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ANNOTATED REMARKS

PIPELINE TO THE BENCH: WOMEN'S LEGAL CAREERS

LINDA GREENHOUSE*

I.

After Justice Thurgood Marshall retired from the Supreme Court, his colleague, Sandra Day O'Connor, published a tribute in which she described Justice Marshall as the embodiment of "moral truth."¹ She wrote that the experience of serving with Justice Marshall for ten years, sitting with him at the justices' conference table, and listening to him talk of amazing experiences from the front lines of the battle for civil rights "would, by and by, perhaps change the way I see the world."²

The year was 1992, and this seemed a surprising sentiment from a justice who was often on the opposite side from Justice Marshall in cases involving the equal protection clause and affirmative action.³ And yet, as we know, "by and by" did come to pass. In 2003, Justice O'Connor's majority opinion in *Grutter v. Bollinger*⁴ preserved race-conscious admissions in higher education. Did she hear Thurgood Marshall's voice in her ear as she cast a deciding vote that few courtwatchers would have predicted?

It may seem odd, in a publication with a focus on women on the bench, to begin with an observation about the influence of a *male* judge. My point is a simple one: the courtroom is an environment, elevated yet isolated, and it matters who populates it. Sandra Day O'Connor learned from Thurgood Marshall. We have to assume that the justices she served with for nearly twenty-five years learned from her, too; not only because she was a woman, but also because she was a Westerner and a self-described cowgirl, with a distinctive and influential view of state sovereignty within the federal

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1. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

2. *Id.* at 1220.

3. *See, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

4. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

system.⁵ Further, we can assume that after she took her seat in 1981, her mere presence on the Supreme Court bench signified to anyone entering the courtroom that, after 200 years, the door was no longer closed to women's aspirations to serve in the highest judicial offices in the country.

Note that this is not an argument from essentialism: that women judges will judge differently because they are women. While for years there was a spirited argument in academic literature over whether female judges speak in a "different voice,"⁶ that debate has ended. Anyone who follows judicial confirmation politics knows that women, no less than men, fill every ideological category.⁷ Qualified women belong on the bench because they are qualified, and because their presence on the bench signals to the world that the system to which we look for justice values women and men equally.

The notion of female essentialism on the bench was deeply rooted. Shirley Abrahamson, the former Chief Justice of the Wisconsin Supreme Court, recounts that in 1976, when she was named to that formerly all-male court—and as only the third woman to be named to any state court in Wisconsin—the press had four questions for her: (1) "Were you appointed because you are a woman?;" (2) "Do you think you were appointed as the token woman on the bench?;" (3) "Do you view yourself as representing women in the courts?;" and (4) "Do you think women judges will make a difference in the administration of justice? Will they bring to the bench the important feminine qualities of warmth, love, sensitivity, forgiveness, understanding of human nature, sympathy with the poor and the downtrodden, a desire to help and 'do good,' patience, a willingness to listen, an appreciation of children, family, and humanistic values, an understanding of the harms caused by discriminatory practices?"⁸

Of all the questions, this last one caused Shirley Abrahamson to "take a deep breath." "Now I'm trapped," she said in a 1980 speech to the National Association of Women Judges. "Naturally I want to have all these wonderful traits attributed to me. . . . But do I believe that? I have spent a lifetime fighting society's urge to stereotype both men and women. . . . We

5. See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

6. Compare, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (arguing that women approach and decide cases differently), with SALLY J. KENNEY, *GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2013) (asserting a lack of proof for any assumed "difference").

7. While the three women on the Supreme Court (Justices Ginsburg, Sotomayor, and Kagan) comprise three-quarters of the court's liberals, the pipeline to the court is filling with conservative women named to the circuit courts by the Trump administration. See, e.g., Alice B. Lloyd, *All of Trump's SCOTUS Women*, WASH. EXAMINER (Jul. 2, 2018, 4:50 AM), <https://www.washingtonexaminer.com/weekly-standard/meet-the-women-trump-could-nominate-to-the-supreme-court>.

8. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 490–92 (1984).

must look not at gender but at the individual, judging each on his or her own merits.”⁹

II.

Law students today are astonished to learn how recently being female was still regarded as a per se disqualification for becoming a judge, and who could blame them? The history is indeed astonishing. It was not until 1934, with President Franklin D. Roosevelt’s appointment of Florence Elinwood Allen to the United States Court of Appeals for the Sixth Circuit, that any woman served as a federal judge.¹⁰ Another fifteen years would pass before Burnita Shelton Matthews, named to the federal district court in Washington, D.C., by President Truman, took her seat in 1949. Then it was another thirteen years before President Kennedy named woman number three, Sarah Tilghman Hughes, to a federal district court seat in Texas. President Johnson named three women; President Nixon, one; and President Ford, one.

The forty women whom President Jimmy Carter appointed to federal judgeships thus represented five times as many women as had ever before sat on the federal bench.¹¹ The impact was transformative. When Carter became president in January 1977, only five women among nearly 400 judges were then serving on the federal district courts, and only one among ninety-seven judges on the federal courts of appeals (Shirley Hufstедler, appointed by President Lyndon Johnson in 1968). Carter appointed eleven women to the federal circuits—including Ruth Bader Ginsburg and the late Patricia Wald—and twenty to the district courts, for a total of 15.8 percent of his 259 judicial appointments.

For our purposes, what is most interesting is not the raw numbers, but the path these women took to the federal bench. Their path differed notably from that of the Carter administration’s male appointees. These women were less politically connected. They were much more likely to be sitting judges on state courts and much less likely to be major law firm partners—not surprisingly, since there were very few women among big law partnerships. Their private practice credentials were more likely to have been earned in government or in public interest settings (again, see Ruth Ginsburg and Pat Wald). More than the male appointees, the women ran into problems with the American Bar Association, which was accustomed to

9. *Id.*

10. For the early history of the appointment of women, see Mary L. Clark, *One Man’s Token Is Another Woman’s Breakthrough: The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487 (2004).

11. For Carter data and the story of the politics behind his appointments, see Mary L. Clark, *Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record*, 11 AM. U. J. GENDER, SOC. POL’Y & L. 1131 (2003).

evaluating judicial candidates with more conventional credentials—read, *male*.¹²

This brief history should not be read as a unidimensional march of progress. As feminist scholars including Sally Kenney have documented, judicial appointments were a contentious front in the gender wars of the time.¹³ Nonetheless, these early appointments were highly significant, propelling women to the front ranks of the federal judiciary.

What does the pipeline to legal careers, and from law practice to the bench, look like for women today? Now that women outnumber men in the nation's law schools (51.3 percent, according to statistics the American Bar Association published in April 2019),¹⁴ what are their career paths? How do they experience a life in the law? Where do we find women in the pipeline to the bench?

First a statistical snapshot. Women make up 38 percent of attorneys engaged in active practice, according to the American Bar Association.¹⁵ According to Bureau of Labor Statistics data gathered in 2018, women earn 80 percent of male lawyers' earnings across all law firms, a gap that translates into more than \$440 a week—and the gap has grown, rather than shrunk, in the past few years.¹⁶ The gap is somewhat breathtaking between male and female partners at the country's biggest law firms—a 53 percent difference in pay as reported in a legal search firm's survey in December 2018, up from 32 percent in 2010. Male partners at these firms earn an average of \$959,000 compared with women at \$627,000—a difference sometimes attributed to the fact that men are more likely to be the firms' "rainmakers" and to receive "origination credit" for the work they bring in to the firm.¹⁷

Looking at the 200 biggest law firms as an important subset of private law practice, these firms recruit new associates in rough proportion to the gender balance of new law school graduates.¹⁸ At these firms, women are 30 percent of nonequity partners and 20 percent of equity partners.

12. For these comparative portraits, see Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306 (1982).

13. See Sally J. Kenney, *Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go*, 2012 MICH. ST. L. REV. 1499 (2012).

14. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., A CURRENT GLANCE AT WOMEN IN LAW (2019), <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf>.

15. *Id.*

16. U.S. DEP'T OF LAB., U.S. BUREAU OF LAB. STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, <https://www.bls.gov/cps/cpsaat39.htm> (last updated Jan. 18, 2019).

17. Dan Packel, *New Survey Finds Even Bigger Gender Gap in Big Law Partner Pay*, MIAMI DAILY BUS. REV., Dec. 10, 2018, at A1.

18. DESTINY PEERY, NAT'L ASS'N OF WOMEN LAW., REPORT OF THE 2018 NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS.

Women are 26 percent of the general counsels of Fortune 500 companies.¹⁹ On the bench, women account for about one-third of state court judges,²⁰ one third of federal court judges,²¹ and of course, precisely one-third of the membership of the United States Supreme Court.

Speaking of the Supreme Court, for the first time in history, half the law clerks are women.²² Equity among the Supreme Court law clerks does not correspond to equality of opportunity in Supreme Court practice, however. During the 2018–2019 Supreme Court term, lawyers made 185 appearances in argued cases. Only thirty-two were made by women.²³ The United States Solicitor General’s office is the most frequent repeat player before the court. The office is an important feeder to the upper reaches of the Supreme Court bar, and until recently, women accounted for about half the lawyers in that important, small office. In recent months the number has dropped to only four women out of the sixteen lawyers.²⁴ Only one woman—Elena Kagan—has ever served as the Solicitor General.

It is important to get behind the statistics to see what life is like for women in law practice. Studies of women in law firms and in-house counsel positions regularly show evidence of implicit and sometimes unmistakably explicit bias, experienced with even greater frequency by women of color.

Women and lawyers of color frequently report what is known as “prove-it-again” bias—the feeling of always being on trial, with their commitment and competence questioned.²⁵ Women report feeling pressure to behave in conventionally feminine ways and are assigned “office housework” tasks more often than their male peers.²⁶ Often, they respond to this kind of pressure by being the ones who volunteer for the housekeeping tasks.²⁷ One of the recommendations by the study, “You Can’t Change What You Can’t See: Interrupting Racial and Gender Bias in the Legal

19. AM. BAR ASS’N COMM’N ON WOMEN IN THE PROFESSION, *supra* note 14.

20. 2018 US State Court Women Judges, NAT’L ASS’N OF WOMEN JUDGES, <https://www.nawj.org/statistics/2018-us-state-court-women-judges> (last visited Jan. 14, 2020).

21. *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/gender> (last visited Jan. 14, 2020).

22. Emily Baumgaertner, *Justice Kavanaugh’s Law Clerks Are All Women, a First for the Supreme Court*, N.Y. TIMES, Oct. 9, 2018, at A13.

23. Kimberly Strawbridge Robinson, *Women Advocates Stand Out Although Outnumbered at SCOTUS*, BLOOMBERG L. (Apr. 15, 2019), <https://news.bloomberglaw.com/us-law-week/two-women-advocates-stand-out-although-outnumbered-at-scotus>.

24. Kimberly Strawbridge Robinson & Jordan S. Rubin, *Women Argue Only a Fraction of Supreme Court Cases (3)*, BLOOMBERG L. (Jan. 30, 2019, 4:06 PM), <https://news.bloomberglaw.com/us-law-week/women-argue-only-a-fraction-of-supreme-court-cases-3>.

25. MINORITY CORP. COUNS. ASS’N & AM. B. ASS’N COMM’N ON WOMEN IN THE PROF., *YOU CAN’T CHANGE WHAT YOU CAN’T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION* (2018), <https://www.mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf>.

26. *Id.*

27. *Id.*

Profession,” published in 2018 by the American Bar Association and the Minority Corporate Counsel Association, was that firm leaders stop asking for volunteers and assign such tasks on a gender-neutral basis.²⁸

Another study reported that when women leave a firm to go in-house, their motive is often assumed to be a desire for a more manageable work life, while when a man makes the same move, he is regarded as a strategic thinker who wants to be close to the center of corporate power.²⁹ Too often, female general counsels are seen as, and treated as, tokens. Studies of the path to a general counsel’s position show that women who work in-house are rarely promoted to the top position.³⁰ They do better by moving into the general counsel’s position at a different company, but that is no guarantee either.³¹ Of thirty major companies that replaced a retiring general counsel in 2017–2018, twenty-two hired men and only eight hired a woman.³²

In law firms, women and lawyers of color of both sexes report that they are brought along on meetings with prospective clients as “eye candy” to suggest diversity, but if the pitch is successful, they then do not receive credit for their roles in preparing for and participating in the meeting.³³

Women who become mothers report that their career prospects hit a plateau.³⁴ A group of female lawyers at Morrison & Foerster filed a lawsuit against the firm in 2018, claiming that the firm responds to mothers and pregnant women with lower pay and fewer promotional opportunities, including partnership.³⁵ Proskauer, Jones Day, and other big firms have been sued over imbalances in partner compensation.³⁶

28. *Id.*

29. Caroline Spiezio, *Women GCs Face Sexism, Stereotypes From Firm Lawyers—And It Impacts Who They Hire*, LAW.COM: CORP. COUNSEL (Jan. 23, 2019, 11:51 AM), <https://www.law.com/corpocounsel/2019/01/23/women-gcs-face-sexism-stereotypes-from-firm-lawyers-and-it-impacts-who-they-hire>. See also Marcia Coyle, *Law Firms Are Failing Work-Life Balance in the March for Gender Equality, Ginsburg Says*, LAW.COM (Jan. 31, 2020), <https://www.law.com/nationallawjournal/2020/01/31/law-firms-are-failing-work-life-balance-in-the-march-for-gender-equality-ginsburg-says/?sreturn=20200106185014>.

30. Sue Reisinger, *Companies Expected to Hire More Female GCs, Despite Some Obstacles*, LAW.COM: CORP. COUNSEL, (Nov. 30, 2018, 5:43 PM), <https://www.law.com/corpocounsel/2018/11/30/companies-expected-to-hire-more-female-gcs-despite-some-obstacles>.

31. *Id.*

32. See *id.* See also Spiezio, *supra* note 29.

33. MINORITY CORP. COUNS. ASS’N & AM. B. ASS’N COMM’N ON WOMEN IN THE PROF., *supra* note 25.

34. Scott Flaherty, *Another MoFo Associate Joins Lawsuit Alleging ‘Mommy Track’ Bias*, AM. LAW., Mar. 4, 2019.

35. *Id.*

36. Erin Hichman, *Women Describe Their Experiences Working in Big Law, And It’s Not Pretty*, LAW.COM (Apr. 18, 2019, 8:15 AM), <https://www.law.com/2019/04/18/women-describe-their-experience-working-in-big-law-and-its-not-pretty/>. See also, Dan Packel, *Associates Assail ‘Fraternity Culture’ at Jones Day in \$200M Sex Bias Suit*, AM. LAW. (Mar. 14, 2019, 12:45 PM), <https://www.law.com/americanlawyer/2019/04/03/associates-assail-fraternity-culture-at-jones-day-in-200m-sex-bias-suit> (The firms deny the charges. Morrison & Foerster has sought sanctions against the plaintiffs’ attorney.). See Ross Todd, *In ‘Mommy Track’ Suit, Morrison & Foerster Seeks Sanctions Against Former Associate and Sanford Heisler*, THE RECORDER (Apr. 9, 2019,

A real wake-up call came earlier this year, when the law firm of Paul, Weiss, Rifkind, Wharton & Garrison celebrated its new partnership class. Of the dozen new partners, only one was a woman.³⁷ This widely reported incident prompted 170 general counsel and corporate legal officers to sign an open letter to big law firms, announcing that in choosing outside firms to retain, the signers would give priority to those committed to diversity and inclusion.³⁸ Noting partner classes that “in no way reflect the demographic composition of entering associate classes,” the letter said, “[W]e are left to wonder if you and your partners value diversity enough to put into place programs to develop, promote and retain talented and diverse attorneys. . . . We expect the outside law firms we retain to reflect the diversity of the legal community and the companies and the customers we serve.”³⁹

Will this wake-up call be successful? Will anything help to solve a problem that has been identified and discussed for so many years?

The American Bar Association and Minority Corporate Counsel Association study offers several suggestions, beyond the useful one of no longer seeking volunteers for unglamorous tasks around the office. This report emphasizes the use of metrics for evaluating both job applicants and job performance—with the goal being the elimination of subjective and open-ended appraisals and placing everyone on an even playing field. Some big firms, including Proskauer and Skadden, are redesigning summer associate programs to give special attention to women and minority law students; Proskauer now offers a “boot camp” to thirty women who are about to enter law school. The young women will spend a week learning useful law school skills and will receive \$1,000 for their attendance.⁴⁰ Those who complete the program are guaranteed a callback interview for the firm’s summer associate program the following year.⁴¹ As for Paul, Weiss, Rifkind, Wharton & Garrison, it has promised to “do better” in the future.⁴²

So where does this leave us in our quest for gender equity on the bench? Female lawyers as well as judges often report that they have been mistaken for someone’s assistant in the office or in the courthouse. Of

12:38 PM), <https://www.law.com/therecorder/2019/04/09/in-mommy-track-suit-morrison-foers-ter-seeks-sanctions-against-former-associate-and-sanford-heisler>.

37. Noam Scheiber & John Eligon, *Elite Law Firm’s All-White Partner Class Stirs Debate on Diversity*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html>.

38. Christine Simmons, *170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, AM. LAW. (Jan. 27, 2019, 3:00 PM), <https://www.law.com/americanlawyer/2019/01/27/170-gcs-pen-open-letter-to-law-firms-improve-on-diversity-or-lose-our-business>.

39. *Id.*

40. Karen Sloan, *Skadden, Proskauer Get Creative to Recruit Women and Minority Law Students*, NAT’L L.J., Jan. 23, 2019.

41. *Id.*

42. Christine Simmons, *Paul Weiss Vows to ‘Do Better’ After Partner Promotions Stir Diversity Debate*, N.Y. L.J. (Dec. 18, 2018, 5:44 PM), <https://www.law.com/newyorklawjournal/2018/12/18/paul-weiss-vows-to-do-better-after-partner-promotions-stir-diversity-debate>.

course, this applies even more acutely to lawyers and judges of color.⁴³ Earlier this year, after a lawyer in Michigan tweeted in frustration that she had been mistaken once again for a paralegal, Eva Guzman, a Justice on the Texas Supreme Court, tweeted in response, “This evening I was once again told, ‘You don’t look like a judge.’”⁴⁴ Her response in turn prompted a judge from Michigan, Quiana Lillard, to tweet, “People tell me all the time I don’t look like a judge even when I’m in my robe at official events.”⁴⁵

And a Florida judge, Bronwyn Miller, said that sometimes when the door to her chambers was open, “attorneys would inform me that they were there to check in and ask if Judge Miller was here yet.”⁴⁶ Judge Miller would simply accept their signatures without revealing who she was, and then would enjoy the lawyers’ shocked expressions minutes later when she took her seat on the bench.⁴⁷

Would anyone say to a woman wearing a judicial robe at the United States Supreme Court: “You don’t look like a justice”? But remember that just a year or two before President Ronald Reagan named Sandra Day O’Connor to the Supreme Court, there was a hit Broadway play called “First Monday in October” that treated the unlikely notion of a woman sitting on the Supreme Court as a joke.⁴⁸ The play was a comedy.⁴⁹ Then Sandra O’Connor changed the narrative.

For the narrative to keep changing, the culture of law practice has to keep changing as well. More than transitory embarrassment should befall a law firm that proudly touts its all-male class of new partners. General counsels need to insist that the law firms they hire reflect the values of equal opportunity. The culture will change not only as women make partner in increasing numbers, but when they make partner after returning from parental leave—and when fathers feel free to take parental leave as well.

This essay’s final word goes to Justice Ginsburg. In her public appearances, she is often asked when there will be “enough” women on the Supreme Court. The country’s second female Supreme Court justice gives her answer: “When there are nine.”⁵⁰

43. Raychel Lean, ‘You Don’t Look Like a Judge’: Female Jurists, Lawyers Mistaken for Assistants, *DAILY BUS. REV.*, Feb. 1, 2019.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *First Monday in October*, *PLAYBILL*, <http://www.playbill.com/production/first-monday-in-october-majestic-theatre-vault-0000007827> (last visited Jan. 14, 2020).

49. *Id.*

50. *When Will There Be Enough Women on the Supreme Court? Justice Ginsburg Answers That Question*, (PBS News Hour Feb. 5, 2015), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court#transcript>.