

**REMARKS ON WOMEN'S PROGRESS AT THE BAR
AND ON THE BENCH
FOR PRESENTATION AT THE
AMERICAN SOCIOLOGICAL ASSOCIATION
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When my dear friend, Cynthia Epstein, asked me to speak at this Meeting, I could hardly resist the invitation. Cynthia's thesis on Women in Law was a source I mined even before her work became a book in print. The Court's calendar, I knew, would not afford time to delve deeply into social research for this presentation, so I suggested that Cynthia enlist as co-panelists Yale Law School Professor Judith Resnik and Stanford Law School Professor Deborah Rhode. Both are superbly equipped to address the topic "Social Research and Social Change." I did compile, at Cynthia's suggestion, a set of excerpts from briefs filed in the U.S. Supreme Court in the early 1970s turning point gender discrimination cases. The excerpts will be made available to any in this audience interested in seeing the extensive use of social science sources in those briefs.

My remarks this afternoon portray the progress of women at the bar and on the bench in the United States. Remembering the past, I am heartened by the progress. Yet, as the numbers reveal, women in law, even today, are not entering a bias-free profession. Social science research can aid in determining why that is so, and perhaps in solving persistent problems.

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. But as ancient texts reveal, it ain't necessarily so.

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

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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*.

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 judgment. According to the rabbis, Deborah was independently wealthy; thus she could afford to work pro bono.⁴

Even if its members knew nothing of Athena and Deborah, the U.S. legal establishment resisted admitting women into its ranks far too long. 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. That same year, the St. Louis Law School became the first in the nation to open its doors to women.⁵

Lemma Barkaloo, among the first women to attend St. Louis, had earlier been turned away by my own alma mater, Columbia. As Cynthia Epstein has related, in 1890, when Columbia denied admission to three more female applicants, a member of the University's Board of Trustees reportedly 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."⁶ 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 25 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.⁷

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.⁸ The Illinois court thought it instructive, too, that female attorneys were unknown in the mother country. Concerning English practice, Bradwell wrote:

³ *Judges* 4.

⁴ See, e.g., Pnina Navè Levinson, *Deborah—A Political Myth* (Dec. 1991), available at <http://www.bet-debora.de/2001/jewish-family/levinson.htm>.

⁵ CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 49 (2d ed. 1993).

⁶ *Id.*

⁷ AUDREY C. TALLEY ET AL., *MILESTONES FOR WOMEN ATTORNEYS* 12 (1993).

⁸ *In re Bradwell*, 55 Ill. 535 (1869); see *WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK* 46 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996).

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.⁹

(A sense of humor is helpful for those who would advance social change.)

As late as 1968, the law remained largely a male preserve. Textbooks and teachers at that time so confirmed. A widely adopted first year property casebook published in 1968, for example, made this parenthetical comment: “[F]or, after all, land, like woman, was meant to be possessed”¹⁰

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.”¹¹

The critical mass achieved in the 1970s contrasts with the transient 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 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.”¹² (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.”¹³)

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,” featured in the title of one of Deborah Rhode's recent articles—the absence of adequate bathrooms for women.¹⁴

⁹ Myra Bradwell, Editorial, *Women Lawyers*, CHI. LEGAL NEWS, June 19, 1880, at 857.

¹⁰ CURTIS J. BERGER, LAND OWNERSHIP AND USE 139 (1968).

¹¹ 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).

¹² Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 8 (1991).

¹³ See Ruth Bader Ginsburg, *Keynote Address at Hawaii ACLU Conference on Women's Legal Rights* (Mar. 16–17, 1978), quoted in Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 207 (2002); Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1751 (1991).

¹⁴ See, e.g., Deborah L. Rhode, *Beyond Just Potty Parity*, 25 NAT'L L.J. 45 (2003).

Despite the chill air, the depressing signs conveying “No woman wanted here,” brave women in law would not be put down. In the early 1960s, women accounted for about 3% of the nation’s lawyers.¹⁵ Today, their ranks have increased tenfold, to about 30% of the U.S. bar.¹⁶

In the law schools, women filled between 3 and 4.5% of the seats each academic year from 1947 until 1967.¹⁷ Today, women comprise almost 50% of all law students,¹⁸ and over 50% of the associates at large law firms.¹⁹

Progress is evident behind the podium, too. In 1919, Barbara Nachtrieb Armstrong was appointed to the Berkeley (Boalt Hall) law faculty.²⁰ Made an assistant professor in 1923, Armstrong was the first woman ever to gain a tenure-track post at an American Bar Association approved law school.²¹ Over two decades later (1945), only two other women had made their way to the tenure track at schools belonging to the Association of American Law Schools.²²

When I was appointed to the Rutgers Law School faculty in 1963, women headed for tenure at AALS schools still numbered under twenty.²³ But by 1990, more than 20% of law professors were women.²⁴ Today, women account for roughly 19% of law school deans, 25% of tenured professors, and about 35% of law faculty members overall.²⁵

Strides in law practice are similarly marked. Only in Alabama has a woman yet to be elected president of the state bar association. More than 160 women have already served as state bar presidents. Two women have completed terms as President of the American Bar Association, and a third began her term as ABA President this very week. Notably, a woman was chosen to chair the House of Delegates under each female ABA president.²⁶

¹⁵ DEBORAH L. RHODE, ABA COMMISSION ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 13 (2001).

¹⁶ AM. BAR ASS’N COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW I (2005) [hereinafter *WOMEN IN THE LAW*].

¹⁷ 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).

¹⁸ *WOMEN IN THE LAW*, *supra* note 16, at 1.

¹⁹ NAT’L ASS’N FOR LAW PLACEMENT, JOBS FOR NEW LAW GRADUATES—TRENDS FROM 1994–2004 (2005), <http://www.nalp.org> (follow “Recent Graduates” hyperlink).

²⁰ Kay, *supra* note 12, at 5–6.

²¹ *Id.*; Herma Hill Kay, *UC’s Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 337 (2003).

²² Kay, *supra* note 12, at 6.

²³ Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 94 (1995).

²⁴ Robert 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).

²⁵ *WOMEN IN THE LAW*, *supra* note 16, at 2; Elena Kagan, *Women and the Legal Profession—A Status Report*, in THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: GINSBURG AND ARPS LECTURES 37, 42 (2006).

²⁶ Epstein, *supra* note 17, at 744.

In a November 2005 lecture at the Association of the Bar of the City of New York, Harvard Law School's Dean, Elena Kagan, recounted, much as I have just done, the enormous progress women have made at the Bar. But, she added, the news is not all good: "[W]omen lawyers still lag far behind men on most measures of success," she observed.²⁷ Speaking first of the law school setting, Dean Kagan referred to a student report on women's experiences. The report tracked similar surveys at other top-ranking law schools. Women are less likely to volunteer in class, the report noted, and they gain fewer academic honors. Asked if they consider themselves in the top 20% of the class in legal reasoning, 33% of the men answered yes, in contrast to 15% of the women. Women also rated themselves lower on ability to "think quickly on their feet, argue orally, write briefs, and persuade others."²⁸ "What's left," Dean Kagan pondered.

Dean Kagan's colleague, Lani Guinier, who studied women's situation at the University of Pennsylvania Law School, recorded this comment by a woman studying at that school: "Guys think law school is hard, and we just think we're stupid."²⁹ (Law schools are hardly unique in this regard. For example, a Brandeis University geneticist, Gregory Petsko, recently observed that, "[a]lmost without exception, the talented women [he had] known have believed they had less ability than they actually had," while "almost without exception, the talented men [he had] known believed they had more.")³⁰

Turning to life after law school, Dean Kagan got to the bottom line: "*Women lawyers are not assuming leadership roles in proportion to their numbers.*"³¹ Although about 30% of all lawyers, women account for only some 15% of general counsels of Fortune 500 companies and 17% of law firm partners.³²

Another revealing difference. In the Harvard student study, women outnumbered men 2:1 in reporting that "helping others" was an important consideration in choosing law as a career. On that score, Dean Kagan suggested, shouldn't we be acting affirmatively to encourage men to care more about public service endeavors.³³ Dean Kagan posed these questions: Were women disproportionately interested in public service because they found such work "more personally fulfilling"? Or, is public service em-

²⁷ Kagan, *supra* note 25, at 37.

²⁸ *Id.* at 39–40 (citing WORKING GROUP ON STUDENT EXPERIENCES, HARV. L. SCH., STUDY ON WOMEN'S EXPERIENCES AT HARVARD LAW SCHOOL 4, 6, 18–19, 22, 25–26 & app. XX (2004), available at <http://www.law.harvard.edu/students/experiences/FullReport.pdf>).

²⁹ *Id.* at 40 (citing LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 8 (1997)).

³⁰ Sharon Begley, *He, Once a She, Offers Own View on Science Spat*, WALL ST. J., July 13, 2006, at B1.

³¹ Kagan, *supra* note 25, at 40.

³² WOMEN IN THE LAW, *supra* note 16, at 1–3.

³³ Kagan, *supra* note 25, at 41–42.

ployment “more open to [women]—more likely to provide opportunities for advancement and recognition, . . . more flexible regarding leave-taking and reentry.”³⁴

There’s a problem in this picture of women as law students and lawyers, one that social scientists can help us to fathom. Last September, the *New York Times* did a replay of a story it runs from time to time on what women really want, and why they trail men in professional accomplishment. In a recent survey of female undergraduates at Yale, the *Times* recounted, roughly 60% said they would stop, or cut back on, work once they had children.³⁵ One of the letters to the editor prompted by the piece commented: “I’m glad that the things I declared when I was 19 . . . didn’t make front-page news.”³⁶ Dean Kagan countered with a study published in 2005 as a *Harvard Business Review* Research Report. The study made this notable finding: 93% of women in high caliber employment who have stepped out of the labor force for some time want to return.³⁷

Turning to my own line of work, women began to show up on the bench in the 20th century’s middle years. In 1995, I wrote in praise of three door openers in the federal court system: Florence Ellinwood Allen, appointed to 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 Hufstедler, appointed to the U.S. Court of Appeals for the Ninth Circuit in 1968.³⁸ To avoid intruding excessively on my co-panelists’ time, but as a reminder of not-so-long-ago days, I will speak here only of the first of these way pavers, 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.³⁹ Long tenured on the Sixth Circuit, Allen eventually served as that Circuit’s chief judge, another first.⁴⁰

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.⁴¹ But, as political strategist India Edwards, head of the

³⁴ *Id.* at 45–46.

³⁵ Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1.

³⁶ Carolyn Gang Irving, Letter to the Editor, N.Y. TIMES, Sept. 22, 2005, at A30.

³⁷ Kagan, *supra* note 25, at 44 (citing SYLVIA ANN HEWLETT ET AL., *THE HIDDEN BRAIN DRAIN: OFF-RAMPS AND ON-RAMPS IN WOMEN’S CAREERS* 42 (2005)).

³⁸ 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).

³⁹ *Id.* at 282–83.

⁴⁰ *Id.* at 283.

⁴¹ *Id.*; JEANETTE E. TUVE, *FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN* 163–64 (1984).

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 woman⁴²

(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.⁴³ When President Carter took office in 1977, only one woman (Shirley Hufstедler) sat among the 97 judges on the federal Courts of Appeals and only five among the 399 District Court judges.⁴⁴ President Carter appointed a barrier-breaking number of women—40—to lifetime federal judgeships.⁴⁵

Once Carter appointed women to the bench in numbers, there was no turning back. President Reagan made 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.⁴⁶ The first President Bush, in his single term in office, appointed 36 women.⁴⁷ President Clinton appointed a grand total of 104 women, and the current President to date has appointed 52 women.⁴⁸

Today, every federal court of appeals save the First and Eighth Circuits has at least two active women judges. Nine women have served as chief judge of a U.S. Court of Appeals, including three who currently occupy that post. Forty women have served as chief judge of a U.S. District

⁴² TUVE, *supra* note 41, at 164.

⁴³ Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 68 n.1 (1991).

⁴⁴ 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).

⁴⁵ Ginsburg & Brill, *supra* note 38, at 287.

⁴⁶ *Id.* at 288; Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989).

⁴⁷ Ginsburg & Brill, *supra* note 38, at 288; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993).

⁴⁸ Federal Judicial Center, *Federal Judges Biographical Database*, <http://www.fjc.gov> (last visited Nov. 22, 2006).

Court, including the seventeen now holding that position. All told, more than 250 women have served as life-tenured federal judges, fifty-eight of them on appellate courts. Yes, there is a way to go, considering that women make up only about one-fourth of the federal judiciary.⁴⁹ 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 similarly marked. Every State except Oregon, Indiana, and Kentucky has at least one woman on its court of last resort; 30% of the chief justices of those courts are women.

Looking beyond our borders, however, we are not in the lead. For example, the Chief Justice of the Supreme Court of Canada is a woman, as are three of that Court's eight other Justices. The Chief Justice of New Zealand is a woman. Four of the sixteen judges on Germany's Federal Constitutional Court are women, and a woman served as president of that court from 1994–2002. Currently, five women are members of the European Court of Justice, two as judges and three as advocates-general. Women account for eight out of eighteen judges on the International Criminal Court; one of them serves as that court's first vice-president.

At the Court on which I serve, the picture today is not promising. Since Justice O'Connor's retirement effective January 31, 2006, I have been all alone in my corner on the bench. In the term just ended, 117 men, but only 26 women, argued cases before the U.S. Supreme Court, and 2980 men, as opposed to only 1603 women, elected to become members of the Court's Bar. As Judith Resnik reminds me, no woman, to this date, has ever been appointed by the Court as Special Master in an original proceeding, i.e., a case in which the Supreme Court is the tribunal of first and last resort. (The Court has original jurisdiction dominantly in cases between States of the United States, or between the United States and one or more States.) Twenty-three men, but only sixteen women served as law clerks last term. Next term will set a low for the decade: thirty of the new clerks are men, only seven are women.

A question I am often asked: What does women's participation in numbers on the bench add to our judicial system? It is 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.⁵⁰ But it is also true that women, like persons of different racial groups and ethnic origins, contribute what the late Fifth Circuit Judge Alvin Rubin, described as "a distinctive medley of views influenced by differences in biology, cultural impact, and life experience."⁵¹ Our system of justice is

⁴⁹ *Id.*

⁵⁰ 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).

⁵¹ *Healy v. Edwards*, 363 F. Supp. 1110, 1115 (E.D. La. 1973).

surely richer for the diversity of background and experience of its judges. It was poorer when nearly all of its participants were cut from the same mold.

It seems to me fitting to end this presentation with my colleague Sandra Day O'Connor's words on women's progress:

For both men and women the first step in getting power is to become visible to others, and then to put on an impressive show. . . . As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we'll all be better off for it.⁵²

May the impressive progress continue, and the persistent problems gain solutions.

⁵² Sandra Day O'Connor, Address to the 1990 Sixteenth Annual Olin Conference: Women in Power (Nov. 14, 1990).

