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Essays

THE PROGRESSION OF WOMEN IN THE LAW

RUTH BADER GINSBURG*

Justice Ginsburg has honored us with the privilege of printing a collection of her remarks and writings. The following series of passages demonstrates the progression of women in the law, from Justice Ginsburg's perspective, during the past twenty-three years. Women entering the legal profession today should be encouraged that she can describe this progress as "the exhilarating change I have had the good fortune to witness."¹

In the late 1960s and early 1970s, Ruth Bader Ginsburg paved the way for the Supreme Court to reconsider its analysis of sex discrimination and adopt an intermediate level of scrutiny for constitutional challenges to sex discrimination under the Equal Protection Clause.² As director of the ACLU's Women's Rights Project, then-Professor Ginsburg struggled to establish precedent that would ensure equal treatment by the government regardless of sex.³

In 1971, Professor Ginsburg published her remarks from that year's Association of American Law Schools Conference with the Valparaiso University Law Review, focusing on the status of women in law schools.⁴ She advocated for law schools to eliminate from textbooks and classrooms attempts at comic relief via stereotyped gender characterizations. Additionally, she supported the integration into the curriculum of materials on sex-based discrimination.⁵

In 1982, noting the increased numbers of women entering law schools, then-Judge Ginsburg of the United States Court of Appeals for the District of Columbia encouraged members of the legal profession not to stereotype women lawyers as social workers and "backstagers," out of the realm of the adversarial

* Associate Justice, United States Supreme Court.

1. Letter from Justice Ruth Bader Ginsburg to Lisa S. Meyer, Editor in Chief, *Valparaiso University Law Review* (Feb. 7, 1994).

2. Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 335 (1992).

3. *Id.* at 337.

4. Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480 (1971); *reprinted in infra* section II.

5. *Id.* at 481.

courtroom setting.⁶ At this time, Judge Ginsburg stated, "The brightest signal of the changed complexion of our profession is the appointment of Sandra Day O'Connor to the Supreme Court. Even on that highest court, I predict that within the decade women's place will no longer be singular."⁷

Her words were prophetic, and just over a decade later, President Clinton appointed Ruth Bader Ginsburg to serve on the United States Supreme Court. Indeed, the presence of women on the highest court in the land is no longer "singular." -Ed.⁸

I. 1993: HEARINGS ON THE NOMINATION OF RUTH BADER GINSBURG TO BE
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT*
UNITED STATES SENATE JUDICIARY COMMITTEE
JULY 20, 1993

. . . I have been deeply moved by the outpouring of good wishes received in recent weeks from family, neighbors, campmates, classmates, students at Rutgers and Columbia, law-teaching colleagues, lawyers with whom I have worked, judges across the country, and many women and men who do not know me. That huge, spirit lifting collection shows that for many of our people, an individual's sex is no longer remarkable, or even unusual, with regard to his or her qualifications to serve on the Supreme Court.

Indeed, in my lifetime, I expect to see three, four, and perhaps even more women on the High Court bench, women not shaped from the same mold, but of different complexions. Yes, there are still miles in front, but what a distance we have traveled from the day President Thomas Jefferson told his Secretary of State: "The appointment of women to [public] office is an innovation for which the public is not prepared. Nor [Jefferson added] am I."

The increasingly full use of the talent of all of this nation's people holds large promise for the future, but we could not have come to this point—and I surely would not be in this room today—without the determined efforts of men and women who kept dreams of equal citizenship alive in days when few would listen. People like Susan B. Anthony, Elizabeth Cady Stanton, and Harriet

6. Ruth Bader Ginsburg, *Women's Work: The Place of Women in Law Schools*, 32 J. LEGAL EDUC. 272, 274-75 (1982), reprinted in part in *infra* section I.

7. *Id.* at 273-74.

8. Justice Ginsburg has written prolifically on gender issues, as well as on many other legal subjects. For a complete listing of her publications, see *infra* section V.

* *Nomination of Ruth Bader Ginsburg to be Associate Justice of the United States Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1993) (statement of Ruth Bader Ginsburg).

Tubman come to mind. I stand on the shoulders of those brave people. . . .

II. 1971: TREATMENT OF WOMEN BY THE LAW: AWAKENING CONSCIOUSNESS IN THE LAW SCHOOLS*

INTRODUCTION

The question of sex roles in contemporary society is rapidly gaining recognition as an appropriate focus of academic attention in university undergraduate and graduate programs.¹ For the law schools, Leo Kanowitz's pioneering study, *Women and the Law*,² indicated the need and potential for courses and seminars devoted to a fresh and concentrated examination of sex-based discrimination. Within the past two years, electives have appeared in the programs of a few law schools responding to increasing demands for advertence to the role of the law in delineating the status of women. These courses develop two themes: the part law has played in assisting society to "protect" women (and keep them in their place) and the stimulus law might provide in the evolution of society toward equality and independence for the still submissive sex.³

Law schools have not kept pace with developments in the university world generally. Although offerings relating to sex roles in our society have been instituted in dozens of universities and colleges, at the end of 1970 less than ten law schools offered electives in this field. But efforts now underway to publish teaching materials for use in Women and the Law survey courses⁴ may result

* This article is based on remarks made by Ruth Bader Ginsburg as a participant in a panel discussion on treatment of women by the law presented at the annual meeting of the Association of American Law Schools on December 27, 1970, and is reprinted from 5 VAL. U. L. REV. 480 (1971) with the permission of the author. At the time this article was written, Justice Ginsburg was a professor at Rutgers (Newark) Law School.

1. See SHELIA TOBIA, *FEMALE STUDIES I* (KNOW, Inc. 1970) (college syllabi and reading lists in social and behavioral sciences); FLORENCE HOWE, *FEMALE STUDIES II* (KNOW, Inc. 1970) (college syllabi and reading lists in literature and fine arts).

2. LEO KANOWITZ, *WOMEN AND THE LAW* (1969).

3. Cf. Faith A. Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970). The eventual goal which law should serve has been aptly described as "the emancipation of man." See Address by Swedish Prime Minister Olof Palme, Women's National Democratic Club, June 8, 1970.

4. Faculty and students involved in Women and the Law programs at the law schools of Yale, Georgetown, George Washington, and New York University are currently engaged in the development of survey course materials. Professor Leo Kanowitz of the University of New Mexico Law School and Professor Kenneth M. Davidson of the State University of New York at Buffalo teach and continue to develop materials for survey courses on sex-based discrimination. A Women's Rights Law Reporter, edited by Ann Marie Boylan, is scheduled for publication every other month commencing in February, 1971.

in a significant increase in the number of schools with offerings in this area.

Inclusion of an elective course or seminar on Women and the Law (or sex-based discrimination), important as that development is, should not acquit the law school of academic responsibility, a sincere commitment to develop in law students sensitivity to the important social movement for the reexamination of traditional sex roles requires more extensive effort. Enrollment in elective Women and the Law courses will account for a relatively small percent of the student body, and, at least initially, female enrollees will no doubt comprise a majority. To raise consciousness in the law school community generally, the good will and effort of teachers of standard curricular offerings is required. Two jobs merit immediate attention: 1) the elimination from law school texts and classroom presentations of attempts at comic relief via stereotyped characterizations of women; 2) the infusion into standard curricular offerings of material on sex-based discrimination. The second is the major assignment; the first is already underway as a result of sensitivity training given to law school professors by the increasing number of female students attending their classes and reading their materials.⁵

ELIMINATION OF STEREOTYPES

Two examples should suffice to illustrate obsolescence of the kind of humor in vogue when legal education was a male preserve.⁶ A well-known first year property casebook, published in 1968,⁷ noting common law and modern solutions to the hiatus problem that can arise in connection with a life estate per autre vie, makes this parenthetical comment: “[F]or, after all, land, like woman, was meant to be possessed”⁸ Indicative of the change that two years has wrought, a current collaborator of the author of that 1968 text reports this 1970 experience:

In preparing a casebook on Land Transfer and Finance soon to be published, I worked up a set of mimeographed materials to try out on a seminar. One of the topics treated was real estate brokerage and one of the questions there involved (which has puzzled many writers and

5. See preliminary statistical compilation of responses to a questionnaire sent to law school deans by the Association of American Law Schools Special Committee on Women in Legal Education, December 22, 1970 (indicating an overall increase in the percentage of women entering law schools during the period 1966-1970 from 4.30% to 7.82% and 25 of 76 responding schools with 10% or more female enrollment in 1970-71).

6. One member of the Association of American Law Schools, Washington and Lee University Law School, remains an all-male institution accepting no women students. *In 1972, Washington and Lee began admitting women as law students.* —Ed.

7. CURTIS J. BERGER, *LAND OWNERSHIP AND USE* (1968).

8. *Id.* at 139.

lawyers) was, "How come there's so much litigation involving brokers?" After presenting some miscellaneous material bearing on this question, I concluded the topic in my own words, thus, "In forming your own theory as to why there is so much litigation, it may be useful to note that 40% of all real estate brokers are women." When this material was distributed, it was suggested to me by several women students who used it that the conjecture indicated a certain bias on my part. (The author had not checked for correlations with religious affiliation, national origin, height or hair color.) Not wishing to wound, and deciding that the remark was pretty elephantine humor in any event, I deleted it.⁹

"Elephantine humor" of this nature is probably less frequent than inadvertent disregard of matters of important concern to women. For example, a colleague engaged several months ago in the preparation of an article concerning compensatory treatment for blacks made the comment that "few would bother to argue that special protective legislation for women workers not extended to males is unconstitutional."¹⁰ At the time this comment was written, several women had already appealed to the courts to spare them from such "compensatory and preferential treatment,"¹¹ and Professor Kanowitz had persuasively challenged its constitutionality.¹² But change is in the wind, and perhaps before long we may even see a response to a comment made forty years ago concerning judicial discourse on that paragon, the reasonable man: "In all that mass of authorities which bears upon this branch of the law, there is no single mention of the reasonable woman."¹³

CURRICULUM CHANGES

Turning to the more serious problem of new infusions into existing offerings, a sideglance at developments in other areas of law school attention is

9. See ALLAN AXELROD ET AL., *CASES ON LAND TRANSFER AND FINANCE* (1971). The report presented in the text was made by Professor Allan Axelrod of Rutgers (Newark) Law School who now possesses a keen sensitivity on questions of sex-based discrimination.

10. Frank Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65, 74 (1970). Prior to publication, this qualifying footnote remark was added: "Though it is questionable whether such legislation is in fact preferential, the courts have never had any difficulty justifying such 'preferences' under the 14th amendment." *Id.* n.32. *But cf.* Mengelkoch v. Industrial Welfare Comm'n, 437 F.2d 563 (9th Cir. 1971).

11. See Seidenberg, *supra* note 3, at 265-68.

12. KANOWITZ, *supra* note 2, at 179-82; *cf.* Remarks by Leo Kanowitz on the Equal Rights Amendment, 116 CONG. REC. S15274 (daily ed. Sept. 14, 1970).

13. A.P. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 16 (1930), *quoted in* WILLIAM PROSSER, *TORTS* 154 (3d ed. 1964) and CHARLES O. GREGORY & HARRY KALVEN, *CASES AND MATERIALS ON TORTS* 101 (2d ed. 1969).

useful. Poverty law courses are a relative newcomer on the law school scene. Initially, elective survey courses began to appear in law school catalogues. Lately, the effort is not confined to improvement of survey courses but has expanded to the reshaping of materials in traditional offerings to encompass legal problems of particular concern to economically disadvantaged people.¹⁴

Also instructive is the attitude and approach of scholars concerned with the teaching of comparative law. Relatively few students are exposed to the special elective courses, but horizons have been broadened via references in basic course materials to practices and problem solutions abroad.¹⁵

A look at outlines, reading assignments and bibliographies in Women and the Law survey courses would suggest several possibilities to teachers of traditional offerings. Reflections of the dependent, submissive role envisioned for women by the dominant sex¹⁶ can be found in such diverse areas as Constitutional Law, Criminal Law, Property, Labor Law, Family Law and Taxation. A few random illustrations will be noted here.

14. See, e.g., HERBERT SEMMEL, SOCIAL JUSTICE THROUGH LAW: NEW APPROACHES IN THE LAW OF CIVIL PROCEDURE (1970); MARION W. BENFIELD, SOCIAL JUSTICE THROUGH LAW: NEW APPROACHES IN THE LAW OF CONTRACTS (1970); S. PLAGER, SOCIAL JUSTICE THROUGH LAW: NEW APPROACHES IN THE LAW OF PROPERTY (1970).

The status of women should figure importantly in presentations concerning problems of the economically disadvantaged, for almost two-thirds of the nation's adult poor are women. See PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 24 (1970). Cf. *id.* at 21:

Without any question, the growing number of families on Aid to Families with Dependent Children is related to the increase in unemployed young women. For many . . . the inability to find a job means . . . having a child to get on welfare. Potential husbands do not earn enough to support an unemployed wife.

The stability of the low-income family depends as much on training women for employment as it does on training men

The task force expects welfare rolls will continue to rise unless society takes more seriously the need of disadvantaged girls and young women.

Women are plaintiffs in many of the leading cases dealing with problems of the non-affluent. E.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of new residents to welfare); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wage garnishment).

15. See, e.g., MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE (2d ed. 1970).

16. Even in decisions responding affirmatively to women's claims for equal treatment, traditional attitudes concerning woman's ordinary function are apparent. See *Montgomery v. Stephens*, 359 Mich. 33, 101 N.W.2d 227 (1960).

[I]n today's society the wife's position is analogous to that of a partner Her duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort and warmth of the home, she puts her arm and shoulder to the plow.

Id. at 48-49, 101 N.W.2d at 234.

Constitutional Law is probably the most conspicuous area in which treatment of women by the law has been overlooked in the law schools. Standard casebooks deal with problems of classification and discrimination relating principally to race, but also to alienage, condition of birth, and economic situation. Two cases involving women are generally reported or extracted in historical context but not from the perspective at which contemporary feminists view them. *Muller v. Oregon*,¹⁷ upholding state legislation limiting working hours for women after the Supreme Court had rejected a state attempt at hours limitation applicable to both sexes,¹⁸ is noted as one of a series marking the Supreme Court's retreat from substantive due process limitation on state economic regulation and as the occasion of the initiation of the Brandeis brief.¹⁹ *Goesaert v. Cleary*,²⁰ upholding a statute which kept bar ownership a male monopoly, is noted in the context of traditional equal protection standards and state restrictions on a business entry.²¹ Not even a note suggests the relationship of these decisions to the current controversy surrounding equal rights for women. Indeed, the proposed Equal Rights Amendment,²² although it has been in the congressional hopper for decades, is not mentioned.

It would be unthinkable to omit *Brown v. Board of Education*²³ from a contemporary Constitutional Law course. Yet none of the texts, and probably few class discussions, treat related issues currently pressed before federal courts: May a state operated institution, consistent with the fourteenth amendment, deny women educational opportunities afforded to men; and further, is *Plessy v. Ferguson*²⁴ a viable doctrine with respect to sex segregation?²⁵

17. 208 U.S. 412 (1908).

18. *Lochner v. New York*, 198 U.S. 45 (1905).

19. EDWARD L. BARRETT ET AL., CONSTITUTIONAL LAW 670-71 (3d ed. 1968); PAUL A. FREUND ET AL., CONSTITUTIONAL LAW 1621 (3d ed. 1967); GERALD GUNTHER & NOEL T. DOWLING, CONSTITUTIONAL LAW 963-64 (8th ed. 1970); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 494 (2d ed. 1967).

20. 335 U.S. 464 (1948). *But cf. infra* notes 43-48 and accompanying text.

21. FREUND ET AL., *supra* note 19, at 1082; GUNTHER & DOWLING, *supra* note 19, at 995.

22. "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." See Remarks by Professor Leo Kanowitz on the Equal Rights Amendment, 116 CONG. REC. S15274 (daily ed. Sept. 14, 1970).

23. 374 U.S. 483 (1954).

24. 136 U.S. 537 (1896).

25. See *Kirstein v. University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (exclusion of women from educational opportunities afforded to men by a state institution held inconsonant with equal protection clause of fourteenth amendment); Note, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296 (1970). *But see Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) (three-judge court) (females-only admission policy for state supported college does not violate male students' right to equal protection where no showing was made of any feature rendering an all-female facility more advantageous educationally than state supported institutions to which males are admitted); Herbert Wechsler, *Toward Neutral Principles*

In the area of taxation, law school faculties direct hiring committees to search for teachers interested in "policy" questions as well as analysis of the intricate chess game playable under the Internal Revenue Code. How many introductory courses, however, acquaint students with the deliberate and significant disincentive current tax law presents to the woman who contemplates combining a career with marriage and a family? If her earnings approach those of her husband, the Code counsels divorce, for the couple will retain more if they live together without benefit of a marriage license.²⁶ And if a father or mother goes off to work, as a divorcee he or she may be entitled to a child care deduction regardless of income. For a married pair, both working, however, the deduction is available only if joint adjusted gross income of the couple remains close to the subsistence level.²⁷

The tax teacher interested in "policy" might well contrast in this area the approach taken by Sweden in its recent reform. The Swedish system resembled the system in effect in the United States; by relating a wife's income to her husband's, it discouraged wives from working. The new system introduces individual taxation; every person, married or not, is taxed on earned income separately and under a uniformly applicable graduated rate schedule.²⁸ And for those who see an impediment in this country because some of our states have a community property system, the Swedish answer is enlightening. That nation retains the institution of a community severed upon termination of marriage,²⁹ but for income tax purposes, a concept basic in other areas of our own tax law is applied—income is taxed to the one who earns it.³⁰

In Conflict of Laws, issues relating to the status of women appear in

of *Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) ("Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male?")

26. See Britt Richards, *Single v. Married Income Tax Returns Under the Tax Reform Act of 1969*, 48 TAXES 301 (1970).

27. INT. REV. CODE of 1954, § 214. See also PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, *supra* note 14.

Under present law a husband-wife family benefit from the deduction only if their income does not exceed \$6,600 with one dependent or \$6,900 with two or more dependents . . . There is no income limitation on the single head of a household (single women, widow, widower, divorced person), and there seems to be no good reason for limiting the deduction to low-income husband-wife families.

Id. at 15.

28. An explanation of the purposes of the reform appears in the English language publication, SWEDEN NOW, April, 1970, at 5-6. To avoid harsh effects on families long accustomed to the former system, transition period provisions have been made. See Address by Palme, *supra* note 3.

29. See Howard S. Sussman, *Spouses and Their Property Under Swedish Law*, 12 AM. J. COMP. L. 553 (1963).

30. Lucas v. Earl, 281 U.S. 111 (1930).

diverse contexts; sometimes they appear saliently, as in the cases concerning married women's contracts. In other instances, they are less conspicuous. For example, casebooks currently in use report or note a 1967 decision of the Oregon Supreme Court³¹ as illustrative of a "true conflicts" case. The court wrestled with the problem of whether to apply forum law, allowing a forum wife to collect for loss of consortium, or the law of the place of injury which allowed such recovery to a husband and not a wife. Oregon took a "restrained," if not "enlightened," view and deferred to the law of the state where the accident occurred. The court barely considered the possibility of a "no conflict" solution; if the sister state law, recognizing a right in the husband but not in the wife, had been put to the rational classification test of the fourteenth amendment's equal protection clause, the higher authority of the Constitution should have resolved the conflict.³² Sauce for the gander should serve as sauce for the goose as well.

Developing environmental courses inevitably must deal with the problem of population increase; in that context controversial questions surrounding birth control and abortion cannot be ignored.³³ Additionally, in the clinical enterprises now so much in the limelight, sex equality and women's rights cases could be added to the docket. A few examples of cases in which student assistance has been sought at Rutgers are illustrative. A bachelor, qualified in all other respects for the \$600 dependent care deduction provided by section 214(a) of the Internal Revenue Code, is disallowed that deduction solely on the ground of his status as a single man who has never been married. Concededly, the deduction he sought for the care of his incapacitated dependent mother would have been available had the taxpayer been a single woman, or a widowed or divorced person of either sex.³⁴ A woman honorably discharged from the army due to pregnancy seeks to reenlist. Although she is childless at the time of her reenlistment application, the army regulations tell her that her past pregnancy constitutes a "nonwaivable moral and administrative disqualification"

31. *Casey v. Manson Constr. & Eng'r Co.*, 247 Ore. 274, 428 P.2d 898 (1967).

32. *Compare Casey v. Manson Constr. & Eng'r Co.*, 247 Ore. 274, 289 n.7, 428 P.2d 898, 906 n.7 (1967), with *Owen v. Illinois Baking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305, 312 (1968). *Contra Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968), cert. denied, 393 U.S. 1066 (1969).

33. *See, e.g., State v. Munson* (Cir. Ct. S.D., filed April 7, 1970), reported in 15 S.D.L. REV. 332 (1970), posing, rhetorically, these questions: "Are the interests of society being served by women bearing unwanted children, subject to the pressures of an emotionally and financially deprived existence? Are the interests of society being served by the population explosion we are now witnessing?" *Id.* at 333. *See also Defusing the Population Bomb*, TRIAL, Aug.-Sept., 1970, at 10-11, 13-16.

34. *Charles E. Moritz*, 55 T.C. No. 14 (Oct. 22, 1970).

to reentry.³⁵ No such disqualification exists for the man who bore equal responsibility for the pregnancy. A teacher wishes to challenge a school board requirement that she leave in the fifth month of pregnancy, although her doctor affirms that her physical and mental capacities to teach remain unaffected by her pregnancy.³⁶ Women seeking employment in fields for which they are qualified find that, despite Title VII,³⁷ employers continue to advertise in "help wanted-male" columns. If newspapers that maintain such columns are not subject to the law, as a federal district court has ruled,³⁸ are other enforcement possibilities "with clout" available?³⁹ Women seek admission to an all-male college operated by a state university; if turned down, they wish to seek relief in the courts.⁴⁰

CONCLUSION

Law schools can contribute significantly to the awakening process essential to shorten the distance between women and equal opportunity. At this juncture, with increasing female enrollment and a start toward academic attention to sex-based discrimination, law schools are approaching a mid-passage state. Lawyers and judges whose sensitivity has been developed in the law schools should be incapable of the kind of reaction still prevalent in some judicial arenas. For example, in a 1970 decision,⁴¹ a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemptions for women; as a result of these exemptions, women constituted less than twenty percent of the available jury pool. In his published opinion, the judge advised the complainant

35. Army Reg. 601-280, Table 2-4, line AE, March 16, 1970. The Army ultimately waived the "nonwaivable" regulation for the particular case and, in common with other branches of the armed forces, is currently reviewing its positions relating to pregnancy, parenthood and dependents of women in the service.

36. See CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, STATEMENT OF PRINCIPLES (Oct. 29, 1970) (job-related maternity benefits).

37. Civil Rights Act of 1964, §§ 702-16, 42 U.S.C. §§ 2000e et seq. (1964).

38. *Brush v. San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal. 1970).

39. Notice might be given to the Commissioner of the Internal Revenue Service concerning employers and agencies who advertise in sex segregated columns when sex does not constitute a bona fide occupational qualification; it is highly questionable whether business expense deductions should be allowed for these illegal expenses. Cf. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958).

40. Cf. *Kirstein v. University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court).

41. *De Kosenko v. Brandt*, 63 Misc. 2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970). Cf. *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635 (1970), *prob. juris. noted*, 91 S. Ct. 917 (1971) (statute requiring that males must be preferred to females related in the same degree for appointment as administrators of a decedent's estate held consonant with the equal protection clause of the fourteenth amendment). In 1971, the United States Supreme Court decided *Reed v. Reed*, 404 U.S. 71 (1971), and found that a statute preferring men as executors of estates was inconsistent with the Equal Protection Clause. —Ed.

that she was "in the wrong forum." In his view, "[h]er lament should be addressed to the 'Nineteenth Amendment State of Womanhood' which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems"42

A more hopeful model for the future was set recently by the New Jersey Supreme Court.⁴³ Despite the contrary 1948 United States Supreme Court precedent,⁴⁴ a local ordinance denying women the right to tavern employment behind the bar was declared invalid. Significantly, the plaintiffs were a male tavern owner who wished the freedom to select a woman bartender and an association of tavern owners.⁴⁵ The New Jersey Supreme Court was not prepared to overrule the ultimate tribunal on constitutional questions⁴⁶ but did consider itself in full control of the exercise of police power within New Jersey. It ruled that in light of current customs and mores, "the municipal restriction against female bartending may no longer fairly be viewed as a necessary and reasonable exercise of the police power."⁴⁷ In the 1970s, thought and energy directed toward the unfinished business of equality for women should yield general application of the New Jersey pronouncement concerning the issue before it: the law may not tolerate blanket exclusions grounded solely on sex.⁴⁸ So be it!

42. 63 Misc. 2d at 898, 313 N.Y.S.2d at 830. *Compare id.* at 829 ("What woman would want to expose herself to the peering eyes of women only?") with *Diaz v. Pan American World Airways*, 311 F. Supp. 559, 565-67 (S.D. Fla. 1970) ("women passengers might consider personal overtures by male attendants as intrusive and inappropriate, while at the same time welcoming the attentions and conversation of another woman.").

43. *Paterson Tavern & Grill Owners Ass'n, Inc. v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1948).

44. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

45. *Cf. Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970) (hours restrictions imposed upon women by the Illinois Female Employment Act declared inconsistent with Title VII of the federal Civil Rights Act of 1964; plaintiffs were employers who contended that the state "protective" legislation prevented them from promoting or assigning female employees to jobs requiring overtime).

46. *But cf. Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970) (tavern's limitation of patronage to men violates equal protection clause of fourteenth amendment).

47. 57 N.J. at 186, 270 A.2d at 631.

48. *Id.* at 189, 270 A.2d at 633. *Cf. Mengelkoch v. Industrial Welfare Comm'n*, 437 F.2d 563 (9th Cir. 1971) (female employee's equal protection challenge to state law limiting hours women can work presents substantial constitutional question requiring decision by a three-judge federal court).

III. 1982: WOMEN'S WORK: THE PLACE OF WOMEN
IN LAW SCHOOLS*

For seventeen years of my life in the law, I served as a law teacher. When I started in the law-teaching business in 1963, few women appeared on my seating charts, perhaps 5 or 6 in a class of over 100. By 1980, across the country, women comprised over one-third of total law-school enrollment, up from 3.6 percent in 1963 and 9.5 percent in 1971.¹ In more than a few law schools today, fifty percent or more of the students are women. It is an appropriate time to indulge in a few memories of things past and to express the exhilaration I feel about the alterations that have occurred.

A matching change is in sight on the other side of the podium. The change was documented a year ago in an American Bar Foundation report.² In 1950, in all ABA-accredited law schools, 5 women were engaged as full-time tenure-track teachers.³ Literally, women who worked as law teachers could be counted on the fingers of one hand. When the women numbered 5, the male count was over 1200. By 1967, when women neared 4 percent of all lawyers, they were only 1.7 percent of all tenure-track law teachers.⁴ A dozen years later, in 1979, the 1.7 percent had increased to 15 percent and the numbers, from 39 in 1967 to 516 on the verge of the 1980s.⁵ . . .

. . . The brightest signal of the changed complexion of our profession is the appointment of Sandra Day O'Connor to the Supreme Court. Even on that highest court, I predict that within the decade women's place will no longer be singular.

With women at the bar (and even on the bench) no longer curiosities, bar associations, law schools, law firms, and other organizations are beginning to consider the question, does that development have any ramifications for our operations? Is women's participation in the legal profession in numbers affecting the way law business is conducted? It may be too soon for definitive answers. Early conjecture, I think, was short-sighted.

* *Women's Work: The Place of Women in Law Schools*, by Ruth Bader Ginsburg, is reprinted from 32 J. LEGAL EDUC. 272 (1982). Copyright © 1982 by Association of American Law Schools. Reproduced with the permission of the author and publisher. At the time this article was written, Justice Ginsburg was a judge for the United States Court of Appeals for the District of Columbia.

1. See ABA Section on Legal Education and Admissions to the Bar, *Law Schools and Bar Admission Requirements: A Review of Legal Education in the United States (1980-1981)*.

2. Donna Fossum, *Women Law Professors*, 1980 A.B.F. RESEARCH J. 903.

3. *Id.* at 905.

4. *Id.*

5. *Id.* at 914.

My first encounter with the question—what will women's participation mean?—occurred at the Association of American Law Schools' Annual Meeting in 1971. Conversation was stimulated by the prediction that a law school populated by as many women as men was not very far down the road. One of the participants in the discussion, after a moment of apparent insecurity, smiled, confident again as law professors often are, and said with assurance, business would go on as usual, nothing significant would change. What were women lawyers after all? Simply soft men.

A colleague added the following view. Women lawyers come in two varieties. First, there are the social workers, the ones that devote themselves to the poor and the oppressed, the truly needy. That type was not cause for concern. The social workers do not figure at all in the real world of legal business, the professor said. Second, there are the backstagers, women who would find congenial work in drafting wills and contracts, and research and brief writing. The rough-and-tumble, knock-down-drag-out adversary confrontations would continue, as always, he concluded, with hard men center stage.

As I see it, the social-worker stereotype of women earning law degrees in the 1950s and 1960s does hold up to this extent: many of those women are sympathetic to and active in humanitarian causes. But so are many men who have experienced discrimination or sensed the injustice of subordinate status, assigned without regard to one's ability or individual potential to achieve.

I would like to close by borrowing some lines from sociologist Cynthia Fuchs Epstein's book just off the press, titled *Women in Law*.⁶ Professor Epstein documents how women have succeeded in making their way into law schools and the legal profession, despite the fact that they were not wanted. That women lawyers have done well, Professor Epstein concludes, is not surprising to any but the prejudiced. She predicts, and I share her view, that not only will women at the bar continue to do well, they will do so with a certain idealism and humanity, simply because those qualities are expected from them. But Professor Epstein urges, and again I agree, that society not assign to women, simply because they are women, the role of guardian of social consciousness. Humane concern, she writes, ought not be labeled "women's work"; it should be the work of all. And law schools, as I see it, have an important role in encouraging students to pursue that concern throughout their careers at the bar.

6. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1981).

IV. 1993: INVESTITURE OF UNITED STATES SUPREME COURT
JUSTICE RUTH BADER GINSBURG*
THE WHITE HOUSE
AUGUST 10, 1993

Not yet two months ago, President Clinton announced his intention to nominate me as Associate Justice of the Supreme Court of the United States. I said then that, if confirmed, I would try in every way to justify his faith in me. I renew that pledge this afternoon, in the presence of people I hold dear—my family, colleagues, co-workers, and treasured friends. . . .

This weekend I attended a celebration of women lawyers in New York. The keynote speaker was our grand Attorney General, Janet Reno. It may have been the best attended event; it surely was the most remarkable celebration at the American Bar Association's Annual Meeting. Awards were made in the name of Margaret Brent, a great lady of the mid-1600s, celebrated as first woman lawyer in America. Her position as a woman, yet a possessor of power, so confused her contemporaries that she was sometimes named in court records, not as Mistress Margaret Brent, but as Gentleman Margaret Brent.

Times are changing. The President made that clear by appointing me, and just last week naming five other women to Article III courts. Six of his total of fourteen federal bench nominees thus far are women.

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.

I was impressed by the description of women at the bar by one of the 1993 Margaret Brent prize recipients, Esther Rothstein, an attorney in private practice in Chicago. Esther said she found women attorneys to be tough yet tender, wanting to win but not vindictive, cautiously optimistic with the sense to settle

* Statement of Ruth Bader Ginsburg (Aug. 10, 1993) (on file with the *Valparaiso University Law Review*).

for victories that do not leave one's opponent bloodied and bowed, willing to be a link in a chain that is strong, yet pliable.

In my lifetime, I expect, there will be among federal judicial nominees, based on the excellence of their qualifications, as many sisters- as brothers-in-law. That prospect is indeed cause for hope, and its realization will be cause for celebration.

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