

Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*

The Honorable Ruth Bader Ginsburg**

Among the many grand contributions NAWJ has made to our health and welfare as judges, I recall with particular pleasure Gladys Kessler's remarks at the 1983 ABA Annual Meeting. She captured a difficult audience with her clear explanation why augmenting the number of women judges is not merely proper, it is necessary to merit selection and the pursuit of excellence. With good humor, but firmly, she told her Judicial Administration Division listeners that, among the 1976-1980 nominees to the federal bench, the men and women were just about evenly matched so far as education and achievement were concerned, with one notable exception: in academic honors the women far outdistanced the men.

Barbara Tuchman brought a similar message to the Cosmos Club in the fall of 1983 when, as guest of the Club, she received the twentieth annual Cosmos award. The presentation occurred at quarters where women were not—and as far as I know, still are not—accepted as members. Barbara Tuchman remarked on the Club's prime, stated criterion for membership—"achievement." If achievement is indeed the standard, historian Tuchman commented, why then the exclusion of women is the Club's loss ever so much more than it is women's. (This Association helped gain ABA approval some time ago for a modest resolution declaring it "inappropriate" for a judge to belong to a club which has discriminatory membership policies; such membership, the ABA resolution states, "may give rise to perceptions that the judge's impartiality is impaired.")

I am concerned about a threat to women achievers not only from men who are insecure, and whose insecurity causes them to fear women who do not shrink—or pretend to defer—when a male voice speaks. I am concerned too about women, some of them feminists, who seem to have joined the attack by condemning their sis-

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ters for taking on "male" values and culture. Tonight, I would like to share a few still simmering thoughts—some thinking out loud with you—on that subject. I do so because I am among friends who will be indulgent if I tread on controversial ground and raise questions which have no plainly right or clearly wrong answers.

I spent most of July 1984 teaching at an international seminar for judges and lawyers in Salzburg, Austria, and was told of a session held at the same stately mansion just before the Christmas holiday. The organizers of the December 1983 session were European women who were deeply troubled by what they describe as a resurgence in western Europe of biological and psychological deterministic views of gender. Those women have embarked on a project they titled, perhaps in part for dramatic effect, "Women and Fascism." They see grave danger in contemporary attempts to link women with prime or dominant concern and attendant responsibility for family and children, a linkage which places women in a sphere set apart from men. Their notion is that the tight linkage of women and growing children, whether pressed by male chauvinists or by feminists, threatens to set back gains made in the 1960's and 1970's toward women's independence and equality.

My good friend Cynthia Epstein, at her installation as president of the Eastern Sociological Society, sounded a similar theme, although in less ominous terms. She spoke of "The Fallacy of the Mislplaced Dichotomy," of a revived tendency to emphasize differences, rather than similarities, between women and men. In the past, she said, people—mostly men—who emphasized the differences between the sexes judged women inferior. Today, she observed, there are feminists who rate women different and superior. Both perspectives are badly distorted, she warns; both focus on tails, not centers, of distributional curves.

I will mention what may be a key testing case in the United States. Until fairly recently, employers routinely fired or refused to hire pregnant women or denied them health and leave benefits despite the availability of such benefits to persons otherwise disabled for a temporary period. In the late 1970's Congress overturned Supreme Court precedent by amending Title VII to say sex discrimination in employment includes discrimination on the basis of pregnancy or childbirth. Now the hotly debated issues are whether pregnant women should receive not simply the same benefits, but benefits beyond those accorded others unable to work for a temporary period, and whether there should be special rights for mothers.

The pregnancy question has come up in court this way. An

employer provides no leave time for employees until they have worked for the company for a year. But the state's law (Montana's or California's, for example) requires leave for pregnancy even if leave is not granted for any other reason. Is such a law compatible with Title VII? Does it reflect a theory of women's rights that those concerned with the advancement of women's status should cheer?

What about gainfully-employed mothers, among them, women holding professional posts? Some have proposed, for example, that law schools lengthen professional tenure-eligibility periods and provide part-time tenure positions for women teachers with child care obligations. Similar arrangements might be made for women lawyers in the public and private sectors. Perhaps we could even create part-time judgeships for women with young children. That, apparently, is done in some European countries—countries which have career (or civil service) judiciaries. Two judges from the Netherlands at Salzburg with me in the summer of 1984 said such arrangements are possible and in fact occur in their nation.

Some feminists point out that special favors for women, in the past, have had a boomerang effect. The state once protected women, but not men, from working long hours or at night. No doubt some women employed in garment factory sweatshops were immediately helped by that brand of protection. Among the nonbenign results of the protection, however, certain desirable, high-paying jobs were reserved for men. If the employer must provide leave for pregnant women even when no one else gets leave, or part-time work for mothers only, will the tendency be to avoid, to the extent possible, hiring women of childbearing age?

Other feminists argue forcibly that women, at least as childbearers, perform a service for society that nature did not equip men to perform, a service essential to the survival of the human race, one that should attract special recognition and rewards. (People concerned with population growth, one might note, have doubts about encouraging such service.)

Two law teachers, Elyce Zenoff of George Washington and Kathryn Lorio of Loyola in New Orleans, in a recent study of women law professors, expressed doubts about special rules for a mother's tenure. They recommended instead employer establishment or support of day-care centers, thereby signalling appreciation that members of both sexes have parental, child-rearing obligations.

I share a preference for that approach to parenthood. The

more we think exclusively of women and children as the natural unit or package, leaving men out of our sight, the more difficult it will be, I fear, for women to achieve fully equal status in all aspects of life and work. I appreciate the very hard immediate and long-term practical difficulties of involving men with home and children. Nonetheless, were I Queen, my principal affirmative action plan would have three legs. First, it would promote equal educational opportunity and effective job training for women, so they would not be reduced to dependency on a man or the state. Second, my plan would give men encouragement and incentives to share more evenly with women the joys, responsibilities, worries, upsets, and sometimes tedium of raising children from infancy to adulthood. (This, I admit, is the most challenging part of the plan to make concrete and implement.) Third, the plan would make quality day care available from infancy on. Children in my ideal world would not be women's priorities, they would be human priorities.

A May 1984 *New York Times* column reported on the problem women are encountering gaining partnerships in large firms. The child-raising question is a large part of the problem. One new mother, who had done well at her law firm prior to childbirth, was quoted as saying:

They just stopped thinking of me for the big stuff. And I wasn't getting the support I needed, either in the way of secretarial help or younger associates. Ultimately, I decided I didn't want to be partner as badly as I had before the baby. I'm not sure which came first, their lack of commitment to me or mine to them.

Another young mother, who had recently left corporate practice, commented: "As long as the young male lawyers aren't doing serious child care, which they aren't, this will be seen as a women's problem. As long as that's the case, there won't be an overwhelming number of women partners."

I recall how trying it sometimes was when my children were small. My son, the second of the two children in our family, was a lively child who resisted discipline from his parents and teachers; the kind difficult as a youngster but now, just over his teens, on his way to becoming a fine grown-up. In my son's early grade school years there were calls almost every month from the principal requesting a meeting with me to discuss my son's most recent adventure. One afternoon, when I was particularly weary, I responded: "This child has two parents. Please alternate calls for conferences." After that, although I discerned no quick change in my son's behavior, the telephone calls came barely once a semes-

ter. There was considerably more reluctance to take a father away from his work.

My D.C. Circuit colleague, Judge Patricia M. Wald, is the mother of five children. She once remarked: "Our businesses and professions do not yet credit the relentless demands that life makes on women; they persist in talking about 'choices' that no one should have to make." It is critical, I believe, to work continuously, and despite the frustrations, toward educating men in our businesses and professions so they will gain in their appreciation of the demands of which Judge Wald spoke—and one fine day, assume a fair share of the responsibility for answering those demands.

In an April 1984 *Washington Post* column, Ellen Goodman quoted Georgetown law professor Wendy Williams as warning that women haven't yet found a way to be treated "equally" and "specially." Goodman's comment continues:

Special treatment comes with strings attached. Historically, it comes with lower wages, employer skepticism and the resentment of co-workers.

The security needs of pregnant workers are crucial. But before retreating to the bad old days, we ought to at least give "equality" a fair shot.

There is a more idealistic if more difficult solution to the conflict. By establishing women as "normal workers," we can extend the law to men as our equals. Why shouldn't any worker who has been disabled for [some weeks or months have a fair chance] to return to his or her job? Why shouldn't fathers also be entitled to benefits after parental leave?

....

Instead of settling for equally shabby or dangerously preferential treatment, we can embrace the ideal of equally decent treatment.

That idea is not beyond imagining. It was implemented in small measure, for example, in the summer of 1984 in a beginning overture in the pension area, when Congress passed the Retirement Equity Act of 1984. The provisions of that Act are applicable to both women and men, but they were framed with a view to people (mainly women) who do not fit the labor force participation pattern traditionally associated with working men. Other measures in the hopper, with considerable bipartisan support, include an important preliminary step—a GAO study of the feasibility of providing childcare benefits for federal employees (private sector employers have reported impressive gains in productivity as a result of such benefits), and pension and health insurance coverage for divorced spouses of retired federal employees.

I have been told that women of my generation who made it in

the law did so only by assimilating to male roles or modes, by "thinking like men," becoming "tough, aggressive, hard-driving, unsentimental, unemotional, and realistic." I confess that I do not really relate to that description or even fully comprehend what male modes means. (George Gilder says, in contrast, that men are by nature irresponsible and unproductive, and that women's prime work is to civilize men.) Is a gray flannel suit a male mode? What about blue jeans—standard attire for some who deplore dressing for success. Jeans originated, did they not, as blue collar workmen's clothes or cowboy attire. Are Levi's or Wrangler's appropriate dress for one who does not wish to be labeled an assimilationist?

In candor, I have never thought of myself in a male mode any more than I have ever thought of myself as a Marabel Morganschooled "Total Woman." I do firmly believe, as stated in the title to a children's song made popular by *Ms.*, that the changes wrought in the 1970's helped all of us to be "Free(r) to be You and Me." (Among others aided, the women who performed with such skill and stamina at the Olympics owe something to the push for equal opportunity. One of the women coaches said of the change: "It was very painful for me. People would put me down for my size, vigor, aggressiveness, and athletic ability. Now Olympian women are cheered and admired for those same qualities. In my day, we always had a guilt trip, and could never fully go in there, with no reservations, and give it our all.")

When asked what I think of the thesis that women and men speak in or respond to different voices or have fundamentally dissimilar psyches and moral systems, I demur. Accepting the truth of the thesis generally, or "on the average," how should I act on it? Certainly not the way insurance companies do with respect to average male and female life expectancies. I am fearful, or suspicious, of generalizations about the way women or men are. My life's experience indicates that they cannot guide me reliably in making decisions about particular individuals. At least in learning and practicing law, I have uncovered no natural superiority or deficiency in either sex. In class or in grading papers over seventeen years, and now in reading briefs and listening to arguments, I have rarely detected any identifiably male or female thinking—or even penmanship. (A male colleague, I hasten to add, sees it differently. UCLA's Professor Kenneth L. Karst recently wrote that his women law students generally bring to discussions the perceptions and values of the web of relationship and a sense of justice focused on care and connection.)

I am drawn to remarks of a St. John's College philosophy professor, Eva Brann, on this subject. She wrote along these lines in a January 1983 essay: Today's separate modes theses bear some resemblance to the old typology in which the female is classified in terms of passion and its bonds, the male in terms of reason and its distinctions. The current comparison is between men's affinity to autonomy and achievement, women's, to caring and responsibility within a network of relationships. These configurations or caricatures are age-old; they reflect ancient wisdom one need not reject. They have been called the Male and Female principle. Professor Brann ultimately asks: Are not actual men and women at their best when they have a strong admixture of both principles?

Perhaps of some relevance as well to the question—what is women's way—is the research women primatologists have been doing. They tell us that although male dominance of groups is common, females of many species are fiercely competitive, resourceful and independent, sexually assertive and promiscuous and, in some cases, more prone than males to wanderlust. I hesitate to press comparisons to the animal kingdom, however. Stanford professors Eleanor Maccoby and Carol Jacklin did, after all, confirm a link between aggression and dominance in little boys—and in apes. But, they hastened to add, human boys grow up. The leadership style most effective in our civilized, sophisticated society is not the ruthless tough guy who forcibly imposes his will on others. Rather, the qualities that count are the ability to conciliate among opposing factions and to foster development of younger, less experienced people in return for their loyalties. These qualities do not appear to be linked to one sex to a greater extent than to the other.

I have reached what the French call "a certain age," described with more enthusiasm by some in the United States as the time life begins. That occurs, I'm told, when your youngest child goes off to college, as mine did in 1983. It is a good time both to think back on the lessons of the past, and to look to the future with renewed energy. My time of life, for women, was once called, with sadness, the "empty nest" days. There will be no empty nest for women who work to achieve a world in which women stand together with, and not behind, men on the job and at home, in equal partnership.

Hunter College president Donna Shalala said in her inaugural address:

[I]n the 1980s women in power who expect to be counted must be more than role models—they must make a difference for women, for minorities, for the poor. A woman in power must

bring new sensitivity to her position. We are expected to foster change—to humanize the institutions for which we are responsible.

I agree with that comment. But I also agree with Cynthia Epstein, the sociologist I quoted earlier. She cautioned:

Society should not assign to women, simply because they are women, the primary role of guardian of social consciousness. Human caring and concern, for home, children, and the welfare of others, ought not be regarded as dominantly “women’s work,” it should become the work of all.

That is the grand ideal I hold for the turn of the century and beyond. I have seen a part of it realized in my lifetime. My dream for my children and their children, perhaps some of you have it too, is of men and women who, in combination, forge new, shared patterns of career and parenthood, and strive to create a society that facilitates those patterns.

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