Foreword

The Honorable Ruth Bader Ginsburg*

In the spring of 1971, I attended the first *Women and the Law* conference, held in New Haven and organized by Yale Law School students. At that time only two women in the history of the United States had ever sat on an Article III federal appellate bench: Florence Allen, appointed by President Roosevelt to the United States Court of Appeals for the Sixth Circuit in 1934; and Shirley Hufstedler, appointed by President Johnson to the United States Court of Appeals for the Ninth Circuit in 1968. The first woman named to an Article III federal trial court was Burnita Shelton Matthews, appointed to the United States District Court for the District of Columbia by President Truman in 1949.1 President Kennedy appointed Sarah Tilghman Hughes to the United States District Court for the Northern District of Texas in 1962, and President Johnson named two women to the Article III trial bench: Constance Baker Motley, appointed to the United States District Court for the Southern District of New York in 1966; and June Lazenby Green, appointed to the United States District Court for the District of Columbia in 1968.2 But for the most part, until the end of the 1970s, *women and judges*, were mutually exclusive categories.

Before 1960 not more than 14 women had ever held a tenure-track post on a U.S. law faculty.3 I began teaching law in 1963, at Rutgers Law School in Newark, New Jersey. That school was a frontrunner. I was the second woman engaged on the faculty. In 1972, I became the first woman named to a tenured position at Columbia Law School. Even then, women law professors remained few and far between.4

Comments routinely made from the bench in the late 1960s and early 1970s showed that gender-based discrimination was a matter jurists did not yet take seriously. In 1970, for example, a New York trial court rejected a female plaintiff’s challenge to a system that afforded any woman an automatic

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exemption from jury service. In the court’s view, the complainant was “in the wrong forum.” “Her lament,” the court counseled, “should be addressed to the ‘Nineteenth Amendment State of Womanhood’ which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff’s problems.”

Law school texts displayed a similar insensitivity. A widely-used property law casebook, in an edition published in 1968, offered this bit of comic relief: “Land, like woman,” the text said, “was meant to be possessed.” We have come a long way since those now ancient days.

In one sense, our mission in the 1970s was easy. The targets were well defined. There was nothing subtle about the way things were. Statute books in the States and Nation were riddled with what we then called sex-based differentials. For example, in 1971, for the first time in U.S. history, the Supreme Court held a gender-based classification unconstitutional. The case was Reed v. Reed. The Idaho statute challenged in Reed instructed: As between persons “equally entitled to administer” a decedent’s estate, “males must be preferred to females.” Sally Reed, whose teenage son died under tragic circumstances, had sought appointment as administrator of his estate. She contested the Idaho courts’ determination, under the male-preference statute, to appoint the boy’s father (from whom she was divorced), although his application was later in time. The Court moved in a new direction when it ruled, unanimously, that Sally Reed had been denied the equal protection of the laws by the Idaho statute.

I co-authored the merits briefs for Sally Reed, along with ACLU’s Legal Director, Melvin L. Wulf. The opening brief included as an appendix a sampling of statutes that treated women disadvantageously. Research for the brief and appendix was supplied by law students from NYU, Rutgers, and Yale. After the Supreme Court’s decision in Reed until my appointment as a U.S. Court of Appeals judge in 1980, the business of ridding the statute books of laws of the kind collected in the appendix to Sally Reed’s brief consumed most of my days. I was aided in that endeavor by students in seminars I taught, first at Rutgers, then at Columbia.

While our targets were all set out in the law books, our work encountered resistance in this respect. Judges and legislators in the 1960s and at the start of the 1970s regarded differential treatment of men and women not as malign, but as operating benignly in women’s favor. Women, they thought, had the best of all possible worlds. Women could work if they wished; they could stay home if they chose. They could avoid jury duty if they were so inclined, or they could serve if they elected to do so. They could escape military duty, or they

6. Id.
could enlist. Our mission was to educate, along with the public, decisionmakers in the Nation’s legislatures and courts. We tried to convey to them that something was wrong with their perception of the world. We sought to spark judges’ and lawmakers’ understanding that their own daughters and granddaughters could be disadvantaged by the way things were.

In the 1970s gender discrimination cases, including Reed v. Reed, Frontiero v. Richardson,8 Weinberger v. Wiesenfeld,9 Stanton v. Stanton,10 and Craig v. Boren,11 the Supreme Court, as I see it, effectively carried on a dialogue with the political branches of government. The Court wrote modestly; it put forth no grand philosophy. But by propelling and reinforcing legislative and executive branch re-examination of sex-based classifications, the Court helped to ensure that laws and regulations would “catch up with a changed world.”12

Change in Supreme Court case law coincided with change in the complexion of the legal profession. In 1970, women composed only 3% of the Nation’s lawyers. Today, close to 50% of all law students are women.13 In the early 1970s, female and minority judges were barely there. By 1995 the National Association of Women Judges had a membership roster upward of 1,000.14 Typical of the forward movement, in 1997, women held 21% of the Second Circuit’s trial and appellate court judgeships.15 As another barometer, from 1973 through 1980 the Justices of the Supreme Court engaged 34 women and 225 men as law clerks.16 From 1981 through 1997, 162 women and 446 men gained clerkships at the Court.17 During the current (2002) term, 13 women serve as clerks and 22 men.

The progress made to date is remarkable, but an issue of overriding importance defies ready solution: “Who will shoulder responsibility for bringing up the next generation?” Raising young children remains a far more formidable logistical and psychological obstacle to women’s workplace success

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17. Id.
than to men's professional achievement. That reality is not likely to change until a day still distant — a time when men recognize and act on an obligation to share equally in the burdens, and take equal pride in the joys, of parenthood.

It is my hope that today's law graduates will find the opportunities we sought to open enduring, and that they will have the courage and ingenuity to meet both the challenges we know and those we do not yet foresee.

18. See, e.g., Ruth Bader Ginsburg, Foreword, 84 GEO. L.J. 1651, 1655 (1996) ("[T]he [D.C. Circuit Bias Task Force] Report documents, [that] in all age groups of the federal litigators surveyed, women were less likely than men to have children.")