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Symposium Honoring the Advocacy, Scholarship, and Jurisprudence of Justice Ruth Bader Ginsburg: Introduction

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INTRODUCTION: SYMPOSIUM HONORING THE ADVOCACY, SCHOLARSHIP, AND JURISPRUDENCE OF JUSTICE RUTH BADER GINSBURG

KATHERINE FRANKE*

I want to welcome back Justice Ginsburg to Columbia Law School. She has been a frequent visitor since her time here as a student in the late 1950s and again as a member of our faculty in the 1970s. I know she knows, but it is worth reiterating that she always has a home here at Columbia.

Forty years and two weeks ago, on January 24, 1972, the Columbia Law School student newspaper reported an exciting development in the history of the law school—Dean Michael Sovern had announced the hiring of the first woman with full tenure to our law faculty. Under the headline “Law Faculty Selects First Woman Member,” the students wrote that “Ruth Ginsberg”—spelling her name wrong—“currently a professor at Harvard will be the first woman to hold a tenured professorship here. It is expected that she will teach courses in procedure, which is her specialty, as well as one course and one clinical seminar on Sex Discrimination.” The article here, and later on, framed Ruth Ginsburg’s expertise as procedure, not sex discrimination—and in fact she had been working with Hans Smit, whose passing we memorialized yesterday, on the Columbia Project on International Procedure. Mike Sovern told me yesterday that when he made her the offer to join the faculty, she insisted that she would come only if she could teach Civil Procedure—something the law school did not need as we already had a deep bench in that area. But she was adamant and he relented.

Just below the article announcing Ginsburg’s hiring was another piece describing how the law school’s “Women’s Rights Group” had been holding a non-credit “Women and the Law” series where outside experts would be coming in to lecture the students on topics such as Equal Protection, Government Benefits, Abortion and Other Controls of the Body, and Fair Employment. Given that prior to Ruth Ginsburg’s hiring there was no one on the law faculty who could teach these issues, the students took it into their own hands and brought in outside experts to fill in the substantial gap in the faculty’s expertise.

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The New York Times covered Ginsburg's hiring at Columbia and congratulated Columbia for having "snared a prize"¹ I must say *The New York Times* has not given as much enthusiastic attention to our hiring decisions since then.

She wasted no time getting involved in gender-equity issues close to home at the University. Within her first month here, she learned that as a cost-saving matter the University was planning to lay off twenty-five maids but no janitors. She took this issue on and in the end no one—male or female—lost their jobs. She also supported a comprehensive pay equity salary study, the extension of health insurance coverage for pregnancy, and the equalization of benefits paid to retired male and female employees under the TIAA-CREF plan—since women lived longer, we received smaller monthly payments. We snared a prize indeed!

Professor Ginsburg distinguished herself at Columbia for skill in melding her teaching, scholarship, and advocacy. Over her eight years on our faculty, she taught a course called Women's Rights: Sex Discrimination and the Law and collaborated in the writing of the first case book in this area—Herma Hill Kay will be talking about the book this afternoon. And, as if starting a new teaching job, writing a case book, agitating for women's rights on campus, serving in the leadership of many professional committees, and being mother to two young children weren't enough, she also founded the ACLU's Women's Rights Project and litigated some of the most important gender-equality cases of the modern era.

Between 1972 and 1980, she filed briefs in nine of the major sex discrimination cases decided by the Supreme Court and personally argued six of them, winning all but one. She also filed amicus briefs in fifteen related cases.

Along the way, she became one of the principal architects of the constitutional paradigm of sex equality we have inherited today. By the time she left Columbia Law School and the Women's Rights Project at the ACLU in 1980 to serve on the United States Court of Appeals in D.C., sex discrimination no longer fell outside of the scope of the Fourteenth Amendment. Thanks to her advocacy, most formal sex-based classifications by state and local governments had been found to violate the Constitution, and sex-based state action was subject to a heightened level of judicial scrutiny. Some prominent feminist scholars at the time were critical of the strategy Ruth Ginsburg charted, of bringing sex discrimination cases with male plaintiffs. It resulted, they argued, in a toothless, sex-blind, and formalistic erasure of the significance of sex that one described as "empty at

¹ Lesley Oelsner, *Columbia Law Snared a Prize in the Quest for Women Professors*, N.Y. TIMES, Jan. 26, 1972, at 32.

its core.”² For these critics, it was unable to grapple with substantive inequalities between women and men.

More recent work, particularly that of Cary Franklin, has taken a very different view.³ Ginsburg’s strategy of representing male plaintiffs has been lauded as deeply radical, if not subversive, in nature. Rather than advancing a kind of sex-blind empty formalism, what she was really up to was developing an anti-stereotyping principle. By representing non-traditional men—men who were primary caretakers of their children and their elderly mothers,⁴ men who were not the primary breadwinners in the family,⁵ and men who defied traditional norms of masculinity in the 1970s⁶—she was taking on a lot more than formal sex-based classifications. She was crafting a notion of sex-based injustice that highlighted sex-stereotyping over mere classification.

We’re very fortunate to have been able to assemble for the first panel this afternoon a group of lawyers and legal academics who worked closely with Ruth Ginsburg in the 1970s and who can shed greater light on the complex ways in which gender inequality became a problem of constitutional concern during that time. I really look forward to their thoughts on the nature, wisdom, and utility of the litigation strategy Ginsburg developed and honed while at Columbia Law School and the ACLU’s Women’s Rights Project.

2 Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22 (1999); see also Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 56 (1979).

3 Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 85 (2010).

4 Ginsburg’s first sex-discrimination case came in 1970 representing Charles Moritz, “a sexagenarian book editor and life-long bachelor who lived with and cared for his ailing mother in Denver, Colorado. Moritz’s troubles began when he took a deduction on his 1968 federal income tax return for expenses related to his mother’s care.” Franklin, *The Anti-Stereotyping Principle*, *supra* note 3, at 91; see *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972).

5 *Weinberger v. Wiesenfeld*, 420 U.S. 636, 639 (1975) (the plaintiff’s wife’s earnings were “substantially larger” than his and provided the “couple’s principal source of support”); *Frontiero v. Richardson*, 411 U.S. 677, 680 & n.4 (1973) (the male plaintiff was a full-time college student with no earned income).

6 The casebook Ginsburg co-authored opened with the observation that both men and women suffered from sex discrimination when they did not conform to “assigned roles,” but that “the very assurance of [male] dominance marks out for even greater social disapproval men whose unconventional interests and abilities lead them to choose different lifestyles.” KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA H. KAY, *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* xii (1974).

It is important to note, however, that Ruth Ginsburg's early work as academic and as advocate had a wider aperture than just the problem of gender equality in the United States. She came to Columbia in 1972 in no small measure out of her work with Hans Smit and the Project on International Procedure. Hans took her under his wing, hired her to work with him on a project comparing United States and Swedish procedure, and was one of her principal supporters when the faculty considered hiring her at Columbia. Ginsburg has often noted that her eyes were first opened to the prospect of a campaign for sex equality in Scandinavia in the early 1960s, particularly in Sweden, where the women's movement got underway earlier than it did in the United States.⁷ The Swedish women's movement that Ruth Ginsburg was exposed to in the 1960s and 1970s, as Franklin and others have noted, framed the problem of sex-inequality as a matter of sex-stereotyping—of masculine sex roles for men and feminine sex roles for women. The Swedes focused on getting more women into Parliament and more men into taking care of their children. Their approach clearly influenced Ruth Ginsburg's teaching, advocacy, and overall conception of gender-based inequality. Concepts drawn from the writing of leading Swedish feminists made their way into the casebook she co-authored in 1974 and into the briefs she wrote in *Califano v. Goldfarb*, *Weinberger v. Wiesenfeld*, *Kahn v. Shevin*, and *Reed v. Reed*.

In light of the important transnational influences of Ruth Ginsburg's early gender-equality advocacy and scholarship, we are delighted to have a panel this afternoon with prominent jurists from national high courts outside of the United States who will reflect on the paradigms of gender equality in their jurisdictions.

Our aim today is to take stock of Ruth Ginsburg's forty-year legacy of scholarship, advocacy and teaching at Columbia Law School, at the ACLU's Women's Rights Project, and as a jurist.

In so many ways, Columbia Law School of 1972 was a very different place than it is today. In 1972, only one in five students in the 1L class was a woman, while today it's about half. Ruth Ginsburg was the first woman to join our faculty with tenure, while today we have twenty-six women members of the full-time faculty, sixteen tenured and ten untenured (in this second number I count our amazing clinicians). Professor Ginsburg taught the first Women and Law course at Columbia, while today we have a vital Center on Gender & Sexuality Law, and scores of classes on gender-related subjects, such as "Feminist Theory Workshop," "Gender Justice," "Family Law," "Domestic Violence and the Law," and "Meanings of Motherhood: Legal and Historical Perspectives," to name

⁷ Franklin, *The Anti-Stereotyping Principle*, *supra* note 3, at 97 n.64.

only a few. We also have the nation's first Sexuality and Gender Law Clinic run by Suzanne Goldberg—whom, I might add, just like Professor Ginsburg, was hired as both an expert in Civil Procedure and Sexuality and Gender Law.

But the changes at the law school since 1972 have not only been in the expansion of our faculty expertise in gender equality. The many women who have been hired in the last forty years have come from virtually every field in which Columbia Law School excels—from our traditional strengths in public law and corporate law to immigration, human rights, financial regulation, criminal, health, contract, and intellectual property law.

Among those wonderful colleagues are two who will join me up here in a moment: Gillian Metzger and Abbe Gluck. Gillian is among the nation's top constitutional and administrative law scholars whose work has taken on some of the hardest puzzles in federalism. She serves as the Vice Dean of the law school and is responsible for nurturing and developing the faculty's intellectual community. Abbe Gluck joined the faculty two years ago and, in addition to teaching and writing on civil procedure, legislation, and health law, has done an incredible job of bringing a robust health law program to the law school. They were both Justice Ginsburg's clerks and will shortly begin our morning's program—reuniting with the Justice in conversation on a wide range of topics.

Thank you all for joining us today, and special thanks to our panelists whose own advocacy and writing have shaped the field of sex equality in important ways across a range of diverse contexts.