

# Women & Law

JOINT PUBLICATION

FEBRUARY 2020

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# Women & Law

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## *Essays*

Family, Gender, and Leadership in the Legal Profession.....	<i>Kerry Abrams</i>	1
Motherhood as Misogyny.....	<i>Jane H. Aiken</i>	19
On Power & Indian Country.....	<i>Maggie Blackhawk</i>	39
Reflections of a Lady Lawyer.....	<i>Lisa Blatt</i>	57
The Nerve: Women of Color in the Legal Academy.....	<i>Khiara M. Bridges</i>	65
Inching Toward Equal Dignity.....	<i>Denise Brogan-Kator</i>	71
On Firsts, Feminism, and the Future of the Legal Profession.....	<i>Risa L. Goluboff</i>	81
Carrying on <i>Korematsu</i> : Reflections on My Father's Legacy.....	<i>Karen Korematsu</i>	95
Reconstituting the Future: An Equality Amendment.....	<i>Catharine A. MacKinnon</i> <i>Kimberlé W. Crenshaw</i>	109
Law School in a Different Voice.....	<i>Melissa Murray</i>	131
Experience on the Bench.....	<i>Rebecca R. Pallmeyer</i>	143
Kafka's Court: Seeking Law and Justice at Guantanamo Bay.....	<i>Alka Pradhan</i>	151
A Personal Essay.....	<i>Nitza I. Quiñones Alejandro</i>	159
The Nineteenth Amendment: The Catalyst that Opened Courthouse Doors for Women on the Federal Bench.....	<i>Ann Claire Williams</i>	169

## Foreword

In January 2019, I received the highest honor of my law school career—I was elected Editor-in-Chief of the *Duke Law Journal*. My predecessor quickly announced my election to a group of EICs from other schools. Additional election results soon followed: Noor Hasan, *California Law Review*; Nicole Collins, *Stanford Law Review*; Ela Leshem, *Yale Law Journal*. As is customary, our congratulations went to the outgoing EICs and (jokingly) our condolences to the incoming ones. Results continued to pour in: Maia Cole, *New York University Law Review*; Christina Wu, *Texas Law Review*; Lauren Kloss, *Cornell Law Review*. I watched closely: Lauren Beck, *Harvard Law Review*; Annie Prossnitz, *Northwestern University Law Review*; Gabriella Ravida, *Pennsylvania Law Review*; Laura Toulme, *Virginia Law Review*; Emily Vernon, *University of Chicago Law Review*. Cautious excitement. Mary Marshall, *Columbia Law Review*; Alveena Shah, *UCLA Law Review*; Sarah McDonald, *Michigan Law Review*. Holding my breath. Grace Paras, *Georgetown Law Journal*.

The Editors-in-Chief at the flagship law reviews of the top sixteen law schools in the country were all—for the first time ever—women.

What follows is a commemoration of this anomaly. Celebrating in concert with the 100<sup>th</sup> anniversary of the 19<sup>th</sup> Amendment, the sixteen of us joined forces to publish a series of essays by prominent women in the legal community. Our hope was that these women would share the lessons they learned in pursuit of their prominence and that along the way, we would learn a little more about who we are—and who we hope to become.

This publication and the accompanying event could not have been possible without the support and mentorship of the Duke Law faculty—particularly Dean Kerry Abrams, Dean Katharine T. Bartlett, and Professors Kathryn Webb Bradley, Marin K. Levy, and Neil S. Siegel—and the hard work of my dear friend and *Duke Law Journal* Executive Editor, Nicole Wittstein. “Thank you” cannot even begin to express the gratitude they deserve.

The inescapable reality of our legal system is that it was built by men occupying the highest echelons of this profession. That fact dominates our legal education and continues to shape our view of women leaders. Candidly, our achievement was surprising because it is unexpected to see women in such high positions at such high numbers. I treasure what we have accomplished, recognize that our work is incomplete, and hope that in a hundred years, the women and men of the legal community look back at this with bewilderment—for what we recognize today as exceptional has become, to them, utterly ordinary.

Farah Bara  
Editor-in-Chief  
*Duke Law Journal*

*Recommended Citation*

Author name(s), *Essay Title*, in *WOMEN & LAW* page number, pin cite  
(2020) (joint publication of the top sixteen law reviews).

# FAMILY, GENDER, AND LEADERSHIP IN THE LEGAL PROFESSION

KERRY ABRAMS<sup>†</sup>

## INTRODUCTION

One hundred years ago, our nation ratified the Nineteenth Amendment to the Constitution, extending to women the right to vote, run for public office, and serve on juries. Today, we celebrate all we have gained. Women are now leaders throughout society—of states, cities, and towns, of corporations, universities, and foundations. Indeed, this issue represents not only a celebration of the Nineteenth Amendment but also the leadership of women in the field of law: women now make up over 50 percent of law students,<sup>1</sup> and the coeditors of this issue are the sixteen female editors-in-chief of the flagship law reviews of sixteen of the most prestigious law schools in the country. All told, these sixteen law schools have seven female deans.

Our progress, however, is far from finished. In law, and in most elite professions, men still dramatically outnumber women in positions of leadership. Although half of law students and nearly half of lawyers are women, women make up only one-third of attorneys in private practice, 21 percent of equity partners, and 12 percent of the managing partners, chairmen, or CEOs of law firms.<sup>2</sup> Men also run the corporations that we represent as lawyers: fewer than 5 percent of CEOs of Fortune 500 companies are women.<sup>3</sup> Women are also underrepresented as lawmakers and interpreters of the law, making up about 24 percent of Congress, 18 percent of governors, 29 percent of state legislators, 27 percent of mayors of the

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<sup>†</sup> James B. Duke and Benjamin N. Duke Dean and Professor of Law, Duke University School of Law.

1. Stephanie Francis Ward, *Women Outnumber Men in Law Schools for First Time, Newly Updated Data Show*, ABA J. (Dec. 19, 2016), [http://www.abajournal.com/news/article/women\\_outnumber\\_men\\_in\\_law\\_schools\\_for\\_first\\_time\\_newly\\_updated\\_data\\_show](http://www.abajournal.com/news/article/women_outnumber_men_in_law_schools_for_first_time_newly_updated_data_show).

2. Cristina Violante & Jacqueline Bell, *Law360's Glass Ceiling Report, by the Numbers*, LAW360 (May 28, 2018), <https://www.law360.com/articles/1047285>.

3. Judith Warner, Nora Ellmann & Diana Boesch, *The Women's Leadership Gap*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2>.

largest one hundred cities,<sup>4</sup> 27 percent of federal judges,<sup>5</sup> and 35 percent of state appellate judges.<sup>6</sup> Why, despite years of equality in access to voting for lawmakers, do women still trail behind men in the legal profession?

To understand what holds us back, I believe we need to look beyond political rights—voting, holding office, jury service—to gendered family norms and the workplace structures that reinforce these norms. Equality in the workplace and in the public sphere surely matters, and some of the most egregious cases of discrimination occur overtly. But the more pernicious and intractable problem is not overt discrimination but the covert discrimination that occurs every day, in kitchens, living rooms, and bedrooms, and seeps over into the workplace. Those of us who have managed to become leaders in government, academia, or business succeeded not because we are smarter, faster, or wiser than others, but because we have managed to work our way around these norms. This complex dance requires the support of spouses and partners, family members, supervisors, and coworkers. It requires a tenacious insistence on our own self-worth. Perhaps most importantly, it requires a large dose of pure luck. For most women, gendered family norms at home and in the workplace still make the possibility of obtaining a position of leadership extraordinarily difficult.

This phenomenon has been amply documented across many fields by social scientists. In law, one of the most comprehensive and important studies is a longitudinal analysis of graduates of the University of Virginia School of Law, where I taught for thirteen years. This study shows the stark differences that children make in the lives of male and female attorneys who are otherwise identically situated. Fifteen years after graduation, male and female lawyers without children living at home were virtually identical in their working patterns: 96.4 percent of men worked full time, versus 95 percent of women. But for lawyers with children at home, the story was very different: 99.2 percent of men worked full time, but only 50 percent of women.<sup>7</sup> With this large number of women, even from a very prestigious law school, exiting paid work at a critical time in their careers, it is no wonder that so few women are achieving the highest levels of career success in law.

The entire project of evaluating “women’s” advancement, especially this project of considering advancement in light of gendered family law and

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4. *Current Numbers*, CTR. FOR AM. WOMEN AND POL., <https://cawp.rutgers.edu/current-numbers>.

5. Debra Cassens Weiss, *The Percentage of Women in the Federal Judiciary Is the Same as Men with These Names*, ABA J. (Apr. 26, 2018), [http://www.abajournal.com/news/article/the\\_percentage\\_of\\_women\\_in\\_the\\_federal\\_judiciary\\_is\\_the\\_same\\_as\\_men\\_with\\_th](http://www.abajournal.com/news/article/the_percentage_of_women_in_the_federal_judiciary_is_the_same_as_men_with_th).

6. Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. 829, 889 (2016).

7. John Monahan & Jeffrey Swanson, *Lawyers at the Peak of Their Careers: A 30-Year Longitudinal Study of Job and Life Satisfaction*, 16 J. OF EMPIRICAL LEGAL STUD. 4, 13 (2019).

family norms, depends of course on a binary notion of sex, a convergence of sex and gender, and a heterosexual family. Many LGBTQ people will find the constraints of the heteronormative family to be the least of their problems, as they fight against overt discrimination rather than oppressive social norms.<sup>8</sup> Even LGBTQ people, however, can find themselves hemmed in by the application of heteronormative gender roles, especially within families.<sup>9</sup>

In this Essay, I consider the path to female leadership from my own personal perspective. I am interested in sharing my experiences as an “exception”—as a woman who has obtained a position of leadership in my profession—to explore what it would take for women as a group to be truly equal in our field. To put it differently, what are the circumstances necessary to ensure that the sixteen female editors-in-chief of this joint issue continue to be leaders throughout their careers?

#### WORK AND FAMILY, THEN AND NOW

Understanding inequality in the family requires a look back into the age in which the law actually *mandated* gender inequality. The Nineteenth Amendment focused on political rights, but equally important to women’s equality over the last century have been civil rights—the rights to enter into enforceable contracts, to sue in a court of law, and to own and manage one’s own property.<sup>10</sup> Like political rights, these rights were also denied to women in the United States at common law and under our original Constitution.

The mechanism for this denial was, quite literally, the family. Although single women had civil rights, even before they had the vote, the law treated married women as incapacitated, no longer possessing civil rights. This system was referred to as “coverture” because, under it, a married woman “perform[ed] every thing” under the “wing, protection, and cover” of her husband.<sup>11</sup> A married woman was referred to as a “feme-covert,” or covered woman, and her condition during marriage was called “coverture.”<sup>12</sup>

Under the doctrine of coverture, married women were incapable of entering into contracts. They could own property, but during the marriage their husbands had the authority to manage it, and any income generated by

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8. See, e.g., Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1612–26 (2019) (analyzing case law that shows patterns of discrimination in custody determinations involving transgender parents).

9. See generally Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57 (2012).

10. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 10 (1950).

11. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 442 (1771).

12. *Id.*

the property belonged to the husband.<sup>13</sup> If a woman worked outside the home, her husband owned her wages. In turn, husbands were legally responsible for supporting their wives, for their wives' debts, and for torts their wives committed.<sup>14</sup> The coverture doctrine reflected legal, social, and cultural norms. Indeed, one of the chief arguments against the Nineteenth Amendment was that granting political rights to women would undermine the "natural" gender roles within the family.<sup>15</sup>

The incapacitation of married women had profound implications for the rights of all women. For example, in the case of *Bradwell v. Illinois*,<sup>16</sup> the U.S. Supreme Court upheld a law excluding women from practicing law.<sup>17</sup> In a famous concurrence, Justice Bradley justified the result based on the incapacity of married women to enter into contracts—including contracts to represent clients.<sup>18</sup> For Justice Bradley, coverture justified excluding *all* women, not just married women, from the legal profession: "It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state," he wrote, "but these are exceptions to the general rule."<sup>19</sup> He then went on to write: "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."<sup>20</sup>

Indeed, the law of coverture affected women both in and out of marriage. Because the social structure of marriage presumed that a husband was responsible for providing for his family, it was legally and socially justifiable to pay grossly disproportionate wages to men and women for identical work, regardless of their marital status.<sup>21</sup> Women could also be excluded from some jobs or subjected to restrictions on the hours or conditions in order to protect their future as mothers; too much work would "impair their reproductive capacities and threaten the future of the race."<sup>22</sup>

13. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 115–25 (2000).

14. HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 219–20 (1968).

15. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 977–97 (2002).

16. *Bradwell v. Illinois*, 83 U.S. 130 (1873).

17. *Id.* at 139.

18. *Id.* at 141–42 (Bradley, J., concurring).

19. *Id.* at 141 (Bradley, J., concurring).

20. *Id.* at 141–42 (Bradley, J., concurring).

21. Federal law did not require equal pay until the passage of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)).

22. ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20<sup>TH</sup>-CENTURY AMERICA* 31 (2001) (discussing *Muller v. Oregon*, 208 U.S. 412 (1908), and subsequent labor legislation).

Today, our cultural understanding of women's political equality is sometimes oversimplified into a "before" and an "after." Before the Nineteenth Amendment, women could not vote; after the Nineteenth Amendment, they could. Of course, the world was always more complicated than that. For example, prior to the passage of the Nineteenth Amendment, women already had the right to vote in nearly all the Western states.<sup>23</sup> But there is a fairly simple truth in the notion in that the Nineteenth Amendment provides a clear moment of constitutional transformation in which women's citizenship was finally ratified nationally and enshrined in the most important public statement of our most basic values.

In contrast, there was no clear moment when we publicly ratified as a nation the idea that women should have equal civil rights. This regime began to change with the passage of Married Women's Property Acts in the 1830s, which allowed women to continue managing property they brought into a marriage as well as keep wages earned during marriage. As numerous legal historians and law professors have shown, however, the change brought by these statutes was not as dramatic or swift as a constitutional amendment.<sup>24</sup> The thousands upon thousands of statutes and precedential cases that made up the doctrine of coverture were slowly amended or overturned, although some are still officially on the books.<sup>25</sup>

A dramatic transformation almost *did* happen. In 1972, Congress passed the Equal Rights Amendment, and by 1977, thirty-five states had ratified it. But then the amendment stalled, and so the continued work of dismantling coverture continued to be addressed piecemeal. Ruth Bader Ginsburg and other feminist advocates developed theories of gender equality under the Equal Protection Clause of the Fourteenth Amendment. They then brought—and won—cases challenging the legal structures that proscribed rigid gender roles within the family.<sup>26</sup> But Ginsburg and others chose their plaintiffs strategically, so the cases that dismantled the remnants of the coverture system were largely cases about how sex stereotyping harmed *men*.<sup>27</sup> These

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23. T.A. Larson, *Woman Suffrage in Western America*, 38 UTAH HIST. Q. 7, 19 (1970), [https://issuu.com/utah10/docs/uhq\\_volume38\\_1970\\_number1](https://issuu.com/utah10/docs/uhq_volume38_1970_number1).

24. See, e.g., Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082–83 (1994) (showing how coverture unwound slowly and unevenly, so that women might only have capacity to contract in some states).

25. See BLACKSTONE, *supra* note 11, at 442 (noting that a married woman "perform[ed] every thing" under the "wing, protection, and cover" of her husband, and therefore, she was referred to as a feme covert, or covered woman, and her condition during marriage was called "coverture").

26. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1972).

27. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a law allowing women to purchase 3.2 percent beer at age eighteen but requiring men to wait until age twenty-one).

cases have been foundational and crucial for advancing women's rights and for reducing the stereotyping of both women and men, but they fall short of the dramatic paradigm shift represented by the Nineteenth Amendment in the political sphere.

Today, the social ideal of marital unity persists. Although some coverture rules are still technically in force, for the most part culture rather than law dictates the meaning of marital unity. Even when not legally prescribed, these gendered family norms continue to shape how families divide labor. Those decisions, in turn, shape the expectations that employers and coworkers have for how workers should behave and shape the law of the workplace. The dismantling of these expectations and structures is the work that remains unfinished.

#### HUSBANDS AS BREADWINNERS

Even though the law of coverture no longer dictates gender roles within the family, the entire structure of heterosexual marriage still reflects these rules.<sup>28</sup> I have experienced in my own life some vestige of most of the rules. For example, when I married in 2005, I was thirty-four years old.<sup>29</sup> I had a career—I had graduated from law school, clerked for a federal judge, practiced law at a New York firm, and taught law for three years. Both my future husband and I knew that marrying would change our relationship with one another. But we did not fully understand how marriage would change the way *other* people saw us and the extent to which social norms still dictate how married women (even women with flourishing careers) and married men (even men who wholeheartedly support their wives' careers) are expected to behave.

The first and most obvious indication that my status had shifted were the many congratulatory wedding cards I received for "Mr. and Mrs. [His Last Name]." I had decided to keep my birth name, but a significant number of our family and friends clearly never even considered that we might have made this choice. (My husband had also decided to keep his surname; this surprised no one.) The taking of a husband's name by a wife, of course, was one of the clearest and most symbolic indications of the coverture regime. The law *required* a married woman to take her husband's surname—this

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28. Same-sex couples appear to structure their relationships differently, although they are still constrained by social expectations. See Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 771–79 (2012) (discussing gender norms in same-sex couples and their role in the debate over same-sex marriage).

29. I was relatively old; in 2008, the average age of first marriage for college-educated Americans was twenty-eight years old. RICHARD FRY, PEW RESEARCH CTR., THE REVERSAL OF THE COLLEGE MARRIAGE GAP 1 (2010), <https://www.pewresearch.org/wp-content/uploads/sites/3/2010/11/767-college-marriage-gap.pdf>.

signaled to the world that she had lost her legal identity, as “covered” by her husband, and was now his responsibility. Even though name changing is no longer legally required, the persistence of gendered social norms means that in reality the rules of coverture continue to operate in a way that subsumes wives’ legal identity to that of their husbands. Fewer than 10 percent of married women have names other than husbands’ surnames.<sup>30</sup> My friends and relatives were not wrong in their guess that my name had probably changed upon marriage.

Names are of course not the only vestige of coverture that shapes married people’s lives; there is also money and who is presumed to control it. Marriage equality—thankfully—has forced many state agencies to stop asking for information about “husband” and “wife.” Now people fill out forms as “applicant #1” or “taxpayer #2.” These seemingly neutral terms are not treated as such: with every new title, deed, loan application, or tax form, we have to make a decision about whether we will fight to have my name—which comes first alphabetically—come first.<sup>31</sup>

Another hangover from the coverture days is the assumption that a woman will follow her husband to further his career, even at the expense of her own. At common law, courts termed this principle the “derivative domicile.” A husband decided where a couple lived, and his wife shared his legal domicile—even if she was not physically present with him. This rule reflected the husband’s duty as a breadwinner; in order to support his family, he needed the freedom to decide where he could best make a living. Today, in most states, a husband’s domicile no longer dictates his wife’s, and the law presumes that both husband and wife “usually regard the same place as home.”<sup>32</sup>

I first discovered the persistence of the derivative domicile rule in today’s culture when my future spouse and I were both seeking tenure-track academic positions at law schools. One committee chair asked me at the very beginning of an interview whether my “husband” had an interview at the other law school in the region where the interviewing school was located. (I did not yet have a husband, just a fiancé, and I had not disclosed to the

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30. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 785 n.82 (2007) (casting some doubt on the reliability of the 10 percent number cited in the text).

31. Our experience is an example of what Elizabeth Emens has termed “desk-clerk law,” the “advice given by government functionaries who . . . frequently mislead people and discourage unconventional naming choices as a result of ignorance or their own views about proper practice.” *Id.* at 762.

32. Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 426 (2013) (citing Restatement (Second) of Conflict of Laws § 21, cmt. b (1988 revision)). As a practical matter, however, in a heterosexual marriage, it is usually the wife who would have to demonstrate, for tax purposes or others, that she does not regard her husband’s home as her own. *Id.*

committee that I was in a serious relationship.) The rest of the interview was an extremely awkward exercise in clock watching, as it was clear to the committee that it was essentially over—if my “husband” could not move to the region, then neither could I. My interviews included a series of similar fumbles by other hiring chairs, each of which reminded me that my relationship and the constraints the faculty imagined it must place on me were at the forefront of the committee members’ minds.

#### WIVES AS CAREGIVERS

So far, all of my examples of lurking coverture norms have involved situations where a wife loses her social identity, where the “one” person a married couple becomes is the husband. Women take their husband’s names; vendors and banks treat women as secondary on financial accounts and documents; employers expect that women will follow their husbands wherever their careers take them. But coverture had another very important feature that likely shapes family life even more. Although women under coverture lost their legal identity, they gained through marriage a very important new role of “wife.” This role included a legal obligation to render “services” to their husbands. These services included the work of maintaining a home and caring for children.<sup>33</sup>

This feature of coverture, like others, no longer exists today in the same form it did at common law. There are always multiple ways to make a law gender neutral. In the case of spousal services, the law could have been changed to promote either independence or mutual dependence. Courts opted in this case for mutual dependence. The law is now gender neutral; *both* spouses are required to support each other and provide services.

Imagine for a moment that, instead, courts had opted for independence. In that world, the law would no longer require either spouse to support the other financially and would no longer require either spouse to provide services for the other. In this alternative world, spouses would be able to reach agreements to provide services or support, and if their relationship ended, through divorce or death, they could receive compensation for the services they had given.

This imaginary world was one that courts were forced to consider in interpreting married women’s property acts, which allowed women to keep wages that they earned during marriage. Instead of allowing married couples to contract with each other, courts instead interpreted the married women’s

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33. They also included sexual services, hence the impossibility at common law of marital rape. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

property acts as *prohibiting* contracts between spouses for domestic services.<sup>34</sup> The rule they created was gender neutral on its face: now, *both* spouses have a legal right to each other's uncompensated services, and *both* spouses have a legal obligation to financially support the other. Yet today, women continue to do the lion's share of housework, "life admin," and childcare, often to the detriment of their careers and to their impoverishment upon divorce.<sup>35</sup>

Nowhere is the social expectation that wives are different from husbands clearer than in the norms around caring for children. Some of these norms may have biological roots—women can become pregnant, and we sometimes breastfeed our children after birth. These biological facts give us a head start on bonding with a newborn child. Often, however, they lead families down a path where the mother becomes the dominant caregiver, even when it is no longer necessary. Health professionals, family, neighbors, and friends all contribute to this slide. Same-sex couples, who "often divide responsibilities more evenly than their heterosexual counterparts," nevertheless experience pressure to conform to a heteronormative model.<sup>36</sup>

The law charges parents with responsibility for their children, but virtually no parent performs every childcare task alone. Schools, extended kin, siblings, daycares, babysitters, au pairs, nannies, long-term or temporary romantic partners, friends, and neighbors all contribute to childcare.<sup>37</sup> The management and negotiation of these care relationships is the responsibility of a sex-neutral "parent," and it is difficult to tell from outside a family how that parent is actually able to handle this complex task.<sup>38</sup> We know, however, from surveys, sociological studies, and the barrage of evidence that is everywhere around us in our daily lives, that the person coordinating, managing, and negotiating childcare—even childcare she does not do herself—is usually a woman.<sup>39</sup>

The legal requirement that women have the sole responsibility in

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34. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 845 (2004) (noting that this prohibition "protect[ed] a husband's prerogatives under common law coverture from the potential threat that the married women's property acts posed").

35. Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1419 n.34 (2015) (describing household "admin" as "the office-type work involved in running a life," including everything from completing institutional paperwork to creating shopping lists to managing and coordinating schedules).

36. Rosenblum, *supra* note 9, at 88; *see id.* at 58.

37. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390–91 (2008)

38. *Id.* at 398 ("[A] zone of privacy that prevents the state from seeing into the black box of family life to understand how caregiving responsibilities actually are performed.").

39. *See generally* ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (1989) (discussing research on the balance of household work between working women and their spouses).

marriage to provide services and childcare may no longer exist, but the social norm is still broadly present, resulting in daily reminders to mothers and fathers alike that certain tasks are (or are not) their responsibility. At every school my children have attended, teachers have contacted me first if a child has a cold, seems nervous meeting other children, or has been the subject of discipline. This pattern has continued from school to school, even though our registration forms are riddled with special notes: “Call dad first! Then grandma and grandpa! Only call mom if there is no other option!” These notes appear to be completely ignored by school administrators and teachers, and when they do remember, it is often with a comment such as “oh right, you guys have that special deal” or “oh yes, you’re a *working* mom.” The same is true of other parents (usually mothers), who will persist in calling and texting me to get our kids together even when my husband was the one to make the first overture.

Coverture-era norms of childcare do not only affect women. Our culture reminds fathers constantly as well that childcare is not *really* their job. Of course, many men do a lot of childcare, but when they do, they are often met with either amazement (“What an incredible dad! He’s spending time with his child!”) or amusement (“Poor guy, he’s trying so hard but just isn’t as good as mom”). Sometimes the cultural refusal to recognize fathers as competent parents is dangerous. Calling “mom” first when a child is sick at school is not only an irritant to the mother who is on a business trip, but it is also dangerous for the child waiting to be taken to the hospital while the school officials fail to contact “dad” because they presume he is too busy.

For me, flouting the expectation that women manage households and childcare has been necessary to the development of my career. It has also required meticulous planning, constant communication with my spouse and extended family as our needs change, and, over the years, an army of babysitters and nannies, preschools and day-care centers, and housekeepers and lawnmowers. The situation is, of course, far more challenging for parents who are single or impoverished (or both) and stuck in a system that still presumes a child has two parents, one of whom is constantly available. I frequently have to forgo “parent’s night” at my kids’ school because I am traveling for work, but my husband or my parents are able to attend. In contrast, many other parents miss “parent’s night” and a host of activities because they are working the night shift at a second job. For me, the persistence of coverture norms is an irritation, a time waster, and socially awkward; for many, the persistence of these norms threatens their economic stability and livelihood. In all cases, these norms make it much, much harder to put in the little bit of “extra” time and effort that it takes to make it to the top of a profession.

## TOO MANY JOBS

Of course, the gender norms that exist within families do not stop when one arrives at work. If anything, this is where they really impact women's ability to rise in organizations. In my experience, this dynamic happens for two reasons. First, the amount of time and mental energy people are able to devote to their jobs is affected directly by the gendered dynamics of their families' lives. Second, the gendered dynamics of family lives bleed over into how people behave at work and what their expectations are for male and female employees.

Go into most workplaces today, and you will see women and men working side by side, often doing what appears to be the same job. But looks can be deceiving. Often, some workers—disproportionately women—are doing their job while simultaneously planning for what sociologist Archie Hochschild describes as their “second shift”: picking up children, making dinner, paying bills, helping with homework, taking care of elderly parents.<sup>40</sup> It is not that men do not do these tasks—they certainly do—but women do them much more often.<sup>41</sup> Women are also judged more harshly if they fall short of perfection in carrying them out.<sup>42</sup>

I have experienced this dynamic in almost every job I have ever had. In my factory and retail work, I noticed that different people had very different reactions in identical situations. Sometimes, we would reach the end of a shift and discover that the next worker had called in sick. Some of us would rejoice at the opportunity for overtime. Others—usually parents of small children, most often mothers—would panic because they could not afford to be late for childcare pickup. Women are, statistically speaking, far more likely to work a significant second shift than men. Women are more likely to be single parents and more likely to have “primary” responsibility for children if they are coupled.

Employees who do not jump at the opportunity for overtime, whether

40. See generally *id.*

41. According to a 2005 study, married women with no children do an average of 16.5 hours of housework per week, and married men with no children an average of seven hours. In contrast, single women did a little over ten hours per week and single men about eight. The study concluded that marriage “saves” men an hour of housework per week and “costs” women seven hours. *Chore Wars: Men, Women and Housework*, NAT. SCI. FOUND. (Apr. 28, 2008), [https://www.nsf.gov/discoveries/disc\\_images.jsp?cntn\\_id=111458](https://www.nsf.gov/discoveries/disc_images.jsp?cntn_id=111458); see also *Charts by Topic: Household Activities*, BUREAU OF LABOR STATISTICS (Dec. 20, 2016), <https://www.bls.gov/tus/charts/household.htm> (providing various data demonstrating that women, on average, spent more time on household activities than men in 2016).

42. See Sarah Thebaud, Leah Ruppanner & Sabino Kornrich, *The Simple Reason Why Men Do Less Housework, On Average, Than Women*, FAST COMPANY (July 3, 2019), <https://www.fastcompany.com/90372399/why-men-do-less-housework-than-women> (“Women may be judged more harshly for having a less-than-spotless home . . .”).

literally or metaphorically, fall behind in the long run by appearing less committed and motivated than others. This is especially true in professions such as law where “face time” is important and some of the most interesting and career-advancing work comes in late in the day. Many of the best assignments I received as a law firm associate were ones that I volunteered for at 7:00 p.m., after associates with small children had left for the day. Lawyers are also sometimes more relaxed in the evening, and there is a feeling of camaraderie among the people who are so committed that they are willing to stay late into the night. In my experience, some lawyers will purposely schedule themselves to be at the office in the evening precisely so they can get credit for their commitment, even when they do not actually have work that requires them to be there.

It should be obvious how these workplace cultures affect disproportionately people with families. Those people who are responsible for a second shift lose out overtime and find themselves falling behind. They are less likely to become, in the legal world, partners, or in the corporate world, senior executives. They are more likely to find an alternative path—a “mommy track”—that allows reduced hours. The reality of those tracks, however, is that they often lead to a permanent reduction in income and in satisfying, challenging work.

What is less obvious is not what happens to *women*, but what happens to men. Women are not simply “opting out” of full-time work. Many men, buoyed by the gendered norms of who does housework and childcare at home, are “opting in” to longer and longer workweeks. A *part-time* schedule at many law firms is forty-to-sixty hours per week. “Full time” is really “all the time”—which means someone else is handling everything outside of work. Men and women tend to work the same number of hours when they are single with no children, but after marriage, men work several hours more than women each week (and, as noted above, married women do more housework). Some researchers have identified this difference, rather than overt gender discrimination, as the reason for the gender wage gap.<sup>43</sup>

For men, the impact of this difference is both a benefit and a burden. It tends to mean more pay, greater prospects for promotion, and higher status at work. It also means that men who rise high in the legal profession are less likely to spend significant time with their families. And it provides very little choice. The notion that women choose to “opt out” has been roundly critiqued; instead, women are “pushed out” when workplace structures

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43. See, e.g., Payman Taci, *Is the Difference in Work Hours the Real Reason for the Gender Wage Gap?*, MEDIUM (Jan. 22, 2019), <https://towardsdatascience.com/is-the-difference-in-work-hours-the-real-reason-for-the-gender-wage-gap-interactive-infographic-6051dff3a041> (arguing the pay gap directly results from “the difference between the number of hours spent at work by women and men”).

refuse to recognize the reality of their family lives.<sup>44</sup> Similarly, men who “opt in” are responding to workplace structures that leave them few choices.

For men who deviate from this norm, the response can be punishing—sometimes even more punishing than for women. As Joan Williams and Stephanie Bornstein have documented, “men who dare to exercise their right to take family and medical leave to which they are legally entitled may experience stigma and career penalties at work for doing so.”<sup>45</sup>

For me, the ability to rise in my profession while still being a wife and mother has been a direct result of the jobs that my husband and I chose. After several years of legal practice, we both left our law firms to become law professors. This career change was something we very much wanted to do professionally, but we also knew that it would provide more flexibility in our lives. Contrary to popular belief, academic positions are not stress-free. Teaching law students is difficult and much more time-consuming than rookies often realize, engaging in legal research and publishing high-quality scholarship requires time and care, and contributing to the intellectual life at a school and within a community of scholars requires constant interaction with other faculty and students, as well as travel. We have both worked throughout our careers far more than the traditional forty-hour, “full-time” workweek. Academic jobs are different from others, though: we had remarkable control over our schedules; with the exception of classes and committee meetings, we could choose when, where, and how we worked. To return to the statistics I referenced at the beginning, 5 percent of CEOs of Fortune 500 companies are women, as are 21 percent of equity partners at law firms. Nearly 40 percent of law school deans are women—including 43 percent of the deans of the very prestigious law schools represented in this joint issue. Academic culture, which values actual output over the time spent producing and has a more flexible approach to the workday, appears to result in more women in positions of leadership.

Also crucial to our mutual success has been that we *both* have flexible jobs. The picture is very different for families in which one spouse is an academic and the other has a “24/7” job. The academic’s schedule can easily be compressed so that it is treated as secondary to the lawyer or executive’s schedule, and the academic’s second shift grows. The aggregate result of this dynamic is a gender disparity in achievement in the academy, where male

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44. JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 7 (2006), available at <https://perma.cc/PM29-P3F9> (“This Report argues that most mothers do not opt out; they are pushed out by workplace inflexibility, the lack of family supports, and workplace bias against mothers.”).

45. Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1331 (2008).

faculty are often supported by stay-at-home or part-time employed wives who take care of the entire second shift, but female faculty are still taking on that entire shift to help support the career of a husband who is in a less flexible profession.

Parental leave is an important piece of this puzzle, but solving the parental-leave conundrum does not solve the long-term issues in family dynamics because parental leave exists only for the first few months of an infant's life. For me, generous parental leave was critical to my ability to continue successfully toward academic tenure. The amount of time was not the only important factor. Flexibility was also important; for example, during the fall of my first pregnancy, I taught my Family Law class four days a week instead of two and finished teaching in mid-October to accommodate my due date. Also crucial was the application of the parental-leave policy to my husband, who also taught his class double time and was able to share parenting equally with me during the time when patterns of parenting behavior develop.

Yet equal parental leave has a downside that is well documented; male academics are more likely to work on research and scholarship during parental leave, using it as a respite from teaching, while female academics use it to recover from childbirth and bond with their infants.<sup>46</sup> This phenomenon is similar to the way in which the transformation of the coverture-era rule that wives provide services to their husbands to a gender-neutral version has had disproportionate effects on women when they are socially expected to do more at home. When social norms encourage women to take care of infants and men to get ahead in the workplace, gender-neutral parental leave policies can have gendered effects.

#### PLAYING WIFE AND MOM AT WORK

So far, I have been arguing that women are less likely to get “to the top” in most workplaces because the workplaces do not account for the reality of their gendered family roles at home. There is a second way in which these roles affect the workplace, one that can be even more difficult for women to navigate, because nothing we do can change how other people behave. People's experiences with women outside of work affects their attitudes about women at work. Studies have consistently shown that women are more likely to volunteer for “office housekeeping” tasks and that other employees

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46. See Justin Wolfers, *A Family-Friendly Policy That's Friendliest to Male Professors*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/26/business/tenure-extension-policies-that-put-women-at-a-disadvantage.html> (“[M]en who took parental leave used the extra year to publish their research, amassing impressive publication records. But there was no parallel rise in the output of female economists.”).

are more likely to ask women to volunteer.<sup>47</sup> This feature of the workplace affects women regardless of their actual family circumstances. You do not have to be a wife or mom to be treated like one.

I have seen this dynamic play out in multiple workplaces throughout my career. At law schools, it tends to play out in two ways. First, female faculty disproportionately mentor and counsel students, especially about issues that go beyond academics. At every law school I have attended or taught in, there have been a handful of faculty who “everyone knows” are the go-to people for discussing personal problems. These individuals are usually women, people of color, or LGBTQ faculty—often a combination of all of the above. Students come to us with issues related directly to these identities—disclosures of sexual assault or racial harassment, for example. It is not only students who share our gender or racial identities who come to us, however—it is *all* students. Male students, too, are accustomed to getting support and nurturing from women and are quite comfortable asking for—or even demanding—it.

The problem is the students are genuinely needy, and sometimes the problems are true emergencies. No one wants to be the faculty member who turned away a suicidal student; most of us would like to be the person a student looks back on years later as having made an enormous difference to them in a time of trouble. This is not work that most of us would feel comfortable refusing, and it can be a source of meaning and satisfaction. The problem is that the work is not evenly distributed, so some faculty do more of it than others, and it is not valued institutionally. Talking with students about their personal lives does not get you promoted; publishing quality scholarship and teaching effectively in the classroom do.<sup>48</sup>

“Big sister” or “mom” are not the only roles women are expected to play in the workplace. As Dean Laura Rosenbury has explained, during much of the twentieth century, secretaries performed the role of “office wife” for men in executive roles.<sup>49</sup> Today, there are more permutations of relationships at work—ciswomen who have work wives, ciswomen who have work husbands, transmen who have work wives, and on and on. But, as Dean Rosenbury notes, many of these relationships play out traditional

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47. See, e.g., Linda Babcock, Maria P. Recalde, & Lise Vesterlund, *Why Women Volunteer for Tasks That Don't Lead to Promotions*, HARV. BUS. REV. (July 16, 2018), <https://hbr.org/2018/07/why-women-volunteer-for-tasks-that-dont-lead-to-promotions> (arguing that women are more likely than men to volunteer for time consuming, yet “non-promotable,” tasks).

48. See *id.* (“[I]n industry, revenue-generating tasks are more promotable than non-revenue-generating tasks; in academia, research-related tasks are more promotable than service-related tasks . . .”).

49. See Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 347 (2013) (explaining that women working as secretaries were often charged with “providing support that frequently looked like the care wives provided to their husbands at home”).

gender roles, with the employee in the position of “wife” providing emotional support, reminding the other employee of where he or she needs to be, and even looking out for the coworker’s health, by dispensing aspirin or reminding them to see the dentist.<sup>50</sup>

None of the activities that women engage in at work are inherently bad. In fact, many are good—good for the office, good for coworkers, maybe even good for the person engaging in them because they lead to fulfillment and happiness. They do not, however, lead to promotions—at least not without all of the other achievements necessary for promotion. In many workplaces that appear to be equal, some employees are not only carrying on a second shift at home but are also expected to conform to this gendered home identity at work, caring for their coworkers and supervisors the way they care for their children at the expense of their own advancement. Men at work, meanwhile, can be oblivious to this work, the benefits they receive from it, and the toll it takes on women’s achievement.

#### CONCLUSION

I have two final thoughts as I think about the future careers of our sixteen editors-in-chief and the millions of other young women who hope to lead their professions someday. Their achievements to date have resulted from their talent and hard work. Their talent and hard work will of course affect their ability to lead twenty years from now, but their talent and hard work will not be enough. Until we—“we the people”—decide that the legal and social structures underlying families and the workplace need to change, the only women who will become leaders will be those who manage to slip through the cracks—the exceptions. The exceptions are women who have found partners who prioritize our career success. We have found workplaces that provide the flexibility needed to maintain and nurture relationships outside of work. We are contrarian enough in our thinking that we are willing to tolerate the daily reminders that our exceptionalism makes others uncomfortable.

If our society is to move beyond a world where women leaders are exceptions, we need to move beyond expecting women to solve the problems of workplace structure and gendered family norms. Men will have to work with women to remake institutions, often in ways that make them profoundly uncomfortable, relinquish their male privilege, and change the way they live. Men who have benefited from this system will need to understand that the choices they have made—choices made, admittedly, under structural constraints—adversely affect the women with whom they work. The first

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50. *Id.* at 365.

hundred years of a world with the Nineteenth Amendment have been about women fighting for equality. In the next hundred years, we need men to take responsibility for their role in perpetuating gender hierarchies, not just at the polls, in the jury box, or even in workplaces, but in their own homes and families—the source of it all.

# MOTHERHOOD AS MISOGYNY

JANE H. AIKEN<sup>†</sup>

## INTRODUCTION

I remember the day that I sat in a chair teaching my second class of the day, three days after having a C-section. I could not afford leave without pay, the only leave available. It was my fault anyway; I had not timed this pregnancy well. The others had been “academic babies”—born when I had time to stay at home. I now was on a beeper at work: I was beeped when the baby woke up so that I could run home, breastfeed her, and get back to work in time for office hours. And then there were the times I needed to pump breast milk in my office and worried that the factory-like sounds coming from inside might draw attention. Even evenings were fraught as I would run to my other children’s soccer games, dressed in business clothes and inevitably late, and endure the withering looks of fellow mothers, many balancing boxes of cupcakes in their laps for after games (yikes, when was it my turn again?). And why did I struggle so much to figure out how to get the children to the doctor? Did any of this ever occur to my husband? Why didn’t I ask him? Of course, it never ends. I am now the dean of a law school, having taken that job only once all my children were out of college, and I am worried that I will be missing my son’s graduation from medical school because, on the same day, I preside over this law school’s graduation. How much mental energy do I spend every day thinking about how to be the best mother I can be for my children? Motherhood has profoundly influenced my choices, my success as a law professor, my identity as a woman. Critical to that identity is my responsibility to put my children first no matter the impact on me. Mostly, I fail at that. I am caught in the double bind: expected to perform as a teacher and scholar yet criticized for not being selfless if I do not give appropriate primacy to the care of my children.

Flash forward twenty-five years from the birth of my first child. I am teaching a Motherhood and the Law class at Georgetown University Law Center with twenty-four young women sitting around a table in a seminar

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room.<sup>1</sup> My first question: “How many of you are mothers?” Not one hand went up. Puzzled, I asked each of them why she was taking this class. Every one of them expressed some form of, “How do I be a mother and succeed in my career as a lawyer?” These women were not objecting to the structure that made this question necessary, but rather asking how to manage it. They all appreciated that a mother’s value derives from her capacity to sacrifice. They had come to the course with a hope that I could help them develop a plan for coping with this inevitable challenge. My job was to help them manage their expectations about what they could have for themselves and where to sacrifice. In all my time as a law professor, I have never been asked that type of question by a man.<sup>2</sup>

### I. MOTHERHOOD AS SACRIFICE

Mothering is hard work. It is constant; it is intense; it is exhausting. Mahatma Gandhi said that mothers best demonstrate the quality of *ahimsa*, a Hindi word that means infinite love and, at the same time, infinite capacity for suffering.<sup>3</sup> Mothers adjust their lives to accommodate children. Mothering children often requires a mother to choose less remunerative work, lesser chance for advancement, and lower status in order for her to do all the mundane but necessary things required to care for children: breastfeed; arrange for doctors’ appointments, play dates, birthday parties, reading, and homework; buy new shoes; attend parent–teacher meetings; prepare food that children will eat; nurse them when sick; awaken during the night to the slightest irregular sound. No one likes doing all of this work. Mostly, it goes unacknowledged as work; it is merely what we expect from mothers. Nevertheless, this unpaid labor is critical to family function and to our economy.<sup>4</sup> Parenting, handled primarily by mothers, is a job that is neither compensated nor counted in America’s gross domestic product.<sup>5</sup> The work that mothers put into raising their children to become successful adults

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1. Yes, all women. There was a man near the top of the waitlist, but no one dropped, and he did not get into the class.

2. I think this is the number one question I get asked by women during office hours, no matter the subject of the class.

3. Mahatma Gandhi, *What Is Woman’s Role?*, in GANDHI ON WOMEN: COLLECTION OF MAHATMA GANDHI’S WRITINGS AND SPEECHES ON WOMEN 313, 316 (Pushpa Joshi ed., 1988).

4. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 8 (1st ed. 2001).

5. Cf. JOSEPH E. STIGLITZ ET AL., *MISMEASURING OUR LIVES: WHY GDP DOESN’T ADD UP* 49 (2010) (explaining that conventional economic measures fail to account for the monetary value of household production and childcare).

is also not counted in terms of government benefits such as Social Security,<sup>6</sup> nor is it uniformly considered when determining alimony and the division of assets in a divorce.<sup>7</sup> Rather, the implied compensation mothers receive is the personal satisfaction of having children. Although having a family certainly provides many women with happiness and fulfillment, society promotes the notion that this is a sacrifice that is expected of “good” mothers whether they want to make the sacrifice or not.<sup>8</sup> Any behavioral problems with the children or issues of neglect are also automatically blamed on the mother rather than the father.<sup>9</sup> Given the penalties for not being selfless, it is hardly surprising that mothers put their children’s needs before their own, often at the cost of their own lives.<sup>10</sup> This prioritization of children’s needs may explain why women all over the world are poorer than men despite working longer hours.<sup>11</sup> Our construction of motherhood hinges on an expectation of selflessness—an apparent willingness to put the needs of others before the needs of self.

Where once there was an explicit expectation that a woman’s sole role was to bear and care for children while deriving joy and satisfaction through that relationship and subordinating her own needs to the needs of their children, today that expectation has gone underground. It emerges as an

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6. See Iulie Aslaksen & Charlotte Koren, *Reflections on Unpaid Household Work, Economic Growth, and Consumption Possibilities*, in COUNTING ON MARILYN WARING: NEW ADVANCES IN FEMINIST ECONOMICS 55, 64 (Margunn Bjørnholt & Ailsa McKay eds., 2d ed. 2014).

7. See generally Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481 § 12 (1985) (observing that courts in only twenty-six states and the District of Columbia recognized one spouse’s performance of homemaking duties as a contribution to the marriage that should be considered when dividing the marital estate).

8. See, e.g., SUSAN CHIRA, A MOTHER’S PLACE: CHOOSING WORK AND FAMILY WITHOUT GUILT OR BLAME 32 (1998); TWENTY-FIRST-CENTURY MOTHERHOOD: EXPERIENCE, IDENTITY, POLICY, AGENCY (Andrea O’Reilly ed., 2010); see also Isabel S. Wallace, *Being a Good Mother Requires Understanding, Devotion, and Sacrifice*, in BULLETIN NO. 35, TRAINING LITTLE CHILDREN: SUGGESTIONS FOR PARENTS 75, 75 (Bureau of Educ., U.S. Dep’t of Interior ed., 1919).

9. See, e.g., VICKY PHARES, “POPPA” PSYCHOLOGY: THE ROLE OF FATHERS IN CHILDREN’S MENTAL WELL-BEING 39 (1999); Jonathan Metzl, *The New Science of Blaming Moms*, MSNBC (July 21, 2014, 2:24 PM), <http://www.msnbc.com/melissa-harris-perry/the-new-science-blaming-moms>.

10. See, e.g., Rebecca J. Cook, *International Human Rights and Women’s Reproductive Health*, 24 STUD. FAM. PLAN. 73 (1993) (observing that “[t]he cost to women’s health of discharging [the duty of bearing children has historically gone] unrecognized”); Jeremy Shiffman, *Can Poor Countries Surmount High Maternal Mortality?*, 31 STUD. FAM. PLAN. 274 (2000) (discussing the high rates of maternal mortality, particularly in developing countries); L. Lewis Wall, *Dead Mothers and Injured Wives: The Social Context of Maternal Morbidity and Mortality Among the Hausa of Northern Nigeria*, 29 STUD. FAM. PLAN. 341 (1998) (discussing the high rate of maternal mortality among the Hausa); Alicia Ely Yamin & Deborah P. Maine, *Maternal Mortality as a Human Rights Issue: Measuring Compliance with International Treaty Obligations*, 21 HUM. RTS. Q. 563 (1999) (discussing solutions involving the use of potential human rights tools to encourage states to adopt policies and practices dedicated to reducing maternal mortality).

11. See, e.g., CRITTENDEN, *supra* note 4, at 8.

unstated assumption when women deviate from their expected selfless role. Mothers move through this culture with identities that do not include the full range of emotions, severe character faults, or malicious capabilities commonly considered possible in others. Instead, mothers are supposed to be selfless in caring for their children, and anything less risks heavy criticism from the rest of society. This expectation of abnegation is so ingrained in our culture that it often passes without notice.<sup>12</sup>

This Essay draws on my experience as a mother, a lawyer, and an academic handling or analyzing cases where women killed their children, were held responsible for someone else killing their children, or killed someone who threatened their children. Mothers' choices are measured on a continuum of selflessness to selfishness. Paradoxically, both ends of the continuum are implicated in these categories of cases.

These extreme cases offer some insight into the hidden expectation of selflessness incorporated in our consciousness and deeply embraced by our social structures. The social fallout from cases such as these prompted all those students in my Motherhood class to worry, to plan, and to limit themselves.

## II. MOTHERS WHO KILL THEIR CHILDREN

To most people, a mother who kills her child is either a selfish monster or mad.<sup>13</sup> In cases where a mother is charged with killing a child, that mother's motherhood is on trial. Insanity is the only explanation, but in the criminal justice system, a mother's insanity often reflects her own extreme form of selflessness. Under the M'Naghten rule,

to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>14</sup>

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12. It is not at all clear that there is a legal strategy for challenging the ways in which this expectation influences decisions and assessments. This influence may be best understood using a Foucauldian social construction theory. That theory posits an all-encompassing, interlocking network of social regulation that, for mothers, enforces the expectation of selflessness. See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Colin Gordon, ed., Pantheon Books 1980) (providing a collection of essays and interviews that have shaped and discuss Foucauldian social construction theory).

13. See Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 43 (1996); Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 528 & n.5 (2006).

14. M'Naghten's Case (1843) 8 Eng. Rep. 718, 722 (HL).

In these cases, women often fail to meet the rigorous standard for the insanity defense because they are aware that what they are doing will be punished, yet they do it anyway.<sup>15</sup> Looking at prominent insanity claims by women who killed their own children, one sees a striking number of cases in which the mother killed the child under the false belief that it would be better for the child—in other words, out of a deranged sense of caring.<sup>16</sup> Their deranged sense of “selflessness” both inspires the act and defeats the insanity defense. They live out the oxymoron of being both a loving mother of children and the children’s killer.

In October 1994, Susan Smith, distraught over the state of her life, stopped her car on a bridge in Union County, South Carolina, and considered jumping off the bridge to kill herself.<sup>17</sup> As she approached the railing, she stopped, realizing that were she to jump, she would be abandoning her two boys, asleep and strapped in their car seats.<sup>18</sup> Ms. Smith said later, “I felt even more anxiety coming upon me about not wanting to live. . . . I felt I couldn’t be a good mom anymore, but I didn’t want my children to grow up without a mom. . . . I felt I had to end our lives.”<sup>19</sup> She believed that a good mother would not leave her children to grow up without a mom.<sup>20</sup> Ms. Smith returned to her car, sobbing and dazed, and drove to John D. Long Lake.<sup>21</sup> Seeing a boat ramp, she drove the car onto the ramp, allowing it to roll into the water, ready to die with her children.<sup>22</sup> As the car entered the water, Ms. Smith panicked, and she jumped out of the car as it continued into the water and sank.<sup>23</sup> With no one to help her save the children, Ms. Smith thought to herself that she should tell no one what had happened because they would hate her.<sup>24</sup> Ms. Smith had not wanted to leave her children alone and, planning her own suicide, decided to kill them to ensure they did not grow

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15. See CHERYL L. MEYER & MICHELLE OBERMAN, *MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE “PROM MOM”* 95 (2001).

16. See, e.g., Josephine Stanton et al., *A Qualitative Study of Filicide by Mentally Ill Mothers*, 24 *CHILD ABUSE & NEGLECT* 1451 (2000) (providing a survey of various instances of filicide by mothers); Susan Ayres, “[N]ot a Story to Pass On”: *Constructing Mothers Who Kill*, 15 *HASTINGS WOMEN’S L.J.* 39, 86–88, 97, 100–01 (2004).

17. GEOFFREY R. MCKEE, *WHY MOTHERS KILL: A FORENSIC PSYCHOLOGIST’S CASEBOOK* 156, 158 (2006).

18. *Id.* at 156.

19. ANDREA PEYSER, *MOTHER LOVE, DEADLY LOVE: THE SUSAN SMITH MURDERS* 3 (1995).

20. MCKEE, *supra* note 17, at 156.

21. *Id.* at 157.

22. *Id.*

23. *Id.*

24. *Id.* Ms. Smith then dissembled the facts and made a claim easily believed in her small Southern town: that her children had been taken by a black man. *See id.* That assertion prompted a manhunt and a national story. *See id.*

up without a mother.<sup>25</sup> No one would understand that she, too, wanted to die and save her children from abandonment by taking them with her, but that she ultimately did not have the courage to follow through with her suicide. She was charged with capital murder and the prosecution sought the death penalty.<sup>26</sup> I assisted the defense with pretrial surveys of potential jurors. The survey results indicated two possible responses of jurors: that something must have been terribly wrong with Ms. Smith, rendering her insane, or that the killing was the result of Ms. Smith's uncontrolled sexual desires and rejection of the sacred maternal role. As the evidence unfolded, it was clear that Ms. Smith had been victimized by her stepfather and suffered considerable trauma.<sup>27</sup> That evidence did not result in a finding of insanity,<sup>28</sup> but it did help Ms. Smith avoid the death penalty.<sup>29</sup>

In a similar case, defendant Andrea Yates told her doctor that she had killed her children because she felt she was such a bad mother that she had doomed her children to hell.<sup>30</sup> The only way she could save them, she believed, was to kill them.<sup>31</sup> Her attorney, George Parnham, noted that Ms. Yates believed that “[t]hese children of hers needed to die in order to be saved . . . because [she] was such a bad mother that she was causing these children to deteriorate and be doomed to the fires of eternal damnation.”<sup>32</sup> This case shows the tragic meta-recursive layers to this thought process: A woman is so consumed with shame about being a bad mother that she believes she is embodying the archetypal “good” mother qualities in committing the most heinous crime a mother can commit against her children.

Contrast the women in these cases with fathers who kill their children, who rarely manifest this selfless, yet deranged, motivation.<sup>33</sup> Instead fathers

25. PEYSER, *supra* note 19, at 3.

26. See Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, N.Y. TIMES (July 29, 1995), <https://www.nytimes.com/1995/07/29/us/carolina-jury-rejects-execution-for-woman-who-drowned-sons.html>.

27. See Rick Bragg, *Susan Smith Verdict Brings Relief to Small Town*, N.Y. TIMES (July 30, 1995), <https://www.nytimes.com/1995/07/30/us/susan-smith-verdict-brings-relief-to-town.html>.

28. See Rick Bragg, *Judge Rules Susan Smith Is Fit for Trial on Murder Charges*, N.Y. TIMES (July 12, 1995), <https://www.nytimes.com/1995/07/12/us/judge-rules-susan-smith-is-fit-for-trial-on-murder-charges.html>.

29. See Bragg, *supra* note 27.

30. See Lisa Sweetingham, *Defense: Yates Killed Kids to Save Them*, CNN (June 27, 2006, 11:31 AM), <https://www.cnn.com/2006/LAW/06/26/yates.trial/index.html>.

31. *Id.*

32. *Id.*

33. See Elizabeth Yardley et al., *A Taxonomy of Male British Family Annihilators, 1980–2012*, 53 HOW. J. CRIM. JUST. 117, 132 tbl.14 (2014) (finding that only 14% of male family annihilators kill their children as “a way of protecting them from [a] threat”).

predominately act out of anger, jealousy, and marital and life discord.<sup>34</sup> The majority of men who kill their own children engage in family annihilation, usually after a threat of divorce.<sup>35</sup> They kill not only their children but oftentimes also their spouse or partner.<sup>36</sup> Studies of fathers who kill their children note that the primary motivation for such acts can be characterized as self-righteousness.<sup>37</sup> Researchers explain family annihilators classified as self-righteous:

For these men, [the idea of a traditional nuclear] family is central to their masculinity. Their role as the ‘breadwinner’ affords them a significant degree of control. Thus the threat of family breakdown results in efforts to keep the family together—through an escalation of controlling behaviour that may involve threats and violence towards their partners. Where their partners show signs of thriving without them, the family is perceived as having failed. . . . The self-righteous family annihilator, therefore, engages in a dramatic performance of his domineering, masculine identity. By removing his children, he effectively prevents them from becoming the stepchildren of another man. For the self-righteous family annihilator, the family has failed in its function as a forum for the performance of masculinity through dominance and control.

Here we should note that the threat has come from *within* the family—specifically the non-compliance of his partner, who has wrested back a degree of power and independence.<sup>38</sup>

Had she not acted so selfishly, he would not have needed to annihilate the family.

In other cases where mothers, particularly young mothers, kill their children, the failure to engage in selfless behavior heightens the probability of being found guilty. Young mothers who kill their children are often criticized as having engaged in selfish behavior by ridding themselves of an unwanted “problem.” The prosecution often makes considerable use of the trope of selfishness. The trial of Casey Anthony is illustrative.

Ms. Anthony was charged with first-degree murder, aggravated manslaughter, and aggravated child abuse of Caylee Anthony, her daughter, who after having been missing for several weeks was found dead, buried,

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34. Fathers tend to use more violent means than mothers when they kill their children; for example, by using firearms, stabbing, inflicting head injuries, hitting, or kicking. Timothy Y. Mariano et al., *Toward a More Holistic Understanding of Filicide: A Multidisciplinary Analysis of 32 Years of U.S. Arrest Data*, 236 FORENSIC SCI. INT’L 46, 47 (2014).

35. *See id.*; *see also* Yardley et al., *supra* note 33, at 130 (finding family breakdown to be the primary cause of male family annihilation).

36. *Id.* at 129.

37. *Id.* at 131–32.

38. *Id.*

and gagged with duct tape.<sup>39</sup> A significant part of the prosecution's theory of the case was the suggestion that selfishness was the motive for murder, and the prosecution painted Ms. Anthony as a party girl who had a much better life now that Caylee was out of her way.<sup>40</sup> The prosecution's theory of Ms. Anthony's selfishness, though intended to smear her character in the courtroom, spoke most strongly to the throngs of people following the case throughout America.<sup>41</sup> Ms. Anthony went against the prototypical mother—from her reaction at her trial (Nancy Grace called Ms. Anthony stone-faced and said that she would like to slap the expression off Ms. Anthony's face<sup>42</sup>) to her actions the day after Caylee disappeared (running errands to Blockbuster and Target and staying inside her room with boyfriend Tony Lazzaro all day<sup>43</sup>). The prosecution took this idea even further and posited that Ms. Anthony wanted Caylee out of the way so that she could party.<sup>44</sup> It presented testimony that Ms. Anthony gave Caylee a sedative so that Caylee would sleep through the night and Ms. Anthony could go out.<sup>45</sup> It showed pictures of Ms. Anthony partying with her boyfriend several days after Caylee first disappeared.<sup>46</sup> And finally, it ended by presenting a picture of Ms. Anthony's tattoo, which reads "Bella Vita," a phrase that means "beautiful life," that she got several days after Caylee's disappearance.<sup>47</sup> Impugning a woman's mothering practices as selfish or suggesting that she has not engaged in the requisite selfless behavior appears to be a strategy of

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39. See Lizette Alvarez & Timothy Williams, *Anthony Is Sentenced to 4-Year Term for Lying*, N.Y. TIMES (July 7, 2011), <https://www.nytimes.com/2011/07/08/us/08anthony.html>; Breeanna Hare, 'What Really Happened?': The Casey Anthony Case 10 Years Later, CNN (June 30, 2018, 12:54 AM), <https://www.cnn.com/2018/06/29/us/casey-anthony-10-years-later/index.html>.

40. Cara Hutt, *Week 1: As Casey Anthony Murder Trial Begins, Mysteries Remain*, CNN (May 29, 2011, 3:27 PM), <http://www.cnn.com/2011/CRIME/05/28/casey.anthony.trial.wrap/index.html>.

41. See Alvarez & Williams, *supra* note 39.

42. *Nancy Grace: Cindy Anthony Breaks Down in Court at 911 Tapes* (HLN television broadcast May 31, 2011), <http://transcripts.cnn.com/TRANSCRIPTS/1105/31/ng.01.html>.

43. See Barbara Liston, *Casey Anthony "Normal," "Happy" After Tot's Death*, REUTERS (May 25, 2011, 8:42 PM), <https://www.reuters.com/article/us-crime-anthony/casey-anthony-normal-happy-after-tots-death-idUSTRE74O7HQ20110526>; *Timeline in the Casey Anthony Case*, SAN DIEGO UNION-TRIB. (July 17, 2011, 6:41 AM), <https://www.sandiegouniontribune.com/sdut-timeline-in-the-casey-anthony-case-2011jul17-story.html>.

44. Frank Farley, *Infanticide in Order to Party: A Nonsense Motive*, CNN (July 6, 2011, 10:38 AM), <http://www.cnn.com/2011/OPINION/07/05/farley.anthony.trial/index.html>.

45. See Lee Ferran, *Witness Reports: Casey Anthony Used to 'Knock Out' Caylee*, ABC NEWS (Apr. 6, 2010, 12:14 PM), <https://abcnews.go.com/GMA/TheLaw/witness-reports-casey-anthony-knock-caylee/story?id=10301719>.

46. See Ashleigh Banfield & Jessica Hopper, *Casey Anthony Trial: Former Boyfriend Describes Casey Anthony Romance*, ABC NEWS (May 25, 2011, 8:36 AM), <https://abcnews.go.com/US/casey-anthony-trial-tony-lazzaro-describes-romance-caylee/story?id=13682814>.

47. See Alvarez & Williams, *supra* note 39; Farley, *supra* note 44.

choice in painting a defendant as worthy of punishment no matter the limitations of the proof.<sup>48</sup>

### III. MOTHERS OF MURDERED CHILDREN

A woman is also blamed when her child is killed by another. She has either acted selfishly by staying with the killer despite his violent tendencies toward the child, or she has failed as a selfless mother due to her inability to recognize the risk of harm to her child.

Legislators ostensibly design failure-to-protect statutes to protect children, and these statutes appear to be a logical way to reduce instances of child abuse.<sup>49</sup> Child abuse statutes typically appear in two forms: commission statutes aimed at active abusers and omission statutes criminalizing the passive conduct of those who expose a child to a risk of abuse or fail to care for or protect a child in violation of a legal duty.<sup>50</sup> Omission statutes aim “to protect children’s ‘best interests’ by compelling parents to remove their children from abusive environments.”<sup>51</sup> Typically, the passive parent’s liability for child abuse or homicide is predicated upon (1) the parent’s legal duty to protect the child, (2) the parent’s actual or constructive notice of the foreseeability of abuse, (3) the child’s exposure to the abuse, and (4) the parent’s failure to prevent such abuse.<sup>52</sup> Every state imposes some form of criminal liability for passive child abuse.<sup>53</sup> Usually, the prosecutor must show that (1) the defendant had a legal duty to protect the child, (2) the defendant had notice of the foreseeability of abuse, (3) the child was abused, and (4) the defendant failed to prevent the abuse.<sup>54</sup> Mothers who fail to protect their children from third-party abuse can be charged not

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48. In a case with which I am involved, our client, a mother of five children, was charged and convicted of killing her husband. Transcript of Trial Proceedings at 707, *State v. Prewitt*, No. CR484-5F (Mo. Ct. App. Apr. 19, 1985). Faced with little evidence of her connection to the crime, the prosecution suggested that the motive for the killing was our client’s engagement in extramarital affairs. *Id.* at 659. The affairs in question had occurred six years prior during a period of separation from her husband, the victim. *Id.* at 584, 682–83. Apparently seeking to bolster the power of the evidence, on cross-examination, and without objection, the prosecutor asked: “Where were the children when you engaged in intercourse with him?” *Id.* at 639. In a memoir later written by the prosecutor, he described questions like this as “a few parting shots” that relied on “the old favorite, motherhood.” TOM R. WILLIAMS & NAN COCKE, *PRACTICE TO DECEIVE* 467 (2016).

49. See Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner’s Abuse*, 6 *HASTINGS WOMEN’S L.J.* 67, 67–68 (1995).

50. *Id.*

51. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 *J. CRIM. L. & CRIMINOLOGY* 579, 615 (1998).

52. *Id.*; Panko, *supra* note 49, at 68.

53. Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 *N.Y.U. L. REV.* 272, 278 (2001).

54. *Id.* at 279.

only with failure to protect, but also with child abuse, reckless endangerment, accessory to murder, and even felony murder.<sup>55</sup> These failure-to-protect statutes can inflict devastating prison sentences and felony convictions.<sup>56</sup> When combined with felony murder, failure-to-protect convictions can even carry life sentences.<sup>57</sup> Under this framework, evidence of prior abuse of the mother can actually work against her: Instead of being used to potentially explain why a mother was afraid to come between her batterer and her child, evidence of prior abuse can show the mother should have known that her child was in danger.<sup>58</sup> Only a few states provide statutory affirmative defenses that allow the accused to argue that she believed interfering in the abuse would cause physical harm to herself or further injury to her child.<sup>59</sup>

Society's conception of motherhood plays a role in the decision to prosecute for failure to protect. The justice system will often ascribe a preternatural instinct to a mother to see that her child might be at risk of harm. One writer observes that "[s]ociety believes that the maternal instinct bestows upon a woman a superior ability to protect."<sup>60</sup> Another researcher echoes the sentiment: "While courts have determined that the primary responsibility of the child falls upon both parents, mothers are singled out as the primary care takers, and take primary blame when tragedy strikes."<sup>61</sup> One client of mine, whose abusive housemate killed her baby as she walked her six-year-old to the bus stop, could not fathom that this could have happened. She felt that surely it must be her fault. Her all-consuming guilt—and insistence that she had failed as a mother—made defending her against a charge of child endangerment and failure to protect all but impossible. When I met her, she had been in prison for several years, always on suicide watch. I learned her story when I advised her that the paper she asked me to interpret was a voluntary relinquishment of her parental rights—she had signed it earlier, not appreciating its significance. The state had terminated her parental rights to her six-year-old. Although there was not much I could do about this termination after the fact, I determined that we had several grounds to challenge her criminal conviction. She refused to move forward, convinced that she should have known: "After all, I was their mother." I am haunted by this case. The client remains in prison under suicide watch.

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55. *See id.* at 277 n.19, 279 n.26.

56. *Id.* at 277 n.19, 278–79 & n.26.

57. *See, e.g.,* Jacobs, *supra* note 51, at 582–83.

58. Fugate, *supra* note 53, at 291–92.

59. *Id.* at 279.

60. Rebecca Ann Schernitzki, *What Kind of Mother Are You? The Relationship Between Motherhood, Battered Woman Syndrome and Missouri Law*, 56 J. MO. B. 50, 50 (2000).

61. Geneva Brown, *When the Bough Breaks: Traumatic Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 224 (2005).

Even though failure-to-protect statutes are written in gender-neutral terms, prosecutors use them against mothers far more often than against fathers.<sup>62</sup> One advocate stated: “In the 16 years I’ve worked in the courts, I have never seen a father charged with failure to protect when the mom is the abuser. Yet, in virtually every case where Dad is the abuser, we charge Mom with failure to protect.”<sup>63</sup> Thus, common beliefs concerning motherhood have created a bias in the justice system.<sup>64</sup> “[T]hat a mother is charged at all in the failure-to-protect scenario is a powerful example of the ‘mother-blaming’ bias that permeates not only our legal institutions, but also our cultural norms,” writes Professor Jennifer M. Collins.<sup>65</sup>

Perhaps the most poignant example of the lopsided nature of failure-to-protect statutes can be seen in the aforementioned Andrea Yates case. The nation was consumed with the sad story of Ms. Yates, the suburban mother who in 2001 killed all of her children by drowning them and then called the police to report what she had done.<sup>66</sup> Ms. Yates had suffered from intense postpartum depression that transformed into psychosis after her fourth baby was born.<sup>67</sup> She spent considerable time in a mental hospital to recover.<sup>68</sup> Although warned by her physician that she was likely to have the same or worse experience should she give birth again, after pressure from her husband, Rusty Yates, Ms. Yates decided to have another child and risk her descent into psychosis.<sup>69</sup> Indeed, when that baby was born, Ms. Yates did experience postpartum depression.<sup>70</sup> According to the trial testimony, Mr. Yates was told by the psychiatrist that Ms. Yates was not capable of caring for the children and should not be left alone with them.<sup>71</sup> However, without

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62. See Gregory L. Lecklitner et al., *Promoting Safety for Abused Children and Battered Mothers: Miami-Dade County’s Model Dependency Court Intervention Program*, 4 CHILD MALTREATMENT 175 (1999) (quoting a longtime advocate discussing the prevalence of female defendants in failure-to-protect cases).

63. *Id.* at 176.

64. See Fugate, *supra* note 53, at 274 (“Defendants charged and convicted with failure to protect are almost exclusively female. . . . The overwhelming prevalence of female defendants can be explained best by the higher expectations that women face in the realm of parenting and child care.”).

65. Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent–Child Relationship*, 93 IOWA L. REV. 131, 180 (2007).

66. Melissa Chan, *Revisiting Andrea Yates 15 Years After She Drowned Her Children*, TIME (June 20, 2016), <https://time.com/4375398/andrea-yates-15-years-drown-children>; Sweetingham, *supra* note 30.

67. See Terri Langford, *Yates Recounts Wife’s Descent: Tearful Husband Details Frustrating Search for Medical Help*, NEWSROOM, Feb. 28, 2002, at A1.

68. See *id.*

69. Timothy Roche, *The Yates Odyssey*, TIME, Jan. 28, 2002, at 42, 48.

70. See Langford, *supra* note 67.

71. Dale Lezon, *Yates Not Grossly Psychotic Before the Drownings, Dietz Testifies*, HOUSTON CHRONICLE, July 13, 2006, at 1.

consulting the doctor about his plans, Mr. Yates began leaving his wife alone with the children for an hour in the morning and an hour in the afternoon in the weeks leading up to the drownings to ensure that she did not become totally dependent on him and his mother, who had been helping care for the children, for her maternal responsibilities.<sup>72</sup> Mr. Yates decided that Ms. Yates needed to start caring for the children again and decided to leave her, despite the warning of the psychiatrist that Ms. Yates was a danger to the children.<sup>73</sup> On June 21, 2001, Andrea Yates killed all five of her children.<sup>74</sup> She was charged with, tried for, and convicted of their murders.<sup>75</sup> After retrial, she was determined to have been insane at the time of the killing.<sup>76</sup> Mr. Yates, on notice of the physical risk to his children, was never charged with anything.

Men who batter children often also batter the children's mothers.<sup>77</sup> Failure-to-protect cases implicate not only norms of selfishness when a mother does not intervene, but also norms of selflessness when she is expected to incur great harm to herself to intervene. The battered mother charged with failure to protect finds herself in a particularly precarious position. Selflessness is readily apparent in this line of cases because our expectation of mothers is so different from our expectation of fathers. In cases in which the mother is the victim of domestic violence, she is expected to put her own risk aside and act on behalf of her children. A battered woman is still held to the heightened expectation placed on all mothers even though it is hardest for her to intervene. "The battered mother is placed in the dichotomous sphere where her survival is opposed to that of her children."<sup>78</sup> Knowing that she may be prosecuted for failing to protect her children, "[s]he must place herself in harm's way to protect her children and have no regard for her safety and wellbeing."<sup>79</sup>

After leaving her four-year-old daughter, H.C., home alone with her live-in boyfriend, Floyd Boyer, Casey Campbell returned from work shortly after 7:00 PM to find her daughter severely burned.<sup>80</sup> Mr. Boyer claimed the burns were from spilled coffee.<sup>81</sup> Instead of taking H.C. directly to the

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72. See SUZY SPENCER, *BREAKING POINT 300* (St. Martin's Paperbacks ed. 2002).

73. *Id.* at 300.

74. *Id.* at 4.

75. See Chan, *supra* note 66.

76. See *id.*

77. See Fugate, *supra* note 53, at 279–80 (noting that women charged under failure-to-protect statutes are often themselves abused).

78. Brown, *supra* note 61, at 231.

79. *Id.*

80. *Campbell v. State*, 999 P.2d 649, 654 (Wyo. 2000).

81. *Id.*

hospital, Ms. Campbell went to play darts with Mr. Boyer, afraid to provoke the man who “had been physically abusive to [her] for years.”<sup>82</sup> Ms. Campbell and Mr. Boyer did not take H.C. to the hospital until 2:00 AM—after they had returned from darts and H.C.’s pain had intensified.<sup>83</sup> The examining physician did not believe the burns were from hot liquid, and contacted the police.<sup>84</sup> Mr. Boyer pleaded guilty to misdemeanor child endangerment.<sup>85</sup> Ms. Campbell, who had also been charged with child endangerment, went to trial.<sup>86</sup> Her attorney requested a continuance to explore a battered woman’s syndrome defense, but the court denied it.<sup>87</sup> At Ms. Campbell’s trial, Mr. Boyer confirmed that he had abused Ms. Campbell in the past.<sup>88</sup> He testified that he believed Ms. Campbell did not seek medical care for H.C. that night and left her to play darts to avoid angering him and risking further abuse.<sup>89</sup> At the jury instruction stage, Ms. Campbell’s attorney requested an instruction on the defense of duress and coercion, but the instruction was denied.<sup>90</sup> Ms. Campbell was convicted of felony child endangerment, a far more serious crime than the one to which Mr. Boyer pleaded guilty, and she was sentenced to prison.<sup>91</sup>

Ms. Campbell was not at home when her child was injured, and she only failed to get appropriate medical care out of fear of her batterer, Mr. Boyer. Because of the prior abuse by Mr. Boyer that she had endured, Ms. Campbell could not have reasonably been expected to defy the wishes of her batterer, yet she was denied an opportunity to explore a battered woman’s syndrome defense. Ms. Campbell was allowed to testify that she “had been abused by her brother since she was seven years old, by her stepfather since a teenager, and by Boyer since she was sixteen years old, and Boyer had violently assaulted her with knives and guns on past occasions.”<sup>92</sup> She also testified that “[a]t the time of HC’s injuries, she feared for herself and HC if she defied Boyer that night by refusing to play darts.”<sup>93</sup> However, the court’s refusal to instruct the jury on the defense of duress and coercion nullified the

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82. *Id.* at 655.

83. *Id.* at 654.

84. *Id.*

85. *Id.* at 655.

86. *Id.* at 654–55.

87. *Id.* at 655.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*; see also Fugate, *supra* note 53, at 272 n.2.

93. *Campbell*, 999 P.2d at 655.

relevance of this testimony.<sup>94</sup> The justice system failed to recognize that Ms. Campbell might have reasonably failed to protect her child due to her experience of prior abuse and the rational fear that any intervention would further endanger herself or her child. Although the actual abuser received only a misdemeanor conviction, Ms. Campbell was convicted of a devastating felony and sentenced to jail time.<sup>95</sup>

Casey Campbell's story is indicative of a recurring problem. As it currently stands, the legal system punishes women for failing to protect their children regardless of whether they could have reasonably halted the abuse. Battered women, victims themselves, appear to have a reason to hesitate to intervene in their partners' abuse of their children. Research suggests that battered women are six times more likely to be accused of child abuse than women who have not been battered.<sup>96</sup> Nevertheless, the current state of the law has trouble recognizing the effects of domestic violence on a mother's capacity to protect. The expectation that women put their children first overlooks evidence suggesting that doing so can be virtually impossible.

A court might better appreciate the reasonableness of a mother's actions if it considered a woman's decision to stay in the home of her batterer in light of the real threat that her batterer will retaliate if she leaves. Separation assault is well documented, and women often find themselves in a "no-win situation": "You're in danger when you're with him and you're in danger when you're not . . . . That's what leads to a lot of behavior by abused women that those of us on the outside can't understand."<sup>97</sup> The expectation of selflessness is so strong that unless a woman risks her own life to protect a child, and many often will, she has failed and is punishable.

#### IV. MOTHERS WHO KILL TO PROTECT THEIR CHILDREN

Ironically, despite the expectation that women protect their children before themselves, when women kill to protect their children, that protectiveness is not used to mitigate the crime. Instead, it is often recast as a selfish act. Self-defense is justified when there is an imminent threat of death or serious bodily harm.<sup>98</sup> Without imminence, the defense is virtually unavailable.<sup>99</sup> Often when there are children involved, the batterer threatens

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94. *See id.*

95. *See id.*

96. *See* Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97, 102 (1988).

97. Louise Kiernan, *Complex Issues Trap Women in Abuse*, CHI. TRIB. (Mar. 16, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-03-16-9303160061-story.html>.

98. *See, e.g.*, Brown, *supra* note 61, at 207.

99. *See id.*

to take the children if the woman leaves.<sup>100</sup> Battered women may choose to stay with their batterers, managing the abuse to ensure that their children remain safe and in their custody. I represented twelve women convicted of murder as a part of the Missouri Battered Women's Clemency Coalition.<sup>101</sup> Several of the women had attempted to leave their batterer, but returned out of fear—and in some cases, financial necessity—after their batterer stalked them.<sup>102</sup> Many of the women did not kill their batterer until they learned that their batterer was physically abusing their children, sexually abusing their children, or both.<sup>103</sup> As one client told me,

I tried to leave, but he hunted me down. I thought I had found a way to live with the beatings, but then he turned on the kids. I guess that was when I snapped. It is one thing when it is him or me . . . it is really another when it was him or the kids.

Unable to see any way to escape the abuse, facing prison was a sacrifice these women were willing to make to protect their children.

I heard story after story of women negotiating ways to protect their children. There was one woman who set up entirely self-sufficient rooms for her three children, with refrigerators and TV sets, to ensure that they did not have to come into the family area and risk the physical wrath of their father. When the woman's husband physically threw her son out of the house into the snow without shoes or proper clothing for the cold, she felt that her attempts to protect the children were not sufficiently effective. She turned to murder. Another client was charged as an accomplice in the murder of her husband. Her son was charged as the killer. The prosecutor approached her and offered a deal: "If you agree to plead guilty to murder with a life sentence without parole for 50 years, I will not charge your son with capital murder and not seek the death penalty." The client accepted. Thirty-two years later, she was freed from prison.

Another mother filed for divorce alleging that her husband abused her and the children. The guardian *ad litem*, influenced by the husband, discounted the abuse and alleged that the mother was engaging in parental alienation. Fearing that she would lose custody, the mother withdrew her

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100. Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/>.

101. These stories are representations of clients' stories and the names reflected are pseudonyms to protect client confidentiality. Notes are on file with the author.

102. See Bridget B. Romero et al., *The Missouri Battered Women's Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193, 197–98, 200 (2004).

103. See *id.* at 197, 199–202, 207.

petition for divorce and returned to the family home with the children where the abuse escalated. After her teenage daughter reported that her father was coming into the bathroom when she was showering and touching her, this client killed her batterer. She called the police and confessed to the murder, minimizing the violence she experienced and not mentioning his abuse of her daughter. She had internalized the message she had learned well during her attempt to gain custody in her failed divorce proceeding: mentioning abuse could result in being accused of lying.

#### V. MATERNAL SACRIFICE IN THE FACE OF INCARCERATION

These cases help to shed light on this expectation of selflessness. The power and control inherent in the expectation serve as an unstated limit on women's ability to thrive. There is no data on how many mothers sacrifice for their children and go to prison to protect them or how many go in their children's place. Sentences may be enhanced because mothers fail to accept a plea deal and get punished for their failure to cooperate. Sentencing guidelines do not take into account family ties or even the duress that may arise due to the presence of children in abusive relationships when determining appropriate departures. The plea bargaining system is roughly based on a contract model: the prosecutor offers the defendant a deal that is calculated to be somewhat better than what might result from a sentence after trial.<sup>104</sup> The prosecutor's incentive is not only to quickly dispose of a case, but often—especially in cases where there are multiple defendants—to garner evidence against other, perhaps more serious participants in the alleged crime.<sup>105</sup> This incentive is time-sensitive. In other words, the first to “flip” on his or her fellow defendants is most likely to receive the deal.<sup>106</sup> This incentive structure results in significant disadvantages to a woman defendant who may be involved in a crime due to her relationship with another potential defendant. She may not have access to “dealable” information because she is insulated from the higher-ups involved in the crime. She may be “in love” or a victim of domestic abuse, making the calculation of whether to deal a more difficult question and thus not something that can be done quickly. Meanwhile, the prosecutor moves to the next defendant and the offer lapses. For mothers, plea bargaining can be even more difficult. The selflessness often expected of and reinforced in mothers corrupts the plea-bargaining process and systematically disadvantages

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104. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 (1992).

105. See Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 920 (2011).

106. See Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 929 (1999).

mothers. A mother faces many additional barriers to quick action on a plea deal. She may not have a plan for caring for her children, so prison time seems impossible. Her children may be at physical risk should she turn on her partner, and therefore she is, in essence, held hostage. Finally, her children may face enhanced charges if she fails to take an offered plea bargain. In short, mothers face once again the societal need to be “selfless” in the face of criminal liability, sacrificing themselves to protect their children.

Even if a woman goes to trial, she may find that any assertion that her decisions to assist in crimes were made to protect herself or her children has no place in assessing the appropriate sentence. Although the Federal Sentencing Guidelines consider “serious coercion” relevant at sentencing, courts may limit this departure to physical coercion and ignore the “endemic sociological and psychological realities of male dominance, female victimization, and emotional abuse.”<sup>107</sup> Furthermore, post-*Booker*, courts are still uncomfortable exercising their newfound discretion to deviate from the guidelines unless given explicit permission with a recognized departure.<sup>108</sup> Specifically, courts are reluctant to use their discretion in considering the effects of coercion exerted upon battered offenders; “many courts appear no more able than jurors to shirk the ‘myths’ and ‘misconceptions’ surrounding domestic violence, even in connection with sentencing.”<sup>109</sup> Finally, even if courts find these battered offenders who act to ensure their safety and the safety of their children less culpable or outside the scope of the congressional purposes of punishment and wish to exercise their discretion to account for these factors, their discretion is limited by legislative mandatory minimum sentences.<sup>110</sup>

## VI. REJECTING MATERNAL SACRIFICE

In all of the cases I handled, the expectation of maternal sacrifice lurked in the background, sometimes asserting itself as a justification for rules and policies by conflating self-interest with selfishness, sometimes motivating insane acts, and sometimes resulting in the imposition of sanctions without ever revealing itself. I identified with all of the women I represented. We shared the expectation that being a mother required sacrifice. The biggest challenge I faced representing the women was stepping out of that frame. I

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107. Laurie Kratyk Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 735 (1995) (internal quotation marks omitted).

108. See Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 705, 709 (2006).

109. Doré, *supra* note 107, at 736.

110. See *id.* at 735.

encountered this challenge again while teaching my Motherhood and the Law class. There were many times when I wondered how the class would have proceeded had it included some men. Were we being fair? Were we too harsh in our analysis? Was it okay to look at this only with a woman's perspective? Ironically, the real question I was asking myself was, "Are we being selfish?" Reinforcing selfless behavior as appropriate, inevitable, objective, and rational obfuscates the exercise of power and control. Often, when we see shared social norms operating on others, we can finally see the flawed misogynistic structure in which we operate. Only then do we gain the power to name the harm and to resist it.

We must squarely analyze society's embrace of the belief that mothers should put children ahead of their own needs and appreciate how that belief controls women and limits their lives. This persistent sexist belief reinforces women's primary role as one of service, support, and care. Kate Manne identifies the manifestation of this belief as an essential component of misogyny:

Women may not be simply human *beings* but positioned as human *givers* when it comes to the dominant men who look to them for various kinds of moral support, admiration, attention, and so on. She is not allowed to *be* in the same way as he is. She will tend to be in trouble when she does not give enough, or to the right people, in the right way, or in the right spirit. And, if she errs on this score, or asks for something of the same support or attention on her own behalf, there is a risk of misogynistic resentment, punishment, and indignation.<sup>111</sup>

Perhaps mothering is the pinnacle of being a human giver.<sup>112</sup> Mothering is reflected in the mutually constitutive nature of social institutions and discourse, and it makes change in this area difficult. Selfless identity is merely a construction. Uncovering the rhetoric that normalizes the repression and unmasking the power that reinforces it is a critical feminist project. That is why I teach Motherhood and the Law. We must deconstruct that question my students were so eager to engage: "How do I be a mother and succeed . . . ?" Someday I will teach a Parenthood and the Law course,

111. KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY*, at xix (2017).

112. Consider:

Human *beings* have a moral obligation to *be* and express their full humanity, to do whatever it takes to that end, and they can be blamed for failing at that task. Human *givers*, by contrast, have a moral obligation to *give* their full humanity, everything they have—time, attention, affection, even their own bodies. . . . [T]hey are the rightful resource of the human beings, and they are obliged to give their bodies willingly, cheerfully, without imposing any inconvenient needs of their own. Human givers don't get to have needs; only human beings have needs.

Emily Nagoski, *I'm Sorry You're Lonely but It's Not My Job to Help You: The Science of Incels*, MEDIUM (May 5, 2018), <https://medium.com/@enagoski/im-sorry-you-re-lonely-but-it-s-not-my-job-to-help-you-the-science-of-incels-25bf83e2aaa0>.

populated by students of any gender identity. The project will not be to negotiate the inherent limits associated with parenting, but to create a world that promotes all people to express their full personhood.

# ON POWER & INDIAN COUNTRY

MAGGIE BLACKHAWK†

*When we are young, the words are scattered all around us. As they are assembled by experience, so also are we, sentence by sentence, until the story takes shape.*

— Louise Erdrich (Turtle Mountain Ojibwe)<sup>1</sup>

## I. DAYS OF 2007<sup>2</sup>

At the time I was admitted to Stanford Law School, I hadn't met more than a handful of lawyers. The handful that I had met, I had known only for a few months, and they were the very women who had convinced me to apply to law school in the first place. As a Native woman, daughter of a mother who attended community college and who earned her degree after I left home, I had quite a bit of learning to do.

One of the first things that I did was to tell George. George Redman, born and raised on the Wind River Reservation in Wyoming and citizen of the Northern Arapaho Nation, had worked with lawyers as a paralegal. George knew where I could find some advice. That day, we drove the slow road from Fort Washakie to Lander, where the attorneys had their office. The drive was only about fifteen miles, but it was “off reservation”—that is, outside of the borders of the Wind River Reservation. Driving off reservation always made distances seem a bit farther. The towns were worlds apart, separated by sovereignty, culture, language, and history.

We parked the pickup, dusty with reservation soil, in front of the law firm office building. The nondescript, tan one-story was hidden behind trees and housed the firm that had served then as the attorneys for the government of the Northern Arapaho Nation. But Wyoming is such flat country that every building looms large. George and I walked into the immaculate western law office, carrying reservation dust along with us.

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1. LOUISE ERDRICH, *THE PLAGUE OF DOVES* 268 (2008).

2. These headings are a far too simple homage to the great Bill Rubenstein, who drafted an essay to which we should all aspire. See generally William B. Rubenstein, Essay, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317 (2004).

He asked to speak with Berthenia Crocker, a named partner. “No, we didn’t have an appointment and, no, she likely wasn’t expecting us.” But Berthenia had worked in Indian Country long enough to understand Native manners. George had worked for the law firm years before, they had an established relationship, and he drove fifteen miles to ask for her advice. He brought with him his family member, me, who had just been admitted to Stanford Law School. If manners weren’t enough, we were certainly odd enough to pique the interest. Berthenia took the meeting.

Nervousness has a way of locking in the details of memories. I remember the shine of Berthenia’s desk when George and I first sat down. I had never been in a lawyer’s office before, and I wasn’t sure I had ever seen a space so clean and neatly organized. George spoke first and introduced us both. Berthenia thanked him for coming by and, with a curious look, turned to me. “Congratulations,” she said. “That is a great achievement. Do you know what kind of law you are interested in?”

I looked up from the shine of her desk for the first time to see bobbed blonde hair and a smile spread across a friendly face. “Federal Indian law,” I said. I placed an awkward emphasis on “federal” because I had only recently learned that Indian law made by the United States was called *federal*, as opposed to *tribal* law or the law made by tribal governments. “Oh,” Berthenia replied as only a specialist could, “that’s a big field. Are you interested in any particular areas? Environmental law? Tax?”

Without hesitation, I replied: “jurisdiction.”

Jurisdiction is a technical term, belonging to the specialized parlance of lawyers. In essence, jurisdiction means power—the ability to make and apply the laws that govern daily life. First-year law students often hear the word for the first time in their courses on civil procedure. But it isn’t until their second or third year in law school that the meaning of jurisdiction finally takes shape. However, even then the word remains technical—stripped bare of any moral content.

Outside of Indian Country, justice rarely involves jurisdiction. Justice is more often concerned with the language of rights. To the extent that justice concerns itself with jurisdiction at all, it is to seek ways to expand the jurisdiction of the federal courts to better protect rights. The simple story is that rights are the protectors of justice, and federal courts are the protectors of rights.

In Indian Country, this simple story doesn’t hold. Federal power was at the heart of American colonialism, and federal rights have long been used to further the colonial project. Instead, *jurisdiction* is synonymous with justice. Jurisdiction is at the heart of sovereignty, and sovereignty is to Indian

Country what air is to fire. Rather than the language of rights, it is the language of sovereignty that empowers Native people. The language of sovereignty offers us the power to build and shape a world of our own choosing, to constitute a government of our own design, and to make laws and define rights that fit Native values. To speak the language of sovereignty, power, and jurisdiction is to aspire for more than the ability to beg for protection by another's government. Sovereignty offers the ability to govern.

"Jurisdiction?" Berthenia replied, still smiling. "Well, that's the perfect thing to study at law school."

Before meeting Berthenia, Chai Feldblum and her team were the first lawyers I had ever met in my life. At the time, I worked as a social science researcher at the University of California, Los Angeles. I held a joint position as manager of research on the Ethnography of Autism Project and as a senior policy producer at the Center on the Everyday Lives of Families (CELF). My position at CELF was created so I could work with Chai and her team to translate our research on working families into more family-friendly workplace policy.

The most remarkable thing about Chai and her team wasn't that they were all women; it was that they weren't stereotypical lawyers. They were "lobbyists" or, in Chai's terminology, "legislative lawyers."<sup>3</sup> Rather than bringing claims in courts, legislative lawyers took their arguments to Congress, and although their arguments were at times framed in the language of rights, they weren't always so limited. Chai had risen to legislative-lawyering fame when she helped draft and pass the Americans with Disabilities Act as a lobbyist for the ACLU. As most first-year law students learn, the Supreme Court had rejected special rights protection for individuals with disabilities.<sup>4</sup> By turning to the legislature and looking beyond the language of rights as defined narrowly by the Court, Chai was able to better protect a community that, because of its small numbers, might never wield majority political power. Chai's work showed again and again that the simple story of rights and courts was *too* simple, and not just in Indian Country.

At CELF, it was my job to support Chai and her team as they advocated for better law. Over the course of a year, they taught me everything they knew about the lawmaking process. They also eventually convinced me to apply to law school.

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3. See generally Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles of Advocacy*, 34 MCGEORGE L. REV. 785, 785-87 (2003).

4. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (rejecting a higher standard of scrutiny for discrimination against people with intellectual disabilities).

After meeting Chai and Berthenia, I imagined that Stanford Law School would offer courses on lawmaking, jurisdiction, power, and justice. I imagined that I would study Congress and parliamentary procedure and join student groups focused on legislative lawyering. I imagined that I would learn about justice through a lens of power and an exploration of governance. Through Chai and Berthenia, I had seen firsthand the power of wielding jurisdiction and of taking one's case to the lawmaking process for redress. But the simple story still dominated at Stanford Law School. Lessons of justice were taught entirely in the language of rights. Any concern with jurisdiction or procedure often focused on the federal courts as protectors of justice through rights.

Another glaring absence at the law school was any mention of "Indian Country." Scholars of Native Studies write in great depth about the process of erasure of Native Nations and Native people as being central to American colonialism. Paintings of empty Western landscapes and stories of the disappearing Indian formed the heart of Manifest Destiny. But it is still hard to articulate the experience of erasure as a Native person. It was even more challenging to experience erasure as a Native person within an institution that aimed to educate future leaders about the law.

The United States is the only government in the world to recognize inherent tribal sovereignty and support Native Nations' ability to self-govern. Federal Indian law supports American exceptionalism in this regard. Unlike Canada, New Zealand, and other countries, the United States provides more legibility and visibility to Native Nations and Native peoples within its domestic law than any other body of law in the world.<sup>5</sup> Title 25 of the United States Code is titled "Indians" and it, among other laws, governs the relationship between the United States and the over 570 federally recognized Native Nations within its territorial borders.<sup>6</sup> Other statutes govern the United States's relationship with Native Nations in Alaska and Hawaii.<sup>7</sup>

Even beyond the specialized laws that regulate the United States's relationship with Indian Country directly, interactions between the United States, Native Nations, and Native peoples have shaped law across a broad

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5. See, e.g., CHRISTIAN W. MCMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY 91–98, 177–82 (2007) (documenting the adoption of the Marshall Trilogy internationally, but in limited form as property rights only and without recognition of inherent tribal sovereignty).

6. 25 U.S.C. §§ 1-5636 (2018).

7. 43 U.S.C. §§ 1601–1642 (2017); Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921) (later adopted by HAW. CONST. art. XII).

range of subject-matter areas.<sup>8</sup> The majority of treaties negotiated and ratified by the United States in its first hundred years were with Native Nations.<sup>9</sup> Areas of law like the war powers, foreign relations, the territories, and even immigration developed in the context of Indian affairs and owe many of their characteristics—for better or for worse—to that history.<sup>10</sup>

So to experience the near invisibility of Native Nations and Native peoples at Stanford Law School when American law is virtually teeming with the legibility of Native people came as an unwelcome surprise. The first mention of Natives came in my first-year History of American Law course when an offhand comment during a lecture stated that Native Nations and Native peoples no longer existed in any real form in the United States. I was sitting in the front row of the class, as anxious and prepared as ever. The story of the disappearing Indian was so deeply taken for granted that no one questioned the comment, even as I sat next to my classmates. I was erased by the first mention I heard of Native people while in law school and in a class on the history of American law.

One way that Native people combat the active erasure of Indian Country is to self-identify. In doing so, we put our bodies and our reputations between the force of erasure and the furtherance of the American colonial project. To face a Native person is not only to face the reemergence of an erased history—it is to struggle with the difficult moral reality of being both a constitutional democracy and a colonial power that has ruled through conquest. To face a Native person is also to struggle with one's ongoing participation in the erasure of American colonialism—it is to struggle with the "Indian" Halloween costumes, headdresses and playacting during Thanksgiving, "land grab" games in elementary school, racialized mascots, and the list goes on. For academics, facing the reality of Native history, Indian Country, and the ongoing existence of Native people is to face the possibility that previous projects have been incomplete or even incorrect because of that erasure.

Simply put, recognizing Native people is difficult for non-Natives. Because it is difficult, the typical response to self-identification is often rejection. Rejection most often takes the form of disbelief or a series of requests for evidence of "authentic" Native status. Questions like, "How much Native American are you?" or "How did you find out that you were Native American?" often follow. Even worse than the requests for evidence

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8. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1806–45 (2019).

9. *Id.* at 1809–15.

10. *Id.* at 1806–45.

are the conclusions without evidence, “funny, you don’t look that Native American.” Unlike other forms of racialization, the modern racialization of Native people doesn’t often provoke violence or disgust—it doesn’t inspire feelings of inferiority or judgment. Instead, it forces Native people to work endlessly to prove their very existence to non-Native evaluators—evaluators with little or no understanding of Indian Country and with quite a bit invested in its erasure.

These types of interactions can prove to be an incredible distraction and can often deflect real reform. Rather than discussing and debating the law of American colonialism and its impact on the laws of the United States, I was often stuck addressing fundamentals—like the very existence of Native Nations and Native people today. As the late, great Toni Morrison teaches, this distraction is often by design:

[T]he function, the very serious function of racism . . . is distraction. It keeps you from doing your work. It keeps you explaining over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn’t shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you dredge that up. None of that is necessary. There will always be one more thing.<sup>11</sup>

There came a point in my law school tenure when the exhaustion drove me toward different solutions. I had come to Stanford Law School to defend Indian Country, tribal sovereignty, and the jurisdiction or power of Native governments. My law school education had been thorough and rigorous. I had trained in constitutional litigation with the very best, Pam Karlan, and had studied the legislative process with Jane Schacter, who combined theoretical inquiry with hands-on exercises in legislative drafting and interpretation. Both women understood fundamentally the power of the law as a tool for justice and had cut their teeth fighting alongside movements for voting rights, LGBTQIA+ rights, and gender equality. I could not have asked for better teachers.

But the language of equality and rights dominated my training, and the erasure of Indian Country left it to me to explore how I might translate the language of equality and rights into the language of power, sovereignty, and jurisdiction. I had come to law school with the general understanding that rights posed a threat to tribal sovereignty. “Rights” were often invoked as a

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11. Toni Morrison, Black Studies Center Public Dialogue Pt. 2: A Humanist View 7 (May 30, 1975) (emphasis omitted) (transcript available at <https://perma.cc/47KA-DRYN>).

means to undermine the sovereignty of Native Nations—especially the rights of non-Natives. The federal rights of non-Natives trumped inherent tribal sovereignty. Contrary to the simple story, federal rights undermined justice in Indian Country.

I soon learned that “equality” posed as much of a threat to tribal sovereignty as did rights. Equality had structured the doctrine of race jurisprudence, and by “reasoning from race,” the women’s rights movement had shaped an equality doctrine of its own.<sup>12</sup> I had been drawn to law school and trained in the law by women deeply entrenched in the struggle for gender equality. These women had inspired me by seizing and wielding power—often together with other women. But the tools of liberation that they offered—those born of the civil rights movement—were in direct conflict with the lessons of Indian Country.

Most law students are familiar with the backlash against the civil rights movement that took aim at race-based remedial legislation. Allan Bakke still takes center stage in introductory courses on constitutional law, which study in depth the 1978 case where Bakke fractured the Supreme Court with his challenge to the University of California, Davis’s admission policies.<sup>13</sup> Fewer are familiar with the far less fractured opinion that the Court issued just three months earlier, foreshadowing *Bakke*.

In March of 1978, the Court decided *Oliphant v. Suquamish Indian Tribe*.<sup>14</sup> The issues in the 6-2 opinion must have seemed far more mundane at the time—not even controversial enough to inspire separate opinions. Perhaps the only notable sign of controversy would have been the unlikely pairing of Justice Thurgood Marshall and Chief Justice Warren Burger in dissent.<sup>15</sup> But the dissent hadn’t generated enough passion even in Justice Marshall to exceed three sentences—one of them cribbed from the lower court.<sup>16</sup> The balance of the Court joined an opinion written by Justice Rehnquist that was so loosely reasoned that it should have generated outrage on that basis alone.

Mark David Oliphant and Daniel B. Belgarde arrived at the Supreme Court to challenge their convictions under the 1973 Suquamish Nation Law and Order Code as violating their Fifth Amendment right to due process.

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12. SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 1–8 (2011); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–56 (2002).

13. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

14. 435 U.S. 191 (1978).

15. *Id.* at 212 (Marshall, J., dissenting).

16. *Id.* (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

Oliphant and Belgarde had been indicted and convicted for the exotic crimes of assaulting a Suquamish police officer, resisting arrest, and for engaging in a high-speed car chase that ended with Belgarde's vehicle colliding with a police car. But the most dispositive fact of the case was that Oliphant and Belgarde were white.

The Suquamish Nation, like many Native Nations, has a constitutional government with tribal courts and a criminal code. Living within the reservation, Oliphant and Belgarde had chosen to reside within the Nation's borders. They had each recognized the Nation's government long enough to take accurate aim at Suquamish police officers and patrol cars. But the Supreme Court ruled in favor of Oliphant and Belgarde and held that the Suquamish Nation had no criminal jurisdiction over non-Indians—even non-Indians who had committed crimes within Indian Country.

For Oliphant and Belgarde, the language of rights opened the doors of the Supreme Court. The men structured their merits brief around the tensions between historical injustice and a modern liberalism born of the 1970s and steeped in Rawls, rights, and equality:<sup>17</sup>

It is asserted that a sense of *mea culpa* permeates public policy and some judicial decisions by . . . remembering only the past subjugation of Indian tribes . . . , without consideration of the benefits, rights, privileges and immunities received by all people within the United States under the Constitution . . . . It is now argued that as to some non-Indians those rights, privileges and immunities while on an Indian reservation within the United States are being sacrificed by the application to them of the concept of independent Indian tribal sovereignty . . . .<sup>18</sup>

In both *Bakke* and *Oliphant*, the Court resolved the tensions between present day claims to equality and historical injustice by leaning into equality. But in *Oliphant*, the Court was able to foster an uncontroversial

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17. John Rawls first published his *Theory of Justice* in 1971, and it quickly took hold within the legal academy and beyond. JOHN RAWLS, A THEORY OF JUSTICE 102 (1971) (“The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts.”); see also KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY (2019); Katrina Forrester, *The Future of Political Philosophy*, BOS. REV. (Sept. 17, 2019), <https://perma.cc/TAT4-UD9K> (describing the influence of Rawls as: “[L]iberal egalitarians tended to insist that what mattered were institutional solutions to current inequalities; past injustices weren’t relevant, and arguments that relied on historical claims were rejected. That meant that demands for reparations for slavery and other historical injustices made by Black Power and anti-colonial campaigns in the late 1960s and 1970s were rejected too. It also meant that political philosophers in the Rawlsian strain often read later objections to the universalist presumptions of American liberalism as identitarian challenges to equality, rather than as critiques informed by the history of imperialism and decolonization.”).

18. Brief for Petitioners at 26–27, *Oliphant*, 435 U.S. 191 (No. 76-5729), 1977 WL 189288.

consensus opinion by invoking and manipulating the doctrines of American colonialism. It created what I call the “dormant plenary power doctrine” by applying the worst of a Taney Court opinion.<sup>19</sup> Yet, the modern Supreme Court put even Taney to shame by rejecting his deference to the political branches.<sup>20</sup> The Court in *Oliphant* even drew on a late nineteenth-century Supreme Court opinion, crafted in the early spirit of American eugenics and scientific racism, that presumed that people of one race could never govern people of another race fairly.<sup>21</sup> Yet, the language of colonialism garnered far less outrage and controversy than the language of rights in *Bakke*. Erasure is quite effective.

Equality boiled down to “equality of opportunity” or being welcomed into the halls of power and public resources on the same terms as all others. To the extent that equality offered more than simple formality, it aspired to “integration.” Indian Country had seen a form of integration before. The Dawes Act, passed in 1887, began the era of allotment, or efforts to break up and sell off the last of Native land to non-Natives.<sup>22</sup> One justification for selling off Native land for pennies on the dollar was that the “savages” might be better “civilized” by integrating non-Native settlers with Native people.<sup>23</sup> But allotment failed to civilize. Its only real achievement was the dismantling of institutions in which Native people wielded power—majority-minority institutions like Native governments. Allotment was ultimately deemed an abject failure and was formally repudiated by the United States forty years later.<sup>24</sup>

But the blunt tool of integration lived on—still unable to distinguish between segregated institutions and majority-minority institutions where minorities wield power. It lives on today through the promise of “diversity.” Diversity aspires to unmake segregation by reshaping public institutions into

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19. Blackhawk, *supra* note 8, at 1835–38.

20. *Id.*

21. *Oliphant*, 435 U.S. at 210–12 (majority opinion) (describing an argument that to subject non-Native people to Native courts would “tr[y] them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race” (second alteration in original) (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883))).

22. See Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–342 (2018)).

23. See, e.g., Ross R. Cotroneo & Jack Dozier, *A Time of Disintegration: The Coeur d’Alene and the Dawes Act*, 5 W. HIST. Q. 405, 405 (1974) (“Under another provision of the [Dawes Act], those lands remaining after distribution of allotments to the Indians were to be sold to white settlers. . . . [I]t was hoped that the resultant close intermingling of the two cultures would result in the Indians’ more rapid acceptance of the white man’s ways.”).

24. See Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129).

a mirror image of the public. But the deep irony is that, in a system driven by majority power, statistical mirroring of numerical minorities results in the entrenchment of minority status. Twenty percent will never wield power in a system that worships fifty-one percent. For Native people—who often constitute the statistical asterisk in every study—diversity threatens every institution where Native people govern.

Equality also threatened the very foundations of federal Indian law. Title 25 of the United States Code—captioned “Indians”—provides laws, power, and resources for Native Nations and Native peoples only. Others are not welcomed into the halls of “Indian” power and resources on equal footing. In fact, the same backlash against civil rights seen in *Bakke* came first to federal Indian law through a 1974 challenge to a government hiring preference for Native people.<sup>25</sup> The Supreme Court avoided an equality challenge by holding that being “Indian” was a political category and not a racial category.<sup>26</sup> To hold otherwise, the Court recognized, would mean that “an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”<sup>27</sup> Equality had the potential to effectively erase all of federal Indian law and its recognition of inherent tribal sovereignty.

In my final year at Stanford Law School, I saw the first glimmer of a different path forward. Janet Cooper Alexander introduced me to “power,” and I learned the dynamics of how power worked over time and between sovereigns in her class on the federal courts. She was also patient enough to nod supportively after class while I pestered her with analogies between federal Indian law and all facets of public law—she took particular interest in the parallels between the Indian wars and the war on terror, her subject of specialty at the time. Rather than equality, federal Indian law had long been crafted in the language of power, and it was through our discussions of power that I finally found my way toward a solution.

Between her supportive nods, Janet convinced me that I could bring the lessons of Indian Country to the academy by publishing academic articles. Erasure had left federal Indian law in a constant state of precarity. Fighting that erasure in the academy might ultimately change the law. Janet mentored me through my first article and helped me find my way into the legal academy.

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25. *Morton v. Mancari*, 417 U.S. 535 (1974).

26. *Id.* at 553 n.24.

27. *Id.* at 552 (“If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”).

## II. DAYS OF 2017

It wasn't until I looked for an academic job that I learned how difficult it would be to bring Indian Country into the legal academy. My first lesson was to learn how controversial it was to believe that law matters. Hiring committees quickly branded me a "formalist." They framed my project, in the most generous light, as interested in the law as written and the stability of law over time. In the least flattering light, some questioned whether I was aware of my own normative presuppositions, and some even considered my project anti-intellectual.

Legal realism and the critical legal studies movement reign supreme in the legal academy, and they remain convinced that the law is politics all the way down. Some even believe that the law itself is the source of subordination. Based on the simple story, they are right. The law had sanctioned slavery and Jim Crow segregation. Breaking the law, through protest or through the violence of war, brought about justice. But the simple story never holds in Indian Country. It was the breaking of law that furthered American colonialism, and it was through enforcing adherence to the law as written—in treaties and statutes—that Native Nations found justice. However imperfect, the recognition of inherent tribal sovereignty and the framework of United States law that fostered self-governance within Indian Country were born from the rigorous belief that law matters.

The critical legal studies movement has been taken to task over rights and its claim that rights are slippery terms, devoid of meaning.<sup>28</sup> Black scholars, closer to the movement, declared in passionate terms the meaning of rights to their communities.<sup>29</sup> But the critical legal studies movement hasn't yet been taken to task over the meaning of power to Native communities and the central role of law in mitigating American colonialism. Natives have long leveraged formal legal channels to protect the recognition of inherent tribal sovereignty. Non-Natives, hungry for Native land, were the source of subordination, not the legal system.

But my belief in the law was as puzzling to hiring committees as my discomfort with equality and rights. Interest in my work was often coupled

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28. See, e.g., Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714–16, 715 n.8, 716 n.13 (2011) (reviewing the literature and describing the 1980s as the genesis of the "rights critique" by Critical Legal Studies scholars, whom others sometimes called "rights critics").

29. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364–66 (1988); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 403–05 (1987).

with confusion with where I might fit in the pantheon of the legal academy or whether I might ever achieve recognition at all. My project highlighted the voices of minorities and took particular interest in excavating levers of power for the marginalized and vulnerable. But I often confessed doubt at the ability of rights and courts to foster that power. I focused instead on legislatures, the law, and distributed sovereignty through local control. Indian Country taught me that John Hart Ely had gotten it wrong with respect to courts and Native peoples.<sup>30</sup> I witnessed firsthand that it was Congress and not the courts that had protected Indian Country—most recently in 2013, with the tiniest step toward a legislative fix for *Oliphant* in the Violence Against Women Reauthorization Act.<sup>31</sup> Judicial activism often meant furthering the colonial project—at times imposing seemingly liberal values while ignoring the law.<sup>32</sup> Rather than rights, it was power or local control that mitigated colonialism.

Luckily, despite the confusion I carried into every interview like reservation dust, I still found my first academic home at the University of Pennsylvania Law School.

### III. DAYS OF 2027?

It is far too soon to say whether or not I have been able to bring the lessons of Indian Country into the legal academy. At the time I sit and write this Essay, I have only just begun my third year of teaching at Penn Law. In the past two years, I have developed classes, mentored students, and started new research projects. However, more than changing the academy, the academy has changed me.

I came to the academy quite convinced that constitutional law offered little to my project. Federal Indian law has long rejected the frame of

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30. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (crafting a careful analysis of how to best “facilitat[e] the representation of minorities,” but viewing “minorities” entirely through the black–white binary paradigm).

31. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified as amended at 25 U.S.C. § 1304 (2018)) (recognizing inherent tribal court jurisdiction over non-Indian criminal defendants who commit a crime of domestic or dating violence against a partner who is a tribal member, reversing *Oliphant*’s complete stripping of recognition of tribal court jurisdiction over non-Indian criminal defendants).

32. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2055–56 (2014) (Ginsburg, J., dissenting) (joining with Justice Thomas’s dissent from the Court’s upholding of tribal sovereign immunity and writing separately to further clarify that her dissent is rooted in concerns over the overreach of sovereign immunity more generally); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202–03 (2005) (Ginsburg, J.) (crafting out of equitable doctrines a limitation on a Native Nation’s ability to assert jurisdiction over land, because municipal, county, and state governments had relied on the Nation’s absence for tax and governance purposes).

constitutional law,<sup>33</sup> just like it has long rejected the tool of rights. Over time, I came to see the heart of this rejection more clearly: After *Marbury*, the Supreme Court is the final arbiter of constitutional meaning. The Supreme Court has grown increasingly hostile in recent decades to the recognition of inherent tribal sovereignty. Calling something “constitutional law” places the Court as the forum of last resort. Calling something “not constitutional law” moves the locus of control into the political branches—the Congress or the executive. Federal Indian law implicates the Constitution by its very nature in that it implicates the power and reach of the national government. In the past two years, two events brought me to see this rejection as more strategic than accurate.

The first occurred a few weeks after I started at Penn Law: Constitutional law brought me home. In the fall of 2017, the national government for the Fond du Lac Band of Lake Superior Ojibwe, the Minnesota Chippewa Tribe, called for a formal convention to rethink our antiquated constitution. The history is a bit vague as to whether this was the first formal call for a constitutional convention, but it certainly was the first formal call in living memory. The structure of the Minnesota Chippewa Tribe is a bit of a rare gem in Indian Country. Unlike other more centralized Native Nations recognized by the United States, the Minnesota Chippewa Tribe has a federal system. One constitution governs the national government, but that national government oversees six distinct bands that govern separately six geographically disparate reservations. The six bands of the Minnesota Chippewa Tribe have governed so independently for the last eighty years that few still recognize them as a federal system.

But although the structure of the Minnesota Chippewa Tribe is a gem, its constitution is not. It was initially drafted and ratified in 1936—just two years after the passage of the Indian Reorganization Act (IRA). The IRA created a formal infrastructure for the recognition of Native Nations and established parameters by which Native Nations could engineer constitutional governments that the United States would recognize. Hundreds of Native Nations adopted written constitutions in the years following 1934, making it one of the most generative constitutional moments in American history. But many of these constitutions were modified versions of a “model” constitution circulated by the Bureau of Indian Affairs.<sup>34</sup> These

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33. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 440 (2005); Angela R. Riley, Essay, *Native Nations and the Constitution: An Inquiry into “Extra-Constitutionality,”* 130 HARV. L. REV. F. 173, 199 (2017).

34. See FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS xxiii-xxix, 173-77 (David E. Wilkins ed., 2006).

model or “IRA constitutions” lacked separation of powers and instead constituted a “council” that would undertake all government functions—executive, legislative, and judicial—without checks and balances. The Minnesota Chippewa Tribe had a quintessential IRA constitution.

The federal government had also coerced the Nation in the 1960s to amend its constitution and to limit its membership to individuals of a certain “blood quantum.”<sup>35</sup> Blood quantum identified Native individuals at a point in history and classified them as a hundred percent Native. Descendants of that individual, if they were not parented by two one hundred percent individuals, would each be a fraction of that earlier individual—fifty percent for a first-generation descendant, twenty-five percent for a second-generation descendant, and on and on until there were no more Native people. Blood quantum is a nineteenth-century racial construct that the national government adopted within federal Indian law and policy in order to limit its obligations to Native Nations. If there were no Native people, there were no obligations. The 1936 constitution established citizenship criteria that resembled the birthright citizenship of the United States: Children of Minnesota Chippewa Tribe members were members. But the federal government threatened in the 1960s to unilaterally withdraw its treaty obligations if the Nation did not amend its membership criteria to include a blood-quantum requirement.

The Minnesota Chippewa Tribe called a constitutional convention in late summer of 2017 to open a conversation about how the constitution might be amended or rewritten. My mother and I attended our first constitutional convention meeting that fall, and I continued to attend the meetings as they were held on each band’s reservation. The convention meetings were deeply emotional and deeply inspiring. Many members and descendants expressed frustration with the tribal government structure—lack of separation of powers, lack of clarity of the powers of each band, and the “blood quantum” membership criteria topped the list of common criticisms.

A few months later, I was appointed by the council of the Fond du Lac Band to serve as a senior constitutional advisor to the president. The position pressed me to answer a range of legal questions: I researched constitutional-convention procedure and best practices developed by other Native Nations. I struggled with whether the Nation should or could remove the provision, standard to many IRA constitutions, that required the Secretary of the Interior to approve all amendments before they would take effect. I waded deep into the murky legal waters created by drafting a constitution under the

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35. See generally JILL DOERFLER, *THOSE WHO BELONG: IDENTITY, FAMILY, BLOOD, AND CITIZENSHIP AMONG THE WHITE EARTH ANISHINAABEG* 1–8 (2015).

shadow of colonialism. More than answers, my research began to raise for me questions about the United States Constitution and how the national government wielded such power over Indian Country.

The second event occurred in my second semester at Penn Law: Constitutional law came home to me. I came to the academy staunchly committed to studying the field of legislation. Indian Country had taught me to be wary of the Constitution, and my training at Stanford Law had further solidified the sense that constitutional litigation offered few useable tools to empower marginalized people. But my colleagues at Penn Law read my scholarship on petitioning and the First Amendment's Petition Clause<sup>36</sup> and decided that I would teach introductory constitutional law as part of my teaching package.

I began my preparation for the class by surveying the field for casebooks in constitutional law. The Sullivan and Feldman casebook offered finely edited cases and spartan commentary that fostered focused attention on the important details of the doctrine. The Brest and Levinson casebook offered deep context and history. But across the range of casebooks, the complete erasure of Native Nations, Native peoples, and American colonialism was striking.<sup>37</sup> I had entered the academy, in part, to combat the erasure that I had encountered in law school and beyond. Now, in my first year on the faculty, I was going to become complicit in that erasure simply because I lacked the materials to do otherwise.

In that moment, I began crafting the article that became *Federal Indian Law as Paradigm Within Public Law*, an article I published in May 2019 in the *Harvard Law Review*.<sup>38</sup> In it, I make the case that constitutional law scholars and historians have been getting it wrong because they have failed to center Native Nations and American colonialism in their understanding of the Constitution. The article isn't a casebook, and it doesn't identify every connection between federal Indian law and American public law. But it offers a tool to begin to combat the erasure of Native Nations and Native peoples within the legal academy and within the practice of law. It also serves as a strong call for others to join me in this effort.

Combatting the erasure of Native Nations, Native peoples, and American colonialism will likely ensure that never again will a Native law

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36. See generally Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018).

37. Blackhawk, *supra* note 8, at 1793–94, 1794 n.15 (surveying constitutional law casebooks for mention of Native Nations, Native people, or federal Indian law).

38. *Id.*

student sit in the front row of a classroom and have their identity erased by the only exposure they may have in law school to Indian Country. But combatting this erasure could have broader implications also, and those broader implications cannot come too soon.

In Indian Country, we are often reminded how much erasure shapes the law. A case currently pending before the Supreme Court highlights the stakes: *Sharp v. Murphy* (previously known as *Royal v. Murphy* and *Carpenter v. Murphy*).<sup>39</sup> In *Murphy*, the Court is asked whether certain parts of Oklahoma are within the borders of the Muscogee Creek Nation reservation.<sup>40</sup> The law governing *Murphy* is well settled. In a unanimous 2016 opinion drafted by Justice Thomas, the Court held that Congress must clearly and explicitly intend to diminish reservation borders.<sup>41</sup> In *Murphy*, there is no such clear and explicit textual evidence. In fact, there is so little evidence supporting petitioner’s arguments that the petitioner chose to open its brief not with extensive documentation of congressional intent, but with a photo of Tulsa—a city that would be within the reservation if the Court upholds the Tenth Circuit’s decision and resolves the case in favor of *Murphy*.<sup>42</sup>

During oral argument last term, the conservative Justices abandoned their usual commitments: Justice Kavanaugh, for example, abandoned his “textualism” to ask why “historical practice” shouldn’t inform the text of congressional statutes.<sup>43</sup> Mr. *Murphy*’s attorney tried to remind Justice Kavanaugh of the law—that the text must be clear and explicit. But Justice Kavanaugh continued unabated, stating that this case was “massively” different because of the “number of people affected.”<sup>44</sup> Chief Justice Roberts deviated from calling “balls and strikes” thrown by Congress to ponder how a businessperson in Tulsa might feel if the Court held that Tulsa was inside a reservation.<sup>45</sup> Rather than focusing on the law, the conservatives on the Court seemed poised to decide the case on the imagined feelings of non-Natives living in Tulsa—residents that the Court assumed, without polling, would be shocked to learn that they lived within the borders of an Indian reservation. In this way, erasure often becomes law.

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39. No. 17-1107 (U.S. filed Feb. 6, 2018).

40. See, e.g., Brief for Petitioner at 2, *Murphy*, No. 17-1107 (U.S. July 23, 2018). *Murphy* addresses only the Muscogee Creek Nation reservation, but the decision could be far reaching and could result in as much as half of Oklahoma falling within the borders of a reservation. *Id.*

41. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

42. Brief for Petitioner, *supra* note 40, at 3.

43. Transcript of Oral Argument at 55–56, *Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).

44. *Id.* at 56–57.

45. *Id.* at 50–53.

Legal realists would likely be unsurprised by the conservative Justices' retreat from formalism. Yet, the case has also drawn surprisingly little recognition from progressives. The language of power and jurisdiction that frames *Murphy* remains illegible to social justice activists, who aim their advocacy at equality, rights, and race. Criminal justice advocates and the growing movement for prison abolition should see Native Nations as powerful partners in the movement for reform.<sup>46</sup> It is important to remember that *Murphy* is a capital case. Not only could a Native man escape death row, but the case could also recognize the power of Native Nations to oversee the criminal justice system within Oklahoma more generally. Many Native Nations lead the country in progressive criminal justice reform, and scholars have opened a general call to center Native Nations in our study of American governance and innovation.<sup>47</sup> To date, erasure of Native Nations and American colonialism has had costs for progressive movements—as movements craft their reform toolkits too narrowly, and often overlook entirely the importance of power, jurisdiction, and majority-minority institutions.

It may be too late for this particular case. But there is still time to combat this erasure before the next *Murphy* makes it before the Court. There is still time to learn the language of power and jurisdiction, and to learn to see the injustice in stripping power from subordinated communities. Because erasure does so much harm to Indian Country, federal Indian law offers the rare opportunity where simply learning this language and recognizing the jurisdiction of Native Nations can bring about justice.

#### CONCLUSION

When I was asked by the *Stanford Law Review* to write this Essay on my experience as a woman in the legal field, I immediately thought of all of the remarkable women who have mentored and guided me through the complex world of the law—a world that hadn't been built for me or for any of us. Each of these mentors helped me identify those words scattered all around me—equality, rights, and legal change—and helped me assemble

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46. See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

47. See, e.g., Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713 (2017); Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857 (2015); Elizabeth Ann Kronk Warner, *Valuable Lessons to Learn from Tribal Innovation*, FED. LAW., Apr. 2017, at 6; see also Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws*, 78 ALB. L. REV. 885 (2015).

those words, experience by experience, into my own story. Their lessons were invaluable. But they were also incomplete.

To tell my story as a woman in the law, I have to tell that story as a Native woman in the law. That story is more complex than the simple story of rights, equality, and courts. It is instead a story of power, sovereignty, and legislatures. It challenges many of our taken-for-granted assumptions about how our government and Constitution work: By contrast to slavery and Jim Crow segregation, intervention by the federal government into Indian Country only furthered the colonial project. Rights and equality continue to pose a threat to the foundations of federal Indian law.

Indian Country challenges our simple stories about American law, the United States Constitution, and our nation's history. Yet, the complex story of Indian Country may offer additional tools in the fight for liberation, and these tools might offer liberation not just for Native people, but for everyone. The complex story might also offer an alternative vision of justice for all women—one that aims for power in addition to rights and understands the value of building and preserving institutions where women govern.

## REFLECTIONS OF A LADY LAWYER

LISA BLATT†

Kudos to law schools for focusing on women in the legal profession. It's not always easy being a woman in this profession or, what someone from my home state of Texas once called me, "a Lady Lawyer." That was more than ten years ago, when I was a little-known alumnus of the Solicitor General's Office embarking on my appellate career in private practice. The lawyer asked me to speak at the Fifth Circuit Judicial Conference. When I asked why, he candidly responded: "We wanted a Lady Lawyer." The truth is, I was not the least bit offended. I *am* a Lady Lawyer. For better or worse, that is how the profession defines us. And I for one prefer to own it because my success as a lawyer has come in no small part from incorporating my identity as a woman, wife, and mother into my professional status.

I arrived at law school at the University of Texas in 1986 as an insecure, anxious, and very unhappy twenty-one-year-old whose main dietary staple consisted of lettuce that I allowed to marinate in my hot locker until lunchtime. It's a small miracle that I not only survived law school but managed to avoid being felled by food poisoning. I had no money, and I had failed miserably with men. Perhaps that is why I entered law school obsessed with two goals: first, I wanted to do well enough to land a job to keep me out of poverty; and second, I wanted to get married and have kids. Those desires never wavered and happily dovetailed when I started in 1990 at the Washington, D.C. law firm of Williams & Connolly where, within the first few months, I simultaneously made enough money to pay off my credit card debt and met my future husband.

Although now I think of myself as a lawyer who is at the same time a woman, wife, and mother, I started my career thinking that I had to separate my lawyer self from my feminine side. That was a disaster. I tried to look and act like the successful men (and, back then, the few successful women) I saw in law firms. It was the early 1990s, so that involved dressing in ill-fitting, drab suits while trying to be polite, polished, and diplomatic—in other words, I tried my best not to be myself. Once I had children, I tried to look and act like the perfect mother outside working hours: I volunteered at my kids' school and was so desperate to fit stereotypes of motherhood that I attempted baking (the results were not remotely edible). But none of this

worked. I remained full of self-doubt, second-guessing my decisions, not knowing whose advice to take, and feeling like a failure on all fronts. It became clear that being an ideal lawyer, and an ideal wife, and an ideal mother was beyond my limited repertoire. I realized that I needed to embrace who I was—full stop—and stop trying to fake my way through a compartmentalized life.

Fast forward to today. I am back home at Williams & Connolly, some thirty years after I started there, and at a time when I have the distinction of having argued more cases in the Supreme Court than any other woman. I wear a lot of bright colors, and friends' children know that they are not supposed to imitate my colorful language. So how did I get here? For starters, doing well at this law school allowed me to clerk for the incomparable Ruth Bader Ginsburg, then a judge on the D.C. Circuit. Judge Ginsburg showed me what it meant to be a woman not just steeped in the law, but unapologetically chic and equally unapologetic about devoting time to family. She inspired me for decades to work harder so I could feel worthy of having clerked for her. I am positive that I fell short during that year; my two co-clerks were from Harvard and were more mature, better writers, and more sophisticated than me. For many years after, I had anxiety nightmares about appearing before Justice Ginsburg in the Supreme Court without knowing what the case was about or without practicing my answers.

I later gained some level of sophistication, writing skills, and maturity while working for thirteen years as an Assistant to the Solicitor General in the Department of Justice. I there argued twenty-seven cases before the Supreme Court and served under seven incredible Solicitors General and acting Solicitors General—Walter Dellinger, Seth Waxman, Ted Olson, Paul Clement, Greg Garre, Neal Katyal, and Elena Kagan. The Office was honest about why they hired me: it was 1996, they were looking for women, and as I said, I happen to be a Lady Lawyer. When I left that office in 2009, I predicted that female advocates would soon achieve parity with men because half the Office had been female and these women presumably would enter private practice just like me. And for the last ten years, the Office, under both Democratic and Republican administrations, consistently has hired exceptionally talented women.

I was wrong. Parity is still nowhere to be seen. There is an appalling dearth of female Supreme Court advocates. Women argue typically between 15%–18% of the cases before the Supreme Court in any year;<sup>1</sup> women

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1. Adam Feldman, *A Dearth of Female Attorneys at Supreme Court Oral Arguments*, EMPIRICAL SCOTUS (Oct. 22, 2017), <https://empiricalsctus.com/2017/10/22/dearth-female-args/> [https://perma.cc/SDW6-BLX8].

argued a paltry 11% of the cases in 2017.<sup>2</sup> Most of these women are government lawyers, public interest lawyers, and public defenders. Last year, of all the lawyers in private practice who appeared before the Court, only 8% were women.<sup>3</sup> Corporations overwhelmingly hire men. This should either alarm you, depress you, or both.

I do not have an easy fix, but I can offer some observations. First, Supreme Court advocacy, especially oral advocacy, is not focused on problem-solving, consensus-building, or mentorship—attributes people associate with female stereotypes. An “argument” is just that: it involves combative communication and intense verbal jousting. You either win or lose. Or, as I like to frame every case I argue, someone is going to die, and I don’t want it to be me. For better or worse, I think women come across as less combative than men. My empirical research on this is rock-solid: throughout elementary school, I only saw boys get in fights on the playground.

Second, Supreme Court advocacy requires supreme fearlessness and confidence. Again, for better or worse, female lawyers either are less confident, or project less confidence to clients, than male lawyers. In my experience, it is not so much that women sell themselves too short, but that many men sell themselves too long. This is so even when some men who argue have no business standing up in the Supreme Court. My research here again is unassailable: only women have told me they could never see themselves arguing in front of the Supreme Court.

At the same time, I know there is rank discrimination in the profession, even if most of it is unintentional. I have had to ask myself on many occasions: were I man, would these associates be complaining about the way I like binders prepared or cases highlighted or denigrate my judgment on how to strategically frame a case? I have had associates I have never met from other law firms send me cookie-cutter, form e-mails asking me to write briefs for free. I always respond the same: “I typically like to get paid for work, and can you please let me know all of the men you sent this email to?” Maybe these associates were just doing what a partner told them to do. But I have never received a response back after sending these e-mails. I’ve seen many instances where men think only of other men when it comes to oral argument assignments or which associate should give a firm-wide or client presentation. I cannot know whether any of these instances resulted from intentional discrimination, implicit biases, or whether I am just paranoid, or whether all three are in play. No one will admit even to having implicit

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2. *Id.*

3. Jimmy Hoover et al., *Making Her Case: Will the Future of the Supreme Court Bar Be Female?*, LAW360 (Oct. 2, 2018), <https://www.law360.com/articles/1087277> [<https://perma.cc/W7L8-V444>].

biases. Would you?

Here is how I try to help. I try to be a role model for women. I lead my practice group at my law firm, Williams & Connolly, with not one, but two other women. I encourage women to project strength and confidence, and I give young women the following advice: Stop looking for your passion. Sex and horseback riding are passions; work should not be. I do not want a passionate surgeon or a passionate airplane pilot. I want someone who is excellent and can produce good results. The same is true of a lawyer. I want someone who can answer my questions, win my case, or get me out of a jam.

I also tell women to be themselves. Just do what you are good at; chances are, you will generally enjoy doing something you are good at. Telling women to follow their passion also sets way too high of a bar for them, and it is a recipe for defeat and disappointment. Work is stressful and exhausting. I see women leave the workforce or quit their jobs because they weren't successful, not because they lacked passion. You are better off going to work at a place that wants and needs you for a skill you have. You will have more control over your work and schedule. It is much easier to set boundaries when your colleagues need you more than you need them. It may have taken me a while, but I have no problem telling my colleagues to leave me alone because my kids are more important to me than reviewing their briefs, and not to schedule work meetings before 10:00, after 5:00, or on the weekends.

So learn your strengths and know your weaknesses. I accepted early on that I would be a terrible trial lawyer, even though I dreamt of being the next Brendan Sullivan. I do not live only for my work. I love doing something I am good at that helps other people, and the pay is a real plus. And while I hate to lose, winning is not what gives my life meaning. It does not even fill me with joy. In fact, I usually am still mad that the client was sued in the first place or had to sue to obtain relief. I save my passion for my home and my hobbies, like coaching high school debate and shopping.

I like to tell law students that picking a job is a lot like picking a spouse: it's hard to know what you are getting into until it's too late to get out. For instance, when I was looking for a husband, humor, brains, and love of children was all that mattered to me. I never thought to ask about parenting philosophy, religion, finances, and who would control the thermostat or TV remote. In terms of a profession, it also is virtually impossible to know exactly what you want out of a job, or whether you will get it even assuming you know what you want. When starting out, I cared about salary and whether working at a firm would keep doors open for me in case I hated my job. It never occurred to me to think about some basic questions, such as: would someone teach me how to actually practice law; how hard would I work; how would I be reviewed; what if I needed help; could I succeed at

work and have enough time to exercise, shop, go to the doctor, go on dates, and have children; and would I be happy?

Looking back, I don't know who I could have asked, how I could have asked them, or what I even wanted the answers to be. Instead, I chose to work at Williams & Connolly because some primordial instinct told me it was a place that would go to the ends of the earth and back for its clients. I lasted three years there. Although I loved the people, my reviews were only so-so. In retrospect, I had little clue what I was doing, and I was not cut-out for trial work. I discovered that appellate law allows me to use my strengths in empathy, storytelling, and persistence without the need to be good at multi-tasking, organization, and face-to-face adversity with opposing counsel.

I also don't run away from my double X chromosomes. I do not dress like a man, I do not talk like a man, and I do not think like a man. I empathize with my clients. I put myself in their shoes and learn their business. I do not judge them. I do not think about what the law is or should be. I focus only on how to win. How do I do that? Again, I imagine someone is going to die, and I don't want it to be me. And that is where my maternal instincts kick in on steroids. I assume my clients are being bullied (they inevitably are), and my job is to protect and defend them at all costs.

Failure and humiliation are part of life. And work is no different. Disappointment and rejection are inevitable. I can count more jobs and more clients and more cases that I didn't get than those I did. At some point, you can throw in the towel if you just aren't good enough at something. But if you do have a skill, never let other people's perception of you define you. Let me share some priceless advice that has loosely been attributed to Eleanor Roosevelt: you wouldn't worry so much about what other people think of you if you knew how seldom they think of you.

Here are some practical job tips. First impressions mean everything. If you do a great job off the bat, chances are your boss will look past your inevitable mistakes. It's much harder to make up lost ground. Accept criticism when it's deserved. Being too defensive encourages others to start battles and attack you.

As to my approach to oral advocacy, truth is the best form of advocacy. A court is more likely to trust what you have to say if you acknowledge any shortcomings in the record or in your arguments. I have always been extremely direct and blunt. I also have learned to trust my judgment and instincts more as I age. Many colleagues have advised me not to go bold, but to play it safe in briefs or arguments. Thankfully, at key points in my career, I ignored them, and I do not regret it. To the extent I have regrets, I only wish I had stood my ground more often and told more people that they were idiots.

Find mentors who will care about you and who you can turn to for

advice. Justice Ginsburg was key to the Solicitor General's Office hiring me, and I also was fortunate to have had the backing of colleagues I had worked with at Williams & Connolly and the Department of Energy. But you need more than good references. Justice Ginsburg gave me great advice when I went to her about seven years into my career in the Solicitor General's Office, at a time when I thought my career was a standstill. I told her I had been in the job years longer than most people hold that job, and I asked her whether it was time to do something else to advance my career. She asked what the Office was like, and I recounted to her in detail what my daily job entailed. She then said the last thing I wanted or expected to hear: "I think you should stay. You are good at what you are doing. And you seem very happy with your ability to control your schedule and spend time with your kids." I remember leaving very disappointed with what I thought was a milquetoast response. I wanted her to recommend some sexy, new, and thrilling opportunity for me, but thank goodness she knew what she was doing. I stayed in that office for many more years, time that I needed to grow personally and professionally. Staying there was the best thing that could have happened to my career.

I also like to say that behind every successful woman are the many men in her life who just got out of her way. I could not have done my job without a husband who supported my job and at times limited his own work so he could help with parenting when I was crashing in preparation for an oral argument. And I would have quit practicing law a long time ago were it not for one particular boss: Paul Clement. He was my boss for seven years at the Solicitor General's Office, first as Principal Deputy Solicitor General and later as Solicitor General. When Paul was Solicitor General, and shortly after the birth of my second child in 2001, I asked Paul what previously had been anathema in that office—could I go part-time? Paul immediately said "yes" without consulting anyone else, and quickly followed it up by saying, "just let me know at some point what I just agreed to."

Several years later, still in the Solicitor General's Office, I was ready to quit practicing law entirely to spend more time at home. I also was mentally exhausted. Paul suggested that, instead of quitting, I take a leave of absence. And he said something I will never forget: he told me I was good at my job. I took Paul up on his offer, took a half-year off, and returned to the Office six months later, still on a part-time basis. Paul's flexibility and understanding of the challenges facing working mothers saved my career. For the last eighteen years, I have remained part-time. To this day, I often refer to Paul as the greatest feminist of his generation. Every woman should find a boss like Paul Clement.

I end with a word to any Justices, Judges, clients, and lawyers in management who read this: please do more to hire, support, and encourage

talented women who want to work. Women don't look or talk like Perry Mason, and you don't want us to. We often are more creative, smarter, more persistent, and harder-working than men, and we actually win cases. So call me a Lady Lawyer. Just don't underestimate me in Court.

## THE NERVE: WOMEN OF COLOR IN THE LEGAL ACADEMY

KHIARA M. BRIDGES†

The end of this academic year will mark two decades since I started law school, as well as the conclusion of my first decade as a law professor. In many ways, it is remarkable that I am in the legal academy. I am pretty sure that if you told the 1L version of me that she would one day stand in the front of a classroom of students and lecture them on an area of law in which she had acquired an expertise, she would have laughed at you—right before scurrying off to brief some cases. Nevertheless, I am a law professor, and I frequently lecture students on areas of law in which I have acquired an expertise. The 2019–2020 academic year, which marks so many momentous “firsts” for women in the law, provides an opportunity for me—as the first (and only) lawyer in my family, as well as the first (and only) academic in my family—to reflect on my own path into the legal academy. It also provides an opportunity for me to imagine the future of women in the law that I hope will eventually come to pass.

As is true for most law students, my first year of law school—especially the first semester—was incredibly challenging for me. I did not understand the language that was used in the cases that we had to read. Try as I might, I could not identify the issue of the case most of the time. I did not know what a “tort” was. I did not understand what civil procedure was all about. I definitely could not read the large volume of materials that were assigned every day as carefully and thoughtfully as everyone was telling me they needed to be read. Because there would be no tests or evaluations until the end of the semester, I had absolutely no idea how much, if anything, I was actually learning. And although I wanted some indication of whether I was gradually coming to “think like a lawyer,” I would become *lightheaded* at the mere thought of the final exam: my anxiety about being tested on what I had learned was almost strong enough to make me pass out. These are laments shared by many, if not most, 1Ls.

However, other factors that were more unique to me made my first year of law school particularly trying. Before beginning my legal education, I was attracted to the idea of going to law school because I thought that it would allow me an opportunity to explore how the law interacts with—and

produces—race, class, and gender. I was particularly interested in the event of pregnancy, and I wanted to investigate why society has chosen to regulate it in the way that it has. I was well aware that the experience of pregnancy varied dramatically across socioeconomic status and race. I understood that society celebrated the pregnancies of class-privileged white women; meanwhile, the pregnancies of poor women of color were conceptualized as social problems that needed to be solved. I was drawn to law school because I wanted to explore how the law produced and sustained the different values that are attached to reproductive bodies. Moreover, how was this dramatic and obvious inequality possible in a country that purported to be committed to equality? Indeed, was this commitment to equality not explicitly articulated in the Constitution? How could we reconcile the law—indeed, our founding document—with what was actually happening on the ground in real people’s lives?

I found the first year of my legal education to be challenging—and troubling—because although questions about race, class, and gender brought me to law school, we never talked about race, class, or gender in any of my classes. In fact, I do not recall race, class, or gender being *mentioned* in any of my first-year classes—with the exception, of course, of Constitutional Law. I know now that race, class, and gender are interwoven into the interstices of all of the doctrines that we learned during 1L—from the reasonable person standard to the adequacy of consideration. I know now that those doctrines are a product of race, class, and gender hierarchies. I know now that they function to perpetuate and legitimate those hierarchies. However, as a 1L, I did not have the analytical tools to excavate the unspoken elements of race, class, and gender in the cases that were assigned and the doctrines that were being explored. So, as a 1L, I took the failure to discuss race, class, and gender to mean that they were not significant. Indeed, what I ascertained from this deafening silence around race, class, and gender was that the phenomena that were intriguing to me—the phenomena that I thought organized society—were not really that important. They were ancillary to what really matters. Sure, one might explore race, class, and gender in the second and third years of law school. But they were not core concerns. How could they be important when one could only *elect* to analyze them? How could they be significant when law students were not *required* to gain some fluency in them in the course of their legal education?

Simply put, my first year of law school was a profoundly alienating experience. Day after day, I felt as if my legal education was disabusing me of the foolish notion that the things that I had been convinced were critical to understanding why our society operates in the way that does were actually of any consequence.

The turning point for me came during my second year of law school. I

had the good sense to register for a seminar on Critical Race Theory with Professor Kendall Thomas, and I had the good fortune to get in. I do not overstate things when I say that the course changed my life. It gifted me with a vocabulary that I could use to speak about the interrelationship of race, class, and gender—intersectionality! antiessentialism! multidimensionality!—and it gave me the analytical tools with which I could investigate the ways in which race, class, and gender structure society. But perhaps the most important thing that Critical Race Theory and Professor Thomas gave me was validation that race, class, and gender *mattered*. In that seminar, I learned that they were subjects that were worthy of intellectual investigation; they were subjects that serious legal minds could devote their entire lives to studying. By the end of the semester, I had decided that I wanted to become a law professor.

Only recently have I really come to appreciate the *audacity* of my desire to enter the legal academy. I am a black woman. However, I had *no* law professors who were black women during my entire three years in law school. Neither did I have an Asian, Latinx, or indigenous woman as a law professor over the course of my legal education. The numbers that are available on the racial and gender demographics of the legal academy suggest that my experience is not at all rare.<sup>1</sup>

During my first year of law school, all but one of my professors were white men. Notably, the only female professor that I had during my first year was a visitor; Columbia Law School had not yet hired her. The powerful lesson that a reasonable student might learn from the racial and gender demographics of the people who provided her with the foundation of her legal education was that women—and nonwhite women, especially—were incapable of doing that very thing. Women, especially nonwhite women, could not become experts. If the Columbia Law School faculty was comprised only of the giants in the various fields of law—which was how

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1. The American Bar Association released a report on the racial and gender demographics of the legal academy in 2013. Black women comprised 5.2% of the tenured and tenure-track faculty that year. Latinx women, Indigenous women, and women of Asian descent comprised 1.8%, 0.3%, and 1.8% of tenured and tenure-track faculty, respectively. See Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 448 & tbl.1 (2015); *Data from the 2013 Annual Questionnaire: ABA Approved School Staff and Faculty Members, Gender and Ethnicity: Fall 2013*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/statistics-archives](https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives) (last visited Sept. 8, 2019) (on file with the *Columbia Law Review*).

The American Association of Law Schools (AALS) also released a report on the racial and gender composition of the legal academy in 2009. The numbers in that study are similar to those reported by the ABA. According to the AALS, in 2008–2009, Black women, Latinx women, indigenous women, and “Asian and Pacific Islander” women comprised 3.7%, 1.2%, 0.2%, and 1.0% of law faculty, respectively. See ASS'N AM. L. SCHS., AALS STATISTICAL REPORT ON LAW FACULTY, RACE AND ETHNICITY (2009), <http://www.aals.org/statistics/2009dltr/race.html>.

the law school described its faculty, then as now—then women, particularly nonwhite women, were not giants. Instead, they were small. Indeed, they were so small that they were invisible.

I thought the world of my professors. I do not think this was unique to me: I believe that many law students think incredibly highly of their law professors. Professors are fluent in a language that students dedicate three years of their lives to learning. They invariably are described as *the* leaders in their fields. They have the power to evaluate the student, identifying her as *like* or *unlike* themselves. And they stand in front of dozens upon dozens, sometimes hundreds, of students and command classrooms—expounding doctrine, interrogating the unlucky students who are on call, demystifying that which had been mystified. It is significant that I never saw a nonwhite woman do this. I describe my desire to enter the legal academy as audacious because I had to look to the mostly white men who I had seen assume this lofty role and say, “yeah, I can do that.”<sup>2</sup> In retrospect, I can see that I had some nerve.

We have so very much to celebrate when it comes to women in the law. Undeniably, women have made great strides over the past 150 years. The fact that the editors-in-chief of the top sixteen flagship law reviews are all women serves as unimpeachable evidence that significant progress has been made in the last century and a half. We certainly should celebrate all the advances that have been achieved. However, while we celebrate women’s advancement in the law, we should be attuned to the reality that there is still work to be done. Unsettling proportions of the students who graduate from law school every year will never have been taught by a nonwhite woman over the course of their legal education. That is, a disturbing number of lawyers have not had the opportunity to witness a black, Latinx, Asian, or indigenous woman command a room full of students. So many lawyers—established and brand new—have never had the chance to bear witness to a

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2. I would be unforgivably remiss if I failed to acknowledge that, in many important respects, I am in the legal academy today because of the support of two of my white male professors: the late E. Allan Farnsworth, and the former Dean of Columbia Law School, David Leebron. During my time in law school, they hired me as a teaching assistant for their classes, wrote letters of recommendation for me, encouraged me endlessly, and, in general, made the path to the legal academy more accessible to me than it otherwise would have been.

I mention this to make clear that the critique here is not that female law students of color *need* to have women of color as law professors in order for them to dream of entering the legal academy someday. Neither is the critique that white men and white women cannot serve as competent or adequate mentors to women of color who aspire to become law professors. My personal experience disproves both of these claims. The more modest critique that I am making here is that it took some *chutzpah* on my part to aim to assume a role that I, a black woman, had seen white men typically assume. My hope is that there will be more women of color among the next generation of law professors and that those women of color need not to have been brave beyond measure in order to seek a tenure or tenure-track job in the legal academy.

nonwhite woman's unparalleled expertise. Too many lawyers have learned the lesson that reasonable people can learn from nonwhite women's absence from the legal academy: nonwhite women are not in the academy because they are not good enough to be there.

Progress will have been made when the discourses about the incompetence of nonwhite people—especially when they are not cisgender males—no longer circulate. I am certain that these discourses were responsible for producing my legal education as one marked by the complete absence of nonwhite female professors. How many students who will graduate from Columbia Law School this year—two decades later—will have similar experiences? What of the graduates at the fifteen other top law schools?

Further, progress will have been made when female professors of color are as likely to be experts in race and gender as they are in fields that do not directly implicate race and gender. To be clear, I am a scholar of race and gender. I do the work that I do because I find it endlessly fascinating and exceedingly important. I also find it to be terribly (hopelessly?) complex. Race and gender (and the intersection of the two) are phenomena that are in constant flux—incessantly shifting across sites and historical moments. I enjoy studying race and gender because they are challenges—high-stakes puzzles that I am constantly trying to solve. However, my choice to study what I study, and the difficulty of studying what I study, does not erase the reality that the women of color who make it into the legal academy frequently have acquired an expertise in race or gender, or both. I am afraid that this suggests that the gatekeepers to the legal academy—appointments committees, the faculties that vote on candidates—believe that *women of color can only be experts in matters of race or gender*. I am afraid that these gatekeepers believe that race and/or gender are the only things that women of color *can* know with any degree of depth or sophistication.<sup>3</sup> This, of course, is racist and sexist. It also unfairly limits the universe of possibilities for those women of color who desire careers in the legal academy. And it is *insulting*. It insults those women of color who have made the interrogation of race and sex their life's work—implying, as it does, that we could not become experts in any other field. It suggests that we have a narrow set of

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3. At the same time that race and gender are the only things that women of color are imagined to know with any degree of depth or sophistication, there are still discourses circulating that cast doubt on whether race and gender are actually topics worthy of rigorous intellectual engagement. In some significant corners of the legal academy, questions persist about whether theorizing race, gender, or the intersection of the two, is the stuff of serious academic scholarship. While thinking about corporations, tax, or federal courts is undeniably “serious,” thinking about race and gender (as well as sexuality, ability, gender identity, to name a few other denigrated subjects) is not as uncomplicatedly understood as subjects to which “serious” intellectual minds would devote their energies.

intellectual skills that have been made possible not by the work that we have put into developing our abilities, but rather by our social location. Our white male counterparts are imagined to acquire expertise in their areas of specialization because they are, quite simply, brilliant, and they have chosen to concentrate their brilliance on one of many possible topics. Meanwhile, women of color are imagined to acquire expertise in race and/or gender because, well, what else could we possibly know?

So, progress will have been made when nonwhite female law professors are as likely to teach a seminar on Business Associations as they are on Reproductive Rights and Justice. Progress will have been made when women of color in the legal academy are as likely to publish an influential, oft-cited article on federal income tax as they are on the simultaneous over- and underpolicing of communities of color. Progress will have been made when female law professors of color are invited to speak on panels about federal courts as they are asked to present at conferences about civil rights and antidiscrimination law.

Finally, progress will have been made when female law students of color who want to become law professors do not have to be *audacious*. Certainly, we will have made significant gains when audacity is not required to dream of becoming a woman of color in the legal academy.

# INCHING TOWARD EQUAL DIGNITY

DENISE BROGAN-KATOR†

In 2004, I was forty-nine years old and the first openly transgender student to attend the University of Michigan Law School.<sup>1</sup> My path to the law was improbable and, frankly, undertaken not because I admired lawyers, but rather the opposite. But here I am, leading the work on federal and state policy for a national LGBTQ rights organization and collaborating with the true heroes in the movement.

I got off to a slow start. I dropped out of high school when I was sixteen, and on my seventeenth birthday—during the Vietnam War—enlisted in the Navy. I served four years on a submarine in the South Pacific and Southeast Asia during the wind-down of that war. I was honorably discharged when I turned twenty-one, with a submarine insignia, or “dolphins,” tattoo but absolutely no idea what I would do next or how my life would unfold. Nevertheless, having been blessed with straight white male privilege and, thanks to my mom, no small measure of self-confidence, I was on my way.

I worked various jobs, earned an accounting degree, and was certified as a CPA, later obtaining an MBA while working full time. My personal life was a picture of domestic bliss: I married my high school sweetheart, and we had three wonderful red-haired daughters in quick succession. It seemed like every year I was moving up to a better job, a better house in a better place (ultimately settling in Florida)—a better opportunity to live the American Dream.

And then. Without warning, a feeling about myself that I could not control, could not ignore (although I tried), and could not suppress began to surface, although I had no name for it and no understanding of it. I could not escape the realization that the man everyone else perceived me to be was not really *me*. I was playing a male role, but it was just that: a role assigned to me at birth that I had been acting out but was getting harder and harder to perform.

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† Chief Policy Officer, Family Equality.

1. Three years later, I believe I was the first openly transgender member of the Michigan Bar. At the time, there were only a handful of openly trans lawyers in the country, and we all knew each other. Several are friends, and I am proud to know them. But to the extent we were trailblazers, that trail has become a highway. I just recently attended the annual Lavender Law conference (a national gathering of lawyers and law students who identify as LGBTQ or allies, sponsored by the LGBT Bar Association), and I found it remarkable how many trans-identified people were there.

To question my gender identity in the 1990s was, for me, like sailing off the map of the known world. I thought I was all alone. At first, I tried to navigate between the equally fraught paths of self-denial and of coming out to a hostile world. I attempted to maintain normalcy at work and at home, while exploring my feminine identity in a few relatively safe spaces.<sup>2</sup> But after my wife discovered what I felt was my shameful secret, our marriage became tumultuous; we hung on for a few years but couldn't make it work. In contrast, when my employer found out about my off-hours conduct, there was no equivocation; I was immediately and abruptly fired despite years of glowing performance reviews.

Up to that time, I had not given much thought to the law; it was part of the business world in which I operated, but it had nothing to do with me personally. When I consulted a lawyer in 1995 about my humiliating termination, the law suddenly became very real and very personal. I expected advice on how to fight back. Instead, as I told my story, the lawyer's expression changed from one of interest to one of disgust—not for what my employer had done, but at me. He brusquely informed me that the law afforded me no recourse; there were no legal protections—federal, state, or local—from discrimination for people like me.<sup>3</sup>

There is nothing like being the victim of injustice to galvanize your resolve to advocate for change. I became involved in the push to add “T” to the agenda of the gay rights movement. I attended meetings, protested, marched, and lobbied. In the mid-1990s, I attended a lobby day in D.C. to

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2. At that time, the term “transgender” was not in common use, and I did not know of it. If I had to give myself a label, I would have said I was a “cross-dresser,” in that I expressed my gender identity by presenting myself as a woman, wearing women's clothing, a wig, and makeup. I did not identify as a “transsexual,” a term for someone who had made the complete transition to a female identity, and certainly not as a “transvestite,” who derives sexual gratification from wearing female clothing. Nor was I ever a drag queen, who dresses glamorously for performance purposes. I just wanted to feel like, and be perceived and treated as, a woman. It was only during those brief times that I was *me*, and fully happy.

3. Although my lawyer didn't bother to actually explain it to me, the courts had uniformly held that Title VII's prohibition on discrimination on account of “sex” did not apply to transgender people. *See, e.g.,* *Ulane v. E. Airlines*, 742 F.2d 1081, 1084–87 (7th Cir. 1984). It was not until 2004 that a court declared that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), “eviscerated” *Ulane's* approach and that the term “sex” encompassed gender identity and expression because discrimination on that basis is impermissible sex stereotyping. *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004). Now, fifteen years later, the Supreme Court is deliberating whether to roll back those years of progress and exclude gender identity from the protections of Title VII. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). This issue may no longer directly affect me, but it is critical for thousands of trans men and women who are the victims of pervasive discrimination, not just in employment, but in all aspects of society. I was asked to speak from the steps of the Supreme Court on the day of oral arguments; I talked about my wrongful termination, but I also spoke from my heart about the need to stop some people from making other people afraid to be who they are for fear of not getting, or losing, their job. Surely that was what Title VII was meant to do.

advocate for an inclusive Employment Non-Discrimination Act (ENDA) and ran into my home-state senator. When I stopped him and introduced myself as a constituent, he smiled and asked what brought me to the capitol. As I explained, he looked puzzled, and I had to explain to him what “transgender” meant. He recoiled from me as if I had a contagious disease, and his aide stepped between us, obviously considering me a threat. I wish I could say that their prejudice was shocking, but it was just a little more extreme than I had come to expect. Trans people at that time were treated as pariahs, even within the lesbian and gay community, not to mention frequent targets for hate-based violence in the straight world (as we still are<sup>4</sup>).

As demoralizing as it was to repeatedly lose employment and to be politically marginalized, that feeling could not compare to the fear and anger I felt when I next encountered the legal system. During protracted negotiations over alimony and visitation at the end of my divorce proceedings, my wife’s lawyer decided that their best strategy for leverage was to file a motion to terminate my parental rights—meaning I could have no contact with the three girls I loved more than anything—on the grounds that, because I was transgender, I was an unfit parent.<sup>5</sup> Although my wife eventually told her lawyer to withdraw the motion, I still bear the emotional and financial scars from that trauma twenty-five years later.

Meanwhile, I tried once again to find employment by hiding my gender identity. I applied for a position as a chief financial officer for a small software company in Tampa. As the company owner was about to offer me the job, he asked me: “Is there anything else I need to know?” I blanched but decided to tell him the whole truth. After assuring him that I would not let my gender identity affect my performance or embarrass him in any way, he hired me. Thanks to his faith in me (and my desire to reward that faith), we were able to grow the company and, several years later, sell it for \$200 million. At the risk of understating things, this remarkable man changed my life. Not only was I able to transition to living full-time as Denise,<sup>6</sup> the generous bonus he paid me also gave me the opportunity to take my life in a new direction, and I seized it.

During my early years of activism, I had seen that it takes more than marching, letter-writing, and pigeon-holing legislators to change the law. As they say, if you’re not at the table, you’re on the menu. Who’s at the table?

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4. Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an ‘Epidemic,’* N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html>.

5. It was no idle threat. There was at least one reported decision in which a father had lost parental rights by transitioning; the court held she had “terminated her own parental rights as father” because she could not be a father and female at the same time. *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986). For a comprehensive review of court decisions involving transgender and gender-variant parents’ parental rights, see Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593 (2019).

6. By the way, transitioning from male to female or vice versa is a lot harder than you might think. It is not just about changing your clothing, your hairstyle, and your name. To have what is called “passing privilege” (and thus move more safely through the world), most trans people have to try to change the secondary sex characteristics that provide visual cues about gender. Some of us, with enough money and other privileges, can access the various tools available to help make that happen. Those without that privilege are at greater risk for unemployment, trafficking, and violence. See Rojas & Swales, *supra* note 4.

Lawyers. So, despite my previous personal experience with the legal profession, I decided to take the LSAT, apply to law school (in my ignorance, I applied to only one), and see what happened. Once again, a good person—this time the dean of admissions at the University of Michigan Law School—saw something in me and changed my life.

When I entered law school in Ann Arbor in 2004, Michigan was consumed with the fight over Proposal 2, the proposed constitutional amendment banning same-sex marriage, allegedly to benefit children.<sup>7</sup> This smacked of the same “save our children” refrain I had heard in Florida as a cover for the homophobia-driven ban on gay adoptions, the echoes of which hung in the air in my divorce case. While I knew that it wasn’t just transgender people who were unprotected from discrimination, this attack on same-sex couples’ ability to form legally recognized relationships with each other and with their children opened my eyes to the much larger struggle for equality being waged around me.

During law school, I did not spend as much time in the ivory tower of academia (or the bowels of the underground law library) as perhaps I should have. Instead, I engaged with my professors, fellow law students, and the larger university community as much as I could. I participated in the university’s Speakers Bureau to share my story with students who might not have ever met a trans person. When I became aware that the university’s bylaws prohibiting discrimination did not include gender identity and expression, I joined a campaign to change that, speaking at meetings of the Board of Regents and petitioning for an inclusive nondiscrimination policy.<sup>8</sup>

Outside the campus, I joined the board of the local LGBTQ resource center and got involved in the statewide LGBTQ civil rights organization. In the summer before my third year, I interned in D.C. at Servicemembers Legal Defense Network, a nonprofit providing resources to, and advocating for, gay and lesbian service members before the repeal of “don’t ask, don’t tell.” I got a taste of how LGBTQ nonprofits have to work very hard to do more

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7. MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”). I fought against this measure and was truly shocked when it passed with almost 59 percent of the vote, *DeBoer v. Snyder*, 772 F.3d 388, 397 (6th Cir. 2014). It took ten years for a federal court to declare the law unconstitutional, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), and another year for that ruling (after reversal in the Sixth Circuit, *DeBoer*, 772 F.3d 388) to be affirmed by the U.S. Supreme Court, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

8. I may have been a bit overzealous in my advocacy when I led a group of students through the university administration building with a bullhorn demanding protection for trans members of the university community. But the year after I graduated, the Regents invited me back to attend their meeting when they voted to add gender identity and expression to the nondiscrimination policy in the university bylaws.

with less, to make tough choices about where to put their meager resources, and to compete for funding from funders and donors. It taught me about some of the challenges of working for social justice instead of profit.

After graduation, my wife Mary—a lawyer whom I had met during law school<sup>9</sup>—and I started our own law practice to serve the legal needs of LGBTQ people in southeastern Michigan. We envisioned that the practice would largely involve helping LGBTQ couples navigate the lack of legal recognition of their relationships and help them secure ties to each other and their children through conventional tools such as wills, powers of attorney, and real estate deeds. But we quickly found out that our clients had diverse problems that took us to family court, to probate court, to federal court (civil rights litigation), and everything in between. We helped two moms get both their names on their child’s birth certificate, and we helped trans people get gender-marker changes on theirs. Inequality manifests itself in small ways—like needing to convince a judge that a person changing her first name from a masculine one to a feminine one is not inherently “fraudulent”—and in big ways, such as needing to sue a municipality for targeting gay men with police sting operations and wrongful arrests.

While practicing law, I was asked to join the board of Triangle Foundation, a statewide LGBTQ advocacy organization now known as Equality Michigan. I eventually left private practice to serve as its executive director, the first openly “T” person to do so at any statewide LGBTQ equality organization. It was then that I began to fully appreciate the politics that permeate the LGBTQ movement. We are a community of diverse needs and desires. Our movement includes everyone from the stereotypical rich gay couple to trans women living on the street; we are middle class, working class, urban, suburban, rural, every color and religion, every walk of life and every political persuasion. We are single, we are coupled, we are families; we are youth—often bullied and even homeless—we are millennials, we are boomers, and we are elderly. To get a majority of our community to focus their energies on specific goals, and to agree on strategies to effectuate those goals, is in itself nearly impossible. To keep dissenters from tearing everyone

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9. One aspect of being transgender is that you never know who will accept you and who will reject you. When I came to law school, I was divorced and openly transgender, and I wondered if I would ever find someone who would love me for who I am. One day, during my 1L year, the profile of a lawyer named Mary popped up on Match.com. I messaged her, referencing our shared connection to Michigan Law School, and was disappointed by her response that, despite my charming profile, she didn’t think we “were meant to be.” (I later learned that this was solely because I was transgender, and she didn’t know how or what to think about that, having never before met a trans person.) But sometimes what we imagine our fate will be is not what fate has in store. Mary and I met as friends in real life, she thought to herself “she’s a woman with a remarkable life story,” and, long story short, we have now been married for fourteen years, thanks to the progressive marriage laws of Canada. In fact, she now tells me that she has an easier time dealing with the fact that I used to live as a man than that I used to be a Republican.

else down while we gather enough allies to achieve political victory is practically a miracle.

One of the toughest challenges we face is prejudice against trans people (particularly trans women, like me) being used as a wedge to divide our community.<sup>10</sup> When the infamous HB2 passed in North Carolina, it invalidated local ordinances that protected the entire LGBTQ community, but the primary selling point was keeping trans women out of the bathrooms. We saw the same thing in Houston when the voters repealed that city's nondiscrimination ordinance. Whenever an expansion of civil rights laws to protect LGBTQ people is proposed, you can count on someone to say, right out loud, that they have no problem with gay people, but they just can't abide "men in women's restrooms." No matter how I move through the world or how everyone who knows me perceives me, I become relegated to that hateful trope.

Now, as the Chief Policy Officer at Family Equality, I am working at the federal, state, and local levels across the country to collaborate on issues affecting LGBTQ families. We do not usually get involved in litigation, working instead behind the scenes to have a positive impact on state and federal policy.<sup>11</sup>

The most difficult task I have in my work for LGBTQ equality is responding to the post-*Obergefell* backlash against recognition of our relationships and our families. For LGBTQ families, *Obergefell* was a watershed moment, in that there are so many rights, obligations, and benefits that are based on the marriage relationship. But not every governmental

10. Perhaps the most famous example of this is when ENDA, which sought to add protections to Title VII based on sexual orientation and gender identity, was before Congress in 2007. In an effort to make it more palatable to conservatives, an amendment was proposed that dropped protections based on gender identity. One faction of the LGBTQ community, most notably the Human Rights Campaign (HRC), argued that it was better to gain employment protection for the majority of the community at the expense of the few; others would not abide a strategy of leaving the most vulnerable of us behind. See Emily Douglas, *An Uneasy Alliance*, AM. PROSPECT (Oct. 23, 2008), <https://prospect.org/features/uneasy-alliance>. That rift took years to heal. See Chris Johnson, *10 Years Later, Firestorm over Gay-Only ENDA Vote Still Informs Movement*, WASH. BLADE (Nov. 6, 2017, 7:50 PM), <https://www.washingtonblade.com/2017/11/06/10-years-later-firestorm-over-gay-only-enda-vote-still-remembered>. In any event, the exclusive bill passed the House but died in the Senate. *Id.* It was not until 2019 that a new, inclusive version called the Equality Act passed the House, but it is also expected to die in the Senate. H.R. 5, 116th Cong. (2019); see also Catie Edmondson, *House Equality Act Extends Civil Rights Protections to Gay and Transgender People*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/us/politics/equality-act.html>.

11. As an exception, we were plaintiffs in the case that finally forced Mississippi to abandon its ban on adoption by gay couples. Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906 (S.D. Miss. 2014), *affirmed*, 791 F.3d 625 (5th Cir. 2015). That was the last adoption ban to fall. Bill Chappell, *Judge Strikes Down Last Same-Sex Adoption Ban in the U.S.*, NPR: TWO-WAY (Apr. 1, 2016, 10:38 AM), <https://www.npr.org/sections/thetwo-way/2016/04/01/472667168/judge-strikes-down-last-same-sex-adoption-ban-in-the-u-s>.

entity has embraced the moment. State laws and policies that were created based on the assumption of different-sex marriage have not been updated in many places so that they clearly apply equally to same-sex married couples.<sup>12</sup> And those who disagreed with *Obergefell* have transformed its holding—that a state cannot constitutionally deprive same-sex couples of the fundamental right to marry—into an attack on “religious liberty.” Thus, in order to protect that liberty, the argument goes, no one should be forced to treat same-sex married couples and their families with the same dignity as everyone else, if doing so would amount to condoning something contrary to their religious beliefs.

This concept of protecting religious liberty reached its logical extreme in Mississippi, where we unsuccessfully fought to defeat Mississippi House Bill 1523, the so-called Protecting Freedom of Conscience from Government Discrimination Act. Passed in 2016, the bill provides protections for persons, religious organizations, and private associations who choose to provide or withhold services discriminatorily in accordance with any of three “sincerely held religious beliefs or moral convictions”: (a) that marriage is and should be an exclusively heterosexual union; (b) that “[s]exual relations are properly reserved for such a marriage”; and (c) that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>13</sup> So, in Mississippi, it’s perfectly fine to refuse service or otherwise discriminate against not only same-sex married couples, but also against anyone who has had gay sex, or any sex not between husband and wife, or against anyone who is transgender. If that weren’t enough, it expressly protects any person who refuses to provide medical or mental-health services to a trans person.<sup>14</sup> While I used to travel to Ole Miss to work with law students, I honestly don’t feel safe going back now.

We have had success in opposing legislation in many states seeking to protect faith-based discrimination against LGBTQ individuals, couples, and families (which we term “license to discriminate” bills), but we still face a tremendous challenge dealing with long-standing discrimination against gay

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12. For example, the state of Arkansas refused to place the name of the same-sex spouse of a birth mother on the child’s birth certificate as the child’s other parent because she was not a man, arguing that the “presumption of paternity” on which the birth-registration law was based did not apply. After the Arkansas Supreme Court upheld the state’s position, the plaintiffs filed a petition for a writ of certiorari to the U.S. Supreme Court, which summarily reversed. *Pavan v. Smith*, 137 S. Ct. 2075 (2017). Family Equality filed an amicus brief to highlight the importance to children that both of their parents’ names are on their birth certificates and the real-life consequences when that protection isn’t there.

13. MISS. CODE ANN. § 11-62-3 (2017).

14. Needless to say, this horrific bill has been the subject of court challenges, but those have been stymied due to standing issues. *See, e.g., Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 652 (2018).

and transgender families in the child welfare system.<sup>15</sup> Make no mistake, these attempts to prevent LGBTQ people from fostering and adopting are rooted in a deep-seated but wrong-headed belief that people like me shouldn't be raising children, notwithstanding all the evidence to the contrary.<sup>16</sup> Since *Obergefell*, nine states have passed legislation that protects the contracts of faith-based foster care and adoption agencies that continue turning away qualified prospective parents who do not comport with the agency's religious tenets, especially LGBTQ people.<sup>17</sup> These laws, which have been justified by noting the valuable service these agencies provide and how it would hurt children if they were "forced" to cease operations, fail to address the real problem. It is not a shortage of child-placing agencies; it is the shortage of qualified foster and adoptive homes for the thousands of vulnerable children in every state who are waiting for a safe, secure, and loving home. LGBTQ couples are *seven* times more likely to foster or adopt than other couples.<sup>18</sup> As states such as Massachusetts, California, and Illinois—which prohibit discrimination by child-placing agencies—demonstrate, the system works best when the pool of prospective foster and adoptive parents is as large as possible.<sup>19</sup>

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15. At any given time, there are hundreds of thousands of children "in the system,"—that is, *in the custody of the state*, having been removed from their homes because of abuse or neglect. The state is responsible for placing children in suitable foster or group homes and often contracts with child-placing agencies—many of which are religiously affiliated—to recruit foster families and place children. In the absence of, or in some cases in spite of, laws or regulations prohibiting discrimination, some child-placing agencies have in the past freely discriminated against LGBTQ individuals and couples.

16. *E.g.*, ABBIE E. GOLDBERG ET AL., WILLIAMS INST., RESEARCH REPORT ON LGB-PARENT FAMILIES 17–25 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-parent-families-july-2014.pdf>; REBECCA L. STOTZER ET AL., WILLIAMS INST., TRANSGENDER PARENTING: A REVIEW OF EXISTING RESEARCH 11–12 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/transgender-parenting-oct-2014.pdf>; Nanette Gartrell et al., Correspondence, *National Longitudinal Lesbian Family Study—Mental Health of Adult Offspring*, NEW ENG. J. MED., July 19, 2018, at 297.

17. The state of Michigan was sued for entering into such contracts in *Dumont v. Lyon*, a case brought by the ACLU of Michigan and a lesbian married couple that had been turned away by a religiously affiliated foster care agency. 341 F. Supp. 3d 706 (E.D. Mich. 2018). The federal district court denied the state's motion to dismiss, ruling that the plaintiffs had stated claims for violation of the First Amendment's Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 733–43. The case settled in 2019 after the newly elected Michigan attorney general announced that the state would not defend the case. *See* Stipulation of Voluntary Dismissal with Prejudice, *Dumont v. Gordon*, No. 2:17-cv-13080-PDB-EAS (E.D. Mich. 2017), ECF No. 82. But a separate case brought by a faith-based agency challenging the settlement is now winding its way through a different federal court. *Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019), *appeal filed*, No. 19-2185 (6th Cir. Oct. 15, 2019).

18. SHOSANA K. GOLDBERG & KERITH J. CONRON, WILLIAMS INST., HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN? (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>.

19. *See, e.g.*, Brief of Massachusetts et al. as Amici Curiae Supporting Respondent, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574).

At the federal level, I am involved in a pitched battle over whether discrimination against LGBTQ couples and families by child-placing agencies that receive federal funds will be permitted. On one side is the “Child Welfare Provider Inclusion Act,” which protects agencies that discriminate.<sup>20</sup> On the other is the “Every Child Deserves a Family Act”—my organization’s signature legislation, sponsored in the House by civil rights icon John Lewis—which was introduced with bipartisan support to prohibit discrimination by child-placing agencies.<sup>21</sup> We are optimistic about its chances for passage, and I hope to be around when it is signed into law.

We are a divided nation—now, more than ever before in my lifetime—and in many ways, the LGBTQ community has been used as a wedge. The local, state, and federal debates over whether to provide protection from discrimination to LGBTQ people, or to provide protection to those who wish to discriminate against us, cleave this nation in two. *Masterpiece Cakeshop*, involving a baker who refused to provide a wedding cake for a gay couple, was not about cake. It squarely challenged the ability of government to mandate equal treatment of the LGBTQ community, essentially raising the question whether a person or business has a *constitutional right*, based on their religious beliefs, to treat me or any other LGBTQ person unequally—regardless of relevant civil rights laws. The Court’s split-the-baby outcome means that discrimination against the LGBTQ community will continue. Cases will continue to be filed testing whether there is a constitutional right to discriminate.

I had to fight for my right to be seen and recognized as a woman—a fight that cost me dearly. But engaging in that fight helped me realize that oppression of women and of minorities is real. If my life’s journey and my work in the law has taught me anything, it is that regardless of what the law is or what the courts may say, we must keep working until it is universally recognized that all people, *all people*, are equally entitled to human dignity. Our voices, as women, are vital to that quest.

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20. H.R. 897, 116th Cong. (2019). The Act would prevent *any state*, including those with laws prohibiting discrimination by child-placing agencies, from taking adverse action against such agencies if they discriminate on the basis of their religious beliefs.

21. H.R. 3114, 116th Cong. (2019); *see also About the Every Child Deserves a Family Act*, EVERY CHILD DESERVES A FAMILY, <https://everychilddeservesafamily.com/about-ecdf-act>.

# ON FIRSTS, FEMINISM, AND THE FUTURE OF THE LEGAL PROFESSION

RISA L. GOLUBOFF†

This is my inaugural attempt to write about women in the legal profession and my own experiences as a woman in that profession. I must confess that I find the endeavor somewhat uncomfortable. I have spent most of my scholarly career researching and writing about a thirty-year period in American constitutional and civil rights history. I like to know a lot before I write a little. Moreover, I have spent my career writing histories not my own. My goal has always been to amplify the voices of those whose stories and claims have been hard to hear. Now, lately, and I imagine into the future, I find myself asked to share my own story and that of others like me—women with status, resources, and education that give them ample opportunity to speak for themselves.

As I thought about how to write on this new and uncomfortable topic, I realized that two guiding principles that have defined my scholarship in constitutional history apply here too. Both flow from the foundational premise that the most visible markers of constitutional change—Supreme Court cases, constitutional amendments—are better understood as moments of punctuation in longer stories than as changes themselves. The first lesson that flows from that premise is that change is a process, not a point in time. The shift from past to present is rarely instant or binary. The second and related lesson is that change is not made by a single person, institution, or set of elite actors. It is the product of the actions of many different people—those who join a protest or write a letter to a lawyer or file a case or write a newspaper or law review article. Change happens when people—constrained and opportunistic, selfish and selfless, connected and alone—make it happen.

Milestones like the Nineteenth Amendment can easily invite the celebration of a moment: August 18, 1920, when American women became voters.<sup>1</sup> But our commemoration need be limited to neither celebration nor

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1. *The 19th Amendment*, NAT'L ARCHIVES (May 16, 2019), <https://www.archives.gov/exhibits/featured-documents/amendment-19> [<https://perma.cc/6Q43-VYJD>].

that single moment. It should also be a time for us to recognize what preceded that moment and followed it, what it left to be accomplished, and who played critical but unrecognized roles. It can and should provide an opportunity to reflect on how the process of change unfolds and what part each of us, as individuals, in our institutions, and in the profession writ large, have played and can play in the future.

### I. THE PERSONAL STORY

It is fair to say that I did not always have a particularly robust sense of myself as part of a story of gender equality, in the legal profession or otherwise. I certainly did not, until recently, have a sense of the role I would or could play in attaining further gender equality in the legal profession by virtue of serving as the first woman dean of the University of Virginia School of Law.

Growing up, it seemed to me—to the extent that I thought about it—that Second Wave Feminism had already generally succeeded. My mother completed her education (through a doctorate) and went to work full time during my childhood. I found the world as open to me as it was to my two older brothers. They were my models, and what they modeled seemed entirely possible for me too. My mother’s question was always, “If not you, who?” Perhaps in answer, I joined the boys’ wrestling team in middle school. I had grown up boxing and wrestling with my brothers. It seemed like the natural next step for me and a largely uncontroversial one in my world. Women were equal. I could wrestle.

For the rest of my educational career, the fact that I was a woman seemed mostly not to matter. My schools and my classes during college, law school, and graduate school in history were filled with fairly even numbers of men and women. I supported my friends who majored in women’s studies. But I studied race and class because I wanted to use my education and power on behalf of those systemically marginalized in our society. To me, that was not women—or at least not the privileged, white women who still seemed to dominate the feminist imagination.

Looking back, I can see more clearly my own inklings of the unfinished business of Second Wave Feminism. To join that wrestling team, I was required to take a fitness test many of my male teammates could not have passed. In college, I helped found Women’s Street Theater, an organization that brought dramatic education about rape and sexual harassment to our peers on campus. I encountered belittling behavior and harassment on occasion and witnessed far more sex, gender, and intersectional discrimination, harassment, and assault around me. For the most part, however, gender inequality as I experienced it from my relative position of

privilege felt unsystematic and already a vestige of the past. I called myself a feminist as a political stance I chose rather than a personal burden I carried.

Then I entered the work world, and I could see signs of continuing gender inequality all around me. I not infrequently found myself the only woman in the room, or the only woman to speak, or the only woman in a high-status position. When I entered the academic teaching market in 2000, only 6.4% of tenured faculty were women.<sup>2</sup> Neither my law school nor my university—like so many others—had ever been led by a woman.<sup>3</sup> My colleagues and my superiors were overwhelmingly male.

When I became a parent, I realized that my expectations that men and women would share equally the benefits and burdens of work in the home and careers in the world were far less widely shared than I had anticipated. My husband was also a UVA law professor, and he and I were committed to co-parenting. It was hard to do. Schools, teachers, other parents, and children's organizations from soccer to ballet and beyond often treated me as the only relevant parent for appointments, potlucks, and playdates. My children's expectations for my presence in their school lives also exceeded their expectations for my husband. Given all of this, I should not have been surprised that I felt more guilt than he did when work interfered with family—despite the fact that co-parenting and identical jobs meant that we spent basically the same amount of time with our children.

Then I became a first. I never expected to be a first. I thought the firsts were all behind us. Even when I joined the boys' wrestling team, it had not felt like I was a first. There was no fanfare, no announcement, no sense of radical transformation. This new first was nothing like that one. When I became dean of UVA Law School in the summer of 2016, I was both the first female dean and the first Jewish dean in our two-hundred-year history.<sup>4</sup> That is a bit of an overstatement, as the school did not name its first dean until 1904, eighty-four years after the Law School's founding.<sup>5</sup> But I was the twelfth, and it was 2016.<sup>6</sup>

What was particularly striking about this “first” was that aside from some older Jewish alumni who had attended the Law School when anti-Semitism was clearly more pronounced, the Jewish milestone was not nearly

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2. Laura M. Padilla, *A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?*, 15 AM. U. J. GENDER SOC. POL'Y & L. 443, 477 (2007).

3. Mike Fox et al., *Women Who Led the Way*, UVA LAWYER, Fall 2019, at 57.

4. *UVA Law School History*, UNIV. VA. SCH. LAW: ABOUT THE SCHOOL, <https://www.law.virginia.edu/about/uva-law-school-history> [<https://perma.cc/4G2J-PLY9>]; *UVA Stories: Risa Goluboff—The Law School's First Woman Dean* (WTJU 91.1 FM broadcast 2018), <https://player.fm/series/wtju/uva-stories-risa-goluboff-the-law-schools-first-woman-dean> [<https://perma.cc/4774-2CHA>].

5. *UVA Law School History*, *supra* note 4.

6. *Id.*

as salient to most people as the gender milestone. I took that then and I still take it now as an indication—despite the current spike in anti-Semitic violence in the U.S. and around the world— that perhaps in some regards we have come further with religious pluralism than gender equality.

I know some “firsts” who resist the label as either unimportant or affirmatively retrogressive. I have embraced it, not because it is everything—it is not—but precisely because it is a moment of punctuation in my own process of recognizing the ways gender has shaped my career and what it allows me to shape in turn. Shortly after I was named dean, my father asked whether I was still picking pieces of glass out of my hair. I laughed, but the answer was yes. The remnants left from shattering that particular glass ceiling remind me that change is a process, not a point in time.

## II. THE UVA STORY

Had Elizabeth Tompkins known the phrase “glass ceiling” when she became one of the first female law students at the University of Virginia School of Law in 1920,<sup>7</sup> I have no doubt that she would have agreed that the glass shards were mighty hard to shake from her hair. Tompkins and her classmates Rose May Davis and Catherine Rebecca Lipop began their legal studies just a few weeks after the ratification of the Nineteenth Amendment.<sup>8</sup> This year, then, marks a milestone in my institution as well as in the nation: one hundred years of suffrage and one hundred years of educating women to be lawyers at UVA.

Tompkins’ story epitomizes for me both how change is a process rather than a point in time and how individual people make change happen. As women pushed for the vote in 1919, so too, in the words of then-law school dean William Minor Lile, they “clamored” for admission to the University of Virginia for graduate study.<sup>9</sup> Even that was not the beginning, however. By that time, UVA had already been educating, though not granting degrees to, teachers and nurses for decades.<sup>10</sup> In order to get out in front of potentially

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7. *History of Women at UVA*, (RE)IMAGING WOMEN IN STEM (2017), <http://voicesand-visibilityuva.org/about-these-portraits/women-at-uva-history> [<https://perma.cc/7H6H-GXG8>].

8. Peter Wallenstein, “*These New and Strange Beings*”: *Women in the Legal Profession in Virginia, 1890–1990*, 101 VA. MAG. HIST. & BIOGRAPHY 193, 207 & n.30 (1993).

9. Dean William Minor Lile, Address to Law Alumni at the University of Virginia Centennial Celebration (June 3, 1921), in *THE CENTENNIAL OF THE UNIVERSITY OF VIRGINIA, 1819–1921: THE PROCEEDINGS OF THE CENTENARY CELEBRATION, MAY 31 TO JUNE 3, 1921*, at 149, 156 (John C. Metcalf et al. eds., 1922), <https://hdl.handle.net/2027/uva.x000471619?urlappend=%3Bseq=210> [<https://perma.cc/FZ5M-SKKT>].

10. See Anne E. Bromley, *Six Memorable Milestones for Women at UVA*, UVA TODAY (Nov. 15, 2017), <https://news.virginia.edu/content/six-memorable-milestones-women-uva> [<https://perma.cc/C6US-K5A3>]; Sierra Bellows et al., *Women at the University of Virginia*, VA. MAG. (Spring 2011),

more radical change from the legislature in 1919, the University decided to admit a small number of women to its graduate schools—with higher standards of admission—for the fall of 1920.<sup>11</sup>

Tompkins and Davis entered the Law School as regular, degree-seeking students, while Lipop, the law librarian, enrolled as a “special student.”<sup>12</sup> It was clear to Tompkins that admission was the beginning, not the end of her journey. She later recalled that it took the men in her class “one semester to find out that I was not after a husband and another semester to find out that I could do the work. After that, everything was fine.”<sup>13</sup> “Fine” hid a good many remaining challenges. “Fine” did not mean all of the faculty were thrilled with the new female students. Even though some of her professors, including the dean, found her “powers of acquisition and of appreciation of legal principles . . . fully equal to those of the men in the front rank of the graduating class,”<sup>14</sup> she found one professor so resistant that the “invisible wall” he had erected to her academic success was “as inevitable as the Rock of Gibraltar [sic].”<sup>15</sup> It was “destroying any confidence [she] ever had in [her]self.”<sup>16</sup> She also lacked the intellectual community that the men in her class enjoyed in their fraternities, where they had “a round table and discuss[ed] Law every night for an hour.”<sup>17</sup> Excluded from the fraternities, and with no alternatives available, she lamented, “There has been, and there is, no one to argue with when I leave class at noon.”<sup>18</sup>

Upon graduation, Tompkins became the first woman to join the Virginia bar, and she clerked for a local law firm for two years. Though one of her fellow lawyers went out of his way to help her learn the ropes, the principal partner had “yet to offer to show [her] a single thing at the Clerk’s

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[https://uvamagazine.org/articles/women\\_at\\_the\\_university\\_of\\_virginia](https://uvamagazine.org/articles/women_at_the_university_of_virginia) [<https://perma.cc/XN58-HM9V>]; (RE)IMAGING WOMEN, *supra* note 7.

11. UVA Board of Visitors, Meeting Minutes (Feb. 19, 1920), [http://xtf.lib.virginia.edu/xtf/view?docId=2006\\_09/uvaGenText/tei/bov\\_19200219.xml&chunk.id=d3&toc.id=&brand=default](http://xtf.lib.virginia.edu/xtf/view?docId=2006_09/uvaGenText/tei/bov_19200219.xml&chunk.id=d3&toc.id=&brand=default) [<https://perma.cc/7ZPP-FR69>]; UVA Board of Visitors, Meeting Minutes (Jan. 12, 1920), [http://xtf.lib.virginia.edu/xtf/view?docId=2006\\_09/uvaGenText/tei/bov\\_19200112.xml&chunk.id=d3&toc.id=&brand=default](http://xtf.lib.virginia.edu/xtf/view?docId=2006_09/uvaGenText/tei/bov_19200112.xml&chunk.id=d3&toc.id=&brand=default) [<https://perma.cc/XZ32-Y2L6>]; *see* Dean William Minor Lile, *supra* note 9, at 156.

12. Wallenstein, *supra* note 8, at 207.

13. Jane Roush, *Early Women Law Graduates Recall Study in Male World*, VA. L. WEEKLY, Apr. 11, 1980, at 1, 3.

14. William Minor Lile, *Annual Report of the Law Department to the President of the University*, Jan. 1, 1924, ANNUAL REPORTS TO THE PRESIDENT, 1904–1958, Accession #RG-2/1/1.381, Special Collections, University of Virginia Library, Charlottesville, VA (on file in Deans’ Papers, University of Virginia Law Library).

15. Letter from Elizabeth N. Tompkins to her father (Apr. 22, 1921), <https://archives.law.virginia.edu/records/mss/97-4/digital/1098> [<https://perma.cc/LDP2-P7CZ>].

16. *Id.*

17. *Id.*

18. *Id.*

office.”<sup>19</sup> Once the clerkship ended, Tompkins, like other women lawyers of her time and for some time to come, had limited career options and trouble finding a permanent position. Dean Lile suggested that she hang her own shingle and offered his support and advice on how to do so.<sup>20</sup>

Elizabeth Tompkins’ story is not unique to UVA or the Commonwealth of Virginia. When, in 1870, Ada Harriet Miser Kepley received her Bachelor of Laws from what is now Northwestern University—becoming the first woman in the United States to graduate from law school—it was illegal for women to practice law in Illinois.<sup>21</sup> Though many law schools admitted women by 1920, others continued to exclude them as late as 1951.<sup>22</sup> Those women who did manage to attend and graduate from law schools across the country faced many of the problems Tompkins did—discrimination, social and intellectual isolation, lack of mentoring, and most fundamentally, limited career prospects.<sup>23</sup> This trend continued through the middle part of the twentieth century, with most firms refusing to hire women lawyers. Women who found jobs in private practice tended to cluster in fields like family law, tax, and estate planning. Others worked as legal secretaries, law clerks for judges,<sup>24</sup> or as editors for legal publishing houses.<sup>25</sup>

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19. Letter from Elizabeth N. Tompkins to her mother (June 20, 1924), <http://archives.law.virginia.edu/records/mss/97-4/digital/1106> [<https://perma.cc/QX4C-9NCN>].

20. Letter from Dean William Minor Lile to Elizabeth N. Tompkins (Dec. 4, 1924), <http://archives.law.virginia.edu/records/mss/97-4/digital/1107> [<https://perma.cc/DW57-BVBX>].

21. D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, 28 J. LEGAL EDUC. 485, 485 n.2 (1977).

22. VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 118 (1998) (“The phenomenon of sexual integration of American law schools was so widespread that by 1920, women had been admitted to 102 of 142 law schools.”). Some elite law schools continued to exclude women until later. *See, e.g., Law School History Timeline*, DUKE LAW, <https://web.law.duke.edu/history/timeline/vertical> [<https://perma.cc/H9MP-STS2>] (Duke Law, 1927); *The History of Columbia Law School*, COLUMBIA LAW SCH., <https://www.law.columbia.edu/-admissions/jd/learn/history-m> [<https://perma.cc/5CLW-4UYG>] (Columbia Law, 1927); *Harvard Celebrates 60 Years of Women at the Law School*, HARVARD LAW TODAY (Sept. 26, 2013), <https://today.law.harvard.edu/harvard-celebrates-60-years-of-women-at-the-law-school/?redirect=1> [<https://perma.cc/J988-EVEH>] (Harvard Law, 1950); *Georgetown Law Timeline 1870–2010*, GEORGETOWN LAW, <https://www.law.georgetown.edu/library/special-collections/archives/georgetown-law-timeline> [<https://perma.cc/A6ZS-3SXD>] (Georgetown Law, 1951).

23. Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 14 (2009).

24. *See id.* at 7–10, 18 (describing hiring challenges women lawyers faced in the 1940s, 1950s, and 1960s); *see also* JILL ABRAMSON & BARBARA FRANKLIN, *WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974*, at 23 (1986) (reporting an HLS professor in 1956 telling women law students: “Why, none of you is going to have any trouble getting jobs whatsoever. Any of you will get jobs as legal secretaries at any firm.”); *id.* at 215 (describing an HLS grad in the ’70s who had difficulty getting a litigation job at old-line Wall Street firms, which all wanted to put her in estate work or tax).

25. The history of American women lawyers working as legal publishers is as long as the history of American women in the legal profession. After years of studying the law with her husband, a prominent Chicago lawyer, Myra Bradwell launched the weekly newspaper *Chicago Legal News* in 1868. A year

In fits and starts across the twentieth century, women came to play a larger role in the life of UVA and other law schools. Marion Boyd Crockett '32 joined the editorial board of the *Virginia Law Review* in 1931, the first woman to do so.<sup>26</sup> Dean Lile congratulated the *Law Review*'s board "for their fairness and courage in selecting her, in spite of sex prejudice."<sup>27</sup> World War II prompted further change, as when Frances Ames '43 and Flora Kirley '43 were the only editors listed on the masthead for the January 1943 volume of the *Virginia Law Review*. Their male co-editors were serving in the armed forces.<sup>28</sup>

Still a clear minority in the late 1960s and early 1970s, women continued to add new "firsts" as both students and faculty. In 1970, Elaine Jones became the first African American woman to graduate from UVA Law, twenty years after Gregory Swanson broke the color line at UVA Law, the University of Virginia, and every institution of higher education in the former Confederacy.<sup>29</sup> In 1972, Linda Howard '73 became the first woman and the first person of color elected as president of the student body.<sup>30</sup> Carol Stebbins '80 served as the *Virginia Law Review*'s first female editor-in-chief in 1978.<sup>31</sup> Gail Marshall '68 became, in 1969, the first female assistant professor on the full-time teaching faculty.<sup>32</sup> Lillian R. BeVier joined the faculty in 1973 and later became the first tenured female law professor at the school.<sup>33</sup> In 1985, Mildred Robinson became the school's first tenured African American female faculty member, thirteen years after Larry Gibson

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later, she passed the Illinois bar examination but was denied admission to the bar on the basis that she was a woman. *Chicago Legal News* nevertheless became "the most important legal publication west of the Alleghenies." George W. Gale, *Myra Bradwell: The First Woman Lawyer*, 39 A.B.A. J. 1080, 1080–81 (1953). Bradwell's daughter, attorney Bessie Bradwell Helmer, followed her mother into legal publishing, working as editor-in-chief of *Chicago Legal News* and as the editor of at least two volumes of the Revised Statutes of the State of Illinois. ENCYCLOPEDIA OF WOMEN IN AMERICAN HISTORY 300 (Joyce Appleby et al. eds., 2015); Ill. Rev. Stat. (B. Bradwell Helmer ed., 1917); Ill. Rev. Stat. (B. Bradwell Helmer ed., 1921).

26. Recipients of Degrees, Department of Law (June 14, 1932), 19 U. VA. REC. 20 (1933).

27. Diary Entry of William M. Lile (Mar. 5, 1931), in THE DIARY OF A DEAN: EXCERPTS FROM THE PRIVATE JOURNAL OF WILLIAM MINOR LILE 112 (Kristin H. Jensen ed., 2011).

28. Fox et al., *supra* note 3, at 55.

29. *Id.* at 56; Eric Williamson, 'Justice Starts Right Here': Remembering Gregory Swanson, UVA and UVA Law's First Black Student, UVA LAWYER, Fall 2016, at 16, <https://www.law.virginia.edu/uvalawyer/article/justice-starts-right-here-remembering-gregory-swanson-uva-and-uva-laws-first> [<https://perma.cc/FJ8A-2HZF>].

30. Fox et al., *supra* note 3, at 56.

31. *Id.* at 57.

32. *Id.* at 56.

33. Mary Wood, *Lillian BeVier—Law School's First Tenured Female Professor—Ends Career at Head of the Class*, UNIV. VA. SCH. LAW (May 10, 2010), <https://www.law.virginia.edu/news/201005/lillian-bevier---law-school's-first-tenured-female-professor---ends-career-head-class> [<https://perma.cc/TJ7E-GUMB>].

became the first African American junior faculty member and eight years after Samuel Thompson became the first African American tenured professor.<sup>34</sup>

By the late 1970s—at UVA Law and elsewhere—women began attending law schools and entering the legal profession in more significant numbers. As the number of female undergraduates exploded at UVA after the university settled a gender discrimination lawsuit in 1970, women’s enrollment at the Law School grew dramatically as well.<sup>35</sup> That same decade, and again in response to gender discrimination litigation, New York law firms agreed to abide by hiring practices that would ensure the hiring of women associates.<sup>36</sup> As a result, women entered the legal profession and law firms in unprecedented numbers.<sup>37</sup>

In the middle of all these moments—behind, underneath, and through them—were women who studied and excelled and graduated and joined a profession not particularly hospitable to them. Those women made it possible to imagine women trial lawyers, partners, leaders, and deans. They paved the way for my own role in UVA’s history.

When I became dean in 2016, the response was overwhelmingly positive. I had expected alumnae and female students to be excited about this most recent milestone. They were, but they were not alone. Everyone I encountered seemed receptive. My presence revealed a pent-up desire on the part of alumni of all demographics, career paths, and political persuasions to discuss how to make progress for women, people of color, and others who have historically been marginalized in the profession. “Here is what I am doing to diversify my workplace,” they told me. “How can I do more?” they wanted to know.

Over the past three years, I have wondered what Elizabeth Tompkins would make of all this. Would she be surprised to see, one hundred years on, that women make up nearly half our class of law students, that a woman heads the *Virginia Law Review*, that women lead 67% of our student

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34. Fox et al., *supra* note 3, at 57; Eric Williamson, *Black Law Students Mattered*, UVA LAWYER, Spring 2018, at 50, <https://www.law.virginia.edu/uvalawyer/article/black-law-students-mattered> [<https://perma.cc/Y3XK-GHQ9>].

35. See Jane Kelly, *Going Co-Ed*, UVA TODAY (Sept. 28, 2017), <https://news.virginia.edu/content/case-full-coeducation-uva-turned-late-night-phone-call-0> [<https://perma.cc/8552-ZU33>]; Ann Graham, *College Women Encouraged to Consider Legal Training*, VA. L. WEEKLY, Oct. 12, 1973, at 2–3 (showing women’s enrollment growing from 8.5% of the class to 17.8% of the class over three years); see also General Profile of the Entering Class, School of Law, 1967, 1968, 1971, 1974, 1975, 1976, 1977 (Records of the Law School Foundation, RG 107-2013, University of Virginia Law Library) (showing that women’s enrollment grew from single digit percentages for the classes entering in 1967–1969 to 26–27% of the classes entering in 1976 and 1977).

36. Bowman, *supra* note 23, at 14.

37. *Id.* at 15.

organizations, and that a woman has taken Dean Lile's place? Or would she be more surprised to learn that a hundred years on women are not yet half the class, still far from half the faculty, and that we only just hired our first woman as dean? What would she make of the fact that my husband "works for me" as a faculty member and that together we teach a seminar on work-life balance to men and women contemplating both families and careers?<sup>38</sup> Would she think all of this radical and amazing, or a long time coming and still not quite arrived? Most of all, what would she make of the fact that we are still discussing how to achieve true gender equality among lawyers and beyond?

### III. THE PROFESSION'S STORY

The stories I have shared about my own evolution and that of my law school can be multiplied and varied a thousand times over. They are just a few strands of the many that make up the history of pursuing gender equality in the legal academy and the legal profession over the past century.

There is no doubt that immense progress has been made, that we are emphatically not the same profession we were when Elizabeth Tompkins became a lawyer. Recent data show that women make up 57% of undergraduates in the United States, roughly 50% of law students,<sup>39</sup> and 45% of law firm associates.<sup>40</sup>

Real inequalities nonetheless remain, especially in more senior positions in the profession. Though the percentage of female law school deans almost doubled from 18% to 32.5% between 2007 and 2019, it remains just under one third.<sup>41</sup> Indeed, women hover around one third in many key indices: between 33% and 37% of federal judges (depending on the level); 34% of state court judges; and 36% of tenure-line law professors.<sup>42</sup> Other numbers are yet more dispiriting: 19% of equity partners at law firms are women and, across the legal sector, women generally make 78% of men's

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38. He actually reports to the Provost, to avoid conflicts of interest.

39. Kyle McEntee, *More Transparency Please*, 13 FIU L. REV. 465, 478 (2019).

40. Commission on Women in the Profession, *A Current Glance at Women in the Law*, AM. BAR ASS'N, Jan. 2018, at 2, <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf> [<https://perma.cc/XS33-FP76>].

41. Laura M. Padilla, *Women Law Deans, Gender Sidelining, and Presumptions of Incompetence*, 35 BERKELEY J. GENDER, L. & JUST. (forthcoming 2020) (manuscript at 11) (on file with author).

42. Kristen Konrad Tiscione, "Best Practices": A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), A Small Yet Important Step Toward Addressing Gender Discrimination in the Legal Academy, 66 J. LEGAL EDUC. 566, 570 (2017); Commission on Women in the Profession, *supra* note 40, at 5; 2019 US State Court Women Judges, NAT'L ASS'N OF WOMEN JUDGES, <https://www.nawj.org/statistics/2019-us-state-court-women-judges> [<https://perma.cc/N49X-XYYY>].

salaries.<sup>43</sup> Between 2010 and 2018, the gender pay gap in partner compensation actually grew from 32% to a whopping 53%.<sup>44</sup>

When there were literally no women in law schools, it was fairly easy to identify how to increase gender equality: let them in. One hundred years later, it is harder to pinpoint why exactly we have not achieved equality. That is not because people haven't tried to explain the remaining gaps. A bevy of scholars, commentators, politicians, and policymakers tell us the problem is the marriage penalty in our income tax system or a lack of paid family leave.<sup>45</sup> It is men not doing enough housework, or women leaning out when they should be leaning in, or men leaning in when they should be leaning out.<sup>46</sup>

All of these explanations and more have something to offer. But the very existence of so many—and the plausibility of many of these explanations on their face—suggests that there is no single cause for the gender inequality that remains in the legal profession. As in society more generally, the causes are complex, interrelated, and overlapping. Women face explicit bias and sexism, including sexual harassment and discrimination.<sup>47</sup> Implicit bias also plays a role. Leaders (who are predominantly white and male) are less likely to socialize with women than men outside of work, or to hire, promote, mentor, sponsor, and otherwise support those who don't look like them.<sup>48</sup> Men interrupt and ignore women, get away with behavior for which women are penalized,<sup>49</sup> and find it easier

43. Commission on Women in the Profession, *supra* note 40, at 2, 5–6.

44. Elizabeth Olson, *Female Law Partners Face 53 Percent Pay Gap, Survey Finds*, BIG L. BUS. (Dec. 6, 2018) <https://biglawbusiness.com/female-law-partners-face-53-percent-pay-gap-survey-finds> [<https://perma.cc/5FCH-A4KQ>].

45. See, e.g., Alieza Durana, *The Hidden Ways the Tax Code Hurts Women*, SLATE (Oct. 30, 2017), <https://slate.com/human-interest/2017/10/the-tax-codes-joint-filing-system-is-a-sexist-relic-from-the-40s.html> [<https://perma.cc/8ESH-GJMA>]; Claire Cain Miller, *The Gender Pay Gap is Largely Because of Motherhood*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html> [<https://perma.cc/LYX2-GBUL>].

46. See, e.g., Claudia Goldin, *Tackle Gender Inequality at Home and at Work: Flexible But Lower-Paying Jobs Lead to an Earnings Gap*, CHI. BOOTH REV. (May 15, 2019), <https://review.chicagobooth.edu/economics/2019/article/tackle-gender-inequality-home-and-work> [<https://perma.cc/QRH2-BDS3>].

47. Roberta D. Liebenberg & Stephanie A. Scharf, *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, AM. BAR ASS'N 8 (2019) (“Women [lawyers working at law firms] report being four to eight times more likely to be overlooked for advancement, denied a salary increase or bonus, treated as a token representative for diversity, lacking access to business development opportunities, perceived as less committed to her career, and lacking access to sponsors. . . . 50% of women versus 6% of men had received unwanted sexual conduct at work. In essence, one of every two women said they had experienced sexual harassment.” (emphasis omitted)).

48. See RACHEL THOMAS ET AL., *WOMEN IN THE WORKPLACE—2018*, MCKINSEY & CO., AT 12–15.

49. Lynn Smith-Lovin & Charles Brody, *Interruptions in Group Discussions: The Effects of Gender and Group Composition*, 54 AM. SOC. REV. 424, 425 (1989); Joan C. Williams et al., *You Can't Change*

and more rewarding to negotiate aggressively.<sup>50</sup> The structure and expectations of business development and the compensation mechanisms of many workplaces are more attuned to men's conventional preferences than women's.<sup>51</sup>

Legal and regulatory structures and workplace policies unevenly shape workforce participation. Weak family leave laws and policies discourage two-career households, as does a national shortage of adequate, accessible childcare.<sup>52</sup> Parsimonious paternity leave policies contribute to a regime that encourages women to take on the role of primary caregiver and discourages men from doing so. Additionally, there is a mismatch between child-bearing years and many of the most intense moments in legal careers—like tenure in the legal academy, making partner in private practice, or ascending to leadership positions in government and non-profits. Women who take time off to have children, or who work fewer or more flexible hours to care for children or aging parents, are often “mommy-tracked”<sup>53</sup> or have trouble

*What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*, AM. BAR ASS'N 8 (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf> [<https://perma.cc/QP52-237H>].

50. Orly Lobel, *Knowledge Pays: Reversing Information Flows & the Future of Pay Equity*, 120 COLUM. L. REV. (forthcoming 2020) (manuscript at 12–13), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3373160](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373160).

51. See, e.g., PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 86 (2007) (“Women . . . repeatedly brought up the ‘male majority’ in describing the tenor and demeanor of their workplaces. . . . Almost as frequently, women noted that the pace and expectations of their workplaces were set by men with stay-at-home wives.”). See generally ARIN REEVES, ONE SIZE NEVER FITS ALL: BUSINESS DEVELOPMENT STRATEGIES TAILORED FOR WOMEN (AND MOST MEN) (2014).

52. See Youngjoo Cha, *Reinforcing Separate Spheres: The Effect of Spousal Overwork on Men's and Women's Employment in Dual-Earner Households*, 75 AM. SOC. REV. 303, 313 (2010) (finding that “having a spouse who works long hours increases women's likelihood of quitting but not men's”); Grover J. (Russ) Whitehurst, *Why the Federal Government Should Subsidize Childcare and How to Pay for It*, EVIDENCE SPEAKS REPS., Mar. 9, 2017, at 2, [https://www.brookings.edu/wp-content/uploads/2017/03/es\\_20170309\\_whitehurst\\_evidence\\_speaks3.pdf](https://www.brookings.edu/wp-content/uploads/2017/03/es_20170309_whitehurst_evidence_speaks3.pdf) [<https://perma.cc/RNH3-JDA9>] (“Accredited, center-based childcare for a dual-earner family with two young children and with earnings at 150 percent of the average full-time worker's wage would cost that family, on average, 29 percent of their take-home pay.”); Leila Schochet, *The Child Care Crisis is Keeping Women Out of the Workforce*, CTR. FOR AM. PROGRESS (2019), <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467-488/child-care-crisis-keeping-women-workforce> [<https://perma.cc/56ZH-EMPM>]; Williams et al., *supra* note 49, at 8 (reporting that lawyers “agreed that taking family leave would have a negative impact on their career”).

53. Goldin, *supra* note 46 (“Among the majority of highly educated couples with careers and children, the woman is the professional who is on call at home, while the man is the professional who's on call in the office. And in consequence, he earns more than she does.”); STONE, *supra* note 51, at 91 (“Prior to becoming mothers, the women were moving upward, often rapidly; after the first child, half described either plateauing or a decidedly downward trajectory. To the extent that this occurred, women has less incentive to continue with their careers and started to disengage from them.” (footnote omitted)).

finding on-ramps back into the profession.<sup>54</sup>

The gendered cultural norms into which men and women are socialized from birth also contribute to gender inequality by shaping identities and expectations about family life and its relation to work. One recent Harvard Business School study of 25,000 graduates showed that less than 10% of Gen X and Baby Boomer women said they expected their own careers to take precedence over their partners' careers while approximately 60% of their male classmates expected their own careers to take precedence.<sup>55</sup> Many men and women today want both families and careers. As economist Claudia Goldin has noted, both families and careers seem to require someone on call full time. Given the many pressures and incentives mentioned above, the usual result is that men tend to be on call at work and women in the home.<sup>56</sup>

I could go on with this depressing and potentially paralyzing litany of the legal, institutional, economic, cultural, and interpersonal causes of the gender inequality that continues to afflict our profession and society. And that is not even all. As we commemorate the Nineteenth Amendment and coeducation and locate those milestones in the longer story of gender equality, we must locate them as well within the similarly messy stories of the incomplete quest for equality of many different types of people. Writing about the position of "women" in the legal profession is in many ways writing with a limited view. Women are not a single, homogeneous group. The women UVA admitted in 1920 were all white, and it took another half century for African American women to join them. One must understand gender inequality as one aspect of the longstanding, continuing, and often intersectional inequalities faced by people of color, LGBTQIA+ people, people with disabilities, and first-generation professionals, to name a few. Here at UVA Law, we must write of Gregory Swanson and so many others who have repeatedly transformed the very definition of a UVA lawyer.

#### IV. COMING FULL CIRCLE

Needless to say, I have come a long way from thinking of feminism as an abstract thing of the past unrelated to my current challenges and obligations. It is also clear that the divide between my commitment to feminism and my commitments to redressing racial and economic inequality

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54. STONE, *supra* note 51, at 199–200 (explaining that many women seeking to return to work after child-rearing "felt compelled to explore other career options that they hoped would provide greater flexibility" than traditionally male-dominated professions such as law).

55. Robin J. Ely et al., *Rethink What You "Know" About High-Achieving Women*, HARV. BUS. REV., Dec. 2014, at 101, 102, 106, 107.

56. Goldin, *supra* note 46. Though this couple inequity is most pronounced in heterosexual couples, a similar dynamic of division of labor can be seen in same-sex couples as well. *Id.*

is not as large as I had once thought. These variations on equality are key elements of a broader goal for the legal profession: the equal flourishing of all people at work and at home.

As we continue to strive toward that goal, I propose that we start with my initial two premises: that change is a process, not a point in time, and that we are all changemakers. The knowledge that we are empowered to make change transforms the myriad reasons for persistent inequality from a paralyzing obstacle to an open invitation. With so much to do, there is no shortage of opportunities—and therefore obligations—to act at the institutional level and the personal, the professional and the political.

To fight inequality wherever we see it, we will find ourselves called to act in our various roles—as an employer or employee, a husband or wife or partner, a parent or child, a citizen, a community board member, or a voter. We must check our explicit and implicit biases and call others out on theirs. We must reshape our laws to address harassment, discrimination, and the persistent pay gaps that reward some people more than others. We must change the policies in our workplaces and the who-does-what norms within our volunteer organizations, our religious congregations, our children's sports teams, and our own homes.

For me, that means acting as a wife, mother, citizen, lawyer, professor, historian, and most of all as a dean with some ability to shape the future of the institution I lead. I am committed to working toward a future in which all lawyers and aspiring lawyers can thrive at school, at work, and in life. I am committed to making Elizabeth Tompkins, and all who have preceded us, proud of the profession we will yet become.

# CARRYING ON *KOREMATSU*: REFLECTIONS ON MY FATHER'S LEGACY

KAREN KOREMATSU†

Five months before he passed away, my father, Fred Toyosaburo Korematsu, gave me a charge: continue his mission to educate the public and remind people of the dangers of history. At that time, I was running my commercial interior design firm. I was far from a public speaker, educator, and civil rights advocate. However, for the previous four years I had been traveling with my aging father as he spoke to audiences across the country. On numerous occasions, I heard him tell his story and witnessed how he shared his passion for promoting social justice and education. These reflections are a tribute to and a continuation of his efforts.

## I

When I was a junior in high school, we studied World War II in my U.S. Government and History class. For one assignment, the teacher gave each of my classmates a different paperback book relating to the war. We were asked to read the book and deliver an oral report in front of the class. I don't recall the name of the book that I was assigned. However, what I clearly remember is the book report my friend Maya—who is *sansei*, third-generation Japanese American like me—presented that day.

Standing in front of the class, Maya announced the title of her book: *Concentration Camps U.S.A.* I wondered what that could be about, as I thought concentration camps only existed in Europe. To my surprise, she went on to describe a terrible time in history when, following the bombing of Pearl Harbor, the United States government forcibly removed 120,000 people of Japanese ancestry from their homes on the West Coast. At first, they were sent to makeshift detention assembly centers (prisons) that were nothing more than converted horse stalls at racetracks and fairgrounds up and down the West Coast. Three or four months later, the Japanese Americans were ordered to move again and transported by rail to ten permanent concentration camps in desolate areas across the United States, where the majority were imprisoned for the duration of the war.

Maya said that there was one man who resisted the military orders, and

his resistance led to a landmark Supreme Court case, *Korematsu v. United States*. The man, Korematsu, lost his case and the Court upheld his criminal conviction for defying incarceration. “That’s my name,” I thought as I felt 35 pairs of eyes on me. I figured that it must be a reference to some black sheep in our family. All I knew was that my last name was an unusual Japanese name. After class, I asked Maya, “Who is the Korematsu?”

“Your dad,” she said.

“No way,” I replied. “Someone would have told me!”

I ran home to ask my mother. She confirmed what Maya said: *Korematsu* was my father. When I asked why no one had told me, she said they had been waiting until I was older and could understand. Then she gave me the standard answer: you will have to wait until your father gets home and ask him.

At that time, my father worked two jobs, often until late in the evening, so this meant a long wait. When he finally came home at 8 PM that night, I told him what Maya had said. His response was brief. “It happened a long time ago. I did what I thought was right. The government was wrong.”

I saw the hurt wash over his face. I could only bring myself to ask one more question. I asked if he could vote, knowing how important voting was to my parents. He answered yes, and this gave me some reassurance. That was 1966, and we did not speak about his case again until 1982, when Professor Peter Irons visited my father.

## II

My father, Fred Toyosaburo Korematsu, was born in Oakland, California on January 30, 1919. He was the third of four boys. His parents immigrated from Japan at the beginning of the twentieth century and purchased land in East Oakland before the California Alien Land Law of 1913 prohibited immigrants from buying land in the state. On this land, my grandfather built a house and greenhouse nurseries.

My father grew up like any other American kid. He loved spaghetti, hot dogs, hanging out with his friends, playing sports, and, as a teenager, driving cars. Like many other children of immigrants, he experienced discrimination. On a couple of occasions, in San Leandro, a small town adjacent to Oakland, proprietors swore at him, called him racist names, and told him to return to Chinatown “where [he] belonged.” Later, during the war, he tried to enlist in the U.S. National Guard and U.S. Coast Guard, but military officers turned him away because of his Japanese ancestry.

Nevertheless, my father found ways to help with the war effort. He attended welding school and worked in a shipyard that had a contract with the military. Because of his smaller stature, he could get into the hulls of

ships to weld. He was good at his job, and his supervisor even offered to recommend him for a promotion to become a supervisor himself.

On December 7, 1941, the Empire of Japan bombed U.S. naval ships at Pearl Harbor, Hawai'i, propelling America into World War II. My father was 22 years old. Immediately, he wondered if his parents would be in danger because they weren't American citizens. The next day, he was fired from his welding job because of his Japanese ancestry.

Two months later, on February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, which gave the U.S. military authority to forcibly remove any person from the West Coast and imprison them in concentration camps across America until the end of the war. The order didn't specifically mention anyone of Japanese ancestry. Instead, the author authorized the Secretary of War and American commanders to designate particular areas of the United States as military areas where any or all persons may be excluded.

My father had studied the Constitution in his high school U.S. Government class and he knew that he had rights as an American citizen. He questioned how he could be put in a concentration camp and stripped of those rights when he had done nothing wrong. He thought that the Executive Order was unlawful because it denied him due process. And so, he decided to disobey the military orders mandating his relocation and detention.

My father changed the name on his draft card to what he said was a "Spanish Hawaiian" name, Clyde Sarah, to avoid being recognized as Japanese American. He moved to a boarding house near Oakland's Chinatown. He continued to go about his business, trying to get a welding job and blend in. Meanwhile, all other Japanese Americans along the West Coast, including my father's parents and his three brothers, were ordered to report to the detention assembly centers.

### III

On May 30, 1942, about 30 days after Japanese Americans were forcibly removed, my father went to a corner shop in San Leandro to buy cigarettes. When he came out of the store to wait for his girlfriend, an Italian-American woman, the San Leandro police showed up. They approached my father and asked, "Have you seen any short Japanese person around?" He said no. Then the military police arrived, asked my father for identification, arrested him, and took him to the San Leandro jail. He never found out how he was discovered or if someone had turned him in.

The police didn't know what to do with my father. They moved him from San Leandro to the Oakland jail and then to a federal jail in San Francisco. There he had a visitor: Ernest Besig, the Executive Director of the

Northern California affiliate of the American Civil Liberties Union (ACLU). Mr. Besig wanted to bring a legal challenge to the constitutionality of Executive Order 9066 and had read about my father's arrest in the newspaper. He asked my father if he would be willing to participate in a test case. "If need be, we'll take this all the way to the Supreme Court," Mr. Besig said.

My father agreed. His belief in his country convinced him that, if the case did go to the Supreme Court, the justices would find the Executive Order unconstitutional.

About two weeks later, on June 18, 1942, my father's bail hearing was held in the federal district court in San Francisco. After the judge granted him bail, Mr. Besig wrote a check for \$5,000 and gave it to the bailiff. But as soon as my father walked out of the courthouse onto Mission Street, he noticed military police standing under the glaring sun with rifles, waiting for him. The officers said that it was illegal for my father to be free and took him to the stockade at the San Francisco Presidio, where they imprisoned him for several days. Then, they transferred him to the Tanforan Detention Assembly Center in San Bruno—a racetrack where people were forced to live in horse stalls and endure inhumane conditions—where he joined his family and other imprisoned Japanese Americans from the San Francisco Bay Area.

My father did not receive a warm reception when he arrived in the prison center. A group of Japanese American men held a meeting to determine whether he should continue to fight his legal case. They did not invite my father. Afterward, my father's oldest brother told him that the group didn't want him to continue his case. They feared that some harm might come to the rest of them and that it would make their collective situation even more difficult. At that time, they knew that they would be sent away, but they didn't know the conditions they would experience or where they were being sent.

But my father refused to take no for an answer (a trait I inherited). Without telling anyone, he let Mr. Besig carry on with the legal case, which did make its way to the Supreme Court. And on December 18, 1944, the nation's highest court reached a decision.

In a landmark, and now infamous, six-to-three decision, the Court ruled against my father, arguing that "military necessity" justified his incarceration. The three dissenting opinions are still relevant today. Justice Robert H. Jackson wrote, "...the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent

need.”<sup>1</sup> Justice Frank Murphy’s dissent was similarly bitterly severe: “Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”<sup>2</sup> And Justice Owen Roberts came straight to the point. “I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights . . . it is the case of convicting a citizen as punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely become of his ancestry.”<sup>3</sup>

#### IV

The process of reopening my father’s case started in 1982, when my father received a letter from Peter Irons, a political science professor at the University of California, San Diego. Peter was writing a book about World War II Supreme Court cases and planned to include my father’s case, as well as those of *Hirabayashi*, *Yasui*, and *Endo*,<sup>4</sup> who also had challenged the constitutionality of the government’s treatment of Japanese Americans. He had been doing research in Washington, D.C. when he met Aiko Herzig-Yoshinaga in the National Archives. Aiko had been hired by the War Relocation Authority to research how Japanese Americans were treated in the incarceration camps. She and Peter decided to share information with one another, and together they helped right the injustice of my father’s past.

One day, while working in the Immigration and Naturalization Department Archives, Peter came across a dusty box that hadn’t been opened for almost 40 years. Inside, just lying on top, was a memo from the Department of Justice (“DOJ”) in which it admitted to withholding and destroying evidence relating to my father’s Supreme Court hearing in 1944. It was a smoking gun and exactly what Peter had been looking for. Later, he learned that there were originally ten copies of this memo, but only one had survived. To this day, no one knows how it ended up at the top of the box. Perhaps someone hoped that it would be found.

With this new information, Peter wrote to my father and requested a meeting. Many law students over the years had requested interviews, but my father had never been interested. Revisiting the past was too painful. His Supreme Court conviction had a lasting impact on his fundamental rights and affected his ability to obtain employment. For instance, in 1969, his application for a California real estate license was denied.

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1. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

2. *Id.* at 233 (Murphy, J., dissenting).

3. *Id.* at 225–26 (Roberts, J., dissenting).

4. *Hirabayashi v. United States*, 320 U.S. 81 (1943), *conviction vacated*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 320 U.S. 115 (1943), *convicted vacated as noted in Yasui v. United States*, 772 F.2d 1496, 1498 (9th Cir. 1985); *Ex parte Mistuye Endo*, 323 U.S. 238 (1944).

My father wanted to become a realtor to help other minorities, like him, who had experienced housing discrimination and were unable to purchase homes. He took a real estate course and passed with flying colors. But when he went to fill out the application, he saw that it asked whether he had ever been convicted of a crime. Since he had, he couldn't receive his license. He was disgusted and disappointed that he couldn't better his own life, or—more importantly—help others. But my father was never bitter or angry or blamed anyone. He maintained his innocence and never gave up hope that he could reopen his Supreme Court case—even though legal services were expensive and he didn't know who could help him.

My father agreed to a meeting with Peter based on Peter's follow-up phone call in which he revealed he had recently discovered information to show my father. At the meeting, my father saw the large file of evidence that Peter and Aiko had put together. It revealed that at the time of my father's U.S. Supreme Court hearing on December 18, 1944 the Department of Justice had withheld, altered, and destroyed evidence that should have been presented to the justices before their ruling.

On January 19, 1983, a remarkable legal team filed the papers and announced to the world that they were reopening my father's U.S. Supreme Court case, along with *Hirabayashi v. United States*<sup>5</sup> and *Yasui v. United States*.<sup>6</sup> They were filing a petition for a writ of error *coram nobis*, which is a legal procedure used to correct a court's "fundamental error" or "manifest injustice" in a trial, after the defendant has been convicted and served his sentence. They challenged all three decisions based on evidence of governmental misconduct and proof that there was no military necessity for Japanese Americans to be incarcerated during World War II. These attorneys—all working pro bono—included Don Tamaki, Lorraine Bannai, Eric Yamamoto, Edward Chen (now a federal judge), Leigh-Ann Miyasato, Dennis Hayashi, Karen Kai, Bob Rusky, Marjie Barrows, and Prof. Peter Irons, and were led by Dale Minami. In total, over one hundred other attorneys and researchers across the country worked without pay to prepare my father's case. In spite of this support and even after almost forty years since his arrest, my father still experienced resistance from the Japanese American community. People said that, if my father reopened his case and lost, it would hurt their chances for redress and reparations from the U.S. government.

Still my father did not relent. DOJ lawyers offered him a pardon if he would agree to drop his lawsuit, but he rejected the offer. As my mother

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5. 320 U.S. 81 (1943), *conviction vacated*, 828 F.2d 591 (9th Cir. 1987).

6. 320 U.S. 115 (1943), *convicted vacated as noted in Yasui v. United States*, 772 F.2d 1496, 1498 (9th Cir. 1985).

remarked, “Fred was not interested in a pardon from the government; instead, he always felt that it was the government who should seek a pardon from him and from Japanese Americans for the wrong that was committed.” I remember talking with my father about the possibility of a pardon and being struck by how adamant and unwavering he was in his fight for justice.

On November 10, 1983, Judge Marilyn Hall Patel of the District Court for the Northern District of California formally vacated my father’s federal criminal conviction. It was a pivotal moment in U.S. history. Evidence of government misconduct showed that the “military necessity” on which the Supreme Court predicated its decision was nothing more than a smoke screen. The real reason for the government’s deplorable treatment of Japanese Americans wasn’t acts of espionage. Rather, the government acted on a baseless perception of disloyalty grounded in racial stereotypes. My father’s victory in federal court meant that there was no basis to reopen my father’s case in the U.S. Supreme Court. This left the 1944 decision intact, though it was almost universally discredited.

Addressing Judge Patel, my father proclaimed these words: “As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without a trial or a hearing. That is if they look like the enemy of our country. Therefore, I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed or color.”<sup>7</sup>

My father remained an activist and champion for civil rights for the rest of his life. He became an active member of the National Coalition for Redress and Reparations and traveled to Washington, D.C. with my mother, Kathryn, to lobby for a bill that would require an official apology from the U.S. government and compensation of \$20,000 for each surviving Japanese American who had been incarcerated. Although President Reagan initially opposed the legislation, he soon reversed his position due to Japanese Americans’ strong activism. On August 10, 1988, President Reagan signed the redress and reparations legislation into law.

On January 15, 1998, President Clinton awarded my father the Presidential Medal of Freedom, the nation’s highest civilian honor. My father was invited to speak about his experience at numerous events, universities, and law schools all over the United States, including the University of California, Berkeley, Georgetown, the University of Michigan, Harvard, and Yale. In 2000, a documentary about his story, *Of Civil Wrongs*

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7. Transcript, Motion to Vacate Conviction and Dismiss Indictment of Fred T. Korematsu, 30–32, Nov. 10, 1983, File 27635, Criminal Case Files, 1851-1982, U.S. District Courts for the San Francisco Division of the Northern District of California, RG 21, records of the District Courts of the United States, NARA-SF (cited as coram nabis hearing transcript, Nov. 10, 1983).

and *Rights: The Fred Korematsu Story*, premiered in San Francisco's Japantown. My brother, Ken, was the co-producer and Eric Paul Fournier was the director. The film went on to receive two Emmys and my father crisscrossed the country, speaking directly to audiences at showings.

After 9/11, my father continued to speak out. In 2003, he filed an amicus "Friend of the Court" brief in the Supreme Court case, *Shafiq Rasul v. George W. Bush* and *Khaled A.F. Al Odah v. United States*,<sup>8</sup> on behalf of Muslim inmates held at Guantanamo Bay. In the brief, he warned that the government's extreme "national security" measures were reminiscent of Japanese American incarceration. In 2004, he filed a similar brief on behalf of an American Muslim man held in solitary confinement in a military prison without trial.

In another amicus brief, written in April 2004 with the Bar Association of San Francisco, the Asian Law Caucus in San Francisco, the Asian American Bar Association of the Greater Bay Area, Asian Pacific Islander Legal Outreach, and the Japanese American Citizens League, my father expressed his opposition to the government's argument in *Rumsfeld v. Padilla*. The brief emphasized the similarity between my father's unlawful detainment during World War II and that of Jose Padilla following the events of 9/11. My father again warned the government about the danger of repeating past mistakes. He believed that "full vindication for the Japanese-Americans will arrive only when we learn that, even in times of crisis, we must guard against prejudice and keep uppermost our commitment to law and justice."<sup>9</sup>

"Stand up for what is right," my father said often. His message endures all these years later.

## V

My father passed away on March 30, 2005, at the age of 86. With his passing, I realized that I would commit the rest of my life to carrying on his legacy, but I didn't know how. I spent the next few years contemplating what to do. Then, in 2009, I founded the Fred T. Korematsu Institute.

Our mission is educating to advance racial equity, social justice, and human rights for all. Based in San Francisco, the Korematsu Institute began as a local community and education program; we inspire students and the public by sharing my father's story. Soon after our founding, California State

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8. Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Rasul v. Bush*, et al., 542 U.S. 466 (2004) (Nos. 03-334 & 03-343), 2004 WL 103832.

9. Biography, FRED T. KOREMATSU INSTITUTE, <http://www.korematsuinstitute.org/fred-t-korematsu-lifetime> (last visited Dec. 16, 2019).

Assemblymen Warren Furutani and Marty Block recognized my father as an American Civil Rights hero and asked me to join them in working to establish a day honoring my father's fight for justice and steadfast commitment to defending civil liberties and the Constitution. Our work came to fruition in September 2010, when California Governor Schwarzenegger signed the bill into law. It established my father's birthday, January 30, in perpetuity as the Fred Korematsu Day of Civil Liberties and the Constitution. It is the first day in U.S. history named after an Asian American.

This was a turning point for the Korematsu Institute; we broadened our mandate and became a national organization focused on K-12 civic education. As the leader of this national nonprofit, I have worked to ensure that the Korematsu Institute impacts and expands youth civic engagement. We have created and disseminated nearly 15,000 free multimedia Curriculum Toolkits to educators in all 50 states and 12 countries around the world for use in their classrooms. These toolkits include dozens of lesson plans for grades K-12, educational DVDs, classroom posters, a graphic novel, and other materials to equip young people to be civically engaged. In total, we have reached almost two million students.

But our efforts don't stop with the classroom. We also train teachers, host public events, and build coalition partnerships with social-justice education organizations nationwide. Through education, the Korematsu Institute supports establishing a national Fred Korematsu Day of Civil Liberties and the Constitution. Now, every year, on January 30, schools in California and across the country teach Fred Korematsu's story, his fight for justice, and its ongoing relevance today. Other states, including Hawaii, Virginia, and Florida, as well as New York City, have followed California's lead in establishing the "Fred Korematsu Day of Civil Liberties and the Constitution," and several other state governors, state legislatures, and cities have issued similar proclamations. The effort to establish a federal Fred Korematsu Day of Civil Liberties and the Constitution is a reminder to all Americans that we must continue to fight for and uphold our civil liberties and the Constitution. Fred Korematsu's legacy is "one man who made a difference in the face of adversity and so can you."

My father's experience has inspired me to expand the Institute's reach still further. Since 2012, I have presented and/or been a keynote speaker every year at the conference for the National Council for the Social Studies. In 2017, I co-chaired the national conference in San Francisco, enabling the Institute to reach educators from across the United States. No matter where they come from, they often share with me a common message: my father's story, civic education, and the Korematsu Institute's work are increasingly important and needed in our political climate, where Islamophobia and anti-immigrant policies pose a threat to fundamental individual rights and civil

liberties.

In the face of this dire need, I have committed our Institute to promoting not only the memory of forced removal and mass incarceration of Japanese Americans during World War II, but also the dangerous impact of present-day attacks on civil rights and the targeting of historically marginalized communities. We use the past to draw attention to today's issues, including mass incarceration, anti-immigrant sentiment, and Islamophobia. And we advocate for civil liberties for *all* communities. To that end, I have followed in my father's footsteps, joining a number of amicus briefs, notably on cases arising from violations of constitutional rights following 9 /11, including *Trump v. Hawaii*,<sup>10</sup> *Hassan v. City of New York*,<sup>11</sup> *Hedges v. Obama*,<sup>12</sup> *Turkmen v. Ashcroft*,<sup>13</sup> and *Al Odah v. United States*.<sup>14</sup>

Today, I wear many hats as executive director, civil rights advocate, community leader, and living voice of Fred Korematsu. I have elevated my father's legacy to demonstrate how his story is just as relevant today as it was when the Supreme Court handed down its decision in *Korematsu v. United States* in 1944. Since my father's passing, I have responded to issues of racial profiling, immigration, civil rights violations, and many other challenges of our times. In recent years, requests for me to speak at events have tripled. There is an appetite in this country to hear about the importance of protecting our civil liberties from government action, especially after discriminatory travel bans enacted by the current president. Like my father once did, I find myself crisscrossing this country to speak about the incarceration of Japanese Americans during World War II and the importance of fighting for our civil liberties and social justice. I visit public and private schools, colleges and universities, law schools, teachers' conferences, and business, media, and advocacy organizations. I speak to audiences that range from kindergarteners to federal judges.

## VI

My father's story resonates on so many levels, especially at this political moment when we fear that past injustices are being repeated.

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10. Brief of Karen Korematsu, et al., as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1586445.

11. Brief of Karen Korematsu, et al., as Amici Curiae in Support of Appellants, *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015) (No. 14-1688), 2014 WL 3572026.

12. Brief of Karen Korematsu, et al., as Amicie Curiae in Support of Plaintiffs-Appellees, *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013) (Nos. 12-3176 (Lead), 12-3644 (Con)), 2012 WL 6622648.

13. Brief of Karen Korematsu, et al., as Amici Curiae in Support of Respondents, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (Nos. 15-1358, 15-1359, 15-1363), 2016 WL 7494903.

14. Brief of Karen Korematsu, et al., as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1196) 2007 WL 737596.

In 2017, when President Donald Trump issued multiple executive orders banning immigration from predominantly Muslim countries, I noticed that the same kinds of stereotypes that justified the incarceration of Japanese Americans in World War II were being used against Muslim Americans.

So I, along with the children of both Gordon Hirabayashi and Minoru Yasui, and the Fred T. Korematsu Center for Law and Equality submitted an amicus brief in *Trump v. Hawaii*<sup>15</sup> and asked the Supreme Court to reject Trump's Muslim travel ban. We pointed to our fathers' cases as urgent warnings against executive power run amok. We implored the Court to repudiate its decisions in those three cases and create a new legacy: one in which blind deference to the executive branch—even in areas where the president must wield wide discretion—is incompatible with the protection of fundamental freedoms. We urged the Court to recognize that meaningful judicial review is an essential element of a healthy democracy and a vital check on overreach by another co-equal branch of government.

On June 26, 2018, in *Trump v. Hawaii*,<sup>16</sup> the Supreme Court officially overruled *Korematsu v. United States*<sup>17</sup> after nearly 75 years. In the majority decision, Chief Justice John G. Roberts, Jr., citing language from Justice Jackson's dissent to the 1944 ruling, wrote that the Court was taking "the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"<sup>18</sup>

But the Court's repudiation of the *Korematsu* decision told only half the story. Although it correctly rejected the abhorrent race-based relocation and incarceration of Japanese Americans, it failed to recognize—and reject—the rationale that led to *Korematsu*. In fact, the Supreme Court in *Trump v. Hawaii* indicated that the reason it addressed *Korematsu* was because the dissenting justices—Justices Sotomayor and Ginsburg—noted the "stark parallels between the reasoning of" the two cases.<sup>19</sup>

The Court's majority disagreed. Chief Justice Roberts stated that "*Korematsu* had nothing to do with this case."<sup>20</sup> Trump's executive order likewise had "nothing to do with" *Korematsu* and so the majority found it "wholly inapt to liken that morally repugnant order to a facially neutral

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15. Brief of Karen Korematsu, et al., as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1586445.

16. 138 S. Ct. 2392 (2018).

17. *Id.* at 2423 (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)).

18. *Id.*

19. *Id.* at 2447 (Sotomayor, J., dissenting).

20. *Id.* at 2423.

policy denying certain foreign nationals the privilege of admission.”<sup>21</sup> Pointing to the government’s stated purpose of “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices,” the Court saw “persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility.”<sup>22</sup>

In rejecting a racist decision, the Supreme Court then seemed to repeat its same faulty racist logic, rubber-stamping the Trump administration’s bald assertions that the “immigration travel ban” is justified by national security. As Justice Sonia Sotomayor explained in her dissent, “this formal repudiation of a shameful precedent is laudable and long overdue. *But it does not make the majority’s decision here acceptable or right.* By blindly accepting the government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”<sup>23</sup>

On June 27, 2018, I published an op-ed in the *New York Times*. I wrote that “my father spent his life fighting for justice and educating people about the inhumanity of the Japanese American incarceration, so that we would learn from our mistakes. Although he would have been somewhat glad his case was finally overruled, he would have been upset that it was cited while upholding discrimination against another marginalized group. The [C]ourt’s decision replaced one injustice with another nearly 75 years later.”<sup>24</sup>

It is abundantly clear that our work is far from over. And like my father, we will never stop fighting for justice. In 2018, I joined the Stop Repeating History campaign with my father’s legal team, including Dale Minami and Don Tamaki. The campaign educates the public on the dangers of unchecked presidential power, drawing parallels between the World War II incarceration of Japanese Americans and the current administration’s policies targeting minority groups based on race and religion.

The Korematsu Institute also partnered with filmmaker Abby Ginzburg on her documentary *And Then They Came For Us*, which received the American Bar Association’s “Silver Gavel Award.” The Institute’s work through the film connects the story of Japanese American incarceration with

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21. *Id.*

22. *Id.* at 2421.

23. *Id.* at 2448 (Sotomayor, J., dissenting).

24. Karen Korematsu, *How the Supreme Court Replaced One Injustice With Another*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/supreme-court-travel-ban-korematsu-japanese-internment.html>.

civil liberties issues today. With funding from the National Parks Service/Japanese American Confinement Sites (NPS/JACS) program, we recently completed a curriculum writing institute to produce lesson plans so that this important film—along with my father’s two-time Emmy-award-winning documentary *Of Civil Wrongs and Rights: The Fred Korematsu Story*—can be used in classrooms nationwide. Ultimately, we have broadened our vision to include public civic engagement education, promoting the urgency of voting and participating in the Census.

## VII

Sixteen years passed between my first conversation with my father about his Supreme Court case and our next. When we finally spoke about it, my father told me that he discussed this issue with my mother from time to time but of course, not with my brother, Ken, or me. He did not want to burden us until we were old enough to understand. Once his case was reopened, he began speaking about it again, and I learned that his actions had been about more than himself and the Japanese American community. He told me that he did it for all Americans, because he never wanted something like the Japanese American incarceration to happen again, to another group of people. I realized how much courage my dad possessed—to disobey the government’s military orders, to continue his initial legal case in the face of opposition from the Japanese American community, and to reopen his Supreme Court case, despite the risk of losing all over again. I saw how much courage it takes to fight injustice.

I also learned that my dad never gave up hope to reopen his case for almost forty years, even when he wasn’t sure how to proceed. That was a revelation! My dad always has been my hero, and now I want everyone to realize that Fred Korematsu is America’s Civil Rights Hero.

When someone of historical prominence passes away, we don’t always know how their legacy will be remembered or the degree of significance we may attach to their experience. I never would have thought that my father’s 1944 Supreme Court case, *Korematsu v. United States*, would stay (and become more) relevant seventy-five years later. But as I continue to travel this country and speak to audiences of all ages in “red” states and “blue” states, I realize that we are still only on the brink of seeing diversity and inclusion in our professions and institutions. To ensure these attainable ideals, I constantly promote and encourage women to step up as leaders and to fight for social justice in their own lives and careers.

And so, as we approach the hundredth anniversary of the Nineteenth Amendment, I encourage women of all ages to make a difference by showing up to vote and participate in our democracy. We must be persistent and

advocate for ourselves—just as my father did—if we are going to see real change. As my father always said: “Stand up for what is right, and when you see something wrong, don’t be afraid to speak up.”

# RECONSTITUTING THE FUTURE: AN EQUALITY AMENDMENT

CATHARINE A. MACKINNON & KIMBERLÉ W. CRENSHAW<sup>†</sup>

“*unto the Seventh Generation . . .*”  
Iroquois Law of Peace<sup>1</sup>

A new constitutional amendment offers a new beginning. The equality paradigm proposed here recognizes the failures of what is, turns away from language and interpretive canons rooted in an unjust past, and imagines a fully functioning democracy as the inheritance of future generations. This proposal reenvisions constitutional equality from the ground up: it centers on rectifying the founding acts and omissions of race and sex, separately and together, and incorporates similar but distinct inequalities.<sup>2</sup> It is informed by

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1. This phrase is considered common to multiple traditions. Though it does not appear exactly in the Iroquois Great Law of Peace, the notion of fealty to future generations is written there in symbols on wampum. See Terri Hansen, *How the Iroquois Great Law of Peace Shaped U.S. Democracy*, PBS (Dec. 17, 2018, 10:48 AM), <https://www.pbs.org/native-america/blogs/native-voices/how-the-iroquois-great-law-of-peace-shaped-us-democracy> [https://perma.cc/7JX6-QLTJ]; see also Gerald Murphy, *Modern History Sourcebook: The Constitution of the Iroquois Confederacy*, FORDHAM U. (Apr. 12, 2019), <https://sourcebooks.fordham.edu/mod/iroquois.asp> [https://perma.cc/BQ8E-79JR]. The most widely cited iteration of the Seventh Generation concept was expressed by the former head of the Six Nations of the Iroquois Confederacy, Leon Shenandoah (d. 1996): “Look behind you. See your sons and your daughters. They are your future. Look farther and see your sons’ and your daughters’ children and their children’s children even unto the Seventh Generation. That’s the way we were taught. Think about it: you yourself are a Seventh Generation.” Gina Boltz, *Words from the Circle: Native American Quotes*, NATIVE VILLAGE (2016), <https://www.nativevillage.org/Libraries/Quote/Native%20American%20Quotes%2034.htm> [https://perma.cc/3RC2-XH9Z]. Fealty to subsequent generations is deeply rooted in Iroquois civilization, as evidenced by its inclusion in the constitution of the Iroquois Confederacy. See CONST. IROQUOIS NATIONS art. 28 (“Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground—the unborn of the future Nation.”); *id.* art. 57.

2. This proposal reflects insights, aspirations, and critiques of many thinkers and actors—activists, lawyers, theorists, humans with a stake in taming illegitimate power. The Equality Amendment presented here is the joint product of two intensive meetings coconvened by the ERA Coalition and the African

prior efforts to integrate equality into the constitutional landscape that have been decimated by political reversals and doctrinal backlash. It aggregates the insights, aspirations, and critiques of many thinkers and actors who have seized this moment to breathe new life into the nation's reckoning with inequality. It neither looks back to celebrate amendments whose transformative possibilities have been defeated nor participates in contemporary hand-wringing over equality's jurisprudential limitations. It seeks to make equality real and to matter now. We argue that a new equality paradigm is necessary and present one form it could take.

### I. WHY REAL EQUALITY MATTERS NOW

Equality is the foundational problem of the American Republic. White supremacy and male dominance, separately and together, were hardwired into a proslavery and tacitly gender-exclusive Constitution from the beginning. All enslaved people, Native people, and women were consciously and

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American Policy Forum at Columbia Law School, cochaired by the authors on November 19, 2016 and December 20, 2016, in which Charles Lawrence, Mari Matsuda, Gloria Steinem, Carol Jenkins, Jessica Neuwirth, Terry O'Neill, and Carol Robles Roman participated. Their acumen, insights, and erudition contributed greatly to the final draft, which we have since modified slightly. While the discussions were collective, the authors are solely responsible for any errors in the content of the proposal and the arguments herein.

purposely excluded.<sup>3</sup> White men of property<sup>4</sup> intentionally designed the constituting document to ensure the continued institutional existence of the enslavement of Africans and people of African descent,<sup>5</sup> the exclusion of

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3. As Kathleen Sullivan observed,

[T]he U.S. Constitution, in its original text, never referred to women at all. The only known use of the pronoun ‘she’ in the framing deliberations concerned a later-rejected clause that would have referred to the rendition of fugitive slaves. . . . The Constitution provided no explicit protection . . . against laws that disenfranchised women, excluded them from juries, barred married women from owning property or suing in their own capacity, and the like.

Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 735–36 (2002). The tension between women seeking constitutional representation and men resisting it can be seen in letters between Abigail and John Adams in 1776. Abigail Adams pled:

I long to hear that you have declared an independency—and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

Letter from Abigail Adams to John Adams (Mar. 31, 1776), in 1 ADAMS FAMILY CORRESPONDENCE (1761-1776) 369, 370 (L. H. Butterfield et al. eds., 1961) (original spelling retained). John Adams’s reply, combined jocularly and denial with a threatening bottom-line common to the language of misogyny then and now:

Depend upon it, We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would compleatly subject Us to the Despotism of the Peticcoat, I hope General Washington, and all our brave Heroes would fight.

Letter from John Adams to Abigail Adams (Apr. 14, 1776), in 1 ADAMS FAMILY CORRESPONDENCE (1761-1776), *supra*, at 381, 382 (original spelling retained).

4. Among the property-owning white men generally recognized as “Founding Fathers,” the following owned slaves: Charles Carroll; Samuel Chase; Benjamin Franklin, who eventually manumitted his slaves and became an abolitionist; Button Gwinnett; John Hancock; Patrick Henry; John Jay; Thomas Jefferson; Richard Henry Lee; James Madison; Charles Cotesworth Pinckney; Benjamin Rush; Edward Rutledge; and George Washington. See Anthony Iaccarino, *The Founding Fathers and Slavery*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536> [https://perma.cc/4Q9C-HDA9].

5. “[O]f the 11 clauses in the Constitution that deal with or have policy implications for slavery, 10 protect slave property and the powers of masters. Only one, the international slave-trade clause, points to a possible future power by which, after 20 years, slavery might be curtailed . . . .” David Waldstreicher, *How the Constitution Was Indeed Pro-Slavery*, ATLANTIC (Sept. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288> [https://perma.cc/SNX5-NHK9]; see also DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC 15–47 (Ward M. McAfee ed., 2001) (describing the role of ‘slavery in the founding of the United States and how the Constitution protects slavery’); DAVID WALDSTREICHER, SLAVERY’S CONSTITUTION 107–52 (2009) (describing how the Constitution protects slavery); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1123–25 (2012) (same).

women from full citizenship, and the silencing of all of their voices in authoritative forums.<sup>6</sup> Enslaved Africans were counted as three-fifths of a person to give political weight to slave-owning states;<sup>7</sup> the Electoral College was configured to assure the power of slave states in electing the federal executive officer;<sup>8</sup> no woman or enslaved person was permitted to vote. Equality was not mentioned in either the debates in Philadelphia or the resulting document. This raced and gendered institutionalization of power was, and has been, presented as the epitome of freedom and independence.

Since the Founding, constitutional amendments and legislation—impelled by armed struggle and urgent organizing—have guaranteed equality based on race and sex to some degree. This progress has emerged from cataclysmic upheavals and decades-long agitation to address the raw expression of subordination built into the Constitution. Limited equality rights have, at times, been extended to women and people of color by judicial interpretation and legislation.<sup>9</sup> Yet, retraction and resistance to these efforts hollowed out

6. It is said that the Iroquois Confederacy's structures influenced Franklin and the Framers, but the Iroquois's recognition of women's equality and their requirement that every decision be considered for its impact on the Seventh Generation were omitted. *See* H.R. Con. Res. 331, 100th Cong. (1988) (enacted) (acknowledging the contribution of the Iroquois Confederacy to the U.S. Constitution, noting Franklin's admiration for the Iroquois Confederacy and its influence on the American political system). This position is considered inaccurate by scholars who research written records. *See* Erik M. Jensen, *The Harvard Law Review and the Iroquois Influence Thesis*, 6 BRIT. J. AM. LEGAL STUD. 225, 225 (2017) (dismissing "the Iroquois influence thesis" as "nonsense"); Elisabeth Tooker, *The United States Constitution and the Iroquois League*, 35 ETHNOHISTORY 305, 305 (1988) ("A number of writers have suggested that the League of the Iroquois provided the model for the United States Constitution and the ideas embodied in it. A review of the evidence in the historical and ethnographic documents, however, offers virtually no support for this contention."); Jack Rakove, *Did the Founding Fathers Really Get Many of Their Ideas of Liberty from the Iroquois?*, HIST. NEWS NETWORK (July 21, 2005), <https://historynewsnetwork.org/article/12974> [<https://perma.cc/H3AH-Q5VE>].

7. U.S. CONST. art. I, § 2, cl. 3.

8. At the Constitutional Convention, James Madison suggested that a direct presidential election "would have been a dealbreaker [sic] for the South" because slaves could not vote and the "slaveholding South would basically lose every time." Akhil Reed Amar, Opinion, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html> [<https://perma.cc/V5ZL-N59D>]. Despite alternative interpretations, there is no disputing that the South "had extra seats in the Electoral College because of its slaves." *Id.* And while the implications of the system were abundantly clear by the time the Constitution was amended to modify the Electoral College, "Jefferson's Southern allies steamrolled over Northern congressmen who explicitly proposed eliminating the system's pro-slavery bias." *Id.*; *see also* Alan Singer, *Slavery and the Electoral College: One Last Response to Sean Wilentz*, HIST. NEWS NETWORK (Apr. 21, 2019), <https://historynewsnetwork.org/article/171783> [<https://perma.cc/HS75-QHR3>] (agreeing that the Electoral College defended the institution of slavery).

9. Following the Civil War, constitutional amendments aimed to promote racial equality, *see* U.S. CONST. amends. XIII, XIV, XV, while Congress enacted laws intended to deinstitutionalize Jim Crow, *see* Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335; Third Enforcement Act, Pub. L. No. 42-22, 17 Stat. 13 (1871); Second Enforcement Act, Pub. L. No. 41-99, 16 Stat. 433 (1871); First Enforcement Act, Pub. L. No. 41-114, 16 Stat. 140 (1870); Freedmen's Bureau Act of 1866, Pub. L. No. 39-200, 14 Stat. 173; Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27; and Freedmen's Bureau Act of

the ground-shifting post-Civil War Amendments, limited the interpretation of the Nineteenth Amendment, blocked ratification of the Equal Rights Amendment (ERA), and dismantled the mid-twentieth century's modest equality infrastructure. Constitutional equality was effectively stripped of its regenerative potential. Their roots in the constitutional landscape now weakened, both gender and race equality have been cast into treacherous seas—with gender hanging onto race like a castaway clinging to a slender piece of doctrinal driftwood.

Each moment of mobilization and democratic participation toward real equality has been met by a reflexive reassertion of the rights, values, and entitlements of a modestly reformed status quo. Courts in particular have dramatically and continuously undermined efforts to rectify race and gender subordination in society by rolling back what legal equality guarantees could have achieved. As a result, prior efforts have not produced real equality in social life, nor can they until the racial and gendered baselines that ground the constitutional order are denaturalized and uprooted.

As a central instance, judicial interpretation has continuously hobbled the Fourteenth Amendment's promising guarantee of equal protection of the laws.<sup>10</sup> Indeed, the Amendment's most far-reaching implications, which could have dismantled the legal infrastructure that constituted and insulated white supremacy, were snuffed out in their infancy. Less than twenty years after the formal end of slavery, the Supreme Court characterized congressional efforts to remedy widespread discrimination against Black people as special treatment.<sup>11</sup> A century later, courts brutally truncated the Amendment's mid-twentieth century renaissance<sup>12</sup> by interpreting inequality so narrowly that its reproduction remains largely undisturbed by any meaningful

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1865, Pub. L. No. 38-90, 13 Stat. 507. However, courts quickly restricted these initiatives' potential for greatest impact. *See, e.g.,* *Cumming v. Richmond Cty. Bd. of Educ.*, 175 U.S. 528 (1899) (permitting racial segregation in schools); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitting racial segregation in public facilities as consistent with the meaning of constitutional equality); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding Congress was not empowered to end private racial discrimination); *United States v. Cruickshank*, 92 U.S. 542 (1876) (holding that provisions of the Bill of Rights do not apply to state governments); *United States v. Reese*, 92 U.S. 214 (1876) (narrowly construing the Fifteenth Amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (holding that the Privileges and Immunities Clause of the Fourteenth Amendment only protected rights of national, not state, citizenship).

10. U.S. CONST. amend. XIV, § 2. The Fifth Amendment's Due Process Clause has been interpreted to apply constitutional equality standards to the federal government, just as the Fourteenth Amendment does to the states. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

11. *See The Civil Rights Cases*, 109 U.S. at 25 (repudiating the Civil Rights Act of 1875 in part for treating African Americans as the "special favorite" of the law).

12. Courts' interpreting prior guarantees to end legalized segregation are examples. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding policies to end de facto school segregation); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding Congress's power to bar private racial discrimination in property sales under the Thirteenth Amendment); *Brown v. Bd. of Educ.*, 347

legal imperatives.<sup>13</sup>

Fatally, in *Washington v. Davis*, the Court decreed that nonexplicit discrimination with disparate effects on racial groups must be proven intentional to be unconstitutional.<sup>14</sup> In the Court's view, an overwhelmingly disparate injury inflicted on a disadvantaged racial group was not enough to trigger equal protection concern even in the face of utterly predictable and proven outcomes.<sup>15</sup> Only actions taken with a conscious desire to actively harm a vulnerable group would be held illegal.<sup>16</sup> Discriminatory intent, so defined, is subjective. Evidence of it is thus largely within the control of accused discriminators, making it easy to exercise, easy to deny, and almost impossible to prove. Consequently, prevailing constitutional doctrine effectively insulates countless decisions that actively harm structurally subordinated populations.

The Court doubled down on the intent requirement in *Personnel Administrator of Massachusetts v. Feeney*, applying it to sex.<sup>17</sup> It held that a preference for veterans in employment that predictably and knowingly advantaged men over women was constitutionally permissible absent proof that the scheme was deployed specifically to hurt women. *Feeney* spelled out with devastating clarity that decision-makers could comfortably rest disparity-producing preferences on the built-in inequalities created by myriad institutions—so long as they could plausibly deny a specific intent to harm women.<sup>18</sup> By depriving women of the right to challenge disadvantages built

U.S. 483 (1954) (holding de jure racial segregation in schools unconstitutional); *Sweatt v. Painter*, 339 U.S. 629 (1950) (requiring state law school admit Black students under the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding racially restrictive housing covenants judicially unenforceable under the Fourteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding racial limitations on political party membership unconstitutional under the Fifteenth Amendment); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that states must provide legal education facilities for Blacks that were substantially equal to those for whites). But these efforts have been increasingly stymied.

13. See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) (holding that states may constitutionally ban affirmative action by referendum); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (prohibiting use of race classifications in school-assignment plans); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating a public university's specific use of race in admissions); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (prohibiting racial quotas in state medical school admissions); *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999) (holding a public magnet school's consideration of race constitutionally impermissible).

14. 426 U.S. 229, 240–41 (1976).

15. *Id.*

16. *Id.* at 240 (holding that the “invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).

17. 442 U.S. 256, 274 (1979) (holding that a law's disparate impact on women must be intentional in order to be deemed sex based and in violation of the Equal Protection Clause).

18. *Id.*

on preferences for men—even those made possible by the near-complete exclusion of women by law or policy—the Court largely reduced the Equal Protection Clause to a minimalist intervention against some explicitly discriminatory articulations termed “facial.”<sup>19</sup>

Submerged was the deeper obstacle to meaningful gender equality. Sex discrimination is more often accomplished by omission of socially gendered experiences such as pregnancy or sexual assault than explicitly expressed in law. The narrowing of constitutional sex equality jurisprudence to mainly facial discrimination further gutted the Equal Protection Clause of its substantive potential. In much the same way that the Court resisted conceptions of equality that disrupted the existing distribution of white rights and entitlements, *Feeney*—considered a non-facial case—ensured that gendered baselines favoring men, including legal ones, would frame practices that mapped onto them as benign or not gendered at all. This made the inequality these practices imposed difficult or impossible to expose, contest, and change by law.

In the Court’s sense of vindictively motivated acts consciously targeted “because of” group membership, most discrimination is not intentional.<sup>20</sup> But discrimination is no less damaging when built into social norms and structures. Decision-makers, driven by unconscious or implicit bias in favor of the superiority of whites and/or men,<sup>21</sup> may fail to perceive or appreciate the heavy burden their actions force on subordinated groups. No conscious intent is required for such bias to animate decision-making; yet existing constitutional doctrine makes its recognition as discrimination extremely difficult, facilitating the reproduction of inequality.

The intent requirement, paired with the formalistic policing of classifications under heightened review, together stabilize rather than dismantle the raced and gendered social order. Racial classifications, under prevailing tiers-of-scrutiny analysis, are subject to strict scrutiny, grounded in the observation that historically they have been vehicles of racial subordination.<sup>22</sup> Yet

19. There is no doctrinal test for what is facial and what is not.

20. *Id.* at 270.

21. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (noting that most Americans are “unaware” of their racism and fail to acknowledge how cultural experiences influence beliefs about race); see also Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 939–40 (2008) (revisiting his 1987 article and exploring how white supremacy is maintained). In the years since Charles Lawrence’s initial publication, much research has supported his analysis. See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 20 (1995); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971–73 (2006); Justine E. Tinkler, *Controversies in Implicit Bias Research*, 6 SOC. COMPASS 987, 987–88 (2012).

22. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

the history that animates the Court's apoplectic denunciations of racial classifications has been abstracted from its material reality and gentrified with new occupants. Measured against a historical standard, the landmark race cases of the post-Warren Court era have arguably been white-rights cases<sup>23</sup>—largely successful campaigns to arrest legislative and administrative efforts to remedy the contemporary consequences of the very history that justifies heightened scrutiny.<sup>24</sup> The Equal Protection Clause must mean the same thing for everybody, the Court majestically intones. But packaged in its misleading rhetoric equating colorblindness and gender neutrality—so-called same treatment—with constitutional equality are precisely the discordant protections that the Court repudiates. The Court shields the rights and entitlements of those whom the Constitution has historically privileged and disarms the aspirations of those it has historically excluded.

The difficult doctrinal barriers the Court imposed on racially subordinated groups are virtually absent in the jurisprudence developed in response to white grievances against remedial measures. Legal standing, causation, presumptions, and burdens of proof reveal not only a lightened burden for white plaintiffs; they also expose the stubborn baselines against which corrective remedies are repackaged as illegitimate preferences that discriminate against white people. The Court's supposed solicitude for an equality that means the same thing to everyone—"neutrality"—obscures its more reliable role in defending white supremacy.

The gravitational pull of the foundational baselines obscures the discriminatory dimensions of an Equal Protection Clause that protects and insulates gendered as well as racial power, while co-opting the tools that might disrupt the reproduction of such inequality. The elision of gender bias is so deeply entrenched that it is not seen as gender-based at all. Sexual assault, reproductive control, and the family, for instance, are all crucial sites of the creation and exercise of male power, yet laws about them are overwhelmingly not assessed by equality standards at all. Even where gender-based equality nominally exists in law, it is constrained by a fixation with classifications and their ranking into tiers of scrutiny.<sup>25</sup> This approach effectively means that the more perfectly a distinction by law fits a distinction in society, the more "rational"—hence, less discriminatory—it is seen to be.

The result is that the more effective a system of inequality is socially, the more "rational" it will be found constitutionally, rendering constitutional

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23. See Luke C. Harris, *Lessons Still Unlearned: The Continuing Sounds of Silence*, 10 DU BOIS REV. 513 (2013).

24. See *id.*

25. See, e.g., *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 438 (1985); *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Powell, J., concurring).

law virtually useless in disrupting the conditions that most need changing to end gender inequality.<sup>26</sup> Recognizing “sex” as a suspect classification would not solve this problem but rather would accentuate its effect, given that the Court looks to whether “sex” justifies a sex classification, and what it finds to be “sex” is frequently the reality of social sex (that is, gender) *inequality*. Requiring the sexes to be “similarly situated” before a discrimination claim can be brought also serves to evade the reality that social discrimination often prevents women from being situated similarly to men in the first place. The fundamental strategy of sex equality litigation has been to get rights for men in order to get them for women. Constitutional equal protection law has accordingly worked better for men, whose claims of sex discrimination have provided its foundation,<sup>27</sup> than for women of any color.

This basic approach—a separate and overly vigilant policing of remedial racial classifications, a status-quo-oriented solicitude toward gender, and a failure to recognize sex inequality other than in the facial sense—reinforces rather than remedies cascading social harms across multiple overlapping constituencies. It has not only left victims of combined discrimination in a quandary as to the standard that applies to them;<sup>28</sup> it has drained the blood, sweat, and tears of those who sought to replace the flawed vision of the Founders with a constitutional order that embodies the rhetorical claims made in its defense.

As a result, white and male supremacy continues and is socially resurgent, reinforcing brutal, sometimes lethal, disadvantages. The Founders’ handprints are visible across social hierarchies today despite corrective amendments and diligent litigation. The contemporary consequences of the founding formula have not been erased by gradualist improvements and symbolic reforms—and as things stand will not be. Material inequalities between the enslaved and those who benefitted from their enslavement, un-

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26. *Id.*

27. *See, e.g.,* *Orr v. Orr*, 440 U.S. 268 (1979) (holding that a statute that required husbands but not wives to pay alimony violated the Equal Protection Clause); *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down as unconstitutional a New York statute that allowed unwed mothers but not unwed fathers a veto over the adoption of that couple’s children); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a statute that denied the sale of alcohol to individuals of the same age based on their gender violated the Equal Protection Clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down a provision of the Social Security Act that permitted widows but not widowers to collect special benefits while caring for children); *see also* David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 *LAW & INEQ.* 33, 33–35 (1984) (examining effects of several leading sex discrimination cases brought by male plaintiffs).

28. *See* Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond “Either/Or” Approaches to Equal Protection*, 129 *YALE L.J.F.* 108 (2019) (deploying an intersectional analysis to reveal how the tiers-of-scrutiny analysis obscures the incoherence of the standard particularly with respect to Black women).

compensated and unremedied, live on in yawning wealth and well-being disparities, conditions that the Court considers uncorrectable societal inequality. Like their enslaved ancestors, African Americans experience greater exposure to racialized surveillance and state-sanctioned violence,<sup>29</sup> suffer compromised access to education,<sup>30</sup> housing<sup>31</sup> and health care,<sup>32</sup> and face continuing obstacles to their full political participation.<sup>33</sup>

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29. Young Black men are more likely to be incarcerated, and are less represented in college-student populations, than their white peers. *E.g.*, *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/89DH-TT3Z>] (noting that one in three Black young men born in the United States in 2001 will become incarcerated, as compared to one in seventeen white young men); *The Condition of Education 2019: College Enrollment Rates*, NAT'L CTR. FOR EDUC. STAT. 2 (2019), [https://nces.ed.gov/programs/coe/pdf/coe\\_cpb.pdf](https://nces.ed.gov/programs/coe/pdf/coe_cpb.pdf) [<https://perma.cc/PEP3-DFPG>]. Black people are terrifyingly vulnerable to unpunished police brutality. *See, e.g.*, Anthony L. Bui et al., *Years of Life Lost Due to Encounters with Law Enforcement in the USA, 2015-2016*, 72 J. EPIDEMIOLOGY & COMMUNITY HEALTH 715, 716 (2018) (highlighting that police violence disproportionately impacts young people of color).

Although vulnerability to violence is frequently understood as male-exclusive, Black women also face disproportionate risks of both lethal state violence and private violence. *See* Kimberlé Williams Crenshaw & Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*, 4-7 AFR. AM. POL'Y F. (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF\\_SM\\_Brief\\_full\\_singles.compressed.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/55a810d7e4b058f342f55873/1437077719984/AAPF_SM_Brief_full_singles.compressed.pdf) [<https://perma.cc/HK8V-WWS5>].

30. African Americans attend schools that are more racially segregated now than they were when segregation was first prohibited. *See, e.g.*, Valerie Strauss, *Report: Public Schools More Segregated Now Than 40 Years Ago*, WASH. POST. (Aug. 29, 2013, 3:49 PM EST), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/08/29/report-public-schools-more-segregated-now-than-40-years-ago> [<https://perma.cc/M7XE-K2JA>]. *See generally* Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HARV. U.: C.R. PROJECT (Aug. 2002), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/race-in-american-public-schools-rapidly-resegregating-school-districts/frankenberg-rapidly-resegregating-2002.pdf> [<https://perma.cc/LQ56-F48M>] (describing increasing school segregation since the 1980s).

31. *See, e.g.*, Joseph P. Williams, *Segregation's Legacy*, U.S. NEWS (Apr. 20, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act> [<https://perma.cc/MQZ8-Z8WV>] (noting that fifty years after the Fair Housing Act, designed to eliminate housing discrimination, was signed into law, America remains nearly as segregated as when the law was passed). *See generally* Bruce Mitchell & Juan Franco, *HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT'L COMMUNITY REINVESTMENT COALITION (Mar. 20, 2018), <https://nrcr.org/holc> [<https://perma.cc/9ESA-CVR7>] (describing growing housing segregation).

32. Jennifer Jones, Comment, *Bakke at 40: Remedying Black Health Disparities Through Affirmative Action in Medical School Admissions*, 66 UCLA L. REV. 522, 532-33 (2019) (noting disparities in Black health outcomes, such as shortened life expectancies compared to whites, higher infant mortality rates, and higher death rates from cancer and AIDS).

33. *See, e.g.*, Vann R. Newkirk II, *Voter Suppression is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-pri-voter-suppression/565355> [<https://perma.cc/C2T4-9HD2>] (noting deep structural barriers to the ballot for minority voters). White women in slave-owning families and institutions not only benefitted from those systems, but were at times active agents within it, buying and selling enslaved people, exploiting that relation for relative empowerment. *See* STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS*

The material and spiritual dimensions of lives shaped by the theft of land and national integrity from Native Americans and the Mexican State are also framed in sociopolitical discourse as natural and inevitable, rather than as the contemporary manifestations of a ruthlessly constitutionalized colonial and imperial regime. Native peoples and their cultures continue to be subjected to assimilationist pressures and land, resource and child expropriation—contemporary forms of genocidal practices historically inflicted by the U.S. government.<sup>34</sup> Unfettered by meaningful constitutional constraints, Native peoples have been deprived of self-determination, jurisdiction to adjudicate aggression (including sexual) against them, and many treaty rights.<sup>35</sup> Native women are disproportionately trafficked for sex, prostituted, and disappeared.<sup>36</sup> Beyond anti-Black and settler colonialism are institutionalized patterns of xenophobic bias against immigrants of color, which deprive scores of people of basic human rights, including rights to security and family.<sup>37</sup>

The historical foundations upon which male supremacy rests continue to ground conceptions of gender equality that normalize gender hierarchy and frame departures from it as exceptional. Discrimination based on sex and gender, to the limited extent it has been constitutionally prohibited, has been recognized only very recently and merely by interpretation—not originally,

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SLAVE OWNERS IN THE AMERICAN SOUTH (2019).

34. See, e.g., Barbara Perry, *From Ethnocide to Ethnoviolence: Layers of Native American Victimization*, 5 CONTEMP. JUST. REV. 231, 232–33 (2002) (exploring the various forms of institutionalized exploitation and marginalization of Native Americans); Lisa M. Poupart, *The Familiar Face of Genocide: Internalized Oppression Among American Indians*, 18 HYPATIA 86, 87 (2003) (discussing how the consequences of colonialism have created a government-sanctioned systematic genocide of American Indians).

35. For examples of deprivations of treaty rights, see *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (hunting and fishing); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (logging); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (timber); and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny. . .”). Native peoples have also been deprived of legal jurisdictions in criminal law. See Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 49 (2017) (explaining that criminal jurisdiction in Indian Country depends on whether the alleged perpetrator or victim qualifies as “Indian”).

36. See, e.g., Steven W. Perry, *American Indians and Crime 1991-2002*, U.S. DEP'T JUST. 6 (2004); Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 624–29 (2010) (explaining the relationship between colonization and sex trafficking of Native women).

37. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 333–37 (2003) (explaining how an “anchor” immigration system like that of the U.S. disfavors people from groups previously excluded from admission, and disproportionately impacts immigrants of color).

textually, or historically—making its protection particularly thin and vulnerable.<sup>38</sup> Despite some legal progress for (mostly elite) women, male dominance continues to characterize existing laws and their application.<sup>39</sup> Laws responsive to women’s circumstances and the social order that subordinates them either do not exist or are unenforced.<sup>40</sup> State laws against domestic violence and sexual assault have virtually never been held to equality standards in their design or effect.<sup>41</sup> The federal legislation against violence against women was found to lack constitutional basis.<sup>42</sup> Pregnancy is not constitutionally recognized as sex based,<sup>43</sup> limiting defenses of reproductive rights to those that live under other constitutional rubrics. All women on average are not paid equally to men—largely because they are segregated into work that is valued less because women are doing it, or that is seen as appropriate for women because it is valued less hence paid less.<sup>44</sup> This dynamic is accentuated for women of color.<sup>45</sup> This pervasive social arrangement has been

38. Discrimination based on sex and gender was first constitutionally recognized by the Supreme Court in *Reed v. Reed*, 404 U.S. 71, 76 (1971), which held that sex-differential laws must be rationally related to valid legislative purpose.

39. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (holding that an elite military college’s policy of excluding women violates the Equal Protection Clause); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that a firm denying accounting partnership to a woman employee because of sex stereotyping constitutes sex discrimination). *But see* *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing statutory sexual harassment as sex discrimination, a non-elite advance).

40. *See, e.g.*, CATHARINE A. MACKINNON, *SEX EQUALITY 3* (3d ed. 2016) (noting the “potent combination of social and political mechanisms” that enforce the institutionalized subordination of women).

41. *See* Andrea B. Carroll, *Family Law and Female Empowerment*, 24 *UCLA WOMEN’S L.J.* 1, 11–22 (2017) (detailing how state laws attempting to help domestic-violence victims actually impair some women’s rights). However, state statutes are held to equality standards when they are said to discriminate facially against men. *See, e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464 (1981), where a state sexual assault statute said to facially apply only to men who had sex with underage girls was upheld. No position is taken here on whether men were discriminated against by the statute, although a substantive equality rationale for the ruling would have been an improvement.

42. *United States v. Morrison*, 529 U.S. 598, 617, 627 (2000) (holding that Congress exceeded its authority under the Commerce Clause and the Equal Protection Clause in enacting the civil remedy provision of the Violence Against Women Act of 1994).

43. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

44. MACKINNON, *supra* note 40, at 253–56. Women also provide most of the unpaid caretaking work for their own families. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *YALE J.L. & FEMINISM* 317, 323 (2014).

45. For instance, in 2018, the median income of Black women was only 65.3% of the median income of white men, whereas white women earned 81.5% of what white men earned. Ariane Hegewisch & Heidi Hartmann, *The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity*, INST. FOR WOMEN’S POL’Y RES. (Mar. 7, 2019), [https://iwpr.org/wp-content/uploads/2019/03/C478\\_Gender-Wage-Gap-in-2018.pdf](https://iwpr.org/wp-content/uploads/2019/03/C478_Gender-Wage-Gap-in-2018.pdf) [<https://perma.cc/ZG6Y-8HFY>]; *see also* Katherine Richard, *The Wealth Gap for Women of Color*, CTR. FOR GLOBAL POL’Y SOLUTIONS (Oct. 2014) <http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf> [<https://perma.cc/JH74-M7F6>]

(finding that in 2012, Black women and Latina women earned 64% and 54% of wages of white men, while white women earned 78% of wages of white men).

found not to violate existing equality laws.<sup>46</sup> Women, within and across racial groups, are comparatively impoverished and economically insecure. They are violated with impunity, exploited economically and sexually, and deprived of social stature and human dignity. The intersectional effects of race and gender are facilitated within the U.S. sociolegal system, cumulatively stacking the deck against women of color, depriving them of the most basic means to articulate meaningful claims within existing constitutional doctrine.

The vitiation of equality on the bases of race and gender extends to related forms of hierarchy. Discrimination based on sexual orientation enforces compulsory heterosexuality, a means of maintaining male supremacy. Even in the face of the striking legal progress for lesbian women and gay men in recent years, their rights are restricted to areas in which state or federal statutes have been invalidated by the courts—for example, by prohibiting laws criminalizing sodomy<sup>47</sup> and by requiring recognition of same-sex marriage<sup>48</sup>—or under statutes guaranteeing sex equality.<sup>49</sup> However, in some jurisdictions, same-sex partners can still be married on Sunday and fired on Monday for the same reason.<sup>50</sup> Discrimination against transgender people, another kind of gender-based discrimination, is frequently brutal and lethal,

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46. See, e.g., *County of Wash. v. Gunther*, 452 U.S. 161, 179–80 (1981) (allowing a comparable worth claim so long as women prison guards’ pay rates are proven intentionally discriminatory); *Am. Fed’n of State, Cty. & Mun. Emps. (AFSCME) v. Washington*, 770 F.2d 1401, 1406–07 (9th Cir. 1985) (holding that Title VII permits Washington to set wages according to historically sex discriminatory market practices).

47. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

48. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

49. 42 U.S.C. § 2000e-2(a) (2018). See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112–13 (2d Cir. 2018) (holding that sexual orientation discrimination is a subset of sex discrimination prohibited under Title VII), *cert. granted*, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017) (same).

50. Whether the Title VII prohibition on sex discrimination applies to sexual orientation or transgender status is pending before the Supreme Court, to be decided during the 2019 Term. See *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (*cert. granted*); *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (same); *Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (same). This issue has particular impact on the intersection of sexual orientation, gender identity, and race. A recent study analyzing over 9,000 sexual-orientation and gender identity discrimination charges found an “overrepresentation of Black charging parties,” which, combined with allegations of race discrimination, “suggests that the intersection of these stigmatized identities could shape experiences of employment discrimination for this group.” M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, UNIV. OF MASS. AMHERST: CTR. FOR EMP’T EQUITY (July 2018), <https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination> [https://perma.cc/8VVF-DQAM].

causing unemployment,<sup>51</sup> homelessness,<sup>52</sup> and vicious stigmatization without meaningful systemic relief.<sup>53</sup>

Inequality is not inevitable. Indeed, it takes considerable force to maintain, given the fact that all peoples are human equals—meaning, at minimum, that no racial and/or gendered group is actually superior or inferior to another. Human hierarchy based on sex and/or race is not only a political construction created to confer power on some over others. It is predicated on the lie of natural hierarchy: the fiction that the actual basis, origin, and foundation of the present socially tiered status of sex- and race-based groups is sex and/or race itself, rather than the power interests of those who dominate on those grounds—grounds that are themselves constructed by these same politically interested configurations. Failure to order societies to correspond to the reality of equality has resulted in the intensification of inequality over time, making it appear to be “just there” to many, reinforcing the ideology of its natural basis. The law’s participation in obscuring the fact that the existing system is one of imposed social hierarchy rather than natural difference—or, in any event, that such “differences” as exist are equal—has rationalized and legitimated inequality.

As a result, despite the focused and determined efforts of committed movements, communities, organizations, lawyers, and some scholars, led by generations of valiant activists, the United States remains a deeply unequal society. Its laws, against formidable interventions for change, have largely operated to maintain that inequality. This must end.

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51. Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY 140–41 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/SRTJ-TKLX>].

52. *Id.* at 110.

53. Some circuits have recognized transgender discrimination as sex discrimination under Title VII. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000). The best decision conceptually is the breakthrough case of Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). Other courts refuse to cover gender identity discrimination under Title VII’s prohibition on sex discrimination. *See, e.g.*, Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002). Trans individuals continue to face “extraordinary” levels of physical and sexual violence, with more than one in four trans people reporting that they have faced a “bias-driven assault” and even higher rates for trans women and trans people of color. *Issues: Anti-Violence*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/anti-violence> [<https://perma.cc/BH5H-ZRMW>].

## II. NEW EQUALITY AMENDMENT DRAFT

**The Equality Amendment**

**Whereas all women, and men of color, were historically excluded as equals, intentionally and functionally, from the Constitution of the United States, subordinating these groups structurally and systemically; and**

**Whereas prior constitutional amendments have allowed extreme inequalities of race and/or sex and/or like grounds of subordination to continue without effective legal remedy, and have even been used to entrench such inequalities; and**

**Whereas this country aspires to be a democracy of, by, and for all of its people, and to treat all people of the world in accordance with human rights principles;**

Therefore be it enacted that—

**Section 1. Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.**

This language provides affirmative equality rights to all women, rather than prohibiting states from denying women equal rights, whether intentionally or inadvertently, facially or by impact. Because women are not exclusively, or even principally, made or kept unequal to men by the actions of states, but rather by the social order—its structures, forces, institutions, and individuals acting in concert—this Section has no state-action requirement. The state does not so much act to deny equality of rights through law as it fails to guarantee freedom from these violations, and fails to provide legal claims against them or precludes those claims altogether. Equality is powerfully denied to women through law abdicating an equality role, for example, in domestic violence, sexual abuse and exploitation, and unequal pay for work of comparable worth. Law allows these violations to happen, and to continue to happen, until they form the substrate of the normal. The negative state—the state as embodied in a constitution that supposedly guarantees rights best by intervening in society least—has largely abandoned women to social inequality imposed on them by men. This Section therefore affirmatively envisions equality as a right, permitting legal claims for discrimination against nonstate actors and state actors alike who deny equal rights to women.

Marginal improvements can be made in women's conditions by addressing sex as an abstraction, as in Section 2 of this Amendment. But abstract equality enshrines dominant groups as the standard, failing to rectify discrimination for those who do not meet it. Inequality, meanwhile, itself

denies access to the means of meeting dominant standards and creates the illusion that those standards are neutral or meritocratic, when they are simply dominant. Substantive equality, in contrast, begins with recognizing the concrete historical situation of subjected, violated, and denigrated people, called by name: women in all their diversity.<sup>54</sup> This concrete language is particularly useful for avoiding failures to address the situation of women who are multiply subjected, who under the abstract equality approach are open to the dodge that their discrimination is based on factors other than sex.<sup>55</sup> Here, they are women. Women encompass characteristics of virtually every social group: women's diverse qualities and inequalities substantially make up what a woman is. When used through or with sex or gender to discriminate against them, that is discrimination because they are women, therefore what discrimination against women as such looks like.

**Section 2. Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith). No law or its interpretation shall give force to common law disadvantages that exist on the ground(s) enumerated in this Amendment.**

Section 2 provides for negative rights that are predicated on discriminatory state action, state or federal. Once rights are provided unequally, a legal claim of discrimination can arise. This Section adapts in its first sentence the basic language of the ERA proposed in 1972, passage of which would itself be an improvement.<sup>56</sup> Notably, the first clause of Section 2 is

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54. The first time the idea of substantive equality was spoken in public was 1989. See CATHARINE A. MACKINNON, *BUTTERFLY POLITICS* 110 (2017). See generally MACKINNON, *supra* note 40 (developing the concept of substantive equality across U.S., comparative, and international law and theory); Catharine A. MacKinnon, *Substantive Equality Revisited: A Rejoinder to Sandra Fredman*, 15 INT'L J. CONST. L. 1174 (2017) (arguing that hierarchy of power is the fundamental dynamic of inequality); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 1 (2011) (arguing that reality of substantive inequality should be incorporated into the Fourteenth Amendment's equal protection guarantee).

55. See generally KIMBERLÉ CRENSHAW, ON INTERSECTIONALITY (forthcoming 2020); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40, 166–67; Kimberlé Crenshaw, *The Urgency of Intersectionality*, TEDWOMEN (Oct. 2016), [https://www.ted.com/talks/kimberle\\_crenshaw\\_the\\_urgency\\_of\\_intersectionality](https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality) [<https://perma.cc/J4V5-E994>]; Kimberlé Crenshaw, *Why Intersectionality Can't Wait*, WASH. POST (Sept. 24, 2015, 3:00 PM EST), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait> [<https://perma.cc/X3LL-GWCH>].

56. For the conventional articulation of the interpretation of the 1972 ERA, which may yet be ratified, see generally Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

identical to the Nineteenth Amendment and the 1972 ERA, but for its substitution of “equality of rights” in place of the right to vote.<sup>57</sup> Some of the equality theory animating the Equality Amendment—for instance, its substantive and concrete rather than formal and abstract approach, and its understanding of intersectionality as a necessary component of sex—could be used in interpreting the 1972 ERA, should it be ratified and come into force. The language of the Equality Amendment locks in its distinctive approach, meaning, and application. Providing such explicit instruction to courts makes it less likely that the standard symmetrical approach to equality will be reflexively applied and the asymmetries—that is, the actual social inequalities that need to be remedied—will remain ignored. The express reference to subordination in the Equality Amendment provides more substantive language that otherwise could be reduced to anti-classification (as if classification is the only injury of subordination, when it is merely one tool of it), or to anti-stereotyping (as if being typecast as a member of a group of which one is a member is the essence of inequality, when it is merely one tool of it, and only sometimes). Hierarchy is inequality’s real injury. And, of course, the Equality Amendment applies beyond sex itself.

Pregnancy, gender, sexual orientation, and gender identity are grouped under “sex” because they are all facets of the unified but diverse system of inequality that privileges maleness and masculinity over femaleness and femininity, enforcing sexual rules and gendered myths, roles and stereotypes, and punishing noncompliance. Discrimination against transgender or nonbinary persons based on gender or sex, including nonconformity, would be covered. Similarly, ethnicity, national origin, and color are grouped under “race” because they are complexly but inexorably racialized in the United States, privileging whiteness and punishing as lesser anyone seen as not so-called white.

Adaptability is part of the ingenuity, the genius, of inequality. Section 2’s “like grounds” clause is thus open-ended, while maintaining race and sex as the substantive touchstones for the covered inequalities. The “like grounds” clause permits recognition of as yet unknown or unanticipated forms inequality can take.

This Amendment is designed to cover lacunae in existing law. Disability is expressly covered because of inadequacies in existing legislation and a general failure to recognize that it is social assumptions, not individuals’ particular abilities, that result in the deprivation of resources and dignity and extreme marginalization of disability discrimination. Like every inequality, discriminatory deprivations are distinctive to this ground: distinctively

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57. U.S. CONST. amend. XIX.

wrenching, extreme, irrational, and cumulatively and systemically disadvantaging.

Although many constitutional and statutory provisions exist to protect spiritual beliefs and practices, including those fundamental to the Founding, failures to protect minority religions make clear the need to include this provision expressly.<sup>58</sup> All groups are entitled to constitutional rights, but dominant religions have less purchase here, as they would need to show subordination, a substantive term relative to evidence, similar to that suffered by women and people of color, who lack adequate coverage by existing law.

One possible like ground, adequately litigated, could be social and economic class. But race and sex discrimination together and separately do a great deal of class work. Just how much of class disadvantage would be left if race and sex inequality were adequately addressed is an open question. In addition, class as a factor, for women especially, is often vicarious and protean, its features calling for full concrete development.

Of course, the Equality Amendment's language does not imply or permit an intent requirement. This is because discrimination is not a moral failing of individuals but a pervasive social practice of power—epistemic, practical, and structural. No one need intend to perpetuate discrimination for it to persist. Therefore, no showing of intent is required to legally undo and remedy it.

The last sentence of Section 2 prohibits interpretive piggybacking on existing long-term discrimination that is built into the common law. Consider that Section 1 would prohibit as a denial of equality much social discrimination that is not now prohibited and is embodied in common law. A cardinal example of denying force to common law disadvantages predicated on inequality is *Shelley v. Kraemer*, in which state court decisions upholding racially restrictive covenants were denied enforcement under the Fourteenth Amendment's equal protection guarantee.<sup>59</sup> This ruling has been largely confined to its facts; its larger animating principle is captured in Section 3.

**Section 3. To fully realize the rights guaranteed under this Amendment, Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality as prohibited by this Amendment, and shall take all steps requisite and effective to abolish prior laws, policies, or constitutional provisions that impede**

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58. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding the Trump Administration's "Muslim Ban"); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quashing a Muslim detainee's claims of discrimination and mistreatment). While text matters in interpretation, conflicts between provisions cannot be entirely precluded by drafting.

59. 334 U.S. 1, 23 (1948).

**equal political representation.**

The word “shall” affirmatively requires legislative and administrative authorities to implement this Amendment. There is no option not to, although the text of the Section leaves its precise implementation open.

The distribution of political power built into the Constitution impedes democratic progress, making it far easier to sustain conditions made unconstitutional by this Amendment than to dismantle them. The undemocratic protection, promotion, and insulation of an unequal socioeconomic order—slavery—continues to structure the political system under which leadership is elected, undermining the capacity for change in accordance with this Amendment. It must be dislodged from the Constitution’s foundation. Section 3 leaves to Congress the task of evaluating the Electoral College, for example, but giving more weight to voters in some states than in others in presidential elections would likely invalidate it. Upon ratification of this Amendment, Congress would be required to take up the question under this Amendment’s approach.

**Section 4. Nothing in Section 2 shall invalidate a law, program, or activity that is protected or required under Section 1 or 3.**

Undoing discrimination is not discrimination. Promoting equality undoes inequality. Section 4 repudiates the premise that classification per se is the injury of inequality and embraces the understanding that group hierarchy is the essence of inequality’s injury.<sup>60</sup> Accordingly, this Section requires that any law, policy, or practice qualifying as protected or required under Sections 1 and 3 may not be eliminated under Section 2. Currently, for example, affirmative-action plans and policies can be constitutionally challenged as discriminatory based on the notion that the Equal Protection Clause prohibits treatment based on categories or classifications rather than imposed relations of superiority and inferiority among groups or precluded opportunities of certain groups.<sup>61</sup> So long as the requirements of Sections 1 and/or 3 are met, and it is recognized that the Equality Amendment supersedes the Equal Protection Clause (and Fifth Amendment Due Process as to the federal government) in the equality arena, as it should, this reverse engineering of inequality into equality guarantees would be over.

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60. This proposed section parallels Section 15(2) of the Canadian Charter of Rights and Freedoms, which states that the equal-rights protection found in Section 15(1) “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.” Can. Const. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 15(2).

61. John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2124 (2004).

## III. RECONSTITUTING THE FUTURE

The proposed Equality Amendment embraces an intersectional approach to equality, prioritizing race and gender for historical as well as contemporary reasons. This year's Nineteenth Amendment Centennial, commemorating women's right to vote, must not obscure the reality that not all women became full citizens upon the Amendment's passage. As the suffrage struggle for the Nineteenth Amendment demonstrates, the political processes used to change laws deeply influence the substantive changes that those laws can produce. The fight for the vote for all women was intertwined with attempts to repeal the Fifteenth Amendment, which prohibits states from denying the right to vote based on race, color, or prior servitude,<sup>62</sup> because of white racist fears of enfranchising Black women.<sup>63</sup> The suffrage movement often excluded African American women from its marches and speaking platforms, despite their determined support for the right to vote.<sup>64</sup> Historical disempowerment of women of color by some women's suffrage organizers and entities contributed to a demobilization that has undermined their full participation in the political process, and thus real democracy, today. The Equality Amendment is therefore predicated on recognizing the full interconnection between race- and gender-based subordination and is designed to deinstitutionalize it in all of its forms. But in recognition of the relationship between the politics of lawmaking and the law that politics makes, it will be the political mobilization, if pursued by the politics that animate this text, that produces its passage, as much as anything in its wording, that guarantees that the dual erasure of women of color is not replicated.

The Equality Amendment has been needed all along. But it is needed now as much or more than ever. Without equality, democracy is in peril: real equality provides the voting power to break the glass ceiling, guaranteed rights that raise the floor for all citizens, and recognition of the reality that inequalities intersect and overlap, making it impossible to rectify one alone. All Americans deserve equality guarantees that cannot be taken away or disregarded. And in a true democracy, each citizen should have an equal right to vote and have their vote count equally. Only the Constitution can provide this power and protection. But no constitutional amendment alone can guarantee these results. History shows that law is subject to retrenchment as well

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62. U.S. CONST. amend. XV, § 1.

63. See Kimberly A. Hamlin, *How Racism Almost Killed Women's Right to Vote*, WASH. POST (June 4, 2019, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2019/06/04/how-racism-almost-killed-womens-right-to-vote> [https://perma.cc/H7PP-P8A8].

64. See, e.g., ANGELA Y. DAVIS, *Racism in the Woman Suffrage Movement*, in WOMEN, RACE, AND CLASS 70, 70–86 (1981).

as advance, particularly when emerging from and overlaid upon a nonintersectional power grid. This is not a reason to succumb, but a challenge to create the conditions for change.

Most Americans believe that the Constitution already guarantees equal rights.<sup>65</sup> Unlike most constitutions in the world, it does not.<sup>66</sup> It is the responsibility of “We, the People” to adapt the Constitution to the society we live in; to grow in our recognition of problems and potential solutions; to strengthen our democracy in an intimately interconnected world. Neither too vague nor too prescriptive, this proposal, offered as a beginning, aspires to sketch a path, to clear terrain to open a space for everyone to fill and, finally, to be heard.

Generations past have fought and died for equality, bringing us to this moment. The perceptions, principles, and language of this proposal can be used as a guide to legal and political action in every realm. Having broken the code by which U.S. equality law and theory has been constrained from fulfilling its promise, we are determined to be the last generation to fight for it. We can all be framers.

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65. A 2016 poll commissioned by the Equal Rights Amendment Coalition suggests that eighty percent of Americans believe that the Constitution guarantees equal rights to men and women. Nicole Torrioriello, *Making the Case for the Equal Rights Amendment*, ACLU VA. (Jan. 3, 2019, 1:00 PM), <https://acluva.org/en/news/making-case-equal-rights-amendment> [<https://perma.cc/K8JG-Y2YA>].

66. See Catharine A. MacKinnon, *Gender in Constitutions*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 397, 404 (Michel Rosenfeld & András Sajó eds., 2012).

# LAW SCHOOL IN A DIFFERENT VOICE

MELISSA MURRAY†

## INTRODUCTION

Almost twelve years ago, I was living in Northern California and eagerly awaiting the birth of my first child. Like many first-time parents, I sought advice and counsel from more experienced parents. Much of the advice I received only served to stoke my bubbling anxieties about parenthood, but one piece of advice left me truly puzzled. “Get a doula.” A doula? What on earth was a doula? I flipped through all of my parenting magazines. There were several column inches about the best lactation pumps, baby carriers, and strollers, but precious little about doulas. What I did find only amplified my confusion. A doula, one magazine advised, was a companion for new mothers, helping them have a more satisfying labor and birth experience. This revelation only prompted more uncertainty. Why did I need a doula if I already had an obstetrician, a team of medical professionals, and a husband whose duty, if not by law then by custom, was to hold my hand and be an amiable birth companion?

After further inquiry, I learned that the term “doula” derives from the Greek word for “women’s servant.”<sup>1</sup> Indeed, for centuries, doulas have served women in childbirth by providing physical, emotional, and educational support before, during, and after labor.<sup>2</sup> According to the American Pregnancy Association, the doula’s “purpose is to help women have a safe, memorable, and empowering birthing experience.”<sup>3</sup> As my doula put it (yes, I succumbed to the pressure), the doula’s role was to approach birth from a different perspective: the woman’s. The doula’s work was not

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† Frederick I. and Grace Stokes Professor of Law and Faculty Director of the Birnbaum Women’s Leadership Network, New York University School of Law. I am grateful for the opportunity to contribute to this landmark law review issue. Many thanks to Caroline Tan for outstanding editorial assistance and Jeremy Brinster for excellent research assistance. All errors are my own.

1. *See Doula*, OXFORD ENG. DICTIONARY, [www.oed.com/view/Entry/248791](http://www.oed.com/view/Entry/248791) (last visited Nov. 8, 2019); *Having a Doula: Is a Doula for Me?*, AM. PREGNANCY ASS’N, <https://americanpregnancy.org/labor-and-birth/having-a-doula> (last visited Nov. 8, 2019) (“[D]oula is a Greek word meaning *women’s servant*.”).

2. *Having a Doula: Is a Doula for Me?*, *supra* note 1.

3. *Id.*

necessarily to advocate for her patient, but rather to empower and encourage the patient to advocate for herself and her own goals and aspirations for managing labor and delivery. And in supporting the woman through labor and delivery, the doula empowers her charge to take on the many challenges of parenthood with confidence.

Twelve years later, I can barely remember the details of childbirth, but I find myself frequently reflecting on the work of doulas. To be clear, I am not a doula, nor am I about to give birth. But I have had an opportunity to think deeply about what it means to support and empower women at a critical time in their lives: as they begin their careers as lawyers. As importantly, I have thought deeply about what it means to cultivate more broadly the conditions under which women can achieve success in law school and in their professional careers.

Just a year ago, I left Northern California to join the faculty of New York University School of Law. In addition to my role as a law professor, I also assumed the helm of the Birnbaum Women's Leadership Network (BWLN).<sup>4</sup> The BWLN's mission is focused on cultivating and developing the leadership potential of N.Y.U.'s law students, supporting the Law School "as an environment that nurtures women's achievement," and engaging the legal profession "to better enable women lawyers to fulfill their potential."<sup>5</sup> It is a broad mission—and one that can, at times, seem overwhelming. But at bottom, the goals of developing leadership potential and cultivating the conditions under which women can thrive is not that far off from the work of doulas.

In this short essay, I reflect on the progress that women have made in the legal profession over the last fifty years, while also considering areas of concern for women's professional representation. With these challenges in mind, I discuss the BWLN's efforts to create a more inclusive culture within the legal academy and the profession.

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4. *BWLN Leadership*, BIRNBAUM WOMEN'S LEADERSHIP NETWORK, <https://www.law.nyu.edu/centers/birnbaum-womens-leadership-network/about/leadership> (last visited Nov. 8, 2019).

5. *About the BWLN*, BIRNBAUM WOMEN'S LEADERSHIP NETWORK, <https://www.law.nyu.edu/centers/birnbaum-womens-leadership-network/about> (last visited Nov. 8, 2019).

## I. FROM MYRA AND PORTIA TO THE PRESENT

The name Myra Bradwell is unlikely to be well known to most Americans, but for students in my Constitutional Law and Family Law classes, Bradwell's experience is a fundamental part of the doctrine we discuss and a touchstone for their own experiences in law school. Born in Manchester, Vermont in 1831, Bradwell worked as a schoolteacher before marrying James Bradwell in 1852.<sup>6</sup> In 1855, the Bradwells moved to Illinois, where they raised their family and James Bradwell launched a successful career as a lawyer, jurist, and legislator.<sup>7</sup>

As her husband's professional star rose, Myra Bradwell occupied herself with her own professional pursuits. In 1868, she launched the *Chicago Legal News*, a weekly legal periodical.<sup>8</sup> Serving as editor, Myra Bradwell grew the magazine into the most important legal publication in the western United States.<sup>9</sup> In her spare time, Bradwell was also active in the women's suffrage movement.<sup>10</sup>

It was not long before Myra Bradwell began to harbor her own aspirations for a career in the law. In 1869, she sat for and passed the qualifying exam for admission to the Illinois bar.<sup>11</sup> However, when she applied for admission, the Illinois Supreme Court, which oversaw the licensing of lawyers, rejected her application on the ground that women were not contemplated in the statute prescribing the rules for admission to the bar.<sup>12</sup> The Illinois court also noted that as a *married* woman, Bradwell was incapable of forming contracts in Illinois, an essential aspect of legal practice.<sup>13</sup>

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6. George W. Gale, *Myra Bradwell: The First Woman Lawyer*, 39 A.B.A. J. 1080, 1080 (1953) (providing details about Myra Bradwell's personal and family life).

7. See *id.* at 1080–81; Nancy T. Gilliam, *A Professional Pioneer: Myra Bradwell's Fight to Practice Law*, 5 L. & HIST. REV. 105, 106 (1987) (discussing James Bradwell's career path from lawyer to probate judge and state legislator).

8. Gilliam, *supra* note 7, at 106.

9. See Gale, *supra* note 6, at 1080–81 (noting that the publication became “the most important legal publication west of the Alleghenies”).

10. *Id.* at 1081 (describing Myra Bradwell as working “diligently and ever-lastingly for the woman's suffrage movement and freedom for women”).

11. *Id.* at 1080.

12. *In re Bradwell*, 55 Ill. 535, 538 (1869) (holding that the Court could “not admit any persons or class of persons [to the bar] who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute”), *aff'd*, 83 U.S. 130 (1872); see also Gilliam, *supra* note 7, at 110–11 (providing further detail about Myra Bradwell's arguments and the Court's decision).

13. Myra Bradwell's inability to form binding contracts served as the basis for the Illinois Supreme Court's initial order denying her application to the bar. *In re Bradwell*, 55 Ill. at 535–36; Gilliam, *supra* note 7, at 109. In a subsequent order, the Illinois court rejected Bradwell's arguments that recent changes in state law loosening the restrictions of coverture allowed married women like her to make contracts independently of their husbands and therefore enter the legal profession. *In re Bradwell*, 55 Ill. at 536–

Bradwell challenged her exclusion all the way to the United States Supreme Court, where the Court, in one of its earliest decisions exploring the scope and substance of the recently ratified Fourteenth Amendment, concluded that the right to practice law was not among the privileges and immunities protected under the Constitution.<sup>14</sup> If the Court's majority had focused on constitutional text in upholding the Illinois court's disposition of Bradwell's case, Associate Justice Joseph Bradley focused on an entirely different constitution. As Bradley put it, "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."<sup>15</sup> On this account, the state's ability to exclude Bradwell from the legal profession did not proceed from a crabbed interpretation of the Fourteenth Amendment's guarantees, but rather from the basic assumption that women belonged in the home, and not in the legal profession.

I teach Bradwell's case, *Bradwell v. Illinois*, in Constitutional Law and Family Law. In Constitutional Law, the case—and Bradley's concurrence, in particular—reflects the paternalism that once characterized the Court's treatment of sex discrimination. In Family Law, the case mirrors the "separate spheres" ideology that once characterized—and in some areas, still characterizes—the legal regulation of the family.<sup>16</sup>

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14. *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) ("[T]here are privileges and immunities belonging to citizens of the United States . . . which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them.").

15. *Id.* at 141 (Bradley, J., concurring).

16. In the decades following *Bradwell*, the Court openly espoused the idea that women were ill-suited to work outside the home. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (upholding a maximum-hours requirement for women workers because "her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man"); *Radice v. New York*, 264 U.S. 292, 294 (1924) (allowing states to prohibit women from working night shifts in restaurants because the loss of sleep might "bear more heavily against women than men . . . considering their more delicate organism"). As late as the mid-1900s, "the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (invalidating a 1940 immigration statute that favored unwed mothers over unwed fathers based on the assumption that unwed mothers would bear responsibility for nonmarital children); *see also Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (upholding a state law that required men, but not women, to serve on juries because "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years . . . woman is still regarded as the center of home and family life"), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a state licensing scheme that only allowed women to serve as bartenders if their husband or father owned the establishment), *abrogated by Craig v. Boren*, 429 U.S. 190, 210 & n.23 (1976). Even today, the law resists efforts by women to market their labor while fulfilling their family obligations. *See, e.g.*, *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 65 (2012) (Ginsburg, J., dissenting) (criticizing the plurality of the Court for failing to see that guaranteed self-care leave was a "key part" of Congress's effort to "make

But *Bradwell v. Illinois* may have had just as much to say about law school and the legal profession. At bottom, Bradwell's unsuccessful effort to be admitted to practice—and the Court's rejection of her claims—makes clear that, at least as conceived, the law was not intended to be a profession hospitable to the “fairer sex.” Not only were women not contemplated in the rules governing entrance to the profession, but the very nature of legal practice was also deemed incompatible with the demands of family life, which reflected both women's *true* natures and desires *and* the legal impediments of wifedom.

Nevertheless, she persisted. Despite Myra Bradwell's setback, some states permitted women applicants to the bar, though avenues for legal training for women were limited because most law schools restricted their enrollments to men.<sup>17</sup> Some women were fortunate to find practicing lawyers who were willing to engage them as apprentices and “tutor” them in the vagaries of the law. Indeed, in 1908, local attorney Arthur Winfield MacLean agreed to tutor two Boston women eager to sit for the Massachusetts bar examination.<sup>18</sup> MacLean's generosity led other aspiring women lawyers to seek him out, eventually prompting him to formalize the arrangement as the Portia Law School.<sup>19</sup> Named for the heroine of Shakespeare's *The Merchant of Venice*,<sup>20</sup> the Portia Law School became the first law school devoted exclusively to the legal education of women.<sup>21</sup>

But even if some law schools were hospitable—indeed, oriented exclusively—to women, female graduates found the legal profession less receptive to their professional aspirations. Many white-shoe law firms refused to hire Portia graduates, insisting instead on recruiting only from Ivy League law schools,<sup>22</sup> many of which did not admit or enroll women, at least

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it feasible for women to work while sustaining family life”); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (finding that the Family and Medical Leave Act was an appropriate congressional response to evidence that states had unfairly administered family leave policies based on “the pervasive sex-role stereotype that caring for family members is women's work”); Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 19 (Cal. Ct. App. 1993) (holding that a husband could not agree to compensate his wife for in-home caregiving because “a wife is obligated by the marriage contract to provide nursing type care to an ill husband”).

17. See Karen L. Tokarz, *A Tribute to the Nation's First Women Law Students*, 68 WASH. U. L.Q. 89, 92, 94–95 (1990) (noting that Washington University Law School was the first to admit women in 1868 but that other law schools did not admit women until much later, and therefore it was typical at the time for women to have not attended law school prior to being admitted to the bar).

18. PHILLIP K. HAMILTON, *NEW ENGLAND SCHOOL OF LAW* 7 (2008).

19. *Id.*

20. *Law School History*, NEW ENG. L. BOS., <https://student.nesl.edu/engaged/history.cfm> (last visited Nov. 1, 2019).

21. HAMILTON, *supra* note 18, at 7. Today, the Portia Law School survives as New England Law | Boston. *Law School History*, *supra* note 20.

22. See generally JUDITH RICHARDS HOPE, *PINSTRIPES & PEARLS* 152 (2003) (explaining that even

not in significant numbers.<sup>23</sup> And even as World War II prompted elite law schools to reconsider their positions on admitting women, the profession remained stubbornly closed to women for more than a generation.<sup>24</sup>

Justices Sandra Day O'Connor and Ruth Bader Ginsburg, graduates of Stanford Law and Columbia Law, respectively, openly recounted their struggles to obtain law firm employment upon graduation.<sup>25</sup> Ten years later, when Harvard Law graduated a record number of women (fifteen!<sup>26</sup>), women's employment prospects were still uneven. As Judith Richard Hope recounts, six months after graduation, most of the group, which included Elizabeth Hanford Dole (a future Cabinet member and U.S. Senator<sup>27</sup>) and Patricia Schroeder (a future member of Congress<sup>28</sup>), encountered countless rejections in their quest to secure permanent employment.<sup>29</sup> For some, the

in the 1960s, some firms only hired from all-male, mostly-Ivy-League social clubs); KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 90* (1986) (noting the limitations on the numbers of female law students "meant that channels to the larger firms served by Columbia, Yale, and Harvard were cut off").

23. The first women graduated from the University of Pennsylvania Law School in 1883, Cornell Law in 1893, Columbia Law in 1930, and Harvard Law in 1953. *Women, Leadership, & the Law*, U. PA. CAREY L. SCH., <https://www.law.upenn.edu/academics/specialty/women> (last visited Nov. 12, 2019); *Cornell Law School: Historical Timeline*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/about/timeline/index.cfm> (last visited Nov. 6, 2019); *The History of Columbia Law School*, COLUM. L. SCH., <https://www.law.columbia.edu/about/history> (last visited Nov. 1, 2019) (noting that Columbia enrolled its first women students in 1927); Aidan F. Ryan, *Harvard Law School Celebrates 65 Years of Female Graduates*, HARV. CRIMSON (Sept. 19, 2018), <https://www.thecrimson.com/article/2018/9/19/hls-celebration-65>. While one woman allegedly entered Yale Law in 1884 by using only her initials on her application, the school did not have any further woman graduates until 1920. Judith Schiff, *Yale's First Female Graduate*, YALE ALUMNI MAG. (Sept./Oct. 2013), <https://yalealumnimagazine.com/articles/3742-yales-first-female-graduate>.

24. Many firms hired women at the start of the War, but after it was over, many women left after it became clear that they would never make partner. See Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 5–7 (2009) (explaining that many law firms filled wartime vacancies with women lawyers but stopped recruiting women after the War in favor of veterans).

25. See EVAN W. THOMAS, *FIRST: SANDRA DAY O'CONNOR* 43–44 (2019) (recounting O'Connor's frustrations at graduating in the top ten percent of her class and being rejected by every law firm she applied to); Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1549 (1991) ("I myself, after graduating near the top of my class at Stanford Law School, was unable to obtain a position at any national law firm, except as a legal secretary."); Nina Totenberg, *Does Justice Ruth Bader Ginsburg Have Any Regrets? Hardly*, NPR (July 18, 2019, 7:00 AM), <https://www.npr.org/2019/07/28/745304221/does-justice-ruth-bader-ginsburg-have-any-regrets-hardly> (quoting Justice Ginsburg as saying, "I got out of law school, I have top grades, [and] no law firm in the city of New York will hire me").

26. RICHARDS HOPE, *supra* note 22, at 151.

27. DOLE, *Elizabeth Hanford*, U.S. H.R.: HIST., ART & ARCHIVES, <https://history.house.gov/People/detail/12577> (last visited Nov. 7, 2019).

28. SCHROEDER, *Patricia Scott*, U.S. H.R.: HIST., ART & ARCHIVES, [https://history.house.gov/People/Listing/S/SCHROEDER,-Patricia-Scott-\(S000142\)](https://history.house.gov/People/Listing/S/SCHROEDER,-Patricia-Scott-(S000142)) (last visited Nov. 7, 2019).

29. RICHARDS HOPE, *supra* note 22, at 151 (explaining that most of the graduating women did not

rejections diverted them to more fruitful paths—government service and politics.<sup>30</sup> For others, the rejections merely confirmed the sense that, despite the narrow opening that had allowed them the chance to attend Harvard, the doors to the legal profession would remain closed for the foreseeable future.

Today, the doors to law school are open wider than ever to women. In 2016, women made up 51.3% of matriculating J.D. students.<sup>31</sup> As importantly, women graduate from law schools and enter the profession at rates that are on par with their male counterparts.<sup>32</sup>

But even as women have reached parity in law school admission and graduation rates, the empirical portrait in other areas of the profession is less rosy. Men are more likely to achieve the traditional measures of law school success—graduation honors,<sup>33</sup> law review membership and leadership,<sup>34</sup> and judicial clerkships.<sup>35</sup> Women law students also recount feelings of alienation and heightened anxiety during law school.<sup>36</sup>

have permanent jobs lined up six months before graduation). Schroeder moved to Denver, where no firm would hire her as a trial lawyer, so she worked for the National Labor Relations Board. *Id.* at 155. After earning the second-highest bar exam score in Ohio, Hope received no offers from firms except to serve as a secretary, so she moved to Washington, D.C., where she leveraged offers from the U.S. Department of Justice to eventually clinch a job with Williams & Connolly. *Id.* at 169–74. When Dole graduated a year later and Hope recommended her for a position at Williams & Connolly, her boss said they could only have “so many” female Harvard graduates at a time, so Dole ended up at the Department of Health, Education, and Welfare. *Id.* at 175.

30. See *supra* note 29 and accompanying text. Other classmates who entered government service are Marge Gibson Haskell (Department of Defense), Sonia Faust (Corporation Counsel of Honolulu), and Liz Daldy Dyson (probation officer). RICHARDS HOPE, *supra* note 22, at 164–65.

31. AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW 4 (2019), [https://www.americanbar.org/content/dam/aba/administrative/women/current\\_glance\\_2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf).

32. *Id.* at 2, 4 (stating that women make up nearly 46% of associates at law firms and receive fifty percent of J.D.s awarded).

33. See, e.g., THE WOMEN’S ADVOCACY PROJECT, SPEAK NOW: WOMEN, EDUCATION, AND ACHIEVEMENT AT THE UNIVERSITY OF CHICAGO LAW SCHOOL 39 (2018), [https://www.law.uchicago.edu/files/2018-05/wap\\_final.pdf](https://www.law.uchicago.edu/files/2018-05/wap_final.pdf) (noting that between 2014 and 2017 at the University of Chicago Law School, men received 63% of all honors awarded at graduation while women received 37%).

34. MS. JD, WOMEN ON LAW REVIEW: A GENDER DIVERSITY REPORT 1, 4 (2012), [https://ms-jd.org/files/lr2012\\_final.pdf](https://ms-jd.org/files/lr2012_final.pdf) (reporting that law reviews at “Top 50” law schools are made up of about 43% women and only 29% have female editors-in-chief). *But see* Susan Kelley, *Ladies First: Law Review Elects Historic All-Female Board*, CORNELL CHRON. (Feb. 27, 2019), <https://news.cornell.edu/stories/2019/02/ladies-first-law-review-elects-historic-all-female-board> (reporting that the Cornell Law Review elected its first all-female board in 2019).

35. Tony Mauro, *Shut Out: SCOTUS Clerks Still Mostly White and Male*, NAT’L L.J. (Dec. 11, 2017), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/shut-out-scotus-law-clerks-still-mostly-white-and-male> (finding that men are twice as likely as women to be a Supreme Court clerk). *But see* A Demographic Profile of Judicial Clerks – 2006 to 2016, NALP (Oct. 2017), <https://www.nalp.org/1017research> (showing that about 47% of federal judicial clerks and 53% of state judicial clerks were women in 2016).

36. See Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology*, 2012 MICH. ST. L. REV. 1693, 1702–03 (2012) (explaining how female law students

The phenomenon is similar on the other side of the classroom podium. Within the academy, women comprised just 23% of tenured and tenure-track law professors in 2013.<sup>37</sup> Happily, 30% of law school deans are women, a number that has increased remarkably in the last ten years.<sup>38</sup> That said, women's representation among the leadership of the top fifteen law schools lags behind this general trend. Among the top fifteen law schools, a significant number have never had a woman dean.<sup>39</sup>

Women are also less represented on the pages of the leading law reviews and journals. In a random sampling of the top ten law reviews, women comprised just 20% of published authors.<sup>40</sup> The disparity in women's representation in law review publications has important downstream consequences: In the legal academy's "publish or perish" culture, well-placed publications are a crucial factor for tenure decisions and lateral promotions.

The prospects for women in other areas of the profession are even more grim. Although women comprise 48.7% of law firm summer associates and 45.9% of law firm associates, they comprise just 22.7% of law firm partners.<sup>41</sup> And while women are better represented in in-house counsel positions, they are not well-represented in C-suite positions. In 2018, just 30% of *Fortune* 500 companies' general counsels were women.<sup>42</sup>

Women have fared (slightly) better in public service, though they still

experience feelings of alienation); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 44 (1994) (reporting that, in a study of law students at the University of Pennsylvania Law School, women were more likely to report symptoms of anxiety).

37. ABA Approved Law School Staff and Faculty Members, *Gender and Ethnicity: Fall 2013*, A.B.A. (2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2013\\_law\\_school\\_staff\\_gender\\_ethnicity.xlsx](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_school_staff_gender_ethnicity.xlsx).

38. Cynthia L. Cooper, *Women Ascend in Deanships as Law Schools Undergo Dramatic Change*, 24 PERSPECTIVES 8, 8 (2016).

39. To date, among the top fifteen law schools, the University of Chicago, N.Y.U., the University of Michigan, the University of Pennsylvania, Cornell, and the University of Texas have never had a woman dean. Yale, Virginia, Northwestern, and Georgetown have each had a woman dean. Harvard, Columbia, Duke, and UCLA have had two women deans. Stanford and Berkeley have each had three female deans, though at Berkeley two of these women served in an interim or acting dean capacity. In terms of racial and ethnic diversity, only three women of color have served as deans of top-fifteen law schools (Stanford, Berkeley, and UCLA), and one of these women (the author) served in an interim capacity.

40. Lawproflawg, *Are Law Review Articles a Waste of Time?*, ABOVE THE LAW (Apr. 17, 2018, 12:46 PM), <https://abovethelaw.com/2018/04/are-law-review-articles-a-waste-of-time>. Female law students are also published at lower rates than their male classmates. Nancy Leong, *A Noteworthy Absence*, 59 J. LEGAL EDUC. 279, 279 (2009) ("In recent years, female law students at top-fifteen-ranked law schools have authored only 36 percent of all student notes published in their schools' general-interest law reviews.").

41. AM. BAR ASS'N, *supra* note 31, at 2.

42. *Id.* at 3.

lag behind men in terms of representation. Women make up one-third of the composition of the United States Supreme Court—a significant achievement.<sup>43</sup> However, in terms of advocacy before the Supreme Court bar, women are underrepresented. During the Supreme Court’s October 2017 term, only 12% of advocates arguing before the Court were women, reversing a trend line that had seen a rise in women arguing before the high court.<sup>44</sup> Women are also underrepresented in the ranks of the Justices’ inner circles. Between 2005 and 2017, only one-third of Supreme Court clerks were women.<sup>45</sup>

Women are also less well-represented in the lower federal courts. In 2017, women comprised 36.8% of active federal circuit court judges and 34% of active federal district court judges.<sup>46</sup> This underrepresentation is likely to increase in the coming years. As of this writing, although the Trump Administration has successfully appointed a broad slate of federal judges, it has nominated few women (and women of color) to federal judgeships.<sup>47</sup> The picture is even more troubling in state judiciaries, where women are vastly underrepresented relative to their representation in the state population.<sup>48</sup>

These data paint a striking portrait—one that is hard to reconcile with the narrative of women’s social and professional progress. As the data show, over the last forty years, there has been a steady increase of women entering law schools and the legal profession. Yet, the data also makes clear that despite this progress, women continue to lag significantly in terms of their representation in the upper echelons of the academy and the profession. The question, going forward, is how to remedy this gap in professional achievement.

## II. CHANGING THE FACE OF THE LEGAL PROFESSION

Women’s equal representation in law school populations does not

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43. *Id.* at 5.

44. Mark Walsh, *Number of Women Arguing Before the Supreme Court Has Fallen Off Steeply*, A.B.A. J. (Aug. 1, 2018, 2:30 AM), [http://www.abajournal.com/magazine/article/women\\_supreme\\_court\\_bar](http://www.abajournal.com/magazine/article/women_supreme_court_bar).

45. Mauro, *supra* note 35.

46. AM. BAR ASS’N, *supra* note 31, at 5.

47. Of the 154 judges nominated by Trump and approved by the Senate, only thirty-six are women, five of whom are not white. *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Nov. 5, 2019) (select “Nomination/Confirmation/Commission” then “Appointing President” and “Donald J. Trump”; then select “Personal Characteristics” and “Female”).

48. In 2016, 22% of state court judges were white women and 8% were women of color. AM. BAR ASS’N, *supra* note 31, at 5. Currently in state high courts, 36% of the justices are women and 15% are people of color, with nearly half of the country’s supreme courts being entirely white. LAILA ROBBINS ET AL., BRENNAN CTR. FOR JUSTICE, *STATE SUPREME COURT DIVERSITY 2* (2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_State\\_Supreme\\_Court\\_Diversity.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_State_Supreme_Court_Diversity.pdf).

translate into equal representation in all parts of the law school experience, nor is it reflected in various aspects of the profession. What can be done to ensure that women not only matriculate to law school in equal numbers, but also enjoy access to professional opportunities in the same numbers as their male counterparts?

These are the questions that the Birnbaum Women's Leadership Network asks. Founded in 2017, the BWLN seeks to develop N.Y.U. Law students' leadership skills, while also supporting the Law School in cultivating an environment that nurtures women's achievement and success.<sup>49</sup> But creating the conditions for a successful law school experience is only one part of the equation. The BWLN also focuses on research and initiatives aimed at engaging the legal profession to better enable women lawyers to fulfill their potential.<sup>50</sup>

When I joined the BWLN as a faculty co-director in 2018, I did so because its mission was explicitly focused on identifying drivers of women's unequal position in the profession and identifying productive solutions. Of particular interest to me was the BWLN's leadership training program. In Fall 2018, the BWLN announced the launch of the Sara Moss Women's Leadership Training Program, a week-long leadership development program, named in honor of Sara Moss (N.Y.U. '74), a BWLN founding supporter.<sup>51</sup> The program provides training in effective communication, self-awareness and resilience, seeking and receiving feedback, and professional development, among other key leadership skills.<sup>52</sup> In January 2019, the program welcomed its first cohort of fellows, an impressive group of twelve students eager to develop their leadership skills and advance their professional goals.<sup>53</sup>

Of course, a leadership program that serves a select cohort of students does not address the broader systemic issues that women face in law school and in the profession. To this end, the BWLN has also focused on providing broader programming aimed at helping all students find their footing in law school and beyond. This fall, the BWLN hosted "Suddenly Silent," a program open to all N.Y.U. Law students addressing classroom anxieties and

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49. *See supra* note 5 and accompanying text.

50. *See supra* note 5 and accompanying text.

51. *Women's Leadership Fellows Program*, BIRNBAUM WOMEN'S LEADERSHIP NETWORK, <https://www.law.nyu.edu/centers/birnbaum-womens-leadership-network/developing-leaders/fellows> (last visited Nov. 6, 2019).

52. *Id.*

53. *BWLN Fellows*, BIRNBAUM WOMEN'S LEADERSHIP NETWORK, <https://www.law.nyu.edu/centers/birnbaum-womens-leadership-network/about/fellows> (last visited Nov. 5, 2019).

the underrepresentation of women's voices in classroom discussions.<sup>54</sup> Using improvisational comedy techniques, the program offered students new methods for managing classroom stress, so that they could "speak up and stand out."<sup>55</sup> Similarly, last winter, the BWLN sponsored a workshop, also open to the entire N.Y.U. Law community, designed to help young lawyers from underrepresented groups develop skills for negotiating salary and other compensation.<sup>56</sup>

While many of our programmatic efforts focus explicitly on skills-building, we are also committed to fostering a supportive community for women law students and their allies at the law school. In Fall 2018, in the throes of the Brett Kavanaugh confirmation battle, the BWLN hosted an informal lunch for students and faculty to discuss and process this national event. This fall, at the beginning of the term, we sponsored a "movie night," complete with popcorn, candy, and a screening of *RBG*, a documentary chronicling the life and jurisprudence of Justice Ruth Bader Ginsburg.<sup>57</sup>

In a related vein, our annual symposia provide meaningful opportunities to learn about issues that are critically important to advancing women's equal citizenship. In January 2019, we celebrated the tenth anniversary of the Lilly Ledbetter Fair Pay Act with a series of panels on the Act itself and its impact ten years on.<sup>58</sup> This year, in Spring 2020, we will celebrate the centennial of the Nineteenth Amendment and women's suffrage and consider the work still needed to achieve a bold and inclusive vision of women's citizenship.

Although much of the BWLN's work is focused on developing leaders and cultivating a climate in which women law students can flourish, we are looking beyond N.Y.U. to consider the inequities that exist in the legal profession. To this end, the BWLN is actively working with law firms and other organizations within the legal profession to coordinate programming and identify opportunities to address issues of women's professional advancement. These efforts, within and outside of the legal academy, are crucial to ensuring that women are able to realize their ambitions as law students and lawyers.

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54. *Suddenly Silent: Strategies to Speak Up and Stand Out*, N.Y.U. L., <https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=73680> (last visited Nov. 6, 2019).

55. *Id.*

56. *Fair Enough? The Lilly Ledbetter Fair Pay Act at 10 Years*, N.Y.U. L., <https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=70914> (last visited Nov. 5, 2019).

57. *RBG Documentary Screening and Discussion*, N.Y.U. L., <https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=67896> (last visited Nov. 5, 2019).

58. *See Fair Enough? The Lilly Ledbetter Fair Pay Act at 10 Years*, *supra* note 56.

## CONCLUSION

There are times when I look out at my classroom and marvel at the changes that have happened in the twenty years since I first matriculated at law school. But my time in the classroom also makes clear how much more work there is to do. Many law schools are putting in the effort to recruit women students and to appoint women faculty, but the issue is not simply numbers. To truly change the academy and the profession, we must do more than teach law and legal concepts. We must take seriously the charge to develop leaders who are equipped to confront and dismantle the most persistent vestiges of inequality in our profession and in our society. We must cultivate a law school environment and professional culture in which everyone can—and is encouraged to—succeed.

This is hard work—the kind of work that requires an interface between the academy and the profession. In other words, this work requires a doula—someone whose work is to empower women at the beginning of their careers in the hope that these experiences will fuel their future success.

## EXPERIENCE ON THE BENCH

REBECCA R. PALLMEYER†

Just five years after I began practicing law, I took a position as an Administrative Law Judge in our state’s quasi-judicial civil rights agency. Several years later, I was confirmed as a U.S. Magistrate Judge. In 1998, I was confirmed for a seat as a U.S. District Judge, a position I have held ever since. Thus, for most of my professional life, I have been called “Judge Pallmeyer.” I cannot imagine a job I would find more satisfying or one for which I am better suited than this one. I am keenly aware of my good fortune.

Being a judge is the ideal career for me for many reasons, some of them bound up in the fact that I am a woman. Let me attempt to explain this. In the 1980s, psychologist Carol Gilligan famously wrote that women speak with a “different voice.” Gilligan, and the feminist theologian Mary Daly, represent one of two schools of thought concerning women’s abilities—sometimes referred to as “difference feminists,” in contrast to what are referred to as “equality feminists.” On the one hand, the “equality feminist” side, are those who contend that in all relevant ways, women’s brains are much the same as men’s. That is, women are equally “hard headed,” equally capable of both deep thought and pettiness, no more or less capable than men in any intellectual direction. Gilligan and her progeny argued that women are equal, but different—that they have unique and special capabilities. They are more nurturing, she argued. They are more motivated to find consensus. They are oriented toward community and family over individual goals and rights.

As between these two views, I come down hard on the side of the “equality feminists.” I generally share the view, sometimes attributed to Justice O’Connor, that a wise old man and a wise old woman will reach the same conclusion in deciding cases. I have always been wary of the view that my brain is different. And I remain frustrated by the fact that in many areas of the law, considered more challenging (and all too often more lucrative)—securities, antitrust, patents—the bar skews male. Women are every bit as smart and analytical and imaginative as men. Further, I suspect they are no more likely to adopt some “communitarian” rather than zero-sum solution to a binary conflict.

But let’s assume for the moment that “Men are from Mars, and women

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are from Venus.” If differences often attributed to gender are valid, then I suggest that women are particularly well-suited to the role of judge in many ways. In the modern federal court, judges are encouraged to be “active case managers”—meeting regularly with counsel, setting schedules, enforcing deadlines, and often brokering agreements or pushing compromise of one kind or another. Judges joke that discovery disputes remind us sometimes of playground squabbles, complete with complaints of “it’s not fair!” and “s/he started it!” Who better to straighten these disputes out than one who, a generation or two earlier, would have been encouraged to be a primary school teacher? To the litigants, perhaps a gentle reminder about courtesy comes more naturally from a woman.

If the stereotypical woman is less aggressive and more agreeable than her male counterpart, then what would be more appropriate than assigning her to preside over a trial? The judge has prepared well, set a schedule, ruled on the *in limine* motions, and considered and ruled on the jurors’ excuses. But once the trial is underway, the judge’s role is largely passive. She rules on objections as they come up but does not inject herself in favor of either side. She is sensitive to the jurors’ concerns. She is seen as approachable and generous—qualities that, I would argue, make her a more effective judge.

The job of judge suits the purportedly “fairer sex” in other ways as well. The work is not physically challenging. It is performed indoors, ordinarily in comfortable temperatures, during reasonable work hours. The time commitment is significant, but the judge sets the hours. We federal judges have private bathrooms and closets in our chambers, perks that other professional women would treasure. And while many professional women struggle with the expense and complications of dressing for work, we judges enjoy the uniform of utmost authority: In our black robes, we are always dressed for success.

Like so many professions, law is one in which women struggle for credibility. The robe (indeed often referred to as a “gown”) provides the judge with instant cred. Walk into the courtroom wearing the ultimate basic black dress, and a room full of people will rise to its feet. A woman judge, even one who is brand new to the bench, is called “your honor” and treated with deference. Her jokes draw laughs, and her pronouncements generate respect. She always gets the last word. Nor is the instant cred artificial for long; a year or two after taking the bench, a federal district judge will have more trial experience than most of the lawyers who appear before her. Bar organizations, eager to display their own inclusiveness, clamor for women judges to speak at conferences and serve on panels. The experience quickly enhances the judge’s profile.

For most Americans, the courts remain the most respected government institution. In the courtroom and in chambers, the judge is the authority

figure and, if not fawned over, is nearly always accorded respect. The significance of this, for a woman judge, cannot be overstated. I have presided over dozens of cases alleging discrimination or harassment based on sex. Of course, not all of these cases are meritorious. But even when the challenged conduct is not truly actionable, and always when it is, I am struck by the offensive, hostile, and even violent behavior experienced by working women. Women whose very presence on a plant floor or factory is deemed an affront are tested, bullied, verbally abused, and sometimes assaulted. As recently as this year, I have had two cases in which a plaintiff has presented credible evidence that she was fired minutes after, and in direct response to, disclosing to her supervisor that she was pregnant. Even in purportedly enlightened professional settings, women are judged or misjudged on the basis of their appearance, interrupted at meetings, overlooked for leadership roles, and denied recognition. Almost every woman I know can recount an incident in which her suggestion or idea fell on deaf ears, only to be received with enthusiasm when repeated (sometimes just seconds later) by a man. Today, we hear men who cite the “#MeToo” movement in refusing to meet with a woman, even to give her an assignment or feedback—thus using the experience of women as victims as an excuse to victimize them further.

Women judges are not completely immune from these insults, but we are largely so. Our pay is set by statute; we are not able to ask for a raise, but neither are we subject to any nagging concern that a man in the same position is earning more money. Litigants undoubtedly talk about us behind our backs. Lawyers may interrupt or push back against women judges more than they do with men. In the end, though, the judge gets the “last word,” and few men or women have the temerity to express any open disrespect. Fewer still are the times a man will sneer, in her presence, at a woman judge’s body, or voice, or mannerisms. In short, we are taken seriously, as is our right.

I personally benefit from all of these features of the job. I came to the bench qualified by a well-trained mind, common sense, and a willingness to work hard. I now have vast trial experience, but I could not make that claim when I took the bench. Perhaps I would not be able to make the claim even today were it not for the practice, in the federal district court, of random assignment. In our court, when a new judge is sworn in, the Clerk of Court creates that judge’s case assignments from a random draw of cases pending in the court. The new judge starts work on cases old and new, challenging or straightforward, significant or trivial. Then, as new cases are filed, these new cases are assigned at random. That means that if a “heater” case gets filed the day a new judge takes the bench, she or he has an equal chance of drawing that case, regardless of the new judge’s complete lack of experience.

It is easy to see the problems such a system creates. An inexperienced judge may be thrust into a case in an unfamiliar area of the law. The judge’s

uncertainty may result in delays as she learns the law, or confusion if the lawyers attempt to take advantage of the knowledge gap. And a judge who has significant expertise in a particular practice area may not be the one to whom a difficult case in that area is assigned.

But if the random assignment system has its downsides, many women lawyers who practiced with a private firm, as I did, will also immediately recognize its value. What we want most is to have that equal chance. As a young lawyer at a Chicago law firm, I recall being “next in line” for a juicy piece of litigation, and was excited when, just at that time, our firm landed a challenging commercial litigation assignment on the west coast. To my dismay, the associate-level work was assigned to a male colleague two years my junior. I summoned up courage to ask the partner in charge why I had been passed over this work, and he did not challenge my assertion that I was due up for the project. Instead, he told me that he and the other partners had decided (without consulting me) that I would not want to take on a case that would require so much travel “because you are married.”

You know the punch line: the younger male associate was married as well. The firm was concerned enough about my young colleague’s happiness that it arranged to rent a spacious apartment for him and fly his wife to the west coast office every weekend. The young man’s career was launched. The experience he had with that case qualified him as one of the firm’s star litigators. And months later, when there was a lull in the action, he and his wife were able to take a European vacation using the airline miles they had racked up.

I have gotten over my resentment about this incident. My junior colleague who got the great assignment has gone on to have a successful career, but so have I. He is well-compensated as a partner at a local law firm (not the same one where we started practice), and I am now the Chief Judge of the federal district court in Chicago. I left the law firm relatively soon after the incident I have described. That incident was not the reason for my departure, and I am not one who believes that “everything happens for a reason.” Still, it might well be that, had I advanced more rapidly in the law firm, I would not have left when I did, and would not have achieved the success in the judiciary that I have so valued.

For that reason and others, while the incident is in the rear-view mirror, I have not forgotten it. I hope assumptions such as those that excluded me in those early days are now being set aside. In most private practices, though, I know the significance and importance of attracting and servicing “big” clients, who generate challenging issues and can be counted on to pay their large legal bills. Doing so is difficult for any young lawyer who lacks connections, and had I stayed in private practice, it would have continued to be a challenge for me.

How fortunate I am to work in a position where past connections do not matter. Random assignment is a gift. I am as likely to draw the high-profile case as my male colleagues are, and that has been true since I took the bench. As a result of random assignment, I have presided over the “big” cases: the public corruption trial of a sitting Illinois governor, multi-defendant gang/drug-distribution cases, “bet the farm” patent infringement cases, multi-district products liability litigation, and large-scale bankruptcy and commercial disputes. I have also had my share of the “little” cases, some of which make a heartbreaking difference to the human beings affected: criminal charges of illegal entry into the United States, individual employment discrimination cases, claims of excessive force against police officers, and challenges to the conditions of confinement in prisons and jails.

One of the memorable “little” cases was one involving an eight-year-old boy (“N.R.”) and a box of crayons. You recall that the events of September 11, 2001 had a huge effect on the nation. One immediate effect of 9/11 was a “zero tolerance” policy for many things, including weapons in schools. N.R.’s family situation was complicated, and he had just moved in with his grandmother. The grandmother was raising a couple of other grandchildren as well, including a kindergartener who was a cousin of N.R.’s. N.R.’s teacher gave the grandmother a list of school supplies that N.R. and his classmates were expected to bring, including art supplies. N.R. didn’t have what he needed, so his grandma did what many adults would do under the same circumstances: she gave N.R. a box of crayons and markers that belonged to his cousin. When N.R. got to school that morning, and the teacher told everyone to pull out their boxes of crayons, N.R. did so. And among the crayons in this box that N.R.’s grandma had taken from his cousin was a spent shell casing—that is, a bullet shell.

We don’t know where the shell came from, or what the grandmother knew, but I was quite sure that N.R. had nothing to do with it. N.R. compounded his trouble by showing the bullet shell to a classmate, not to the teacher. But the classmate showed the shell to the teacher, the teacher took things to the next level, and eight-year-old N.R. was expelled from the third grade. By the time N.R.’s family brought the case to court, nearly three months had passed. And what was truly startling to me is that N.R. had been out of school that entire time, getting just one hour of education once a week, with a tutor at the local public library.

Most of us remember what we were doing in the third grade: we were learning to multiply and divide. We were working on a science project, or memorizing spelling words. And most of us also know that if you miss these things in the third grade, things slide downward in a hurry. The idea that this little boy had missed more than one third of the third grade haunted me. I ordered the school district to begin providing him with five hours of tutoring

every day, to make up for the time he was missing in school, until I could rule on the family's challenge to the school district's "zero tolerance" policy. When the school district's lawyer asked how soon the school would have to get this tutoring underway, I said, "Tomorrow."

You may not be surprised to learn that this was all it took. The school district did not have funds to pay for a private tutor every day for N.R. They put him back in the classroom. The case ended about a week later.

I have handled the "big" cases; I am known for them. Random assignment has given me plenty of public attention. But in many years as a federal judge, I can't think of a case that I found so satisfying as one involving one little boy and one odd little episode with a box of crayons. I realized that N.R. might well get into more trouble down the road. But because the court was there, and because people have to do what I tell them to do, this little boy was not turned out of the education system at age eight.

I have been extremely fortunate in my professional life. I served as law clerk to Judge Rosalie Wahl, the first woman justice of the Minnesota Supreme Court. Before her appointment, Justice Wahl had devoted her practice to representing indigent criminal defendants at a law school legal clinic. Her appointment to the state's highest court drew the predictable criticism: that she did not have relevant civil or commercial experience to be effective. The criticism emerged again two years after her appointment, when the Justice was required to run for election statewide to a full ten-year term, but Justice Wahl brushed it off. She assured voters she had learned on the job and would continue to do so, "just like the men did." I, too, learn on the job, just as the men do. I, too, have cases both large and small in which I make the decisions.

Justice Wahl referred to herself as my "mother in *the* law," and indeed that is what she was. Justice Wahl's intellect, decency, and integrity made her the ideal role model for me, and her calm confidence in my abilities continues to motivate me, years after her death. She would be proud and delighted that I am now the Chief Judge of the federal court in Chicago, the first woman to serve as Chief in this district. In the federal courts, the role of Chief is filled by the judge of the court who has the greatest seniority but has not yet reached the age of 65. So the very fact that I am now Chief Judge is a function of the fact that I didn't have to campaign for the position or win a popularity contest with my colleagues.

For several years, I have been part of the faculty for a labor and employment law seminar conducted by the American Law Institute in Santa Fe, New Mexico. Santa Fe is a great venue in part because during the days of the seminar, we are often able to tour the federal courthouse or the New Mexico Supreme Court building, which was built by the WPA and is on the

National Historical Register. Since 1942, the New Mexico Supreme Court has honored its former chief justices with a portrait that hangs on the second floor in a room now known as the Hall of Chief Justices. The Chief Justice in that state is selected by her fellow justices, but by tradition, every justice takes a turn in that position—except for Justice Mary Walters, the first woman to serve on the Court. Justice Walters served on the New Mexico Supreme Court from 1984 to 1988, but when her turn to be Chief rolled around, she was passed over by her colleagues. Years later, Justice Pamela Minzner became the first woman to serve as Chief Justice. Justice Minzner took action to right the wrong done to her predecessor in a significant way: she moved Justice Walters’s portrait into the Hall of Chief Justices, naming her an honorary Chief Justice.

My own photo hangs in the Chief Judge’s courtroom in the Dirksen Courthouse. My status as Chief is, as I’ve explained, a function of seniority. But it is also a function of the decision of my predecessor to step down several months before the conclusion of his own term, and before my 65<sup>th</sup> birthday. Judge Ruben Castillo announced his decision on March 8, 2019—International Women’s Day. Judge Castillo was ready to leave; but he chose to do so deliberately to ensure that the court would not wait years longer to be led by a woman judge. What an honor it is to fill this role at a time in history when all of our institutions are under challenge. The judiciary is the one I am called to, and have been blessed to serve. Theodore Roosevelt said, “Far and away the best prize that life has to offer is the chance to work hard at work worth doing.” I’m not sure Teddy Roosevelt was right; my family and friends are dear prizes as well, but the chance to work hard as a federal district judge is for me the work most worth doing.

I am the first woman to serve as Chief of this court, but I will not be the last. Women and men will follow me in this role. They may well find it quaint or slightly ridiculous that there was a time when my appointment seemed groundbreaking. My responsibility is to ensure that those who follow me get the same chances that I have had, and that the court continues to administer justice with an even hand. Judges must continue to work hard on the cases they are assigned, large and small. To carry out this responsibility is an extraordinary honor. It is indeed “work worth doing.”

## KAFKA'S COURT: SEEKING LAW AND JUSTICE AT GUANTANAMO BAY

ALKA PRADHAN<sup>†</sup>

“Why do you wear a hijab?” asks a prominent journalist.

“Why do you wear a hijab?” asks the mother of an FDNY firefighter who selflessly ran in to save lives before the second tower fell.

“Why do you wear a hijab?” asks a second-year law student, holding a “Feminist” coffee mug.

“Practicing law at Guantanamo Bay” often seems oxymoronic. The detainee camps there were created in 2002 for the specific purpose of being outside the law. Nearly eighteen years later, the judges at the slow-moving military commissions still can't decide whether or which parts of the Constitution might apply to the forty men who remain there. Human rights are for all humans, I lecture my students, but if the jailers don't recognize the humanity of their charges and no outsider can make them, is it true?

The detainees at Guantanamo are presented as a monolith—hardened terrorists who want to kill Americans. The first impression, shaped by people like Donald Rumsfeld and Dick Cheney who also controlled all information about the men, has become truth in the minds of the public. I have represented over a dozen men at Guantanamo. Unlike Rumsfeld or Cheney, I have sat in rooms with them, shared meals with them, been given pregnancy and parenting advice from them, and tightened my jaw as some of them cried over their mothers, brothers, or children dying in faraway homes while they remained locked up at Guantanamo. No one gets family visits at Guantanamo. One client had a son he had never met. Another lost a young son to shelling in Syria while he was at Gitmo. One wrote frantic letters with a right hand that cramped constantly from his early torture, trying to participate somehow in the preparations for his daughter's pending marriage. His letters all arrived after the wedding, words of advice inexplicably covered in censor ink.

One of my favorite clients, a gentle man who would apologize for

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taking me away from my family to visit him at Guantanamo, wrote love letters to his wife every day. He would quietly tear out pictures of flowers and animals from Department of Defense-approved magazines and enclose them with his letters to her. He begged her to wait for him and against my advice, agreed to a release deal that would put him in great danger when he left Guantanamo—in the hopes of reuniting with her faster. Upon release, he was illegally disappeared for nearly six months. It was the last straw for his long-suffering wife, who refused to rejoin him afterwards.

It has been reported that all of these men took up arms against the United States, that they all pose a threat to Americans and that is why we are forced to hold them forever, outside of the United States, in the equivalent of a gulag. That statement is unequivocally false. Here are some truths: We have held nearly eight hundred men at Guantanamo; the majority should not have been detained at all. If they had been white and from France or Norway or Germany, the extraterritorial prison at Guantanamo would never have been allowed to exist. And it certainly would not have lasted for eighteen years with no end in sight.

The only truth that all of the detainees have in common is that they were tortured by Americans. We lied about that, too, and still do. These weren't "enhanced interrogation techniques." They were brutal, medieval acts, some of them the same as those committed at the Tower of London and at Salem—and yes, at Bergen-Belsen. Men were killed in our torture program. Those who survived were physically and psychologically maimed for life.

## I. BACKGROUND

When I decided at the ripe old age of sixteen that I was going to practice human rights and humanitarian law, I would have never guessed that I would be litigating against my own government. I was newly returned from a high school summer program at Oxford University, where one of the speakers was Patricia Viseur Sellers, then a prosecutor specializing in gender-based war crimes at the ICTY.<sup>1</sup> She was an American lawyer, like I wanted to be, helping to shape the then-brand-new field of international criminal law. And she was a woman, and her skin looked like mine.

I grew up primarily in a comfortable, homogeneous suburb in Ohio, the type of place captured well by TV shows like *One Tree Hill* or *My So-Called Life*. What those shows lack, however, are the female Indian-American characters whose self-deprecating comments and loud laughs are meant to preempt the jokes about their clothes ("not Abercrombie"), faces ("too dark to see in photos"), religions ("my parents don't want me coming over if you

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1. International Criminal Tribunal for the former Yugoslavia.

have an elephant god on your wall”), countries of origin (“shithole,” long before the President said so), and home-packed lunches (“stinks of curry”).

I wouldn't let myself feel bullied. I made the jokes before they opened their mouths, embraced the punch lines, left them feeling awkward. I did it for the newer immigrant kids too, the ones who didn't understand the joke. “The joke is how we look to them.” Twenty years later, I find myself nodding along when my client, Ammar, talks about his feeling of being an outsider as a teen refugee in Iran. I was infinitely more privileged than Ammar, but minority teen angst is a bonding agent.

My grandfather worked for the United Nations, and I spent many long summers in Geneva around family friends who were all international civil servants. I read about the Balkan Wars, the Rwandan genocide, the India–Pakistan nuclear arms race, debated the merits of sovereignty versus humanitarian intervention in my high school American Politics and Government class. When I saw Ms. Sellers speak, it felt like I'd found my place. As she explained, no one invented human rights—they exist inherent in every human being. But without people to defend those rights with sword and shield, there is no way to temper the chaos of politics and war. I wanted to do that.

When we grow up in America, though—and especially when we study law in America—we are taught that we are the good guys. Sometimes that is true. We helped to shape much of the world after World War II and we led the charge on the international law that now chafes on our Department of Defense at Guantanamo Bay. Our Constitution is magnificent and deeply flawed, and magnificent again for how it creates the institutions—Congress, Presidency, Courts—to help resolve those flaws.

But the Constitution, written in a time of state power, didn't know what to do with the 9/11 attacks, and neither did the institutions. Caught paying too little attention to intelligence about a non-state actor (Al Qaeda), Congress and the Executive overcorrected. Sweeping powers were employed, the normal rules of intelligence gathering in secret and war-fighting in public were suspended. The United States didn't want to follow the laws it had helped to write.

We now know some of the mistakes that we made. We didn't understand the nature or diversity of the parties on the ground in Afghanistan. The rendition and torture program didn't generate useable intelligence and may have wasted years in the search for Bin Laden. But we have still never reckoned with the effects of those mistakes. We still do not discuss the impact on our national security of our allies withdrawing from joint operations because of our detainee torture. The government still strenuously argues that Guantanamo detainees should have no constitutional

protections at all in territory controlled by the United States and in courtrooms over which the flag flies. We don't seem to see how those mistakes—torturing people of color, creating separate courts for Muslim men outside of the Constitution—have undermined the security we sought so desperately to ensure.

## II. IN THE COURTROOM

For much of the four years that I have represented Ammar in the purpose-built courtroom at “Camp Justice” (the legal compound at Guantanamo Bay), I have been the only female attorney of color. One of only a handful of females in the courtroom at all, in fact. During my first oral argument, I paused on the word “Abbottabad.” Abbottabad is a town in Pakistan where Osama bin Laden was eventually found and killed by U.S. forces in 2011. It is constantly mispronounced in the press, including by President Obama. Nearly two decades after the war began in Afghanistan, is it truly too much to ask that we learn to pronounce “Afghanistan,” “Taliban,” “Iraq,” “Abu Ghraib,”—and yes, “Abbottabad,” correctly? Disrespecting a culture and a people because five of them are accused of committing crimes (even heinous ones) is antithetical to rights-based justice. So I paused, and explained to the judge in two sentences the history of Abbottabad and that I was going to pronounce it the way Pakistanis pronounce it. To me, it seemed like a perfectly rational thing to do. The judge, to his credit, accepted the explanation gracefully. To my right, however, there was a chorus of snorts from the prosecution through the rest of my argument.

Many courtrooms are still male-dominated, and I hear the same commentary at the purpose-built courtroom at Guantanamo as my female colleagues do around the world. I've been called “hysterical” for talking about Ammar's traumatic brain injury at the hands of the CIA. The prosecutors have retorted that I “don't understand” litigation. One male prosecutor commented that I “needed to get back to my children” after a particularly contentious week of hearings. These are standard unimaginative lines that can be dismissed.

Where it gets weird is the “terrorist sympathizer” label. My skin is brown, and I am the only woman of color who stands up at the podium and argues in the purpose-built courtroom at Guantanamo. I wear a hijab when Ammar and the other four defendants are in the courtroom, so observers sometime conclude that I am Muslim. The sister of a 9/11 victim, her unimaginable pain resurfacing after a day of arguments about the flaws that are holding up the trial, told me, “You're on *their side*. You're not American.” Another family member said baldly that the prosecution-appointed minders informed them that I was there to promote “the terrorists.”

An observer once asked me, oblivious to both the absurdity and the offense, whether I enjoyed projecting a “Mata Hari” vibe. (When I asked if he knew that Mata Hari’s prosecutor cited her gender as evidence against her, he made a hasty exit. Also, I assure everyone that I am fully clothed in the courtroom.) All of my defense colleagues take fire for representing our clients. But with me, the “joke” is, once again, how I look.

This time, I don’t preempt the comments. The reason is the “purpose-built” courtroom. The courtroom sits surrounded by barbed wire and signs saying “Expeditionary Legal Complex.” It was built deliberately outside of our legal system, with an obscure clause in its statute allowing for evidence derived from Ammar’s black site torture. The purpose for which it was built is to execute Ammar as quickly as possible. The purpose of the taunts and the roadblocks by the government—spying on our meetings, withholding funding, refusing discovery—is to stop us from defending him. In real terms, if we get distracted by preempting the punchlines about us, Ammar will be killed without anyone to fight the corrupt system that is prosecuting him. We’re not in Ohio anymore, Toto.

It is possible to be a great defense lawyer without being very close to your client, but not at Guantanamo. Because these men were so dehumanized, they trust almost no one. They live isolated, away from press and observers and family, in a secret camp in Cuba. The first thing we do, if they’ll let us, is get to know them. Learn what their childhoods were like, how many siblings they have. If they like dates from Kuwait or from Dubai better, if there is a special dish their mother makes during Ramadan. Whether they ever played cricket or soccer or watched Bollywood films, which are ubiquitous in the Middle East. How they modify the prison meals with yogurt, mint, garlic, or hot sauce to make them palatable. Only after we reconstruct their personhoods can we defend them in a court designed to reduce them to one-dimensional monsters.

During every interaction, we have to try to avoid retriggering their trauma. Certain music played at the black sites rewired Ammar’s brain such that he feels he is going to be killed when he hears it. Another prisoner is reduced to panic whenever he is transported in a blacked-out van—which is every time he goes to a legal meeting or medical appointment. One of the tortures visited on these men was sexual humiliation by female interrogators and guards. Sexual humiliation is cruel, inhuman, and degrading treatment for any person, but takes on another dimension with Muslim men because of the specific tenets of their religion. To eliminate the trigger for that humiliation, I wear a hijab in the courtroom.

I am not naturally comfortable in a hijab. I don’t really like putting anything on my head (wearing even a fascinator for Ascot was a pain). I have to pin it securely in place to make sure it doesn’t fall off when I speak at the

podium, because I tend to use my hands a lot in describing the government's failures to abide by any sort of fair trial standards. It gets warm under that hijab in the 100-degree Guantanamo heat, on top of wearing the required pantsuit. Some of the other women in the courtroom choose to wear full abayas, which would feel too physically restrictive for me. I am not Muslim and sometimes feel self-conscious about adopting, for practical purposes, a custom that holds religious and cultural meaning for many women around the world. But if a hijab can (and does) allow that trauma trigger to relax enough to let me do my job in that courtroom, then it is fully worth it. And ironically, just that little bit of "otherizing" visited upon me and my colleagues by American observers of our hijabs or abayas, allows me to better understand our country's use of Guantanamo as a massive experiment in dehumanization.

Even more ironically, I receive more respect and consideration from Ammar and my previous clients, as their American female attorney, than from my prosecution colleagues. No detainee has ever refused to meet with me because I am a woman. When I talk about Ammar's diagnosed traumatic brain injury, they call it "honest," not "hysterical." When I was in the depths of a fight with the State Department to negotiate conditions of repatriation for a client, he called me his "tiger lawyer" after the character in *Kung Fu Panda* (one of the Department of Defense-approved movies at Camp 6<sup>2</sup>). During my pregnancy through half of 2018 while attending hearings at Guantanamo, I received well-wishes from Camp 7,<sup>3</sup> combined with questions about when I'd be back after the baby's birth. Drinking ginger tea made for me by Ammar to combat my nausea so that I'd be recovered in time for oral arguments, I promised that I'd be back, and I was. It turns out that if you offer respect and humanity to people, it comes back tenfold.

#### CONCLUSION

My path has diverged greatly from that of my inspiration, Patricia Sellers. Instead of international courts, I cite the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Geneva Conventions in an illegal military commission in Cuba. I chose defense rather than prosecution, but I tried to follow her example as a human rights

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2. Camp 6 is the facility for detainees considered to be "low value." Detainees in Camp 6 were almost all captured in Afghanistan post-9/11, and most were cleared for release by the Bush and Obama administrations. Camp 6 detainees have traditionally had slightly more access to communal recreation and entertainment items (movies and books) than detainees in any other facilities at Guantanamo.

3. Camp 7 is the facility for detainees deemed to be "high value." The detainees in Camp 7 were all held by the CIA in black sites around the world for three or four years before being brought to Department of Defense custody in September 2006. Until 2017, the detainees at Camp 7 were held in near-solitary confinement. All of the defendants in the 9/11 case are held at Camp 7.

defender, whatever the job title. I don't question the patriotism of my work; as Judge Tatel said recently in a D.C. Circuit decision excoriating the government for its handling of the *Nashiri* case at Guantanamo: "[C]riminal justice is a shared responsibility," among prosecution, defense, and judiciary.<sup>4</sup> Without a strong defense bar, justice crumbles, and particularly at Guantanamo.

Ms. Sellers was once asked in an interview how important the *Akayesu* case was in international legal history, and she could not emphasize enough how progressive the decision had been. I feel the same way about the 9/11 case,<sup>5</sup> for the opposite reason: international legal history will record lessons of the injustices we perpetrated. The Guantanamo Bay military commissions have allowed the charging of *ex post facto* "war crimes," insisted on the existence of a "war" extending back to 1996 to cover jurisdiction over all of the detainees, hidden the most important evidence of the defendants' torture, and then enforced a governing statute that allows the use of torture-acquired evidence. I play a small part in spotlighting these gross legal violations through litigation and press and Twitter. And someday, the public will understand why we fought our own government so hard in the 9/11 case, why we spent months and years of our lives in a forgotten corner of Cuba—and why we wear the hijabs.

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4. *In re Abd Al-Rahim Hussein Muhammed Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019).

5. *United States v. Khalid Sheikh Mohammad, Walid Muhammad Salih Mubarak Bin Attash, Ramzi bin al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*. "Ammar al Baluchi" is Ali Abdul-Aziz Ali's family name.

## A PERSONAL ESSAY

NITZA I. QUIÑONES ALEJANDRO†

Amidst the string of hearings and trials that normally fill my schedule, I finally sat down with my law clerk for the few-hour niche of time we had set aside to interview potential summer interns. Tired from the long day, when I asked the last law student if she had any questions for us, I hoped she would keep her response short and sweet. She paused for a moment, then shyly asked, “So, how did you get to be a federal judge?” With a loaded question like that, I had two possible responses: a canned response about how careers are full of twists and turns, how hard work and persistence pay off, etc., or an honest answer. The former never entered my mind. My exhaustion vanished and, in one moment, years of memories flashed through my head. I smiled and told her, “I never expected to be where I am today.”



I was born in Puerto Rico, the daughter of a First Sergeant in the United States Army and a homemaker. I grew up on a series of military bases, attended the finest schools, and was surrounded by a community of military families. I recognize now how fortunate I was to have grown up in a world where the only apparent distinction between individuals was military rank. Throughout my adolescence, I never would have predicted that someday it would matter in my professional and social interactions that I was a woman, that I was Latina, or that I was gay.

My decision to go to law school was not part of a grand plan. When I graduated from college, where I had studied business and statistics, I was eager to join the workforce. My excitement to begin applying for accounting jobs was surprisingly met with disapproval from my mother. As I was looking into job openings and daydreaming about becoming a working professional, my mother eventually expressed her disapproval: “Yo esperaba más de ti.” *I expected more of you.* Her words stung. Here I was, twenty-one years old, about to graduate from college with honors at the top of my class and, rather than praise, I was met with disappointment. To provide context, I am the youngest of three children and, at that time, my sister was pursuing a master’s degree in urban planning and my brother was in dental school.

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† I am eternally grateful to my law clerks, most notably Allison Vélez, for both encouraging me to participate in this project and devoting many hours to the research and composition of this essay. This was truly a team effort and without their immeasurable contributions, my story would not have been told here.

From my mother's perspective, my siblings had blazed the trail towards higher education, and I needed to follow it.

In hindsight, I realize there were countless other young women facing a similar conversation with their mothers, but who were instead chastised for wishing to pursue a career at all, as opposed to becoming a homemaker. I now know I was fortunate that my mother's disappointment stemmed from her desire to see me pursue something more—like an advanced degree—to break through glass ceilings in the world's most elite professions, rather than from a desire to see me fulfill traditional gender roles. The sting of my mother's disapproval, while painful at the time, successfully guilted me into applying for graduate studies—a decision that would lay the groundwork for a career I would treasure for the rest of my life.



In my class at the University of Puerto Rico School of Law, there were approximately twenty-five women and one hundred men. While this statistical disparity certainly did not surprise me, the divide I felt most prominently was not between genders, but rather between the students who came from families of lawyers and those of us who would be first-generation attorneys. This professional disparity was not only significant numerically, but also significant in its practical effects. Those of us who weren't fulfilling a legacy were unfamiliar with the jargon that permeates the legal world, did not know the logistics of how court systems worked, and certainly did not know how to network without any personal connections in the field. I unexpectedly found myself in a discrete minority and, because of that classification, I felt disadvantaged.

During my first semester of law school, I genuinely contemplated dropping out. Between the academic difficulties (like receiving the first “D” of my life) and the practical challenges, it was hard for me to see a successful future on that path. My mother's words, however, haunted me: “Yo esperaba más de ti.” Failure was not an option in the Quiñones Alejandro family. What would my family think of me if I gave up now?

I decided to be pragmatic about my future. I would remain in law school for at least one more semester—in order to give things a chance to improve, and so that I could say I completed a full year of study—and I would get a job. In fulfillment of this brilliant plan, I got a part-time job at a legal services clinic in San Juan. It was at that tiny office, surrounded by an overworked attorney and desperate clients, that a spark ignited within me. I felt, for the first time, that I was where I was meant to be.

Working at the clinic was my first opportunity to have hands-on experience helping people. I was not doing any of the “fancy” lawyering that the supervising attorney was, but even in doing research, writing assignments, and logistical tasks, I felt the impact of the gratitude that our clients expressed so vehemently. Tasks as simple as helping to fill out forms, scheduling meetings, or taking notes during interviews were met with deep appreciation from the clients.

I remember thinking, “If this is the kind of impact I already have, imagine what I could do if I finished law school... imagine what I could do with that education, degree, and experience under my belt. I could *really* help people.” Inspired with that sense of purpose, I embraced the challenge of completing law school, eager for the opportunities I hoped would follow.



The canned answer I could have given to the internship candidate would not have been a dishonest one. Careers *are* full of twists and turns. Hard work and persistence *do* often pay off, and they certainly have for me. The problem with the canned answer was not its veracity, but that it condenses dozens of life experiences into generic, cliché phrases, and in so doing, those experiences lose their cogency. It is more beneficial to elaborate on and share such experiences than to condense them into nondescript phrases. The salient moments that come to mind when I am asked to reflect on my career collectively convey this sentiment: one can be competitive without being aggressive, and determined without being unyielding. The stories that follow illustrate some of those moments.



After graduation, I followed my passion for public service to the mainland United States and took a position at Community Legal Services of Philadelphia (“CLS”). After two rewarding and fulfilling years at CLS, I transitioned to my first federal job as an attorney advisor at the Social Security Administration (“SSA”) in Philadelphia. While working at the SSA, I was contacted by the Department of Veterans Affairs (“VA”) about an opportunity to join their team. I was excited by the chance to expand my legal experience and, having grown up in military communities as the daughter of an army veteran, I was thrilled at the idea of serving the veteran community. I would be the first female attorney in that office, a perspective the agency was itching to obtain and one I was keen to provide. My eagerness hit a wall, though, when it came time to discuss salary. In my current position at the SSA, my federal pay scale level was GS-11,<sup>1</sup> and within a few weeks, I would be promoted to a GS-12. The VA offered me this great, exciting position at the not-so-great, not-so-exciting pay scale level of a GS-9, which was two levels below my current level and three levels below what I was about to obtain at the SSA. I was shocked. They had seemed so positive and intent on hiring me throughout the interview process at the VA, but that was not the message of their offer.

At that moment, I had three options: 1) decline the offer, 2) accept the offer at the reduced pay grade, or 3) demand a higher salary. I knew what I

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1. Most federal government employees’ salaries are governed by the General Schedule (“GS”)—a national pay scale comprised of levels and steps that determines an employee’s salary according to various criteria, such as level of education, years of experience and government service, and level of difficulty of the position. Each federal agency classifies its positions within the GS.

was worth, and I knew that I would be a valuable addition to their team. I went with the first option. While I was honestly offended by their offer, I did not want to respond with anger or a sense of entitlement and demand more money. It was not the actual dollar amount that was so offensive; rather, it was the fact that they expected me to keep nodding and smiling when they casually shifted the tone from “Welcome aboard!” to “This is such a great opportunity for you, you shouldn’t mind taking a pay cut!” I do not know what actually motivated that offer, but the message it sent was clear—they thought they could get me for less than I was worth. I could not imagine that they would have made such a proposal to a man. If they were not going to respect my qualifications, then that was not a workplace I wanted to join.

When I politely declined the offer, they made a second offer to bring me in as a GS-11. I stood my ground. I told them that unless I would be paid at the level I was about to obtain at the SSA, I would not accept their offer. I did not raise my voice, I did not lecture them on how demeaning their initial offer was, I did not tell them I was worth more, and I did not ask the question at the forefront of my mind: would you have dared treat a male attorney the same way? They came back after I had said, “No, thank you” to the GS-11 offer, asking me to reconsider, and this time I concisely explained why I was again declining. I knew that they likely would not ask again, that there probably would not be another counteroffer, and that I was potentially turning down a wonderful opportunity, but I decided that I had to be firm. A few days later, I received a call offering me the position at the GS-12 level. I am thankful for that call because it enabled me to slide my foot in the door of another men’s club, to broaden my practice area, and to spend years doing a job I loved, serving a community I was passionate about. But I am also thankful that I found the strength to say no, twice, when the opportunity was attractive but the offer was unfair. Before even setting foot in the office, I had sent a clear message: I know my worth.



In 1990, six vacancies opened up on the Philadelphia Court of Common Pleas. For one of the most diverse cities in the country, Philly’s judiciary did not look much like its citizens. The Hispanic Bar Association of Pennsylvania (“HBA”) was one of a few organizations that set out to change that disparity. Determined to get Hispanic representation on the bench, the leaders of the HBA met with Governor Robert P. Casey’s representatives and expressed their mission. Governor Casey agreed to consider an HBA-recommended candidate for a nomination, as long as the individual went through the established nomination process.

When the leadership of the HBA met to identify a potential candidate to recommend, I never thought that I would be that candidate. There were many reasons why other attorneys would have been great choices, but as we

discussed potential candidates, it became clear that there were just as many challenges that would make it difficult for most of my colleagues to run. For me, running would require resigning my position at the VA, which meant living without any income. However, I realized this was an invaluable, albeit unexpected, opportunity to expand my commitment to government service, while simultaneously helping nudge the door open for others in the Latino legal community. So I volunteered to run, with the full support of the HBA behind me.

After being scrutinized and vetted by the Governor's nomination committee and the Philadelphia Bar Association, Governor Casey announced my nomination at a banquet held by ASPIRA, a nonprofit organization dedicated to Hispanic education. My delight and excitement were short-lived, though, as I learned that the Pennsylvania Senate was refusing to confirm me. The explanation I received was two-fold: 1) no one knew who I was and 2) I had not done anything for the Democratic party. I was frustrated. I had been a federal employee for most of my legal career—I was a political unknown because the law required as much.<sup>2</sup> As a career government employee, my priority had always been serving the community around me, not serving a political party. I took several deep breaths and decided that my aspirations were more important than the reasons offered to oppose me. I would run despite the Senate's doubts. I chose to view the explanation as motivation, rather than fighting words. I was not going to make a scene about the Senate refusing to confirm the first Hispanic nominee, I was just going to win the election instead.

The victory I hoped for would not just be for me. It would be for the HBA, for Hispanics, for Philadelphians, and for women. Which is why I refused when my advisors suggested I abbreviate my name on the ballot. They suggested that, rather than use my full given name, "Nitza I. Quiñones Alejandro," I should eliminate "Quiñones" and run only as "Nitza I. Alejandro." Why? Because Alejandro sounded more Italian, more white. My advisors believed strangers would be more inclined to vote for me if I seemed less Latina. That logic was unacceptable. I was not trying to get elected at all costs, and certainly not at the cost of sacrificing my identity. In Puerto Rico, it is tradition for children to take the last names of both parents, honoring both their father and mother. While changing my name may have been a strategically sound political suggestion, it was not a suggestion I was willing to take; that was not the way I wanted to win. I was a proud member of the Latino community, and that was how I would run.

My decision to run unconfirmed and unendorsed was further hindered

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2. The Hatch Act prohibits federal employees from participating in certain partisan political activities. 5 U.S.C. § 7321 *et seq.*

by the fact that I knew nothing about campaigning. I did a lot of research and surrounded myself with strong, intelligent friends who were eager to help run my campaign, but I was constantly reminded of my disadvantage. In Philadelphia, the city is divided up into political wards. A huge part of campaigning for city offices is visiting the various wards, speaking to the people, and promoting oneself. Since I had no party support or stamp of approval from the Senate, and little finances, I was completely disconnected from any official communications about these essential events. When and where were the ward meetings? How much time would I get to speak? Did I have to register to speak ahead of time? I did not have the answers to these questions, but every endorsed candidate did.

Whenever I could find such a meeting, I would show up. Most of the time, the organizers were either, at best, surprised, or at worst, annoyed, to see me. My lack of political affiliation meant I spoke last, after every other candidate had shared a similar message—justice and impartiality are important, and they are the best candidate for the job. Thirty-two of us were running for sixteen judicial seats. Only five candidates, including myself, were women. While we were technically adversaries vying for a few precious spots, in my mind, we were colleagues first and foremost. I was disappointed to realize that not all of the candidates shared my view, but I found a friend in a man who, at the end of each ward meeting, would whisper to me the date and location of the next one. That small act of discrete kindness, from a member of the in-club to an outsider like me, has stuck with me all these years.

After all of the campaigning, the election results spoke for themselves. All five female candidates not only won seats on the bench, but had five of the six highest vote totals of all candidates. I was overjoyed to have won, but I also felt a deep satisfaction that so many qualified, impressive women were taking this step alongside me. Sometimes progress happens one step at a time, but sometimes it happens in five powerful strides at once.



I learned a great deal during the campaign and election process, but nothing could have quite prepared me for the weight of responsibility that I felt once I actually began working as a judge on the Philadelphia Court of Common Pleas. I do not think of myself as a “powerful” person, but I remember when I took the bench for the first time, I instantly became starkly aware of the immense power that we judges have—not only the power to resolve disputes and determine the fates of the accused, but also to give shape to the laws that govern us. From that first day, I knew that with that power came the immense responsibility to get things right.

The disadvantages I had faced as a candidate without political connections quickly faded, replaced only by my lack of judicial experience.

I was initially assigned to the criminal division. Having never practiced criminal law, my knowledge of the practice area was basically equivalent to what I had learned in law school. Obviously, that needed to change. So, I studied. I read the entire criminal bench book, cover to cover, before my first day in the courtroom. I knew I had done everything I could to prepare, but that did not stop my heart from nearly beating out of my chest when I first put on my black robe, entered the courtroom, and took my place in front of a room full of lawyers, defendants, witnesses, and members of the public, all on their feet with their eyes on me. I survived, of course, and the nerves subsided after that first day, but the weight of the awesome responsibility and my obligation to be prepared, attentive, and impartial endures to this day.

The responsibilities of the position itself were not—and are not—the only pressure that I felt. As the first female Hispanic judge in the Commonwealth of Pennsylvania, I feared that any failure or mistake of mine, however small, would be held, not just against me, but also against other Hispanic attorneys who aspired to be judges in the future. For fear that my shortcomings would impede others' chances in the future, I could not give anyone a reason to say the Hispanic judge could not cut it. In my mind, I had to be better, smarter, more consistent, and more thorough than my peers. Whether that pressure actually existed outside of my own head, I do not know. But for me, the pressure was very real.

While I experienced no disrespect or condescension from my fellow judges while on the state bench, I could not say the same for every attorney that appeared in front of me. In particular, some of the more seasoned attorneys occasionally sought to take advantage of newer judges. During one of my first civil trials, a well-known local attorney asked to conduct a re-redirect examination. Opposing counsel objected to this third round of interrogation as not permitted by the applicable rules, which I knew to be correct. I called counsel to side bar and placed the Pennsylvania Rules of Civil Procedure in front of the attorney seeking the additional line of questioning. "Counsel," I said, "find the rule that allows you to do re-redirect, and I'll let you do it." "Ahh, I know I can do it," he said, with more grumbling. "I'll appeal you to the Superior Court!" In response to his angry threats and foot stomping, I calmly told him that he had the right to appeal my decision and I asked again for him to show me where in the book this supposed rule was written. He could not, but continued to argue with me. After a moment, I said it was time to return to the courtroom. "The objection is sustained," I announced for the record. As I was leaving court that day, another experienced attorney, who later became a federal judge, approached me and whispered, "I'm proud of you." As he turned away, I smiled, because I was proud of me, too.

I quickly learned to command the respect of the attorneys in my

courtroom with similar small gestures. When counsel would get combative in my courtroom, I would interrupt—not with a gavel or exclamation of my own—but with a story of my mother. I would say that when I was a child, my mother always said, “En mi casa, nadie levanta la voz más alta que la mía.” *In my home, no one raises their voice above mine.* Then I would say, “This is my courtroom.” That, often, was enough.



After years of service as a state court judge, I decided to pursue my aspiration of a federal judicial appointment. I loved being a judge and I felt that my years on the state bench and fifteen years of experience as a federal employee made me ideally suited for the federal bench. After a few unsuccessful attempts, I applied for consideration again in 2012. At that time, I—like many people in this country—was riding the wave of excitement that rippled from the election of our first minority president, President Barack Obama. His landmark victory was an inspirational moment for positive social change. For the first time, it felt safe enough, or maybe I felt brave enough, to explicitly disclose my sexual orientation to the nomination committee.

I like to think I never hid the fact that I was gay. For years I had been myself with my closest friends and select colleagues, but I certainly did not wear it on my sleeve or shout it from the rooftops. I was comfortable with who I was, and that felt like enough. Frankly, I did not think it was anyone else’s business. I knew, though, that many people I interacted with professionally had no idea. That was about to change.

I had not been living in active fear of people treating me differently if they knew that I was gay, but in the new social climate, for the first time, I was okay with being a part of the narrative of acceptance—a small, quiet part. I was not a crusader. Although I did not plan to make speeches or march in a parade, I thought that maybe the sheer fact that a gay woman could obtain a position like a federal judgeship would be another sign to this country that times were changing, and that our differences do not have to separate or preclude us.

One morning in November 2012, months after my decision to share my sexual orientation with the nomination committee, I was sitting at the kitchen table enjoying my morning coffee and perusing the newspaper with my kittens, Diego and Frieda, when my phone rang. It was a dear friend and colleague who sat with me on the state court. “Congratulations!” she yelled. I had no idea what she was talking about. “You got the nomination! It’s in the paper.” I looked down at the black and white pages in my hands. Somehow, when flipping through the paper, I had missed it. But there it was. I had been nominated. This was really happening.

Seven months later, after a drawn-out confirmation process, another slew of articles hit with news of my confirmation. While the public announcements were exciting, the headlines shocked me. In big, bold, black letters: “A Philadelphia Judge Will Become the First Openly Lesbian Latina in the Post.” I was speechless. But, in my head, I thought, “Well... I guess I’m out to the whole world now.”

When discussing the moments I learned of my nomination and confirmation with others, people always assume I must have been so excited, thrilled, proud, or happy. While I did eventually experience all of those emotions, they were not the first feelings to surface. My name was in print—tiny print—below the much larger print labeling me as a Latina lesbian. What about my twenty-one years on the state bench? My thirty-five years as a public servant? My accomplishments and hard work? Those were the things that had motivated me to seek a federal appointment. Those were the things that qualified me to join the federal bench. Yet those facts were absent from the headlines, which relegated my accomplishments and qualifications to three immutable characteristics. While I was, and always will be, proud of the fact that I am Latina, gay, and a woman, I had never defined myself by any of those characteristics. The visual juxtaposition of those adjectives and any words referring to my merits was jolting. In the story of my life, I viewed those traits as facts to be mentioned somewhere in the narrative, but not in the title, not as a headline.

In the following days, while I scrambled to manage the reactions of the members of my family and of my partner’s family who had not already known that we were gay or a couple, it finally began to sink in that this was really happening. As the excitement and happiness grew, the shock of the form of the announcement wore off. I knew that regardless of the headlines, I had earned this moment through a lifetime of hard work.



Everyone is nervous when they start a new job. New people, new office, new responsibilities. On top of all the normal nerves, though, I had some extra jitters when I took the federal bench. The headline was out there. Before I could actually meet my new colleagues, a newspaper had made a first impression for me. I wondered how I would be received, especially because some members of the federal bench, like me, belong to an older generation. Soon enough, though, my anxieties were put to rest.

Shortly after I made the transition to the federal bench, I attended our District’s Judicial Retreat with my partner, Jenny. It certainly helped calm my nerves that Jenny can make friends anywhere she goes, but what really relaxed me was seeing how sincerely interested my new colleagues were in getting to know us—*both* of us. At one point in the evening, another judge’s wife suddenly said, “You two just look so nice together, let me take your

picture!” I sort of giggled as she whipped out a camera and Jenny leaned into me for the photo. Days later, she sent me a framed copy of that photo with a note welcoming me into this federal family. That photo sits on my desk at work. When I look at it, I see us happy. I see unspoken acceptance. It still brings a smile to my face when I remember the relief I felt when I was warmly welcomed to a bench that does not look very much like me.



When I reflect on my career, as I was prompted to by the curious internship candidate, I feel fortunate to have seen such an evolution of acceptance and equality in the legal profession. The world we work in today feels so different from the world in which I spent the first formative years of my career—a world in which I never imagined I would become a federal judge. I delight in the victories, big and small, that have opened the door to this profession a little wider for women, Latinos, ethnic and racial minorities, and people of different sexual orientations. Nevertheless, the other side of the door remains fairly homogenous. When a new judge joins the bench in District Court, the sitting judges come together to attend the new judge’s investiture. We don our equalizing black robes and gather together to welcome the new addition. At these events, I look around at our group and I become acutely aware that there are so few women and so few people of color among us—of the thirty District Court judges in the Eastern District of Pennsylvania, only six are women, and only seven are ethnic or racial minorities. But this recurring realization does not dishearten me. Rather, I am optimistic that my bench, and the judiciaries, law offices, and state bars across the country, will continue to diversify. As I answered the young, aspiring female attorney sitting in front of me during that interview, and as I share these stories now, I hope that my optimism is contagious. I hope that learning of my challenges and successes left that young woman, and will leave future generations, excited about how far we have come and the potential that lies ahead. I, for one, cannot wait to see what comes next.

# THE NINETEENTH AMENDMENT: THE CATALYST THAT OPENED COURTHOUSE DOORS FOR WOMEN ON THE FEDERAL BENCH

JUDGE ANN CLAIRE WILLIAMS (RET.)†

I was incredibly honored and blessed to serve as a federal judge for nearly thirty-three years, first on the United States District Court for the Northern District of Illinois and next on the United States Court of Appeals for the Seventh Circuit. The 100th anniversary of the Nineteenth Amendment is especially meaningful to me because it not only opened the voting booth to women, it opened the courthouse doors for women to become federal judges.

No woman had served as a federal judge prior to the Nineteenth Amendment. Indeed, few women judges sat on any court before it was ratified. No woman had been elected judge before the Nineteenth Amendment passed, and there were certainly no Article III lifetime, presidentially appointed women federal judges.

The Nineteenth Amendment changed that. As Judge Florence E. Allen later reflected, “With the winning of the vote women gained the right . . . to assume their part in public and professional life.”<sup>1</sup> Allen embraced that right in full.

In 1906, thirteen years before the passage of the Nineteenth Amendment, Allen was the music critic for the Cleveland *Plain Dealer* and a teacher at a school for girls.<sup>2</sup> Never one to be idle, she also took graduate courses and obtained a Master of Arts degree in Political Science.<sup>3</sup> A professor asked her, “Why don’t you study law?”, which she said “came like

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† Of Counsel at Jones Day, where she leads its efforts to advance the rule of law in Africa. Her confirmation to the United States District Court for the Northern District of Illinois in 1985 made her the first woman of color to serve as a district judge in the three-state Seventh Circuit. In 1999, she became the first and only judge of color to sit on the United States Court of Appeals for the Seventh Circuit. She was president of the Federal Judges Association from 1999–2001 and received the Devitt Award, the federal judiciary’s highest honor, in 2010. She thanks Erin McGinley, Of Counsel at Jones Day and her former permanent law clerk, for her invaluable assistance with this article.

The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which she is associated.

1. FLORENCE ELLINWOOD ALLEN, *TO DO JUSTLY* 150 (1965).
2. *See id.* at 22–23.
3. *Id.* at 23.

a revelation[.]”<sup>4</sup> That was the beginning of her dream to become a lawyer.

But her hometown law school did not admit women, so Allen attended the University of Chicago Law School.<sup>5</sup> She was then drawn to New York City by the opportunity to assist new immigrants with the New York League for Protection of Immigrants.<sup>6</sup> She decided to complete her last two years of law school at New York University School of Law.<sup>7</sup> Allen struggled to support herself during law school by lecturing on music at public schools and in libraries.<sup>8</sup> She was only able to rent a gown for commencement exercises because her sister sent her \$10.<sup>9</sup> It was at graduation that Allen learned, to her “amazement,” that she had graduated second in the 1913 NYU School of Law class.<sup>10</sup> Yet she received no offers from New York law firms.<sup>11</sup> So she went back home to Cleveland, where she made \$25 in her first month as a lawyer.<sup>12</sup> As she said, “I had no clients. And I had no money. But I had great hopes[.]”<sup>13</sup>

Allen also had great hopes and dreams that women would soon have the right to vote. In the decade before the Nineteenth Amendment was ratified, Allen spent countless hours fighting for women’s suffrage.<sup>14</sup> An amendment to the State Constitution of Ohio was proposed in 1910 that gave the full right to vote to women, and Ohio became a women’s suffrage battleground.<sup>15</sup> Allen helped form a Campus Suffrage Club at Western Reserve University and, while in law school, served as assistant secretary to the prominent suffragist Maud Wood Park.<sup>16</sup> Park encouraged Allen to travel throughout Ohio and to organize local counties.<sup>17</sup>

Travel and organize Allen did, lining up a schedule of ninety-two speeches in eighty-eight Ohio counties.<sup>18</sup> She took advantage of every opportunity to speak, including in a circus tent and before and after a band

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4. *Id.*

5. *Id.* at 23.

6. *Id.* at 24.

7. *Id.* at 25.

8. *Id.* at 25–26.

9. *Id.* at 28.

10. *Id.*

11. See *Florence Ellinwood Allen*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYS., <https://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp> [<https://perma.cc/Y8VK-RS3N>] (last visited Nov. 16, 2019).

12. *The Career of a Woman Judge*, CHRISTIAN SCI. MONITOR, Jan. 11, 1924, at 9.

13. *Spinster Breadwinner Hailed as Heroine by Woman Judge*, WASH. POST, Mar. 10, 1934, at 11.

14. See ALLEN, *supra* note 1, at 29–38.

15. See *id.* at 29–30.

16. See *id.* at 29, 31.

17. See *id.* at 32.

18. *Id.*

concert.<sup>19</sup> Allen also performed significant legal work on behalf of women's suffrage and displayed her fine advocacy skills when she convinced a train conductor to speed up a train so she could make it on time to an argument in the Supreme Court of Ohio.<sup>20</sup>

On August 18, 1920, the Nineteenth Amendment was ratified. Allen's friends in the Woman Suffrage Party encouraged her to run for a judgeship.<sup>21</sup> The primary had already been held, so she needed to get enough signatures to have her name placed on the ballot. Within two days, party members gathered 2,000 signatures.<sup>22</sup>

On November 6, 1920, in the first election in Ohio in which women could vote other than on local matters, and backed by all the Cleveland newspapers, Allen became the first woman elected to a court of general jurisdiction in the United States when she was elected to the Cuyahoga Court of Common Pleas.<sup>23</sup> Three years later, she became the first woman in the United States elected to a state's highest court when she was voted onto the Supreme Court of Ohio.<sup>24</sup> The people she met throughout Ohio as she campaigned for women's suffrage remembered her and even formed "Florence Allen Clubs" when she was running for Ohio Supreme Court justice.<sup>25</sup>

Allen's "firsts" did not stop there. In 1934, President Franklin D. Roosevelt appointed her to the United States Court of Appeals for the Sixth Circuit, making her the first woman Article III federal judge.<sup>26</sup> None of the other judges favored her appointment. One went to bed for two days when her appointment was announced.<sup>27</sup> She believed that her insistence on sitting for argument the day after a fall which required the removal of one and a half teeth and bandages across her face, along with her diligent work, led her male colleagues to respect her.<sup>28</sup> Later in her long and very distinguished career, she became the first woman to serve as Chief Judge of any federal district or appellate court and the first woman to serve on the United States Judicial Conference, the policy-making body of the federal judiciary.<sup>29</sup> She became

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19. *Id.* at 34.

20. *Id.* at 36.

21. *Id.* at 41.

22. *Id.* at 42.

23. *Id.* at 43–44.

24. *Id.* at 64, 70.

25. *See id.* at 67.

26. *Id.* at 94, 95.

27. *Id.* at 95.

28. *Id.* at 96–98.

29. *See Florence Ellinwood Allen, NAT'L WOMEN'S HALL OF FAME,* <https://www.womenofthehall.org/inductee/florence-ellinwood-allen> [https://perma.cc/T9RZ-TX4R]

my inspiration each time I appeared before the U.S. Judicial Conference as Chair of the Court Administration and Case Management Committee.

I am indebted to Florence Allen, who fought for women's suffrage and opened the door for me and 447 other women, out of a total of 3,734 appointed in history, to serve as lifetime-tenured federal judges.<sup>30</sup> Over fifty years ago, Allen wrote in her autobiography, "This battle for the rights of full citizenship is a matter of such ancient history that we are inclined to accept the privilege of the vote as if we had always had it, forgetting what we owe to the hard-working and courageous women who devoted their lives to this cause."<sup>31</sup> These words strike me as true regarding women on the bench as well.

On the 100th anniversary of the Nineteenth Amendment, it is my privilege to pay tribute to Allen and some of the many hard-working and courageous women in the federal judiciary who were "firsts" in their courts and who personally impacted my life. Although lesser known than iconic, groundbreaking Supreme Court Justices and my friends Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, these other extraordinary, hardworking, and courageous women judges opened doors in federal courthouses around the country so that they were not so heavy for judges like me to walk through. I am so grateful for the role that each played in my life.

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(select "Personal Characteristics and Background" and search by "Female" and "Both" under gender) (last visited Nov. 25, 2019).

30. *Biographical Directory of Article III Federal Judges, 1789–Present*, FEDERAL JUDGES ASS'N, <https://www.fjc.gov/history/judges/search/advanced-search> [https://perma.cc/6X57-SQ33] (last visited Nov. 16, 2019).

31. ALLEN, *supra* note 1, at 38.

*“Women have within them . . . [the] power of working for something which they see not, something which they only hope and dream will come to pass.”*<sup>32</sup>—Florence Allen

Dreaming big. Many of the women judges who were “firsts” in their courts dreamed big dreams, even when they had few, if any, women role models. Judge Phyllis Kravitch, who was born in Savannah, Georgia, in 1920, was one of those dreamers. When she was growing up, most prominent white lawyers in Savannah would not accept a court appointment to defend an African American person in a criminal case.<sup>33</sup> But her father did.<sup>34</sup>

Aaron Kravitch believed “equality under the law meant there were no color lines.”<sup>35</sup> That meant he was usually the lawyer appointed in unpopular, highly publicized cases representing African Americans.<sup>36</sup> As a result, when she was twelve years old, Phyllis was the only girl in her scout troop not invited to a birthday party.<sup>37</sup>

In her words:

[M]y father’s way of consoling me, because I was quite upset about it, was to explain the Constitution and the Sixth Amendment, and finally realizing it wasn’t getting through to me, he said, “When you’re a little older, you’ll understand that there are more important things in life than birthday parties.” I didn’t understand it at the time, but as time went on by, I knew exactly what he meant.<sup>38</sup>

Inspired by her father, Phyllis began to dream of becoming an attorney herself. But when she was a teenager watching one of his cases, her father pulled her aside and said, “The judge wants you to leave. He doesn’t think this is any place for a young woman.”<sup>39</sup> Undeterred, Phyllis found one of her father’s African American employees, who took her to the segregated

32. *Id.* at 155.

33. Transcript of Interview by Anne Emanuel with Phyllis A. Kravitch (July 19, 2013) at 13 [hereinafter Kravitch (July 19, 2013)], [https://stacks.stanford.edu/file/druid:mn569fh4578/mn569fh4578\\_KravitchP\\_Transcript.pdf](https://stacks.stanford.edu/file/druid:mn569fh4578/mn569fh4578_KravitchP_Transcript.pdf) [https://perma.cc/42Z8-APEK].

34. Transcript of Interview by Anne Emanuel with Phyllis A. Kravitch (July 17, 2013) at 7 [hereinafter Kravitch (July 17, 2013)], [https://stacks.stanford.edu/file/druid:mn569fh4578/mn569fh4578\\_KravitchP\\_Transcript.pdf](https://stacks.stanford.edu/file/druid:mn569fh4578/mn569fh4578_KravitchP_Transcript.pdf) [https://perma.cc/42Z8-APEK].

35. Kravitch (July 19, 2013), *supra* note 33, at 13.

36. *See id.*

37. *See* Kravitch (July 17, 2013), *supra* note 34, at 1.

38. Kravitch (July 19, 2013), *supra* note 33, at 15.

39. *Id.* at 10.

balcony where African Americans were allowed to watch court.<sup>40</sup> There she hid and watched her father's cases.<sup>41</sup> She ultimately became one of the first woman trial lawyers in the South.<sup>42</sup> She was the first woman in the South, and third nationwide, to become a federal appellate judge when she was appointed by President Jimmy Carter to the United States Court of Appeals for the Fifth Circuit in 1979. She dreamed big.

Judge Constance Baker Motley, who was born in 1921, also dreamed big. She decided she wanted to be a lawyer at fifteen years old. No one thought this was a good idea. Her mother wanted her to be a hairdresser.<sup>43</sup> Connie later reflected:

With very little opportunity for employment or advancement by blacks or women, there were those who actively discouraged me from thinking about the law. For some reason, this lack of encouragement never deterred me. In fact, I think the effect was just the opposite. I was the kind of person who would not be put down. I rejected the notion that my race or sex would bar my success in life.<sup>44</sup>

She went on to become the first woman lawyer at the NAACP Legal Defense Fund, the first African American woman to argue in the United States Supreme Court, where she won nine out of ten cases outright, and the tenth when the Supreme Court later reversed itself,<sup>45</sup> the first African American woman to serve in the New York State Senate, and the first woman Manhattan Borough president.<sup>46</sup> Her firsts did not stop there. In 1961, she became the first woman of color appointed to any federal district court in the country, and the fourth woman Article III judge when President Lyndon B. Johnson selected her to serve on the United States District Court for the Southern District of New York.<sup>47</sup> She was also the first woman of color Chief

40. *See id.*

41. *See id.*

42. Kravitch (July 17, 2013), *supra* note 34, at 6–8.

43. CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 41 (1998).

44. *Id.* at 41–42.

45. *See* *Batson v. Kentucky*, 476 U.S. 79, 82 (1986) (ruling that peremptory challenges may not be used to excuse jurors solely because of their race and criticizing *Swain v. Alabama*, 380 U.S. 202 (1965)); Meg Penrose, *The Way Pavers: Eleven Supreme Court-Worthy Women*, HARV. J.L. & GENDER ONLINE, <https://harvardjlg.com/2018/07/the-way-pavers-eleven-supreme-court-worthy-women> [https://perma.cc/PZ57-X2WW]; Brian Gene Hoffman, *Constance Baker Motley (1921–2005)*, BLACKPAST (Mar. 12, 2018), <https://www.blackpast.org/african-american-history/people-african-american-history/motley-constance-baker-1921-2005> [https://perma.cc/P8S9-EKSH]; *Motley, Constance Baker, 1921–2005*, CIVIL RIGHTS DIGITAL LIBRARY, [http://crdl.usg.edu/people/m/motley\\_constance\\_baker\\_1921\\_2005/?Welcome](http://crdl.usg.edu/people/m/motley_constance_baker_1921_2005/?Welcome) [https://perma.cc/VCR6-85GU] (last visited Nov. 16, 2019).

46. *See* MOTLEY, *supra* note 43, at 206, 210.

47. *See id.* at 214.

Judge.<sup>48</sup> She made her big dreams come true and opened the doors for the fifty-nine African American women, thirty-one Latina women, sixteen Asian American women, and one Native American woman Article III judges who followed.<sup>49</sup>

*“I never totaled [the number of decisions I wrote]. . . . I never had time—whenever I finished with one group of cases, I just went right to the next batch.”*<sup>50</sup>—Florence Allen

Working hard. That was the only way Judge Patricia Wald knew how to work. Her father left her family when she was two years old, and she was raised by her mother and other relatives.<sup>51</sup> All worked at a local factory, including Pat who greased ball bearings on the night shift during summers as a teenager.<sup>52</sup> She earned a scholarship to college and a fellowship to law school, where she graduated with excellent credentials equivalent to those of a male Yale Law School classmate.<sup>53</sup> When a law firm offered him a higher salary, she turned down the firm’s offer and instead clerked for Judge Jerome Frank on the United States Court of Appeals for the Second Circuit.<sup>54</sup> Her tireless and meticulous work during her clerkship yielded a one-sentence letter of recommendation. But what a sentence it was: “She is the best law clerk that I ever had. Signed, Jerry Frank.”<sup>55</sup>

Pat worked at a law firm and then left to spend ten years focusing on her family and five young children. Working into the early morning hours while her children slept, she dedicated herself to such projects as a book on law and poverty and another book with a Yale classmate that helped spur the Bail Reform Act of 1966.<sup>56</sup> She went back to work full time when her

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48. *Judge Constance Baker Motley (1921–2005)*, EQUAL JUSTICE SOC’Y, <https://equaljusticesociety.org/aboutus/motley> [https://perma.cc/Y9GA-X34B] (last visited Nov. 16, 2019).

49. *Biographical Directory of Article III Federal Judges, 1789–Present*, *supra* note 30.

50. Mary Ellen Gale, *Her Honor*, HARVARD CRIMSON (Nov. 10, 1960), <https://www.thecrimson.com/article/1960/11/10/her-honor-ptoday-just-two-days> [https://perma.cc/U8YX-DZKM].

51. Transcript of Interview by Judith A. Winston with Patricia M. Wald, Tape 1 (June 5, 2006), at 2, [https://stacks.stanford.edu/file/zj195yf5579/WaldP\\_Transcript.pdf](https://stacks.stanford.edu/file/zj195yf5579/WaldP_Transcript.pdf) [https://perma.cc/39EN-MHZM].

52. *Id.* at 5–6, 21.

53. *Id.* at 10, 23, 33.

54. *Id.* at 33.

55. Transcript of Interview by Judith A. Winston with Patricia M. Wald, Tapes 2A & 2B (June 19, 2006) at 2, [https://stacks.stanford.edu/file/zj195yf5579/WaldP\\_Transcript.pdf](https://stacks.stanford.edu/file/zj195yf5579/WaldP_Transcript.pdf) [https://perma.cc/39EN-MHZM].

56. *See id.* at 16–17.

youngest was in kindergarten.<sup>57</sup> In 1979, President Jimmy Carter made her the first woman appointed to the District of Columbia, and she later became its first woman Chief Judge.<sup>58</sup> She was a force on the bench, authoring over 800 opinions. She was also devoted to public service throughout her life.<sup>59</sup> Her service to the nation and to the world continued well after she left the federal bench. I was fortunate to teach with her, including at the International Criminal Tribunal for Rwanda, and to see firsthand her gifts as a teacher, the depth of her character, and the impact she had. Pat never stopped working to improve the world around her.

Judge Diana Murphy, appointed in 1994 by President William Clinton to be the first woman on the United States Court of Appeals for the Eighth Circuit, and the only woman there for nineteen years,<sup>60</sup> was another tireless worker even in the face of physical adversity. Diana also did not take a traditional path to the district<sup>61</sup> and appellate bench. She went to law school after raising two sons and graduated from law school twenty years after her college graduation.

Although one would not know it, Diana's rheumatoid arthritis increased in intensity during the course of her career. In 1999, while she was a busy judge on the Eighth Circuit, Diana became the first woman to take on another enormous responsibility—chair of the United States Sentencing Commission,<sup>62</sup> which establishes the federal sentencing guidelines and collects, analyzes, and distributes information on federal sentencing practices. There she fought for, and laid the foundation for changing, the unjustified and unfair 100-to-1 crack versus powder cocaine sentencing disparity which adversely affected so many communities of color.<sup>63</sup>

Judge Jonathan Lebedoff reflected:

In all the many years of our friendship, I never heard Diana complain to me

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57. *See id.* at 15, 20.

58. Transcript of Interview by Judith A. Winston with Patricia M. Wald, Tape 3A & B (June 19, 2006) at 5, 10–11, [https://stacks.stanford.edu/file/zj195yf5579/WaldP\\_Transcript.pdf](https://stacks.stanford.edu/file/zj195yf5579/WaldP_Transcript.pdf) [<https://perma.cc/39EN-MHZM>].

59. *Id.* at 10.

60. *See* Beth Forsythe, *A Clerk's Tribute to Eighth Circuit Judge Diana E. Murphy*, BAR ASS'N OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT NEWSLETTER, Winter 2018, at 3, <http://www.eighthcircuitbar.com/resources/Documents/newsletters/Winter2018Newsletter.pdf> [<https://perma.cc/X96X-A9LX>].

61. President Jimmy Carter nominated Diana Murphy to the United States District Court for the District of Minnesota, and she received her commission in 1980.

62. *See id.* at 18.

63. *See* Press Release, U.S. Sentencing Comm'n, Sentencing Comm'n Reports on Cocaine Sentencing Policy (May 22, 2002), <https://www.uscc.gov/about/news/press-releases/may-22-2002> [<https://perma.cc/9HAQ-QRLY>]; *Dorsey v. United States* (567 U.S. 260, 269) (2012) (noting Fair Sentencing Act of 2010 reduced 100-to-1 crack to powder cocaine crack ratio to 18-to-1).

or to anyone else about her physical difficulties. Her strength of character would not allow her to lessen her legal or community service, at a cost that she kept to herself. . . . Her responsibilities as head of the Sentencing Commission required frequent flights to Washington. She typically handled both duties in a brilliant fashion, without complaint and at a physical cost known only to herself. Diana faced a physical challenge that would have left most men and women housebound, and defeated it by ignoring it.<sup>64</sup>

Diana Murphy, like many women, worked hard, no matter how difficult the challenge.

*“None of the judges favored my appointment.”*<sup>65</sup>—  
Florence Allen

Don’t give up. In 1962, the year after Consuelo Marshall graduated from law school, the Los Angeles City Attorney’s Office had never hired a woman attorney.<sup>66</sup> That did not stop Connie from applying. Her interviewer made it clear that the office did not hire women attorneys, and he took her to see the City Attorney himself to explain the policy. The City Attorney explained that all deputy attorneys began in the criminal section, and attorneys there might need to use words that could be embarrassing to women. Connie was not deterred. The City Attorney reconsidered, and she became the first female attorney in the office. She later said, “There was no way I wouldn’t have taken the job because of the challenge.”<sup>67</sup>

She met another young attorney there named Johnnie L. Cochran, Jr. and went to work with him when he went into private practice. After distinguished service on the state court bench, she was appointed to the United States District Court for the Central District of California in 1980 by President Jimmy Carter.<sup>68</sup> She was the first woman of color appointed in the West<sup>69</sup> and the first woman Chief Judge of color west of the Mississippi.<sup>70</sup> As Chair of the Ninth Circuit Pacific Island Committee, she has helped

64. Jonathan Lebedoff, *Remembrance of Judge Diana E. Murphy*, 103 MINN. L. REV. 17, 18 (2018).

65. ALLEN, *supra* note 1, at 95.

66. See Susan McRae, *Judicial Profile, Hon. Consuelo B. Marshall, U.S. District Court for the Central District of California*, FEDERAL LAWYER, May 2003, at 18, [http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Ninth-Circuit\\_1/Marshall-Hon-Consuelo.aspx](http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Ninth-Circuit_1/Marshall-Hon-Consuelo.aspx) [<https://perma.cc/7TG9-YK6X>].

67. *Id.*

68. *Id.* at 20.

69. Brenda Harbin-Forte, *African-American Women on the California Bench: A History*, DAILY J. (May 26, 2019), <https://www.dailyjournal.com/articles/351628-african-american-women-on-the-california-bench-a-history> [<https://perma.cc/6YCS-9YY5>].

70. *The Honorable Consuelo B. Marshall*, EQUAL JUSTICE WORKS, <https://www.equaljusticeworks.org/about/bios/the-honorable-consuelo-b-marshall> [<https://perma.cc/J6GK-4MF8>] (last visited Nov. 26, 2019).

transform the courts in republics and U.S. territories in the Pacific. Like she always has for her beloved law clerk family, Connie provided me with wise counsel and guidance through the years. Her calm presence, dedication, patience, and good humor in the face of any challenge are legendary.

Amalya Kearsse was elected Order of the Coif at the University of Michigan Law School and was an editor of the Law Review. She wanted to work at a Wall Street law firm after graduation, later reflecting, “I felt that Wall Street was the big time, and I wanted to see if I could make it on Wall Street.”<sup>71</sup> But there were very few women lawyers in Wall Street firms at the time, and few if any African American lawyers. One male lawyer who interviewed her looked at her resume and said, “I wish you were a man.”<sup>72</sup> Another said his firm had no women lawyers and had only recently started employing women secretaries, so he could not imagine what his partners would say if he told them a woman wanted to be a lawyer in their firm.<sup>73</sup>

Amalya, whose mother was the only woman in her medical school class, persisted. She received an offer and joined the Wall Street firm of Hughes, Hubbard & Reed.<sup>74</sup> She worked nonstop, remarking, “Literally, there is no time for anything else.”<sup>75</sup> After only seven years, she became a partner at the firm.<sup>76</sup> One of her colleagues commented, “She became a partner here not because she is a woman, not because she is black, but because she is just so damned good—no question about it.”<sup>77</sup> Four years later, she was named head of the firm’s hiring committee.<sup>78</sup>

In 1979, at the age of forty-one, President Jimmy Carter nominated her to the United States Court of Appeals for the Second Circuit, the court on which she still sits. She became the first woman of color appointed to a federal appellate court. The night she was sworn in, Amalya and her mother were the first to arrive for a celebratory dinner. A guest asked the restaurant maître d’ whether Judge Kearsse and Dr. Kearsse had arrived, to which the maître d’ replied, “No, just two ladies.”<sup>79</sup> Although the maître d’ did not recognize her, I was well aware of Amalya’s brilliance and extraordinary

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71. *Amalya Kearsse*, ACADEMY OF ACHIEVEMENT BLACK HISTORY MONTH (July 6, 1984) (downloaded using Apple Podcasts).

72. *Id.*

73. *Id.*

74. See Tom Goldstein, *Amalya Lyle Kearsse*, N.Y. TIMES, June 25, 1979, at B2, <https://www.nytimes.com/1979/06/25/archives/amalya-lyle-kearse-woman-in-the-news.html> [<https://perma.cc/L7WZ-UR9U>].

75. *Id.*

76. See *id.*

77. *Id.*

78. See *id.*

79. *Amalya Kearsse*, *supra* note 71.

achievements long before I was appointed to the Seventh Circuit and had the privilege of getting to know her. And Amalya's brilliance is not limited to the law. She is also a World Bridge Federation World Life Master and seven-time U.S. national champion.<sup>80</sup> This legal giant has been a tremendous role model of shining light.

“[T]o do justly is one of the highest human endeavors.”<sup>81</sup>—Florence Allen

Standing up. In 1979, Judge Gabrielle McDonald became the first woman of color to be appointed to the federal bench in Texas and in the South.<sup>82</sup> Two years later, the Ku Klux Klan tried to disqualify her in a case where Vietnamese shrimpers sued the Klan for burning several shrimp boats.<sup>83</sup> Gaby received hate mail, including four one-way tickets to Africa.<sup>84</sup> Klan members attended the court hearings.<sup>85</sup> For the first time, a metal detector was installed in the courthouse.<sup>86</sup> Gaby stood her ground and would not recuse herself.<sup>87</sup> She told Klan members they were not entitled to a judge of their choosing, but to one who would be fair. And fair she was.

A few years later, Gaby refused to recuse herself after the City of Houston asserted that, as an African American woman, she was a member of the class that would benefit from the suit that alleged racial discrimination in employment, election practices, and provision for municipal services. She wrote: “If my race is enough to disqualify me from hearing this case, then I must disqualify myself as well from a substantial portion of cases on my docket. This circumstance would cripple my efforts to fulfill my oath as a

80. Joe Messa, *The Honorable Amalya Lyle Kearsse*, MESSA & ASSOCS., <https://www.messalaw.com/the-honorable-amalya-lyle-kearse-second-circuit-appeals-court-judge-and-world-class-bridge-player> [<https://perma.cc/5LH9-FWUE>] (last visited Dec. 10, 2019).

81. See ALLEN, *supra* note 1, at vii.

82. See *The Honorable Gabrielle Kirk McDonald*, HISTORYMAKERS, <https://www.thehistorymakers.org/biography/honorable-gabrielle-kirk-mcdonald> [<https://perma.cc/9G2Z-CWAE>] (last visited Nov. 26, 2019).

83. See Barbara Canetti, *Vietnamese Fishermen Confronted the Ku Klux Klan and Texas*, UNITED PRESS INT'L (May 11, 1981), <https://www.upi.com/Archives/1981/05/11/Vietnamese-fishermen-confronted-the-Ku-Klux-Klan-and-Texas/2090358401600> [<https://perma.cc/J968-26H3>].

84. See Steven J. Niven, *McDonald, Gabrielle Kirk*, in *AFRICAN AMERICAN LIVES 578* (Henry Louis Gates, Jr. & Evelyn Brooks Higginbotham eds., 2004).

85. See Andrew Chin, *The KKK and Vietnamese Fishermen*, UNIV. OF N.C. SCH. OF LAW, <http://www.unclaw.com/chin/scholarship/fishermen.htm> [<https://perma.cc/6ZRH-2UJZ>] (last visited Nov. 26, 2019).

86. William Horne, *Judging Tadic: Former U.S. District Judge in Houston Answers State Department's Call*, CASE FILES COURT TV, <https://web.archive.org/web/20050112110546/http://www.courtstv.com/archive/casefiles/warcrimes/reports/judge.html> [<https://perma.cc/DB5K-BTUB>].

87. See Canetti, *supra* note 83.

federal judge[.]”<sup>88</sup> Gabrielle McDonald, standing up. After leaving the federal bench, she became one of the first judges on the International Criminal Tribunal for the former Yugoslavia.<sup>89</sup> Pat Wald took her seat when Gaby stepped down in 1999, and Gaby later served on the Iran-United States Claims Tribunal.<sup>90</sup> Gaby was a role model for me as I was the first woman of color to serve as a district judge in the three-state Seventh Circuit. I vividly remember when she joined the Tribunal to advance the rule of law internationally, and that served as an inspiration to me in my efforts to advance the rule of law in Africa while I sat on the bench and in my current work.

Phyllis Kravitch also stood up. She was rejected from a Supreme Court clerkship and from every law firm to which she applied because she was a woman, so she returned to Savannah to practice with her father.<sup>91</sup> As a lawyer, she refused to follow the practice in the South of referring to African American people by their first names, not by “Mr.” or “Mrs.” like other parties and witnesses.<sup>92</sup> Her extensive civil rights work included a lawsuit she and her father brought to allow African Americans to vote in the Democratic primary.<sup>93</sup> She also joined the county Board of Education and fought against the extensive disparities in segregated schools.<sup>94</sup>

Of her time on the bench, her colleague of seventeen years, Judge Thomas Clark, said:

All of us seek approval of others—it makes us feel good. But there are times in life when the crowd may be moving in an errant direction and one must be courageous enough to take a stand against the majority. Phyllis Kravitch has always been courageous. . . . At times she has been a minority of one. In every instance she has abided by what she thought was right. She has never “gone along to get along.”<sup>95</sup>

Phyllis knew how to stand up, all five feet or so tall of her. But she also

88. *LeRoy v. City of Houston*, 592 F. Supp. 415, 420 (S.D. Tex. 1984).

89. *See The Honorable Gabrielle Kirk McDonald*, *supra* note 82.

90. Press Release, United Nations Criminal Tribunal for the Former Yugoslavia, Appointment of Judge Patricia M. Wald to succeed Judge Gabrielle Kirk McDonald in November 1999 (July 7, 1999), <https://www.icty.org/en/press/appointment-judge-patricia-m-wald-succeed-judge-gabrielle-kirk-mcdonald-november-1999> [<https://perma.cc/8DDV-L8PG>].

91. Kravitch (July 17, 2013), *supra* note 34, at 6, 8.

92. *See id.* at 10–11.

93. *Id.* at 17–18.

94. Transcript of Interview by Anne Emanuel with Phyllis A. Kravitch (Aug. 7, 2013) at 5–6 [hereinafter Kravitch (Aug. 7, 2013)], [https://stacks.stanford.edu/file/druid:mn569fh4578/mn569fh4578\\_KravitchP\\_Transcript.pdf](https://stacks.stanford.edu/file/druid:mn569fh4578/mn569fh4578_KravitchP_Transcript.pdf) [<https://perma.cc/42Z8-APEK>].

95. Thomas A. Clark, *A Tribute to Judge Phyllis A. Kravitch*, 13 GA. ST. U. L. REV. 345, 345 (1997).

knew how to keep her cool. For one of her first sittings on the Fifth Circuit, Phyllis traveled to New Orleans and was waiting for a cab in pouring rain outside the hotel. Two men cut in front of her and jumped into the cab, one saying he had somewhere important to be. Phyllis caught the next cab. At oral argument that morning, the men who had taken Phyllis's cab looked up and saw that she was on the bench.<sup>96</sup> Later that day during the judges' conference, one of Phyllis's colleagues said he was shocked that the first lawyers could barely speak at the argument because their brief had been written so well.<sup>97</sup> Her strength under fire, courage that never failed, and graciousness in the face of all challenges inspired me even before I met and interviewed her about her incredible life story.

*"A great public service is demanded of lawyers."*<sup>98</sup> —  
Florence Allen

Giving back. Diana Murphy came into my life one year after I was appointed. She took me under her wing during a meeting of the National Association of Women Judges and became a mentor and sponsor. She encouraged me to be active in the Federal Judges Association, an organization which she and Betty Fletcher of the Ninth Circuit helped found. They were also the FJA's first two women presidents.<sup>99</sup> The FJA, which fights for the independence of the federal judiciary and works to sustain our system of justice through civics education and public outreach, now has over 1,100 district and appellate judge members. She and Betty supported me as I rose and helped me, step by step, to become the FJA's president, the first judge of color.

Diana also said "yes" when I asked her to be one of the original board members of what is now Equal Justice Works, which has awarded more than 2,000 fellowships to recent law school graduates committed to public service.<sup>100</sup> I started the two-year fellowship program with \$2.3 million in *cy pres* funds from a case I presided over as a district judge,<sup>101</sup> and I appointed

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96. See Kravitch (Aug. 7, 2013), *supra* note 94, at 39–40.

97. See *id.* at 40.

98. See ALLEN, *supra* note 1, at 152.

99. *History of the FJA, FEDERAL JUDGES ASS'N*, <https://www.federaljudgesassoc.org/section/subsection.php?structureid=21> [<https://perma.cc/8MME-5A85>] (last visited Dec. 10, 2019).

100. Press Release, Equal Justice Works, Equal Justice Works Announces 2019 Class of Fellows, <https://www.equaljusticeworks.org/news/equal-justice-works-announces-2019-class-of-fellows> [<https://perma.cc/7XJK-SBDD>] (last visited Dec. 10, 2019).

101. *In re Folding Carton Antitrust Litigation*, No. MDL 250, 1991 WL 32867 (N.D. Ill. Mar. 6, 1991); see *Hon. Ann Claire Williams (Ret.)*, CARNEGIE, <https://www.carnegie.org/about/trustees-and-staff/ann-claire-williams> [<https://perma.cc/7YPP-RW74>] (last visited Dec. 10, 2019).

Diana as one of the first board members. Diana Murphy was always giving back. In recognition of her pathbreaking and exemplary service to the bench and community, the federal courthouse in Minneapolis was named the Diana E. Murphy United States Courthouse in 2019.<sup>102</sup> That courthouse is only the second in the country to be named solely after a woman judge. The first was the Sandra Day O'Connor U.S. Courthouse in Phoenix.

Constance Baker Motley became one of my mentors from the beginning of my time on the bench. I had read about her in magazines as a teenager and college student. I was in awe when we first met soon after I took the bench. At first, I could only call her “Judge Motley.” She also devoted her life to giving back. Connie was at the forefront of the civil rights movement, from writing the draft complaint for *Brown v. Board of Education* to representing James Meredith in his long fight to become the first African American to attend the University of Mississippi.<sup>103</sup> She inspired me to strive to practice humility and commitment to equal justice under the law throughout my career both on and off the bench, just as she did.

Inspired by impactful mentors in her own life, Connie was a generous mentor with mentees too numerous to count. Connie’s life was forever changed when Clarence Blakeslee, a wealthy white philanthropist, heard her speak as a teenager.<sup>104</sup> He paid for Connie’s college and law school education. He mentored and supported her. She could not have paid for her education without his help. She also learned from another mentor, Thurgood Marshall, to laugh off indignities. Early in her judicial career, Connie’s judicial colleagues snuck her onto a club’s male-only floor in New York City for judges’ dinner meetings by saying she was the secretary.<sup>105</sup> While it was true that as the junior judge she had to take notes at the meeting, she called it “an amusing experience” when she learned why she had been able to enter the male-only upper floors so easily. I am grateful to have learned from her when to laugh off an “ism.”

Connie was one of the first judges to support the creation of Just The Beginning—A Pipeline Organization, an organization I co-founded. It works to inspire young people of color and from other underrepresented groups to enter the legal profession through programs for middle school, high school,

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102. *U.S. Courthouse Named for Judge Diana E. Murphy*, U.S. GEN. SERVS. ADMIN. (Oct. 16, 2019), <https://www.gsa.gov/about-us/regions/welcome-to-the-great-lakes-region-5/region-5-newsroom/news-releases/us-courthouse-named-for-judge-diana-e-murphy> [https://perma.cc/RR3L-CHM9].

103. *See Constance Baker Motley Biography*, JRANK LAW LIBRARY, <https://biography.jrank.org/pages/2924/Motley-Constance-Baker.html> [https://perma.cc/3QGE-UYN6] (last visited Nov. 16, 2019).

104. *See id.*

105. MOTLEY, *supra* note 43, at 224.

and law school students.<sup>106</sup> Connie was a pillar of JTB-APO and a pillar in my life. I am fortunate to be one of the many judges, law clerks, lawyers, and friends mentored by Connie, who always gave back.

*“We don’t accomplish anything in this world alone . . . and whatever happens is the result of the whole tapestry of one’s life and all the weavings of individual threads from one to another that creates something.”*<sup>107</sup>—Justice Sandra Day O’Connor

I have been blessed throughout my legal career with an abundance of threads from people of many walks of life, races, and creeds. Two of the most vibrant threads in my tapestry are those of my parents, Joshua Marcus Williams and Dorothy Ethel Williams, who both passed at the age of ninety-two.

Every day my parents lived values I would later see in trailblazing women on the bench: dreaming big, working hard, not giving up, standing up, and giving back. Because of racial discrimination, my African American parents could not obtain work in their fields in the 1940s even though they had college degrees. My mother, who had a degree in home economics, could not get a job in Detroit as a full-time public-school teacher. She taught at a training school for delinquent children for twelve years, then served as a substitute teacher for five years. Finally, the doors opened so she could teach full time.

My dad, with degrees in political science and psychology, tried to sell insurance. But he was a poor salesman, so he drove a bus for twenty years in Detroit like so many African American educated and professional men at the time. When he applied for a supervisor position, he was told by his white boss that he could not handle it. But my father had been a staff sergeant in the United States Army and served during World War II.

He became fed up. Since he had enough money in his pension, he quit his job so he could go back to school to become a teacher. As fate would have it, we were in college together at Wayne State University. During a speech class, my professor asked me to talk about the person I admired most in life. I said, with tears rolling down my cheeks, “Daddy.” I had loved my dad’s job as a child. I relished running down the bus aisles after his shift, helping him roll coins, and seeing how handsome he looked in his uniform. But it hit me in that class: “Bus driver, college degree. College degree, bus

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106. Hon. Ann Claire Williams, CORNELL LAW SCH., <https://www.lawschool.cornell.edu/womenandjustice/About-Us/Williams.cfm> [https://perma.cc/F4TF-RQYR] (last visited Dec. 10, 2019).

107. DENNIS ABRAMS, SANDRA DAY O’CONNOR: U.S. SUPREME COURT JUSTICE 41 (2009).

driver.” How could he do it? When I got home that night, I asked him, “Daddy, why aren’t you burning down the streets of Detroit?”

He answered: “No one can take my education away. And being a bus driver is good, honest work. I wanted you and your two sisters to have a better life. So I did what I had to do.” He had a great sense of humor and added, “Besides, I used a lot of psychology with people on the bus.”

And so I have tried to live my life, doing what I had to do, standing up for justice and equality. I stand on my parents’ shoulders and the shoulders of the many that have come before me, including Florence Allen and the women judges of every race, creed, and ethnic origin who opened the courthouse doors for me and held out their hands to me and so many others.

On the 100th anniversary of the Nineteenth Amendment, the catalyst for women to enter the federal judiciary, I honor and celebrate the “first” women of the federal judiciary. They dreamed big. They worked hard. They never gave up. They stood up. And they gave back. To borrow the words of one of Florence Allen’s Sixth Circuit colleagues at her portrait unveiling, it is my hope that “[t]he heart and mind of Florence Allen,” and the hearts and minds of Amalya Kearse, Phyllis Kravitch, Consuelo Marshall, Gabrielle McDonald, Constance Baker Motley, Diana Murphy, Patricia Wald, and the many other trailblazing women judges “will flame for generations as a beacon for thousands of young women who will take their rightful places in government, in the practice of the law, and in judicial service.” The flames of the Nineteenth Amendment have changed the course of history.<sup>108</sup>

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108. ALLEN, *supra* note 1, at 148.