable to all. On the other end of the spectrum, some notable feminist theorists strongly protest that Gilligan's views do not reflect a higher order of moral development, but rather perpetuate existing societal oppression of women.<sup>19</sup> Extensive literature on feminist jurisprudence develops the contention that law is gendered, reinforcing existing stereotypes and biases inherent in society. I do not attempt to address the debate on this issue, but merely alert readers to its existence.<sup>20</sup>

Many studies show that in households with two working parents, women shoulder disproportionate responsibility for child care and domestic chores.<sup>21</sup> Employed women spend about twice the time on domestic responsibilities, as do employed men; women lawyers report excessive work hours as a leading cause of job dissatisfaction.<sup>22</sup> The "second shift" at home has impeded these women from professional advancement because they cannot work the long hours necessary to meet some firms' billable time or workload expectations and participate in useful socializing with colleagues and clients. Women's movement into the professional workforce has prompted both women and men to look for family-friendly workplaces that respect their need for life outside the office. Increasingly, lawyers are making employment and career choices to accommodate their desire to achieve a healthy balance between work, family, and other interests.<sup>23</sup> A recent

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17. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25-29 (Harv. U. Press 1982).

18. Menkel-Meadow, *supra* n. 15, at 52-53.

19. Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *Buff. L. Rev.* 1, 74-75 (1985).

20. See e.g. Symposium, *Is the Law Male?*, 69 *Chi. Kent L. Rev.* 293-411 (1993); Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *Fordham L. Rev.* 249 (1998); Deborah L. Rhode, *Gender and Professional Roles*, 63 *Fordham L. Rev.* 39 (1994); Patricia A. Cain, *Feminist Legal Scholarship*, 77 *Iowa L. Rev.* 19 (1991).

21. Deborah L. Rhode, *The Profession and Its Discontents*, 61 *Ohio St. L.J.* 1335, 1345-46 (2000); Jane C. Hood, *Becoming a Two-Job Family* 107-08 (Praeger 1983); Andrew J. Cherlin, *Public and Private Families: An Introduction, with Free PowerWeb* 298 (McGraw-Hill 2001).

22. Rhode, *supra* n. 21, at 1345.

23. *Study Shows How and Why Firms Focus on Work-Family Balance*, *L. Off. Mgt. & Administration Rep.* 2 (Feb. 2000).

survey reports that “[g]iven no other choice, only half (51%) of attorneys would prefer a 10% increase in pay to a 10% reduction in work hours.”<sup>24</sup> To the extent that the legal workplace is modeled after the “traditional” post-war nuclear family, with father as primary breadwinner expected to work long hours outside the home, and mother as primary care-giver and domestic manager, mothers who are lawyers will be systematically disadvantaged. Accommodation for mothers’ care-giving responsibilities is not enough; employers must also respectfully accommodate care-giving by fathers. Until then, equality for women lawyers will remain an elusive goal.

### III. WE’VE COME A LONG WAY, BABY . . . SORT OF

#### A. *Progress Made*

Women lawyers have achieved varying degrees of success, nationwide and locally. They have been involved in professional activities for long enough that some have achieved significant leadership position in the organized bar. Two have been elected President of the American Bar Association. The late Mona Lambird served in 1996 as President of the OBA and Melissa DeLacerda is now President for 2003. Several women serve on the OBA Board of Governors.<sup>25</sup> Most, although not all, standing committees and sections of the OBA have women in some leadership roles. The same is true for other groups related to the bar.<sup>26</sup> Three female attorneys serve on Oklahoma’s Judicial Nomination Commission.<sup>27</sup>

As increased numbers of women matured and achieved professional success, some have taken the bench. In Oklahoma state courts, women and ethnic minorities are statistically better represented on the lower court bench than on the appellate level.<sup>28</sup> Since Justice Wilson’s death in 1999, Justice Yvonne Kauger is the sole woman on the Supreme Court. Judges Carol Hansen and Reta Strubhar serve on the Court of Civil Appeals and Court of Criminal Appeals, respectively. In a recent article, I analyzed state court judicial selection processes, including

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24. Gregory J. Mazares, *Associate Retention for Law Firms: What Are Your Lawyers Saying about You?* <[http://www.spherion.com/recruiting\\_pov\\_lawretention.jsp](http://www.spherion.com/recruiting_pov_lawretention.jsp)> (accessed Oct. 5, 2002).

25. See *Handbook for 2002 Oklahoma Bar Association Reference Guide*, 73 Okla. B. J. 225 (Jan. 26, 2002) (identifying elected bar leaders, tribunal members, section chairs, chairs and members of standing committees, county bar presidents, and heads of related groups). In 2002, the board had three female members. *Id.*

26. *Id.*

27. Okla. B. Assn., *Oklahoma Bar Association Reference Guide*, 74 Okla. B. J. 281, 373-74 (Jan. 25, 2003).

28. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. Tex. L. Rev. 1197, 1239-40 n. 244 (2000) (citing Letter from Janice P. Dreiling, 1999 Pres. of the Okla. Jud. Conf., to the membership (Nov. 8, 1999) (copy on file with author) (On the elected trial bench, of the seventy-one district judges, fifteen (21.13 percent) are women, four are African-American (5.63 percent); of the seventy-seven elected associate district judges, located in less populated areas, fifteen (19.48 percent) are women and none are ethnic minorities. Of the seventy-seven special district judges appointed by a presiding judge, fifteen (19.48 percent) are women, and two (2.6 percent) are ethnic minorities. On the Oklahoma appellate courts, three (12.5 percent) of the twenty-four judges are women; the first African-American man was named to sit on the Oklahoma Court of Civil Appeals in the year 2000.).

elections and appointment through the Judicial Nomination Commission and final selection by the governor.<sup>29</sup> Despite the many difficulties with elections, it presently appears that greater diversity on the Oklahoma state court bench is achieved through election than appointment.<sup>30</sup> Any local efforts to revise the selection process must address this issue.

The local federal bench has relatively more women judges than the Oklahoma state courts, but currently has only one judge who is an ethnic or racial minority.<sup>31</sup> While the federal appointment system presents many different issues than state court selection, some federal districts have been more inclusive in their appointments than others.

### B. Room for Improvement

The “glass ceiling” that limits women’s advancement into the upper echelons of the profession is especially evident in private firms.<sup>32</sup> Although nationally women now are about thirty percent of all lawyers, only about fifteen percent attain partnership or director status.<sup>33</sup> Deborah Rhode, a respected scholar in both legal ethics and gender, states, “[w]omen and minorities remain overrepresented at the bottom and underrepresented at the top of professional status and reward structures.”<sup>34</sup> Multiple factors are at work: work-family conflicts, stereotypes on areas of practice deemed suitable for women, differential perceptions of conduct,<sup>35</sup> shortage of mentoring and rainmaking opportunities, and various degrees of sexual harassment. Pay discrimination may also be involved. One recent study found that “[a]fter correcting for differences in hours worked, years of practice experience, type of practice, and other variables, . . .

29. Maute, *supra* n. 28, at 1239 n. 244.

30. *Id.*

31. Three (18.75 percent) of the sixteen judges on the Tenth Circuit Court of Appeals are women, including Chief Judge Deanell R. Tacha. Three (21.43 percent) of the fourteen federal district judges sitting in Oklahoma are women: Judge Claire Eagan from the Eastern District and Judges Robin J. Cauthron and Vicki Miles-LaGrange, both from the Western District. Judge Eagan is the first female federal district judge to serve in the Northern District. Three (27.27 percent) of the eleven federal magistrates in Oklahoma are women. One (1.67 percent) of the six local bankruptcy judges is a woman. Okla. B. Assn., *Oklahoma Legal Directory 2001*, at 25-27, 34-39 (Leg. Directories Publ. Co., Inc. 2001); *Judicial Choices: Let's Get the Show on the Road*, Tulsa World (Tulsa, Okla.) A11 (Feb. 12, 2001); Federal Judicial Center, *History of the Northern District* <[http://air.fjc.gov/history/judges\\_frm.html](http://air.fjc.gov/history/judges_frm.html)> (accessed Oct. 5, 2002). Since the resignation of Judge Michael Burrage, Judge Miles-LaGrange is the only federal judge in Oklahoma who is a racial or ethnic minority. *Id.*

32. ABA Commn. on Women in the Profession & Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession* 14 (ABA 2001) (available at <<http://www.abanet.org/ftp/pub/women/unfinishedagenda.pdf>>) (accessed Oct. 13, 2001) (women are about fifteen percent of federal judges, ten percent of law school deans, ten percent of general counsels, and five percent of managing partners of large firms); see generally Neumann, *supra* n. 7 (In legal education, women are similarly concentrated in lower ranks of untenured assistant or associate professors, instructors and administrative deans).

33. See *id.*

34. Rhode, *supra* n. 20, at 1348.

35. See ABA Commn., *supra* n. 33, at 15 (same attributes considered aggressive and effective in male lawyers, but abrasive in women).

women attorneys were still paid significantly less than men, for no apparent reason other than their gender.”<sup>36</sup>

Women and lawyers of color are in the paradoxical position of being either professionally invisible or obvious because they are visually different from white men, who historically have defined the standards for the legal profession. The few who reach the top may be held up as “success stories” to further the perception that equal opportunity has been substantially achieved, and thus avoid recognition that real barriers remain. Many others remain unnoticed for their professional accomplishments and untapped legal talent.<sup>37</sup> Rhode calls this the “‘no-problem’ problem.”<sup>38</sup> In Oklahoma and nationwide, it is still relatively common for continuing legal education programs and comparable high profile positions to reflect little of the diversity existing within the bar.<sup>39</sup> Because many lawyers regard speaking opportunities and other high visibility work as plum assignments that showcase their expertise and help generate new business, the failure to include accomplished women and minorities has tangible consequences.<sup>40</sup> It also communicates a subtle, but powerful, message to the audience about inclusion and exclusion and the extent to which a particular practice field values the contributions made by women and minorities. Lip service to diversity is not enough. Until such time that program organizers, as a matter of course, include women and minorities for such assignments, the bar needs to take an active leadership role in encouraging this to happen.

While women and minority lawyers may be overlooked or marginalized when it comes to professional opportunities, they may also be subject to closer scrutiny and not to benefit from the presumption of competence routinely given to lawyers who are white and male, and thus physically match the traditional image of lawyers. When not invisible, they may be noticed and receive comments about their physical attributes. Since 1982, sixty-five state and federal courts have studied issues of bias in the courts. The resulting task force reports show widely varying perceptions of bias: between two-thirds and three-fourths of women report experiencing bias, whereas only one-fourth to one-third of men report observing it.<sup>41</sup> Similar disparities in perception hold true for other forms of bias on the basis of race, disability, and sexual orientation.<sup>42</sup> Disrespectful treatment, devaluation of credibility, and use of stereotypical assumptions are mentioned most frequently. Almost three-fourths of women lawyers perceive that

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36. Kenneth G. Dau-Schmidt & Kaushik Mukhopadhyaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction across the Legal Profession*, 49 J. Leg. Educ. 342, 366 (1999).

37. See ABA Commn., *supra* n. 33, at 5; Rhode, *supra* n. 20; Rhode, *supra* n. 21.

38. Rhode, *supra* n. 20, at 1349.

39. *E.g. Summary of Actions of the Board of Governors*, 71 Okla. B. J. 3129, 3157 (Dec. 9, 2000) (Past OBA President Sanders recognized this issue, “urg[ing] the bar to continue its efforts to promote diversity that was not reflected in the panel members selected to speak on the topic at the plenary session” of the OBA 2000 annual meeting.).

40. *Id.*

41. See ABA Commn., *supra* n. 33, at 20.

42. *Id.*



harassment is a problem in their workplace.<sup>43</sup> Unfortunately, heightened sensitivity to issues of harassment has left many senior lawyers wary about mentoring women lawyers.

#### IV. CONCLUSION

Changing demographics, competitive economic pressures, and technological advancements together have transformed the practice of law. Lively debates address the relative costs and benefits of the profound changes. Certainly, the clock cannot be turned back. The legal profession has "special responsibility for the quality of justice."<sup>44</sup> The organized bar would do well to include issues of equality in its efforts to promote professionalism. Forthright self-assessment can be a catalyst for renewed commitment to equality, identifying benchmarks to measure progress, and formulating viable goals for the future.<sup>45</sup> Legal employers should evaluate whether formal or informal mechanisms work to systematically disadvantage lawyers who are women or minorities. The influx of women lawyers initially gave voice to concerns about family-work conflicts and having a balanced life outside the office. And yet, it is not a women's issue. As Georgia Chief Justice Robert Benham eloquently made the point in his recent Law Day speech, taking time to be a good parent, spouse or partner, and community member is also an issue of professionalism.<sup>46</sup>

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43. *Id.* at 19 ("The most recent surveys find that between about half to two-thirds of female lawyers, and a quarter to half of female court personnel, report experiencing or observing sexual harassment."); ABA Young Laws Div., *The State of the Legal Profession 1990*, at 67-69 (ABA 1991) (A 1990 study conducted by the ABA Young Lawyers' Division reported that eighty-five percent of women lawyers had experienced or observed some form of sexual harassment; among junior associates, the figure was one hundred percent. Despite gender-based differences in perceptions of harassment, the fact that seventy-eight percent of responding male lawyers also observed conduct they considered harassment indicates its pervasiveness.).

44. Okla. Stat. tit. 5, ch.1, app. 3-A Preamble: *A Lawyer's Responsibilities* (1988).

45. See generally ABA Commn., *supra* n. 33, at 33-37.

46. Robert Benham, C.J. Ga. App., Speech, *Oklahoma City Law Day Celebration* (Okla. City, Okla., May 1, 2001) (copy on file with *Oklahoma City Univ. Law Review*).