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INTRODUCTION TO WOMEN AND THE LAW: FACING THE MILLENNIUM *INDIANA LAW REVIEW*

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I am pleased to introduce this special issue of the *Indiana Law Review* and to provide some reflections on the progress women have made under the law and as lawyers during my lifetime. Let me begin by inviting you to travel with me to Washington, D.C., to my current place of work, but back to a day in the United States Supreme Court long before modern times, way back to the year 1853. Sarah Grimke, great feminist and anti-slavery lecturer from South Carolina, was in the Capital City that December, and wrote this to a friend describing her visit:

> Yesterday, visited the Capitol. Went into the Supreme Court, not in session. Was invited to sit in the Chief Justice's seat. As I took the place, I involuntarily exclaimed: "Who knows, but this chair may one day be occupied by a woman." The brethren laughed heartily. Nevertheless, it may be a true prophecy.[1]

Today, no one would laugh at that prophecy.

More than a generation ago, in a comment about the treatment of women by the law and in law schools, I remarked on lawyers' "awakening consciousness" to the prevalence of sex-based discrimination.[2] This issue of the *Indiana Law Review*, superintended by the first all-female Executive Board, reveals the large progress made in the intervening years.

My savvy, sympatique colleague and counselor, first woman appointed to the U.S. Supreme Court, Justice Sandra Day O'Connor, confirms a report familiar to students who attended law schools in the 1950s, even in the 1960s. Justice O'Connor graduated from Stanford Law School in 1952 in the top of her class. Our Chief Justice, William Rehnquist, was in the same class, and he also ranked at the top. Young Rehnquist got a Supreme Court clerkship, then, as now, a much sought-after job for young lawyers. No opportunity of that kind was open to Sandra Day. Indeed, no private firm would hire her to do a lawyer's work. "I interviewed with law firms in Los Angeles and San Francisco," Justice O'Connor

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* Associate Justice, Supreme Court of the United States. I acknowledge, with appreciation, the aid of my 1998 Term law clerk, Alexandra Edsall, in composing these remarks.

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

2. Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 Val. U. L. Rev. 480 (1971).

recalls, "but none had ever hired a woman as a lawyer."[3] Many firms were not prepared to break that bad habit until years after the U.S. civil rights legislation of the mid-1960s made it illegal.[4]

In the last years of the 1960s—at the same time that a widely-used property law casebook declared: "Land, like women, was meant to be possessed"[5]—movements to revise the law's treatment of women began. I was then a professor of law at Rutgers, New Jersey's state university. When new kinds of complaints began to trickle into the New Jersey affiliate of the American Civil Liberties Union, the Executive Director of the New Jersey ACLU referred the novel inquiries to me. Among the brave new complainants, I will mention a typical few.

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

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

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

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

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

4. Jeanette Reibman, one of two women who graduated from Indiana University School of Law in 1937, recalled similar barriers. When she looked for jobs in Washington, D.C., she "got more offers for dates than . . . for jobs." *Former Senator Urges Local Women: "Make It Your World,"* LANCASTER NEW ERA, Nov. 4, 1995, at A6. Reibman went on to serve seven terms in the Pennsylvania State Senate and reflected upon retirement that many of the initiatives she had pioneered would not have been accomplished, "if I hadn't been there fighting tooth and nail." *Id.*

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

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

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

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

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

Hardest of my extracurricular activities for my Columbia University and Law School colleagues to bear was the litigation that followed after a tea at the home of Madame Wu, world-celebrated professor of chemistry. The tea took place on a clear winter day in the mid-1970s; the invitees were all the senior women at Columbia University. (Eleven women had achieved that rank in the mid-1970s, compared to over 1000 men.) One of the 11, Carol Meyer, Professor at the School of Social Work, wrote about the meeting years later. She was more than a little suspicious when she received the invitation, which came from me. "Women meeting together? Was this to be a socialist—or worse, Communist—cell meeting of some kind," she wondered.[8] What we discussed, primarily, was the sex differential then part of the University's retirement plan,

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

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

under which women received lower monthly retirement benefits because, on average, women live longer than men.

Eventually, a case charging unlawful discrimination was filed, with some 100 Columbia women—teachers and administrators—as named complainants. In a parallel case, one from California, the U.S. Supreme Court settled the issue, in favor of the women.[9] Several—probably most—of my Columbia Law School faculty colleagues would have voted the other way, but their spirited discussions helped me sharpen a friend of the court brief filed on the winning side. In that matter, as in many others—I recall particularly an earlier episode involving a request to extend health benefits to cover pregnant employees—I was shielded from accusations of disloyalty to the University by law school deans and colleagues who—although they did not inevitably agree with me on the merits—recognized the value of having the questions fully aired.

In 1980, I moved from the academy to the judiciary, an area in which women have also made substantial advances. When President Carter sought, for the first time in our Nation's history, to place women, in numbers, on the federal bench, he rightly recognized that merit was the key to opening doors. In place of "old boy networks," he encouraged broader search methods, including senatorial nominating committees for district court judgeships, and he established his own nominating commissions for appeals court vacancies. With the aid of more open nominating procedures, he achieved his goal—to make appointments reflective of the excellence of lawyers of diverse strains in our population. The increasing presence of women on the bench struck me with particular force in 1990, when I sat with Chief Judge Patricia Wald and Judge Karen Henderson on the D.C. Circuit's first all-female panel.[10]

Women have continued to become judges in increasing numbers. Women constitute close to 30% of President Clinton's appointees to the federal bench, 79 women out of 274 total appointments as of July 1998, to be precise.[11] A critical mass, social scientists might say. Are we really there? Well, not quite, I am reminded with some regularity when advocates—occasionally even other justices—call me Justice O'Connor. Task forces on gender bias in our state and federal courts have helpfully revealed the existence of often unconscious prejudice; gender bias studies have prompted those who work in our courts to listen to women's diverse voices, then to accord women's inquiries and proposals the respect and attention customarily accorded questions and ideas advanced by men.[12]

As women join men in diverse fields of endeavor, as lawyers, judges, engineers, bartenders, computer programmers, we are discovering that

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

10. *See* Microimage Display Division v. NLRB, 924 F.2d 245 (D.C. Cir. 1991).

11. Figures supplied by the U.S. Department of Justice.

12. *See, e.g.*, Ruth Bader Ginsburg, *Foreword* to *Report of the Special Committee on Gender, Prepared for the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1651 (1996); Ruth Bader Ginsburg, *Foreword* to *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts* (forthcoming).

personality characteristics for both sexes span a wide range. Theoretical discussions are ongoing today—particularly in academic circles—about differences in the voices women and men hear, or in their moral perceptions. When asked about such things, I usually abstain—or fudge. Generalizations about the way women or men are—my life's experience bears out—cannot guide me reliably in making decisions about particular individuals. At least in the law, I have found no natural superiority or deficiency in either sex. In class or in grading papers from 1963 until 1980, and now in reading briefs and listening to arguments in court for over 18 years, I have detected no reliable indicator of distinctly male or surely female thinking—or even penmanship.

The exhilarating changes I have seen lead me to conclude on a high note. A long distance has been traveled from the 1950s to the 1990s. A few years ago, in a tribute to Justice Sandra Day O'Connor, United States District Judge Kimba Wood, of the Southern District of New York, wrote: "Justice O'Connor's appointment to the U.S. Supreme Court was a momentous event."[13] But Sandra's greatest achievement, Judge Wood said, is one from which great numbers of women lawyers have benefited and now have the responsibility to further advance—to make women's participation in all manner of legal work "not momentous, but commonplace."[14]

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

14. *Id.* at li.