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2004 ALBRITTON LECTURE: WOMEN'S PROGRESS AT THE BAR AND ON THE BENCH: PATHMARKS IN ALABAMA AND ELSEWHERE IN THE NATION*

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May I say first how much I appreciate the hearty welcome accorded me by all involved in arranging the Albritton lecture. My 2001 Term law clerk, Heather Elliott, has told me of the grand experience she had here as last year's Hugo Black Faculty Fellow, and I am pleased that Heather has returned to be with us for this event.

My lecture centers on women's remarkable progress in recent decades, both at the bar and on the bench, in the United States generally and in Alabama particularly. In my growing-up years, men of the bench and bar generally held what the French call an *idée fixe*, the unyielding conviction that women and lawyering, no less judging, do not mix. It ain't necessarily so, even ancient texts reveal.

In Greek mythology, Pallas Athena was celebrated as the goddess of reason and justice. To end the cycle of violence that began with Agamemnon's sacrifice of his daughter, Iphigenia, Athena created a court of justice to try Agamemnon's son and avenger Orestes, thereby installing the rule of law in lieu of the reign of vengeance.

Recall also the Biblical Deborah (whose activities are recounted in the Book of Judges). She was at the same time prophet, judge, and military leader. This triple-headed authority was exercised by only two other Israelites, both men: Moses and Samuel. People came from far and wide to seek Deborah's judgments. According to the rabbis, Deborah was independently wealthy; thus she could afford to work pro bono.

The U.S. legal establishment, even if its members knew of Athena and Deborah, for too long resisted admitting women into its ranks. It was only in 1869 that Iowa's Arabella Mansfield became the first female to gain admis-

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** Associate Justice, Supreme Court of the United States. Justice Ginsburg appreciates the grand assistance of her 2003-2004 Term law clerk, Abbe Gluck, in composing these remarks.

sion to the practice of law in this country. That same year, St. Louis Law School in Missouri became the first in the nation to open its doors to women.

Lemma Barkaloo, among the first women to attend St. Louis, earlier had been turned away by my alma mater, Columbia. In 1890, when Columbia denied admission to three other female applicants, a member of the University's Board of Trustees is reported to have said: "No woman shall degrade herself by practicing law in New York especially if I can save her. . . . [T]he clack of these possible Portias will never be heard in [our University's] Moot Court." That board member surely lacked Deborah's prophetic powers.

Once granted admission to law schools, women were not greeted by their teachers and classmates with open arms and undiluted zeal. An example from the University of Pennsylvania Law School: In 1911, the student body held a vote on a widely supported resolution to compel members of the freshman class to grow mustaches. A 25 cents per week penalty was to be imposed on each student who failed to show substantial progress in his growth. Thanks to the eleventh-hour plea of a student who remembered the lone woman in the class, the resolution was defeated, but only after a heated debate.

The bar's reluctance to admit women into the club played out in several inglorious cases. In denying Myra Bradwell admission to the bar, the Illinois Supreme Court observed in 1869 that, as a married woman, Bradwell would not be bound by contracts she made. The Illinois court thought it instructive, too, that female attorneys were unknown in the mother country. Concerning the Illinois court's recall of English practice, Bradwell wrote:

According to our . . . English brothers, it would be cruel to allow a woman to "embark upon the rough and troubled sea of actual legal practice," but not [beyond the pale] to allow her to govern all England with Canada and other dependencies thrown in. Our brothers will get used to it and then it will not seem any worse to them to have women practicing in the courts than it does now to have a queen rule over them.

In 1875, when Lavinia Goodell of Wisconsin was denied admission to her State's bar, a Justice of the Wisconsin Supreme Court remarked: "It would be revolting to all female sense of . . . innocence . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice" An enlightened local newspaper commented in an editorial: "If her purity is in danger, it would be better to reconstruct the court and bar than to exclude the women." Goodell persevered. Wisconsin's legislature trumped the State's high court and, in 1879, Goodell became a member of the state bar.

In Alabama, one of the waypaving women lawyers was Maud McLure Kelly, daughter of a graduate of this University who practiced law in Bir-

mingham and served as a state legislator. While working as a stenographer in her father's law practice, Kelly read law under her father's tutelage. In 1907, she took the entrance exam for Alabama University's law department and scored high enough to gain placement in the senior class.

Her prospects for a law degree were secure, but it was uncertain, when she enrolled here, whether she would be allowed to practice law after graduation. Alabama law at that time provided that anyone who presented *his* diploma from the University of Alabama would be permitted to try cases. The law said nothing about a graduate who might present *her* diploma. One of Kelly's classmates came to her aid. He introduced a clarifying bill in the Alabama Legislature. Over strong opposition, but in time for Kelly's graduation, the bill passed. Alabama's law was recast to read "his or her diploma."

When Kelly gained admission to the Alabama bar in 1908, women in other Southern states, including Arkansas, Georgia, Mississippi, and Texas, were still prohibited from practicing law. Six years later, Kelly became the South's first practicing female attorney to be admitted to the bar of the U.S. Supreme Court. Of her law practice, Kelly said, "I [thought of] the women [who would come] after me. . . . I tried to so conduct myself that things would be easier for them."

As late as 1968, however, the law remained largely a male preserve, as textbooks and teachers confirmed. A typical example: A first year property casebook published that year, written by a Columbia Law School professor and widely adopted, made this parenthetical comment: "[F]or, after all, land, like woman, was meant to be possessed . . ."

The few women who braved law school in the 1950s and 1960s, it was generally supposed, presented no real challenge to (or competition for) the men. They were expected to do pro bono work and not to engage in high fee paying commercial practice. One distinguished law professor commented at a 1971 Association of American Law Schools meeting, when colleagues expressed misgivings about the rising enrollment of women that coincided with the call up of men for Vietnam War service: "Not to worry," he said. "What were women law students after all, only soft men."

The critical mass achieved in the 1970s contrasts with the impermanent jump in women's enrollment in law school during World War II. In that earlier era, the president of Harvard was reportedly asked how the Law School was faring during the World War: "[It's] [n]ot as bad as we thought," he replied. "We have 75 students, and we haven't had to admit any women." (Compare the concern said to have been expressed by the same University's head in Vietnam War days: "We shall be left with the blind, the lame, and the women.")

Why did law schools wait so long before putting out a welcome mat for women? Arguments ranged from the anticipation that women would not put their law degrees to the same full use as men, to the "potty problem"—the absence of adequate bathrooms for women.

Despite the chill air, the depressing signs conveying “No woman wanted here,” female lawyers stayed in the fray, many of them hopeful, as Maud Kelly was, for a better day. In the early 1960s, women accounted for about 3% of the nation’s lawyers. Today, their ranks have increased tenfold, to 30% of the U.S. bar. (Alabama is not too far behind, with women now 26% of the State’s lawyers.)

In the law schools nationwide, women filled between 3 and 4.5% of the seats each academic year from 1947 until 1967. Then the numbers began to grow. In Alabama, in 1970, for example, women accounted for 5.5% of the students at Cumberland Law School and 10% of this law school’s graduates. Today, women are more than 50% of the entering law school population nationwide (and still catching up, 40% of the students enrolled in Alabama law schools). Of the new associates engaged by large law firms across the country, 41% are women. In Birmingham, women currently are some 38% of all large firm associates.

Progress is evident behind the podium, too. In 1919, Barbara Nachtrieb Armstrong was appointed to the Berkeley (Boalt Hall) law faculty. Made an assistant professor in 1923, Armstrong was the first woman ever to gain a tenure-track post at an ABA-approved law school. Over two decades later (as of 1945), only two other women had made their way to the tenure-track at AALS-member schools. When I was appointed to the Rutgers faculty in 1963, women headed for tenure at AALS schools still numbered under 20.

But by the 1990s, the tide had turned. By the beginning of that decade, more than 20% of law professors were women. Today, women are 23% of the full professors with tenure, and more than 32% of law faculty members overall. At this law school, if my information is correct, women hold one-fourth of the tenure-track faculty appointments.

Strides in law practice are similarly marked. In all but three states, a woman has served as president of the state bar association. To date, over 130 women have headed state associations. Eight women are currently state bar presidents. Two women have served as President of the American Bar Association in the decade just passed. Notably, a woman chaired the House of Delegates under each female ABA president.

Women also began to show up on the bench in the 20th century’s middle years. In prior essays, I have written in praise of three door openers at the federal level: Florence Ellinwood Allen, appointed to the U.S. Court of Appeals for the Sixth Circuit in 1934; Burnita Shelton Matthews, appointed to the U.S. District Court for the District of Columbia in 1949; and Shirley Mount Hufstедler, appointed to the U.S. Court of Appeals for the Ninth Circuit in 1968. This morning, I will speak only of the first of these way-pavers at the federal level, Florence Allen, first woman ever to serve on an Article III federal court. In addition, I will speak of a nationally known trailblazer here in Alabama, Janie Ledlow Shores, this State’s first female Supreme Court Justice.

Before joining the federal bench, Florence Allen achieved many “firsts” in Ohio: first female assistant prosecutor in the country; first woman elected

to sit on a court of general jurisdiction; and the nation's first female state supreme court justice.

Long-tenured on the Sixth Circuit, Allen eventually served as that Circuit's chief judge, another first. It was rumored that Allen might become the first female U.S. Supreme Court justice. In 1949, two vacancies opened on the Court. President Truman reportedly was not opposed to the idea of filling one of them with a woman. But, as political strategist India Edwards, head of the Women's Division of the Democratic National Committee, recalled, Truman ultimately decided the time was not ripe. Edwards wrote of the brethren's reaction when Truman sought their advice:

[A] woman as a Justice . . . would make it difficult for [the other Justices] to meet informally with robes, and perhaps shoes, off, shirt collars unbuttoned and discuss their problems and come to decisions. I am certain that the old line about there being no sanitary arrangement for a female Justice was also included in their reasons for not wanting a woman

(Times have indeed changed: To mark my 1993 appointment to the Supreme Court, my colleagues ordered the installation of a women's bathroom in the Justices' robing room, its size precisely the same as the men's.)

Turning to Alabama's trailblazer, Janie Ledlow Shores's first paid employment was as a strawberry picker. She then worked as a potato picker, a bookkeeper, and a waitress before gaining the legal secretary's job that changed her life. Encouraged by her employer to pursue higher education and law school, Shores began taking college courses in 1954. Only five years later, she graduated first in her class from this law school, one of the brightest students ever to enroll here. After clerking on the Alabama Supreme Court for Justice Robert Simpson, and then practicing privately, she joined the faculty of Cumberland Law School in 1965. Cumberland had moved to Birmingham from Tennessee in 1961, and Shores was that school's first female law professor. In fact, Shores was the first full-time female law professor in Alabama and among the first five in the entire Southeast.

In 1974, Shores was elected to the Alabama Supreme Court, becoming the first woman ever to sit on that court, and only the seventh woman in U.S. history to sit on a state court of last resort. She served the court with distinction for a quarter century before retiring in 1999.

Brave women like Justice Shores and Judge Allen helped to advance the end of the days when women appeared on the bench as one-at-a-time curiosities. At the federal level, the administrations of Kennedy, Johnson, Nixon, and Ford combined had appointed just six women to Article III courts. When President Carter took office in 1977, only one woman (Shirley Hufstедler) sat among the 97 judges on the federal Courts of Appeals and only five among the 399 U.S. District Court judges. President Carter ap-

pointed a barrier-breaking number of women—40—to lifetime federal judgeships.

Once Carter appointed women to the bench in numbers, there was no turning back. President Reagan made headlines and history when he appointed the first woman to the Supreme Court, my dear colleague, Justice Sandra Day O'Connor. He also appointed 28 women to other federal courts. The first President Bush, in his single term in office, appointed 36 women. President Clinton appointed a grand total of 104 women, and the current President, by the close of 2003, had appointed 33 women.

Today, every federal circuit but the First and Eighth has at least two active women judges. The Eleventh Circuit, of which Alabama is part, has four women judges, including its first, Phyllis Kravitch, now on senior status. Eight women have served as chief judge of a U.S. Court of Appeals, including three who currently occupy that post. Thirty-two women have served as chief judge of a U.S. District Court, including the eleven now holding that position. One of the eleven is Callie V. Granade, who presides over the Southern District of Alabama.

To date, more than 230 women have served as life-tenured federal judges, 54 of them on appellate courts. Yes, there is a way to go, considering, for example, that women make up only about one-fourth of the federal judiciary. But what a distance we have come since Janie Shores's and my own 1959 graduation from law school; that year, Florence Allen remained the sole woman ever to have served on a federal appellate bench.

In the state courts, progress is equally marked, as Alabama illustrates. In 1951, Annie Lola Price was appointed to fill a vacancy on the Alabama Court of Appeals. She was the first woman in the State to hold appellate judicial office. Her appointment by then-Governor Jim Folsom was all the more startling: At the time Price became an appellate judge, and for more than 15 years thereafter, Alabama excluded all women from jury service.

In 1966, in a case titled *White v. Crook*, a three-judge U.S. District Court serving the Middle District of Alabama—the court over which Chief Judge Albritton now presides—made an historic decision: It declared unconstitutional the Alabama law that barred women from serving on juries. The Alabama Legislature, in 1967, wisely decided to switch rather than oppose the federal decree: It amended the law to make jury duty the civic obligation of all its citizens.

Judge Price's appointment to the Alabama Court of Appeals, at a time when women did not even qualify as jurors, met with so much opposition from the bar and public that she held her investiture in private. One of her favorite stories concerned a ceremony at which the Governor addressed the Legislature. All of the appellate judges had reserved seats. When Price entered to take her seat alongside her brethren, the bemused doorkeeper cried out: "Halt, you can't go in there. These places are reserved for the judges." Undeterred, she distinguished herself on the Court of Appeals, won reelection to four consecutive six-year terms, became presiding judge of that

court, and in 1969, of the newly created Court of Criminal Appeals. Even then, she remained the only female appellate judge in the State.

Today, in contrast, two women sit on the Alabama Supreme Court, Justice Jean Williams Brown and Justice Lyn Stuart. The Presiding Judge of the Alabama Court of Civil Appeals is a woman, Judge Sharon Gilbert Yates. Three of the five judges on the Court of Criminal Appeals are women. Fourteen women are state Circuit Court judges, and one of them, Sharon Hindman Hester, presides over her Judicial District. Nationwide, as of this past summer, every State except Oregon and Indiana had at least one woman on its court of last resort; approximately one-third of the chief justices of those courts are women.

Looking beyond our borders, however, we are not in the lead. The Chief Justice of the Supreme Court of Canada is a woman, as are two of that Court's eight other Justices. The Chief Justice of New Zealand is a woman. Five of the sixteen judges on Germany's Federal Constitutional Court are women, and a woman served as president of that court from 1994 until 2002. Five women are members of the European Court of Justice, three as judges and two as advocates-general. Women account for seven out of eighteen judges recently placed on the International Criminal Court; two of them serve as that court's vice-presidents. Still, we are ahead of the U. K., which has just announced the appointment of its first ever Lady Law Lord, Lady Brenda Hale.

True, as Jeanne Coyne of Minnesota's Supreme Court famously said: At the end of the day, a wise old man and a wise old woman will reach the same decision. But it is also true that women, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge Alvin Rubin, described as "a distinctive medley of views influenced by differences in biology, cultural impact, and life experience." Our system of justice is surely richer for the diversity of background and experience of its participants. It was poorer, in relation to the society law exists to serve, when nearly all of its members were cut from the same mold.

I would like to add to my remembrances of courageous women who paved the way for others one final example, a woman who died last summer, after living most of her adult years in Birmingham. Her name was Addine Drew. Though not a lawyer, Deenie Drew has been called the "den mother of the civil rights movement in Birmingham." She devoted her mind, heart, and home to the struggle for an end to rank discrimination against persons of color. She hosted strategy meetings for leaders of the civil rights movement, including Martin Luther King, Jr., Roy Wilkins, Whitney Young, and Dorothy Height. She participated in voter registration efforts, led student sit-ins, and worked to integrate Alabama's libraries.

At a September memorial service for Deenie Drew, Vernon Jordan recalled his first visit to Drew's home, in 1961. He remembered the remarkable assemblage of talented and brave black lawyers who gathered in that house—an inspiration for Jordan, then a recent law school graduate. Drew was a calming presence, Jordan said; her home was "a brief respite from the

mean-spirited, recalcitrant, unrelenting power structure—political and economic—of Birmingham of yore.” Legions of civil rights attorneys, among them U.W. Clemon, Alabama’s first black federal judge, now chief judge of the Northern District of Alabama, were sheltered and nurtured by this wise and caring woman.

Roughly two centuries earlier, in 1776, another notable woman, Abigail Adams, admonished her husband John to “remember the ladies” in the new nation’s code of laws. Today, women need not depend on men’s memories. In our courts, conference rooms, and classrooms, in ever-increasing numbers, women are speaking for themselves, and doing their part, along with *sympathique* brothers-in-law, to help create a better world for our daughters and sons. Women will of course be remembered, for we are everywhere.