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Women and Law: Challenging What is Natural and Proper

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WOMEN AND LAW: CHALLENGING WHAT IS NATURAL AND PROPER *

THE HONORABLE DEANELL REECE TACHA⁺

I.	WOMEN'S IMPACT ON THE LAW: BREAKING DOWN STEREOTYPES, CREATING POSSIBILITIES	261
II.	WOMEN'S IMPACT ON THE JUDICIARY: SHARED STORIES, DIFFERENT VOICES	271
III.	CONCLUSION	277

In 1872, United States Supreme Court Justice Joseph Bradley offered the following rationale for why Illinois could properly refuse Myra Bradwell a license to practice law:

[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 paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.¹

Myra Bradwell, like countless women before and after her, had to challenge not only the laws of the state,² but also the laws of history and society, laws that seemed natural and universal—in Justice Bradley's words, the “law of the Creator.”³ In tracing the place of women in the legal profession, we

* This essay is an expanded version of two lectures delivered at the Shepard Broad Law Center of Nova Southeastern University as part of the Leo Goodwin Distinguished Lecture Series.

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1. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring).

2. Within five years after state courts denied law licenses to women, including Bradwell, state and federal legislatures began authorizing admission. DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 23 (1989) [hereinafter RHODE, *JUSTICE AND GENDER*]. “[F]ive women lawyers . . . were practicing in the United States” in 1870, but they numbered just over a thousand by the turn of the century as twenty states admitted women to their bars. *Id.*

3. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

are, therefore, talking about more than strictly legal change. Changes in our laws and public policies are part of the larger struggle to change the way we think and how we relate to one another in our everyday lives. Moreover, while women in the legal profession have not always agreed on the role law can and should play in this larger struggle, they have historically agreed that law is an important element in the struggle for social equality.

In light of Justice Bradley's remarks, we should not be surprised that women have recognized law as a powerful force, shaping the reality of their everyday lives. Myra Bradwell was denied a license to practice law because, in Justice Bradley's words, she "had no legal existence separate from her husband, who was regarded as her head and representative in the social state."⁴ Without a legally recognized separate identity, she could not form contracts on her own. The law reflected the belief that a woman belonged in the private sphere of home and family; she simply had no place in public life. Indeed, this rigid notion of private and public spheres, of separate spheres for women and men, is at the heart of women's experiences of subordination. And the story of women and law over the last century is largely the story of women's many challenges to entrenched notions of what is public and what is private and how the law should understand this distinction or, perhaps more accurately, what role the law should play in breaking down this distinction.⁵

The brief historical overview in the first part of this essay highlights women's impact on the law and legal profession. In particular, it traces how, once women gained access to and recognition under the law, they began contesting the law from the inside by transforming its underlying assumptions and using it as a tool for broader social change. Because of their efforts, gender stereotypes and assumptions that once seemed "natural" and universal are no longer acceptable bases for our laws. We now aspire to construct laws and institutions more representative of the diverse society in which we live. Moreover, as I argue in the second part of the essay, as lawyers and judges, we should draw upon our diversity and resist the temptation to replace old generalizations with new ones. That is, rather than asking how a distinctly "female" presence, or voice, has changed the legal profession and the judiciary, we should ask how the legal profession can better recognize and incorporate the range of styles women have to offer. By embracing our differences, rather than seeking a unified voice, we honor the contributions of generations of women activists and scholars.

4. *Id.*

5. *See infra* Section I.

I. WOMEN'S IMPACT ON THE LAW: BREAKING DOWN STEREOTYPES, CREATING POSSIBILITIES

Before women could use the law as a force for change, they had to fight it on its own terms. In other words, they sought to be recognized under the law in the same way men were. The Equal Rights Amendment (ERA) was first proposed by the National Women's Party in 1921.⁶ To the extent the law reinforced the idea that women had no place in public life, the ERA was designed to change this by guaranteeing their equal access—for example, their rights to control property, to contract, to sue, and to serve on juries.⁷ In the 1960s, building on the civil rights movement, women continued this fight for formal equality, a fight that resulted in landmark legislation: the Equal Pay Act of 1963⁸ and Title VII,⁹ which prohibit discrimination by employers on the basis of sex. In addition, once the laws were enacted, women made sure they were implemented. For example, when the Equal Employment Opportunity Commission (EEOC) failed to enforce Title VII, women formed the National Organization of Women to monitor the agency and advocate for serious enforcement of claims.¹⁰

Because of women's efforts, the law finally began to recognize women as equal members of public society. Of course, formal changes in the law did not translate into immediate social change. Statistics from then and now illustrate how slowly change occurs. Fewer than 5% of lawyers were women in the 1960s¹¹ and fewer than 2% of all law professors were women.¹² Despite the fact that law schools began abandoning their male-only admissions policies in the 1970s, only 13% of lawyers were women in 1984.¹³ Today,

6. Jo Freeman, *Social Revolution and the ERA*, 3 SOC. F. 145, 145 (1988) [hereinafter Freeman, *Social Revolution*]; see also RHODE, JUSTICE AND GENDER, *supra* note 2, at 35 (noting that advocates of the amendment introduced a version of it in every congressional session from 1923 to 1972).

7. Freeman, *Social Revolution*, *supra* note 6, at 145.

8. 29 U.S.C. § 206(d) (2000).

9. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h-6 (2000).

10. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 198 (1989–90); see also Jo Freeman, *From Suffrage to Women's Liberation: Feminism in Twentieth-Century America*, in WOMEN: A FEMINIST PERSPECTIVE 513 (Jo Freeman ed., 5th ed. 1995).

11. *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 138, 140 tbl.2 (1990) [hereinafter *Different Voices*].

12. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 219 tbl.12.1 (2d ed. 1993).

13. *Id.* at 220–21; *Different Voices*, *supra* note 11, at 138.

women make up only about 30% of the profession.¹⁴ Although the percentage of female judges in the federal judiciary doubled in the 1990s, today, women make up only about 24% of the federal bench.¹⁵ And by recent estimates, only about 29% of the judges on state courts of last resort are women.¹⁶ In addition, although women now make up more than half of entering law school classes, only about 20% of full law professors are women,¹⁷ and a little over 17% of law firm partners are women.¹⁸ The numbers are even less encouraging for women of color, who constitute only 5% of the total number of full law professors.¹⁹ As recently as 2005, “81% of [minority female associates had left] their law firms within five years of being hired.”²⁰

Yet, even in small numbers, women lawyers and law professors have had an enormous impact on formal laws and their enforcement. Beginning in 1971, with Ruth Bader Ginsburg’s United States Supreme Court victory in *Reed v. Reed*,²¹ women lawyers successfully challenged discriminatory laws and practices on equal protection grounds. It is quite fitting that, twenty-five years later, Justice Ginsburg would author the opinion in *United States v. Virginia*,²² emphasizing that—in her words—“generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them

14. DEBORAH L. RHODE, ABA COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 13 (2001) [hereinafter RHODE, UNFINISHED AGENDA].

15. See ABA Comm’n on Women in the Profession, A Current Glance at Women in the Law 2006 4, <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf> [hereinafter Current Glance at Women in the Law]; see also Kate Zernike, *Pool of Female Judges Has Boomed in 24 Years*, N.Y. TIMES, Oct. 29, 2005, at A10 (recognizing that 24% is a notable increase from 6% in 1981 when Justice Sandra Day O’Connor was nominated by President Ronald Reagan).

16. Current Glance at Women in the Law, *supra* note 15, at 4; see also Lynn Hecht Scharf, *Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 954–56 (2004) (discussing the number of women in the federal and state judiciaries).

17. RHODE, UNFINISHED AGENDA, *supra* note 14, at 13, 27.

18. Current Glance at Women in the Law, *supra* note 15, at 2.

19. RHODE, UNFINISHED AGENDA, *supra* note 14, at 27.

20. Paulette Brown & Cathy Fleming, ‘Invisible’ Attorneys Seek Notice, THE NAT’L L.J., Oct. 23, 2006, available at <http://www.eapdlaw.com/newsstand/detail.aspx?news=742> (click on “PDF & Printable Article” hyperlink); see also ABA COMM’N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 9 (2006), <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf> (providing an in-depth study of the experiences of women of color in private law firms).

21. 404 U.S. 71 (1971).

22. 518 U.S. 515 (1996).

outside the average description.”²³ Indeed, estimates of what was considered appropriate for most women are what prompted Justice Bradley to conclude that women’s exclusion from public life followed from the natural law of the creator.

But women in the early 1970s challenged this assumption. Building on the approach used in race discrimination cases, they argued that laws should not distinguish between men and women who are similarly situated.²⁴ At that time, plenty of state laws included sex-specific distinctions, which the Supreme Court had routinely upheld. For example, in 1961, in *Hoyt v. Florida*,²⁵ the Court upheld a state statute excluding women from juror rolls, unless they specifically asked to be included.²⁶ But in 1971, the Court changed its approach in *Reed*.²⁷ Persuaded by Ruth Bader Ginsburg and other attorneys working for the ACLU’s Women’s Rights Project, the Court struck down an Idaho statute that gave preference to men over women as administrators of estates.²⁸ Idaho justified the distinction as a reasonable means of resolving a tie between two individuals equally qualified by their relationship to the decedent.²⁹ The state argued that men should be preferred because they generally have more business experience than women.³⁰ The Court rejected this argument, describing the male preference as “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause” of the Constitution.³¹

Other United States Supreme Court victories followed the *Reed* decision. But although the Court struck down many sex-specific distinctions on equal protection grounds, it did not adopt the approach advanced by women’s rights activists and litigators. Women had argued that the courts should apply a standard of strict scrutiny, the same level of scrutiny already applied to classifications based on race and the toughest test under the Constitution’s Equal Protection Clause.³² But in light of the far-reaching impli-

23. *Id.* at 550 (emphasis in original).

24. See generally Serena Mayeri, Note, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001) (discussing the historical emergence and development of the analogy to race in feminist thought and activism).

25. 368 U.S. 57 (1961).

26. *Id.* at 69.

27. *Reed v. Reed*, 404 U.S. 71 (1971).

28. *Id.* at 77.

29. Brief for Respondent at 12, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

30. *Reed*, 404 U.S. at 76.

31. *Id.* at 76.

32. See generally RHODE, JUSTICE AND GENDER, *supra* note 2, at 86–92 (discussing the United States Supreme Court’s “search for standards” in cases involving sex-based classifications).

cations of this kind of test—for example, how could women’s exclusion from the draft survive?—the Court stopped short of strict scrutiny.³³ When women’s rights activists realized the Court would not adopt this stringent test, they made a strategic choice to focus on contesting sex-based classifications that disadvantaged *men*.³⁴ They hoped this strategy would steadily weaken the stereotypes and generalizations that made women second-class citizens.³⁵

The strategy resulted in some success. For example, in *Craig v. Boren*,³⁶ the Court struck down an Oklahoma statute prohibiting the “sale of 3.2% beer to males under the age of 21 and to [women] under the age of 18.”³⁷ The Court also invalidated social security laws that treated widows more favorably than widowers.³⁸ It held that alimony after divorce should be awarded on a gender-neutral basis.³⁹ And it struck down a state statute excluding men from a state-supported nursing school.⁴⁰

Largely because of these early efforts, law was transformed into a strategic tool for undermining long-held stereotypes and assumptions regarding sex. Law is, however, an imperfect tool. As a product of history and social context, it is undoubtedly lopsided. Guarantees of formal equality could not erase the law’s foundations in male-centered assumptions and standards, such as the division of the public from the private.⁴¹ For years, laws had

33. *Id.*

34. MARGARET A. BERGER, *LITIGATION ON BEHALF OF WOMEN: A REVIEW FOR THE FORD FOUNDATION* 18–19 (1980).

35. *Id.* at 19.

36. 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny standard for sex classifications).

37. *Id.* at 191–92.

38. *Califano v. Goldfarb*, 430 U.S. 199, 201–02, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–39, 653 (1975).

39. *Orr v. Orr*, 440 U.S. 268, 270–71, 283 (1979).

40. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719, 723 (1982). The Court did, however, uphold some distinctions compensating women for historical disadvantage. See *Califano v. Webster*, 430 U.S. 313, 315–16 (1977) (upholding social security provisions allowing women to exclude three more low-earning years than men when calculating base-period income); *Schlesinger v. Ballard*, 419 U.S. 498, 508–10 (1975); *Kahn v. Shevin*, 416 U.S. 351, 352, 355–56 (1974) (upholding state statute giving widows a \$500 annual exemption in property taxes).

41. See Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 847–48 (2000) (noting that “attacking the public/private line has been one of the primary concerns (if not *the* primary concern) of feminist legal theorizing for over two decades” and arguing that the distinction has continued value for feminist theory). These critiques of the public-private dichotomy are part of a larger body of literature discussing how seemingly neutral and universal legal concepts subordinate women. See, e.g., Fran-

governed the public sphere and treated the private sphere of home and family as inviolate.

Formal equality, the idea that women should be treated the same as men, therefore, created the illusion of choice for many women. It granted women access to the legal profession without ensuring a workplace free of sexual harassment. It mandated that the state affirmatively treat women the same as men, guaranteeing them equal protection of the laws, without extending the reach of the law into the private sphere where women frequently endured sexual and physical violence. It prohibited discrimination in employment, but did not recognize different treatment of pregnant women as sex-based discrimination. After a long, hard fight for access to the public sphere, women realized that the rigid separation of public and private had itself to be challenged—a critique that resonates in the 1970s slogan “the personal is political.”⁴²

As feminist scholars and activists in the 1970s and 1980s turned their attention to the reality of women’s private lives, they focused especially on the ways in which women’s lives differed from men’s. Some feminists celebrated this difference, often credited to women’s experiences as mothers and caretakers, and argued that society should recognize women’s “different voice” as equal rather than inferior to the male voice.⁴³ Others argued that women’s difference was a result of the underlying structural imbalance in power between men and women in society.⁴⁴ Differences in this view are a result of men’s dominance, not women’s inherent nature, a perspective reflected in Catharine MacKinnon’s frequently quoted statement: “Women value care because men have valued us according to the care we give them.”⁴⁵

ces E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

42. For further discussion of the public-private distinction, see Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (S.I. Benn & G.F. Gaus eds., 1983); *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289, 1289–1608 (1982).

43. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 613–616 (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 63 (1985); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 173–74 (1982).

44. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376–80 (1986); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

45. MACKINNON, FEMINISM UNMODIFIED, *supra* note 44, at 39.

Professor MacKinnon's "inequality approach" to sex discrimination was particularly influential.⁴⁶ It called into question the idea that laws should treat men and women the same, that is, as if they are similarly situated. In her landmark book, *Sexual Harassment of Working Women*, Professor MacKinnon argues that the "only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status."⁴⁷ This approach to sex discrimination and its application to employment practices helped lead to the Supreme Court's recognition of sexual harassment as a violation of Title VII in *Meritor Savings Bank, FSB v. Vinson*.⁴⁸ Following the consensus of the appellate courts and the EEOC, the Supreme Court held that sexual harassment creating a hostile work environment violates Title VII, even when the victim does not suffer an economic injury.⁴⁹

About the time *Meritor* was decided in the 1980s, women were also engaged in legal battles to decide how the law should handle the fact that only women give birth to children.⁵⁰ In 1974, in *Geduldig v. Aiello*,⁵¹ the Supreme Court upheld, under the Equal Protection Clause, a California statute excluding pregnancy from its list of covered disabilities.⁵² According to the Court, the statute did not exclude any individual on the basis of sex; rather, it simply did not cover a particular disability (i.e., pregnancy) that affects some but not all women.⁵³ A couple years after *Geduldig*, the Court followed the same reasoning in deciding a case under Title VII.⁵⁴ Congress disagreed,

46. In addition to Professor MacKinnon, many other feminist theorists and scholars influenced legal practice and helped inspire political change. See generally Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249 (1998) (discussing the interrelated nature of feminist theory and practice).

47. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117–18 (1979).

48. 477 U.S. 57 (1986).

49. *Id.* at 67–68. In addition to changing employment laws, feminists advocated the reform of criminal laws (for example, rape and domestic violence laws) that failed to redress women's injuries. See generally RHODE, *JUSTICE AND GENDER*, *supra* note 2, at 237–52. These legal changes chipped away at the standards and assumptions that placed sexuality and sexual conduct outside the reach of the law as something private and personal and therefore not actionable. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 *HASTINGS L.J.* 557, 558 (2006) (discussing feminist critique of the public-private dichotomy and its significance to the domestic violence movement).

50. See generally Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1985).

51. 417 U.S. 484 (1974).

52. See *id.* at 495–97.

53. *Id.*

54. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976).

however, and overturned this decision by enacting the Pregnancy Discrimination Act (PDA), an amendment to Title VII that makes discrimination on the basis of pregnancy unlawful sex discrimination.⁵⁵ Although feminists in the 1980s agreed that pregnant women deserve protection under the law, they disagreed about how the law should approach the issue.⁵⁶ While some feminists argued that pregnancy should be treated like any other disability (an equal treatment approach), others pushed for laws that would give pregnant women special benefits (a special treatment approach).⁵⁷

In one important Supreme Court case,⁵⁸ feminists actually argued both in favor of and against a California statute requiring that employers provide leave to employees disabled by pregnancy, but not to employees disabled for other reasons.⁵⁹ The statute was challenged as contrary to the PDA, which requires that pregnancy be treated like other temporary disabilities in the employment context.⁶⁰ Some feminists argued that the statute was preempted by the PDA;⁶¹ others argued that the statute should be upheld as long as employers are required to provide the same leave to other temporarily disabled employees;⁶² and a third group argued that the statute should stand because it enables women to exercise their procreative rights on equal terms with men.⁶³ In the end, the Court held that the PDA was intended to prohibit discrimination against pregnancy, not prevent states from enacting laws that benefit pregnant workers.⁶⁴ It did not, therefore, preempt the California statute, and employers did not have to extend the same benefits to other disabled employees.⁶⁵

55. 42 U.S.C. § 2000e(k) (2000).

56. See RHODE, JUSTICE AND GENDER, *supra* note 2, at 38–46.

57. *Id.* This debate over sameness versus difference did not begin in the 1980s. It has a long history. For example, throughout the first part of the twentieth century, feminists fought both for and against labor legislation that treated women differently from men (e.g., by restricting the number of hours they could work). *Id.*

58. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (feminist scholars and groups filed three different amicus briefs).

59. *Id.* at 290–92.

60. *Id.* at 292–94 (Stevens, J., concurring).

61. See Brief for ACLU et al. as Amici Curiae Supporting Respondent at 48–49, Ca. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728369.

62. Brief for the Nat'l Org. for Women et al. as Amici Curiae Supporting Respondent at 11, Ca. Fed. Sav. & Loan Ass'n v. Guerra, Inc. 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728368.

63. Brief for the Coal. for Reprod. Equal. in the Workplace et al. as Amici Curiae for Respondent at 35–36, Ca. Fed. Sav. & Loan Ass'n v. Guerra, Inc., 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728372.

64. Guerra, 479 U.S. at 287.

65. *Id.* at 292.

Not surprisingly, the Court's decision did not settle the larger issue. Feminists continued to debate how the law should treat men and women in contexts where they are inescapably different.⁶⁶ Although this debate is frequently described as a disagreement that weakened the women's movement, we could also understand it as a logical step in the struggle to further social equality. After all, how could women be heard as lawyers, activists, and law professors without the openings provided by formal equality? Once women gained access to legal institutions, they could more easily critique them. We should not be surprised that they offered different critiques.

Of course, the debate regarding women's difference was not really new. As soon as women began fighting for legal change, they began disagreeing over how the law could improve the quality of women's lives. Even as the National Women's Party advocated the Equal Rights Amendment, other women's organizations vigorously opposed it, fearing it would mean the end of protective labor laws that set maximum hours and wages and governed working conditions for women.⁶⁷ While ERA advocates argued such laws were paternalistic mechanisms used to deny women desirable jobs and the pay they deserved, proponents of protective legislation argued that laws should recognize the reality of women's everyday lives—as mothers and caretakers of home and family.⁶⁸ In their view, treating women and men as “similarly situated” was a fiction that ignored the ways in which women's lives were undeniably different.⁶⁹ In particular, they argued that motherhood deserved special protection.⁷⁰

The Supreme Court embraced a similar view of motherhood for many years.⁷¹ According to the Court, women's childbearing responsibilities not only placed them at a disadvantage, but also made them the proper wards of the public interest and, therefore, the state.⁷² In 1908, the Court reasoned: “[T]he physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”⁷³ Even as the civil rights movement was underway in the 1960s, the Court was still

66. See generally RHODE, JUSTICE AND GENDER, *supra* note 2.

67. See Freeman, *Social Revolution*, *supra* note 6, at 145. Women's groups opposed the addition of “sex” to Title VII for the same reasons. See JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 233–34 (1991).

68. See RHODE, JUSTICE AND GENDER, *supra* note 2, at 35–37.

69. See *id.* at 37.

70. *Id.*

71. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

72. *Id.*

73. *Id.* (upholding as constitutional protective labor laws limiting the working hours of women).

referring to the “special responsibilities” women have “as the center of home and family life.”⁷⁴

While proponents of formal equality eventually won the battle over protective legislation, the critique of liberal equality continued.⁷⁵ The idea that the law should enable individuals to pursue their own, self-interested choices on equal terms *assumes* that individuals enjoy the same freedom to choose. But our choices are undoubtedly constrained by a range of factors, over which we have little control—for example, our gender, our race, and our socioeconomic circumstances.⁷⁶ Formal equality has helped some women, while failing to address the needs of others.⁷⁷

Indeed, as contemporary feminist theorists have emphasized, accounts of women’s experiences are all too frequently based on the experiences of white middle-class women.⁷⁸ These accounts can ignore the ways in which some women are subjected to multiple forms of discrimination, as well as the ways in which some women participate in the subordination of other women. For example, formal equality may give a relatively privileged white woman access to professional employment opportunities, while doing very little for the woman she hires to care for her home and children.⁷⁹ Hence, the crucial question is: How do women use their collective strength to continue fighting for an egalitarian society, while at the same time recognizing the diversity of women’s experiences?

I think diversity can actually be our collective strength. Once we leave behind the rigid view of a world divided between essential categories of “woman” and “man” and recognize the messy reality in all its diversity, we

74. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a state statute permitting, but not requiring, women to serve on juries).

75. See, e.g., Frances E. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984). Not all feminists, however, rejected the liberal rights discourse. Some theorists articulated feminist approaches to the liberal discourse of individual rights. See, e.g., Christine A. Littleton, *Equality Across Difference: A Place for Rights Discourse*, 3 WIS. WOMEN’S L.J. 189 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). For an overview of three generations of feminist thought, see Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443 (1999).

76. See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 438 (1990).

77. See Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 36 (2005) (arguing that the “master narratives” surrounding work and family (e.g., family leave policies) leave out the interests of less privileged women).

78. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

79. Albiston, *supra* note 77, at 36–37.

may be in a better position to attack the underlying structures that further inequality—that is, to question Law, with a capital L, or what Justice Bradley called the “law of the Creator.”⁸⁰ In truth, this has always been the real target. The debate regarding difference reflected in the disagreement over equal versus special treatment is really a debate about short-term solutions. Fortunately, most of us agree on the long-term goal, and thankfully, we do seem closer to that goal today than we were when I began my legal career.

Rather than using the law to protect women so that they are able to carry out their domestic duties, our Supreme Court now speaks in terms of the law as a remedial and forward-looking device.⁸¹ Recently, in discussing the virtues of the Family and Medical Leave Act (FMLA),⁸² which gives both men and women the right to family and medical leave in some cases, Chief Justice Rehnquist explained how gender stereotypes contribute to social inequality.⁸³ Writing for the majority, Chief Justice Rehnquist stated:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.⁸⁴

These words leave little doubt that women have made significant progress. There is nothing natural about a woman’s historically inferior position, and consequently, the law should break down rather than build up stereotypes. It is a tool in the larger struggle to give individuals more choices in how they order their lives. As Deborah Rhode explains, we should empower individuals and improve the quality of life for both women and men: “Our priority should be to empower women as well as men to re-

80. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

81. *See, e.g., Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that state employees may sue the states for failure to comply with the FMLA).

82. *See Family and Medical Leave Act of 1993*, 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (2000).

83. *See Nev. Dep’t of Human Res.*, 538 U.S. at 736.

84. *Id.*

shape the institutions that are shaping them. At issue is not simply equality between the sexes, but the quality of life for both of them.”⁸⁵

II. WOMEN’S IMPACT ON THE JUDICIARY: SHARED STORIES, DIFFERENT VOICES

After a century of tireless advocacy and remarkable change, generalizations about women are no longer accepted as legitimate foundations for our laws or legal theories. But although we have rejected gender stereotypes as an appropriate basis for our laws and institutions, empirical studies have continued to focus on the possibility of difference by asking whether women think differently or speak in a “different voice.”⁸⁶ Scientists continue to ask whether women and men are hardwired differently.⁸⁷ And studies in the social sciences frequently look for evidence of this theoretical difference—

85. RHODE, JUSTICE AND GENDER, *supra* note 2, at 320. Nowhere is this desire for a better quality of life more apparent than in the daily struggle to balance work and family. Largely because of the efforts of women in the legal profession, the FMLA is a reality. It requires employers with more than fifty employees to give both men and women equal amounts (twelve weeks) of unpaid leave for specified family and medical reasons. *See* 29 U.S.C. §§ 2611-2612 (2000). Moreover, there is growing evidence that women are right about the need for this gender-neutral law governing the work-family balance. *E.g.*, CATALYST, WORKPLACE FLEXIBILITY ISN’T JUST A WOMAN’S ISSUE 1 (Aug. 2003), <http://www.catalystwomen.org/files/view/Workplace%20Flexibility%20Isn't%20Just%20a%20Women's%20Issue.pdf>. Recent studies report that men and women alike desire more flexible work options. *Id.* For instance, 92% of United States workers report that they do not have enough flexibility to take care of personal responsibilities, such as caring for sick children or parents. GEO. UNIV. LAW CTR., MEETING THE NEEDS OF TODAY’S FAMILIES: THE ROLE OF WORKPLACE FLEXIBILITY 6, http://www.law.georgetown.edu/workplaceflexibility2010/documents/FF_BW_FI_Fact.pdf (last visited Mar. 25, 2007). Unfortunately, many workers are still not covered by laws, such as the FMLA, or by employment policies guaranteeing leave. *Id.* For example, only 30% of workers are covered by policies allowing them to take time off to care for sick children. *Id.*

Men and women also express the same desire to work fewer hours. *See* CATALYST, *supra* at 1. Dissatisfaction with work-life balance is particularly prevalent in the legal profession. *Id.* A 2003 study reported that two-thirds of law graduates, both men and women, said they have difficulty balancing their personal and professional lives. *Id.* This is particularly true of young lawyers in large firms. *See* BRIAN MELENDEZ, ABA YOUNG LAWYERS DIVISION SURVEY: CAREER SATISFACTION, http://www.abanet.org/yld/satisfaction_800.doc (last visited May 25, 2007). A 2000 ABA study found that nearly 81% of the young lawyers in these firms might consider leaving their firms. *Id.* Although the legal profession has helped create the conditions for change, as an institution, the profession itself is very resistant to change. One of the most pressing questions for the profession today is whether it will lead or follow in meeting demands for a work environment that recognizes both women and men as individuals with personal and family responsibilities.

86. *See generally supra* note 85 and accompanying text.

87. *See, e.g.*, LOUANN BRIZENDINE, THE FEMALE BRAIN 1–9 (2006).

for example, do women in the judiciary decide cases differently from men?⁸⁸ The best answer to this question is that we do not know because the studies, as a whole, are inconclusive.⁸⁹ More important, however, are the implications of these studies. In my view, we should be asking why we continue to pose this question.

I am not suggesting that we stop paying attention to how many women are serving as members of state and federal judiciaries. If we are to be a representative democracy, our governmental institutions must reflect the diverse membership of our society, and we should work especially toward ensuring access for members of historically excluded groups, such as women and racial minorities. We should also encourage the changes diversity inevitably brings. Women in the judiciary have certainly had a positive effect on society in general and the legal profession specifically.⁹⁰ For example, their presence has encouraged young women to pursue legal careers, and they have raised awareness of gender bias in the court system.⁹¹ Indeed, in my experience, the presence of women in judicial roles has raised awareness within the judiciary concerning the subtle, but powerful, implications of lan-

88. See, e.g., Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689 (2004); Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 BUFF. WOMEN'S L.J. 295 (2001); Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205 (2000); see also Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821, 821 nn.2–9 (2005) (citing studies by social scientists).

89. See Heather Elliott, *The Difference Women Judges Make: Stare Decisis, Norms of Collegiality, and "Feminine Jurisprudence" A Research Proposal*, 16 WIS. WOMEN'S L.J. 41, 43–44 (2001). There is, however, some support for difference in sex discrimination cases. Beiner, *supra* note 88, at 824 (citing John Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting in the U.S. Court of Appeals*, 67 JUDICATURE 165, 171–72 (1983); and Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Court of Appeals, 1981–1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author)).

90. See generally Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487 (2004) (providing history of the first women federal judges and discussing the social significance of women judges).

91. See Hope Viner Samborn, *Gender Bias in the Courts: Working Toward Change*, PERSP., Winter/Spring 2002, at 4, 6, available at <http://www.abanet.org/women/perspectives/PSPGenderBias2.pdf>. The National Association of Women Judges has supported programs to educate judges about gender bias in decision-making and courtroom interaction and suggest ways to further gender fairness. *Id.* In addition, the International Association of Women Judges sponsored a program that provided training to more than 600 judges and other professionals on the application of international and regional human rights conventions in cases involving discrimination or violence against women. See International Association of Women Judges, <http://www.iawj.org/what/jep.asp> (last visited Apr. 9, 2007) (describing the "Jurisprudence of Equality Program").

guage and the use of particular words in judicial writing. More than once, as a member of an appellate panel, I have requested very minor changes in opinion language to avoid disparaging sex-based connotations. Thus, the involvement of women in the judicial process certainly has some effect, although it is often invisible to litigants and the public.

In addition, women clearly have different experiences to draw upon from their male colleagues. As Justice O'Connor often notes, after graduating at the top of her law school class, she was offered a job as a legal secretary,⁹² an experience her male peers did not share. I, like all women lawyers of my generation, have similar stories, such as the time a partner at a law school interview said to me: "Deanell, you have a very good record, but don't you know that you have to be better than the men to get hired?" After law school, I ran into similar barriers. For example, when I returned to Kansas after working in securities law in Washington, I discovered that a respected Kansas corporation was seeking an attorney to assist the general counsel as the company embarked upon some securities transactions. The company's offices were in a small town within driving distance of where I planned to live. I doubted then, and doubt today, that anyone else with my level of experience was interested in that position. After two very positive interview days, I never heard another word from the company, not even a rejection letter. Many years later, I heard—through a rumor mill—that I was not hired because of concerns about a woman accompanying company officials to New York to prepare for the public offering. I have no idea whether this is true, but it was, at the very least, a plausible explanation in the minds of some individuals. Unfortunately, many women in the legal profession have similar stories to tell.

In light of these stories, it is no surprise that 81% of the women judges surveyed in a 1990 study said sex discrimination was a problem, but none of the male judges identified it as a problem.⁹³ Women have experienced their gender in ways men have not, and these experiences no doubt influence how they see the world. But does this mean women think or reason in a distinctly feminine way? The fact that the empirical studies are inconclusive does not mean we have yet to find the answer. The answer may simply be that we cannot generalize about sex differences. And, I would add, we should not. This is dangerous business.

To see how it is dangerous, just consider the implications of a conclusive answer. What if a study concludes that women on average do in fact

92. Justice Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1549 (1991).

93. Elaine Martin, *Men and Women on the Bench: Vive La Difference?* 73 JUDICATURE 204, 207 (1990).

decide cases differently from men? This begs the question of *why* women decide cases differently. The typical answer—one grounded in both feminist theories of cultural difference and anti-feminist theories of difference—is that women reason from an ethic of care and connectedness, rather than an abstract and hierarchical logic of rules.⁹⁴ That is, women value obligation and responsibility over rights and rules, and they care more about preserving relationships than playing by the rules.⁹⁵

Responding to these theories of difference, many women have cautioned that a view of women as caring and men as rational sounds very much like the myth of “true womanhood” used to perpetuate women’s inferior status.⁹⁶ Generalizations about the way women are and think have been used throughout history to exclude women from the law and other professions. And this continues to be a danger today. We all remember the controversy surrounding the remarks of Harvard’s president almost two years ago.⁹⁷ He suggested that the lack of women in the hard sciences may be a result of intrinsic differences between women and men.⁹⁸ Many people expressed concern that the notion of intrinsic differences could be used to explain and excuse women’s absence from the sciences.⁹⁹ In other words, generalizations about difference threaten to close more doors than they open. Moreover, they simply do not hold true in reality. We can always find exceptions.

In fact, studies that find some support for a difference in male and female judging also show how frequently men and women agree. For exam-

94. See, e.g., Menkel-Meadow, *supra* note 43, at 47–48; Sherry, *supra* note 43, at 543; see also Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (exploring the ways in which feminist theory may inform the tradition of judging).

95. For a discussion and critique of the idea of “gender-based styles of lawyering,” see Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992). Cahn argues for a contextual approach leading to a feminist, rather than feminine, lawyering process. *Id.* at 1039–42. Instead of labeling style by gender, she encourages feminist theory to examine different styles to gain insights that can be used to challenge dominant practices and create new approaches to lawyering. See *id.*

96. See, e.g., O’Connor, *supra* note 92, at 1553. Over two centuries ago, Mary Wollstonecraft eloquently warned against this view of women’s nature: “It would be an endless task to trace the variety of meanness, cares, and sorrows into which women are plunged by the prevailing opinion that they were created rather to feel than reason, and that all the power they obtain must be obtained by their charms and weakness.” MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS 50 (1792), available at http://olldownload.libertyfund.org/EBooks/Wollstonecraft_0730.pdf.

97. See Sam Dillon & Sara Rimer, *No Break in the Storm over Harvard President’s Words*, N.Y. TIMES, Jan. 19, 2005, at A14.

98. See *id.*

99. *Id.*

ple, a 1993 study of appellate judges found that “[m]ore than 63% of the votes cast by women supported” plaintiffs’ discrimination claims, while 46% of the men’s votes favored plaintiffs.¹⁰⁰ This is a statistically significant difference, showing some support for the theory that women decide discrimination cases differently from men.¹⁰¹ But this can be misleading. What about the nearly 37% of the female votes cast against discrimination claims and the 46% of the male votes cast in favor of such claims?¹⁰² Significant numbers of men and women cast votes not predicted by the theory, leaving us to wonder why the statistically significant difference matters. We have rejected stereotypes and generalizations as proper foundations for the law. So, what would we do if we did find some empirical support for these stereotypes?

Real or not, generalizations always exclude some people. We know this because, for every generalization, we can think of a story—our own or someone else’s—that undermines it. Interestingly, although feminist legal theory contains many different viewpoints and approaches, scholars and activists have shared a belief in the power of narrative for some time.¹⁰³ From the consciousness-raising efforts of the 1970s to contemporary postmodern critiques, feminists have recognized the power of storytelling.¹⁰⁴ Stories validate individual experience. They help us understand the concrete reality of individuals’ lives. Moreover, they help us make connections. These connections are formed when we hear elements of own experience in the stories of others. But they are also formed when we hear stories that are radically different from our own experience. They help us realize the diversity of human experience and encourage us to see the world from a different perspective.¹⁰⁵

100. Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131 (1993).

101. *See id.*

102. *See id.*

103. *See* Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 948–49 (2006); Linda E. Fisher, *I Know It When I See It, or What Makes Scholarship Feminist: A Cautionary Tale*, 12 COLUM. J. GENDER & L. 439, 439–40 (2003); Jean C. Love, *Commentary: The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87, 87 (1998); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 973 (1991); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–67 (1990); Patricia Williams, *On Being the Object of Property*, 14 SIGNS: J. WOMEN CUL. SOC. 5 (1988).

104. *See* Bartlett, *supra* note 103, at 863–67; Abrams, *supra* note 103, at 973.

105. Instead of abstract generalizations, our difference is what we have in common: “The human universal becomes difference itself. Difference is what we most fundamentally have in common.” Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 32 (1986) (describing feminist view).

As a woman and a judge, I have quite a collection of stories that would likely resonate with other women, as well as stories that demonstrate how we sometimes experience things differently. I have often referred to these stories as “W” stories, stories that are unique to my experience as a woman.¹⁰⁶ For example, I often tell the story of the first day that the Tenth Circuit had an all-female panel for oral argument.¹⁰⁷ The reports in the press were comical for their non-newsworthiness. The press reported comments, such as “they were very well prepared,” and “they asked good questions.” On a lighter note, I will never forget the quizzical look on the face of one of my very bright male law clerks one Halloween morning when my children were young, as he said with some puzzlement: “I think I may work for the only federal judge in the nation who stayed up all night to make a costume for a child!” His reaction was likely grounded in gendered stereotypes and assumptions, but I always chuckle about the incident. (By the way, sewing a very furry costume made my day job look easy!) Even a lighthearted anecdote, such as this, illustrates how stereotypes pervade our everyday interactions. But generalizing about women or men, in the judiciary or anywhere else, is often misleading and almost always fails to capture the varied nuances and dimensions of human experience and interests.

When I tell these stories, I hope they speak to the experiences of some women, but I also hope they inspire some listeners to try to see the world from a standpoint unlike their own. We learn a great deal from other people’s stories. This is, in fact, what law students come to understand as they learn the law by reading cases based on people’s experiences,¹⁰⁸ and they think about how the law should resolve hypothetical controversies. Similarly, judging is an exercise in listening to stories. Judges attempt to see the world from many different perspectives.¹⁰⁹ Indeed, we *expect* each judge to try to transcend his or her own views and experiences in order to understand the perspectives of others.

In short, we are better served by stories than by generalizations. The more we expand our limited perspectives, the better lawyers, teachers, and judges we will be. We should learn from the feminist tradition of connecting

106. Deanell Reece Tacha, “W” Stories: *Women in Leadership Positions in the Judiciary*, 97 W. VA. L. REV. 683 (1995).

107. See, e.g., *id.* at 700.

108. See Love, *supra* note 103, at 88.

109. Katharine Bartlett argues that feminist theory should encourage “the effort to extend one’s limited perspective . . . I cannot transcend my perspective; by definition, whatever perspective I currently have limits my view. But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.” Bartlett, *supra* note 103, at 881–82.

to each other through our real-life stories, without adopting one story as representative of us all. This is, after all, how our laws have come to disavow many stereotypes and generalizations—through individual stories (i.e., cases) that challenge our views of what is natural and universal. In the end, it seems we gain little, and risk a great deal, by continuing to ask whether certain stereotypes hold true in practice. Instead, we should follow the example of Myra Bradwell and countless other women, who have worked to create a society of possibilities, rather than categorical limitations.

III. CONCLUSION

So, after decades of legal change, what can we say about the impact of women on the law? When asked about women's impact on politics, Florence Ellinwood Allen, the first woman appointed to an Article III court, replied:

You can hardly judge women's effect on politics merely from the action of individual women officeholders. We don't judge men's effect on politics in such a manner. And it will take a long time for women's effect on politics to register so that we may properly appraise it. But the constant filtering into the home of information about government, through mothers now as well as fathers, is making itself felt.¹¹⁰

Similarly, we may conclude that we can hardly judge women's impact on the law, as lawyers, judges, and teachers, by looking at individual acts. But we can have faith that women's presence in the profession is making itself felt. Women have challenged what seemed natural and universal; indeed, they have questioned what was once touted as Law, with a capital "L," the notion that women are "unfit" for public life and that public laws ought not to meddle in the private space women are destined to inhabit. In doing so, women have used the law to help create the conditions necessary for broader social change.

It is this ardent commitment to a more inclusive vision of society that has left its mark and inspired a new generation of women lawyers to continue breaking down rigid categories and untenable assumptions. As a student of society and culture, Margaret Mead eloquently captured the promise of a society able to transcend these limiting social constructions: "If we are to achieve a richer culture, rich in contrasting values, we must recognize the whole gamut of human potentialities, and so weave a less arbitrary social

110. N.R. Howard, *Miss Allen Talks of Women's Gains*, N.Y. TIMES, Mar. 25, 1934, available at <http://womenslegalhistory.stanford.edu/articles/howard.htm>.

fabric, one in which each diverse human gift will find a fitting place.”¹¹¹ Women in the legal profession have moved us closer to this goal by exposing what once appeared natural and proper as arbitrary and indefensible and by insisting we work toward a society in which diverse human gifts may indeed flourish.

111. MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1935).