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Remarks on Women's Progress at the Bar and on the Bench

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ADDRESS

REMARKS ON WOMEN'S PROGRESS AT THE BAR AND ON THE BENCH†

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In my growing-up years, men of the bench and bar generally held what the French call an *idée fixe*: the unyielding conviction that women and lawyering, no less judging, do not mix. It ain't necessarily so, ancient texts reveal.

In Greek mythology, Pallas Athena was celebrated as the goddess of reason and justice.[1] To end the cycle of violence that began with Agamemnon's sacrifice of his daughter, Iphigenia, Athena created a court of justice to try Orestes, thereby installing the rule of law in lieu of the reign of vengeance.[2]

Recall also the Biblical Deborah (from the Book of Judges).[3] She was at the same time prophet, judge, and military leader. This triple-headed authority was exercised by only two other Israelites, both men: Moses and Samuel. People came from far and wide to seek Deborah's judgments. According to the rabbis, Deborah was independently wealthy; thus she could afford to work pro bono.[4]

The U.S. legal establishment, even if its members knew of Athena and Deborah, for too long resisted admitting women into its ranks. It was only in 1869 that Iowa's Arabella Mansfield became the first female to gain admission to the practice of law in this country.[5] That same year, the St. Louis Law School became the first in the nation to open its doors to women.[6]

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1 *See, e.g.*, ROBERT E. BELL, DICTIONARY OF CLASSICAL MYTHOLOGY 147 (1982); EDITH HAMILTON, MYTHOLOGY 29–30 (1942).

2 *See* AESCHYLUS, EUMENIDES (A.J. Podlecki ed. & trans., 1989).

3 *Judges* 4.

4 *See, e.g.*, Pnina Navè Levinson, *Deborah — A Political Myth*, *at* http://www.bet-debora.de/2001/jewish-family/levinson.htm.

5 CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 49 (1981).

6 *Id.*

Lemma Barkaloo, among the first women to attend St. Louis, earlier had been turned away by my own alma mater, Columbia. In 1890, when Columbia denied admission to three more female applicants, a member of the University's Board of Trustees is reported to have said: "No woman shall degrade herself by practicing law in New York especially if I can save her. . . . [T]he clack of these possible Portias will never be heard in [our University's] Moot Court."[7] That board member surely lacked Deborah's prophetic powers.

Once granted admission to law schools, women were not greeted by their teachers and classmates with open arms and undiluted zeal. An example from the University of Pennsylvania Law School: In 1911, the student body held a vote on a widely supported resolution to compel members of the freshman class to grow mustaches. A twenty-five cents per week penalty was to be imposed on each student who failed to show substantial progress in his growth. Thanks to the eleventh-hour plea of a student who remembered the lone woman in the class, the resolution was defeated, but only after a heated debate.[8]

The bar's reluctance to admit women into the club played out in several inglorious cases. In denying Myra Bradwell admission to the bar, the Illinois Supreme Court observed in 1869 that, as a married woman, Bradwell would not be bound by contracts she made.[9] The Illinois court thought it instructive, too, that female attorneys were unknown in the mother country. Concerning English practice, Bradwell wrote:

> According to our . . . English brothers it would be cruel to allow a woman to "embark upon the rough and troubled sea of actual legal practice," but not [beyond the pale] to allow her to govern all England with Canada and other dependencies thrown in. Our brothers will get used to it and then it will not seem any worse to them to have women practicing in the courts than it does now to have a queen rule over them.[10]

In 1875, when Lavinia Goodell of Wisconsin was denied admission to her State's bar, a justice of the Wisconsin Supreme Court remarked: "It would be revolting to all female sense of . . . innocence . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice . . . ."[11] An enlightened local newspaper commented in an editorial: "If her purity is in danger, it would be better to reconstruct the court and the bar,

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7 *Id.*

8 AUDREY C. TALLEY ET AL., MILESTONES FOR WOMEN ATTORNEYS 12 (1993).

9 *In re* Bradwell, 55 Ill. 535 (1869); *see* WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK 46 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996).

10 Myra Bradwell, *Women Lawyers*, CHI. LEGAL NEWS, June 19, 1880, at 857.

11 *In re* Goodell, 39 Wis. 232 (1875).

than to exclude the women."[12] Goodell persevered. Wisconsin's legislature trumped the State's high court and, in 1879, Goodell became a member of the state bar.[13]

As late as 1968, however, the law remained largely a male preserve, as textbooks and teachers confirmed. A widely adopted first year property casebook published that year, for example, made this parenthetical comment: "[F]or, after all, land, like woman, was meant to be possessed . . . ."[14]

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. One distinguished law professor commented at a 1971 Association of American Law Schools meeting, when colleagues expressed misgivings about the rising enrollment of women that coincided with the call up of men for Vietnam War service: "Not to worry," he said. "What were women law students after all, only soft men."[15]

The critical mass achieved in the 1970s contrasts with the impermanent jump in women's enrollment in law school during World War II. In that earlier era, the president of Harvard was reportedly asked how the Law School was faring during the World War: "[It's] [n]ot as bad as we thought," he replied. "We have 75 students, and we haven't had to admit any women."[16] (Compare the concern said to have been expressed by the same University's head in Vietnam War days: "We shall be left with the blind, the lame, and the women."[17])

Why did law schools wait so long before putting out a welcome mat for women? Arguments ranged from the anticipation that women would not put their law degrees to the same full use as men, to the "potty problem"—the absence of adequate bathrooms for women.[18]

Despite the chill air, the depressing signs conveying, "No woman wanted here," female lawyers would not be put down. In the early 1960s, women accounted for about three percent of the nation's law-

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12 JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL 148 (1993).

13 *Id.* at 149.

14 CURTIS J. BERGER, LAND OWNERSHIP AND USE 139 (1968).

15 *See* Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 15 (1997); Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161, 1173 (1994).

16 Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 8 (1991).

17 *See* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 207 (2002) (quoting Ruth Bader Ginsburg, Keynote Address at Hawaii ACLU Conference on Women's Legal Rights (Mar. 16–17, 1978)); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1751 (1991).

18 *See, e.g.*, Deborah L. Rhode, *Beyond Just Potty Parity*, NAT'L L.J., July 28, 2003, at 35, 45.

yers.[19] Today, their ranks have increased tenfold, to thirty percent of the U.S. bar.[20]

In the law schools, women filled between three percent and four-and-a-half percent of the seats each academic year from 1947 until 1967.[21] Today, women are more than fifty percent of the entering law school population, and forty-one percent of the new associates engaged by large law firms.[22]

Progress is evident behind the podium, too. In 1919, Barbara Nachtrieb Armstrong was appointed to the Berkeley (Boalt Hall) law faculty.[23] Made an assistant professor in 1923, Armstrong was the first woman ever to gain a tenure-track post at an American Bar Association (ABA)-approved law school.[24] Over two decades later, in 1945, only two other women had made their way to the tenure-track at AALS-member schools.[25] When I was appointed to the Rutgers faculty in 1963, women headed for tenure at AALS schools still numbered under a score.[26] But by 1990, more than twenty percent of law professors were women.[27] Today, women are twenty-three percent of the full professors with tenure,[28] and more than thirty-two percent of law faculty members overall.[29]

Strides in law practice are similarly marked. In all but three states, a woman has served as president of the state bar association. To date, over 130 women have headed state associations. Eight women are currently state bar presidents. Two women have served as president of the ABA in the decade just passed. Notably, a woman chaired the House of Delegates under each female ABA president.[30]

Women began to show up on the bench in the twentieth century's middle years. In a prior essay,[31] I wrote in praise of three door openers at the federal level: Florence Ellinwood Allen, appointed to

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19 DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 13 (2001).

20 *Id.*

21 AM. BAR ASS'N, STATISTICS, ABA SECTION ON LEGAL EDUCATION (on file with author); *see also* Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 KAN. L. REV. 733, 736 (2001).

22 AM. BAR ASS'N, *supra* note 21; Epstein, *supra* note 21, at 736–37.

23 Kay, *supra* note 16, at 5–6.

24 *Id.*; Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 337 (2003).

25 Kay, *supra* note 16, at 6.

26 Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 94.

27 Rohert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 199–201 (1991).

28 RHODE, *supra* note 19, at 28; Rhode, *supra* note 18.

29 RHODE, *supra* note 19, at 28.

30 Epstein, *supra* note 21, at 744.

31 Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281 (1995).

the U.S. Court of Appeals for the Sixth Circuit in 1934; Burnita Shelton Matthews, appointed to the U.S. District Court for the District of Columbia in 1949; and Shirley Mount Hufstedler, appointed to the U.S. Court of Appeals for the Ninth Circuit in 1968. In these remarks, I will speak only of the first of these waypavers, Florence Allen, first woman ever to serve on an Article III federal court. Before joining the federal bench, Allen achieved many "firsts" in Ohio: first female assistant prosecutor in the country; first woman elected to sit on a court of general jurisdiction; and the nation's first female state supreme court justice.[32]

Long tenured on the Sixth Circuit, Allen eventually served as that Circuit's chief judge, another first.[33] It was rumored that Allen might become the first female U.S. Supreme Court Justice. In 1949, two vacancies opened on the Court. President Truman reportedly was not opposed to the idea of filling one of them with a woman.[34] But, as political strategist India Edwards, head of the Women's Division of the Democratic National Committee, recalled, Truman ultimately decided the time was not ripe. Edwards wrote of the brethren's reaction when Truman sought their advice:

> [A] woman as a Justice . . . would make it difficult for [the other Justices] to meet informally with robes, and perhaps shoes, off, shirt collars unbuttoned and discuss their problems and come to decisions. I am certain that the old line about there being no sanitary arrangement for a female Justice was also included in their reasons for not wanting a woman . . . .[35]

(Times have indeed changed: To mark my 1993 appointment to the Supreme Court, my colleagues ordered the installation of a women's bathroom in the Justices' robing room, its size precisely the same as the men's.)

The founding of the National Association of Women Judges in 1978 coincided with, and helped to advance, the end of the days when women appeared on the bench as one-at-a-time curiosities. At the federal level, the administrations of Kennedy, Johnson, Nixon, and Ford combined had appointed just six women to Article III courts.[36] When President Carter took office in 1977, only one woman, Shirley Hufstedler, sat among the 97 judges on the federal courts of appeals and

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32 *Id.* at 282–83.

33 *Id.* at 283.

34 *Id.*; JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 163–64 (1984).

35 TUVE, *supra* note 34, at 164.

36 Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 68 n.1 (1991).

only 5 among the 399 District Court judges.[37] President Carter appointed a barrier-breaking number of women—40—to lifetime federal judgeships.[38] Once Carter appointed women to the bench in numbers, there was no turning back. President Reagan made headlines and history when he appointed the first woman to the Supreme Court, my dear colleague, Justice Sandra Day O'Connor. He also appointed 28 women to other federal courts.[39] The first President Bush, in his single term in office, appointed 36 women.[40] President Clinton appointed a grand total of 104 women, and the current President to date has appointed 33 women.[41]

Today, every federal circuit but the First and Eighth has at least two active women judges.[42] Eight women have served as chief judge of a U.S. court of appeals, including three who currently occupy that post.[43] Thirty-two women have served as chief judge of a U.S. district court, including the eleven now holding that position.[44] More than 230 women have served as life-tenured federal judges, 54 of them on appellate courts.[45] Yes, there is a way to go, considering that women make up only about one-fourth of the federal judiciary.[46] But what a distance we have come since my 1959 graduation from law school, when Florence Allen remained the sole woman ever to have served on the federal appellate bench.

In the state courts, progress is equally remarkable. As of July 2003, every state except Oregon and Indiana had at least one woman on its court of last resort; approximately one-third of the chief justices of those courts are women.

Looking beyond our borders, however, we are not in the lead. The Chief Justice of the Supreme Court of Canada is a woman, as are two of that Court's eight other Justices. The Chief Justice of New Zealand is a woman. Five of the sixteen judges on Germany's Federal Constitutional Court are women, and a woman served as president of that court from 1994 until 2002. Currently, five women are members of the European Court of Justice, three as judges and two as advocates-

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37 Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 245 (2002).

38 Ginsburg & Brill, *supra* note 31, at 287.

39 *Id.* at 288; Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing up*, 72 JUDICATURE 318, 322, 325 (1989).

40 Ginsburg & Brill, *supra* note 31, at 288; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993).

41 FED. JUDICIAL CTR., FEDERAL JUDGES BIOGRAPHICAL DATABASE, *at* http://www.fjc.gov/newweb/jnetweb.nsf/hisj.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 NAT'L ASS'N OF WOMEN JUDGES, INFORMATION ON WOMEN JUDGES (2003) (on file with author).

general. Women account for seven out of eighteen Judges recently placed on the International Criminal Court; two of them serve as that court's vice-presidents.

True, as Jeanne Coyne of Minnesota's Supreme Court famously said: At the end of the day, "a wise old man and a wise old woman will reach the same decision."[47] But it is also true 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."[48] Our system of justice is surely richer for the diversity of background and experience of its judges. It was poorer, in relation to the society law exists to serve, when nearly all of its participants were cut from the same mold.

In 1776, Abigail Adams admonished her husband John to "remember the ladies" in the new nation's code of laws.[49] Today, women need not depend on men's memories. In our courts, conference rooms, and classrooms, in ever-increasing numbers, women are speaking for themselves, and doing their part, along with *sympathique* brothers-in-law, to help create a better world. Women will of course be remembered, for we are everywhere.

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47 *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991) (quoting David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16) (internal quotation marks omitted).

48 Healy v. Edwards, 363 F. Supp. 1110, 1115 (E.D. La. 1973).

49 Letter from Abigail Adams to John Adams (Mar. 31, 1776), *in* 1 ADAMS' FAMILY CORRESPONDENCE 370 (L.H. Butterfield et al. eds., 1963).