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CLAIMING A SPACE IN THE LAW SCHOOL CURRICULUM: A CASEBOOK ON SEX-BASED DISCRIMINATION

HERMA HILL KAY*

INTRODUCTION

We are gathered here today to celebrate the 40th anniversary of Justice Ginsburg's appointment in 1972 as Columbia's first woman law professor. That auspicious date also marks the beginning of my collaboration with her on a law school casebook published in 1974 on the newly-created subject of sex-based discrimination.¹ Linda Kerber traced the general history of this and other casebooks that appeared about the same time² in her wonderfully insightful historical essay, *Writing Our Own Rare Books*, presented at a symposium held at Yale Law School in April 2000.³ In recalling those heady times today, I will offer a more detailed account of how our first edition came into being, as well as a comparison of how its coverage—and the subject itself—has changed over the ensuing thirty-eight years.

I. How the RBG-KMD-HHK Collaboration Came About and Why It Was Published as the KMD-RBG-HHK Casebook

The demand for law school courses on “Women and the Law” followed closely after the rapid increase of women law students beginning in the late 1960s,⁴ who did

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1 KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, *CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* (1974).

2 Professor Leo Kanowitz published a coursebook a year earlier, *SEX ROLES IN LAW AND SOCIETY: CASES AND MATERIALS* (1973), which contained text excerpts from his earlier book, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969). The other casebook came out in 1975: BARBARA ALLEN BABCOCK, ANN E. FREEDMAN, ELEANOR NORTON & SUSAN DELLER ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975).

3 Linda Kerber, *Writing Our Own Rare Books*, 14 *YALE J.L. & FEMINISM* 429 (2002).

4 See COUNCIL OF THE ABA SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, *REPORTS*, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.authcheckdam.pdf (showing that the first year female J.D. enrollment in ABA-approved law schools increased from 7.2 % of total J.D. enrollment

not find the legal issues that affected them covered in the traditional curriculum. All three of us responded individually to requests from our students to create such courses. In 1971, Kenneth M. Davidson was an Associate Professor at SUNY Buffalo, where he was teaching a course on Women and the Law, primarily focused on sex discrimination in employment, to law students and undergraduates, and using his own mimeographed materials. A year earlier, Ruth Bader Ginsburg had launched a course on Women's Rights: Sex Discrimination and the Law, at Rutgers, Newark. She thus explained:

Around 1970, women students whose conscience had awakened at least as much as mine, women encouraged by a vibrant movement for racial equality, asked for a seminar on Women and the Law. I repaired to the Library. There, in the space of a month, I read every federal decision *ever* published involving women's legal status, and every law review article. That was no grand feat. There were not many decisions and not much in the way of commentary. Probably less altogether than today accumulates in six months time.⁵

Berkeley women students brought a similar request to me at about the same time: in 1970, I helped them persuade a practitioner, Colquit Meacham Walker, to offer a Women and the Law Seminar by promising to attend all of the class sessions.

No casebooks existed for such a course. Ken wanted to turn his materials into a casebook, but he also wanted to recruit co-authors to join the project and add materials on other areas where sex discrimination was beginning to make itself felt. He sent his materials to me. I read them and was immediately struck by how well a chapter on Family Law would work with Ken's employment materials: the connections between the stereotypes ingrained in the roles of "wife" and "office wife" (which were just beginning to be explored) were even then too clear to overlook. Ken welcomed my participation, and we both agreed that the projected casebook would need the collaboration of an expert on Constitutional Law. Both of us thought of Ruth Bader Ginsburg, who as the Director of the ACLU's Women's Rights Project was already litigating the path-breaking Equal Protection cases before the United States Supreme Court that would ultimately write women into the Constitution for the first time in its history. Neither of us knew her personally, so we arranged to meet her at the AALS-sponsored Conference on The Law School Curriculum and the Legal Rights of Women that she had helped to organize

in 1967-70 to 10.3% in 1970-71, 12.0% in 1971-72, 15.7% in 1972-73, and 20.2% in 1973-74).

5 Ruth Bader Ginsburg, Remarks for Rutgers (Apr. 11, 1995).

which was to take place at NYU Law School on October 20–21, 1972.⁶

A major topic of discussion at the Conference was whether the subject of Women and the Law should remain a stand-alone course, or whether coverage of the subject should be distributed more broadly across the curriculum. The preliminary announcement for the event had expressed a clear preference for the latter option. It acknowledged that “dedicated faculty members” had taught such courses to “students who have a special interest in the subject of women’s rights and the ways in which the law affects all women.” It cautioned, however, that “[u]nless information on the legal rights and disabilities of women is included in the most basic law school courses, the nation’s law school graduates will continue to have scant understanding of the legal restrictions under which 53 percent of the population lives.”⁷ The three of us were among the “dedicated faculty” who had been engaged in the former course, and when the Conference was over, we concluded that both options were viable and should be pursued independently. For ourselves, we elected to prepare a casebook for a stand-alone course.

Ruth handled the business end of the project: she managed to convince Roger Noreen, the Legal Editor for West Publishing Company, to sign a contract with the three of us to produce a casebook on Sex-Based Discrimination. She was convinced, and Ken and I agreed, that the subject was limitless: no area of the law could escape the universal separation of men and women into two groups with different assigned roles. In the opening paragraph of the Foreword to the First Edition—signed by the three of us but written, if memory serves, by Ruth alone—we cited the noted female anthropologist, Margaret Mead, for the proposition that no known culture had failed to establish a division of roles based on sex, and the noted writer, Simone de Beauvoir, for the insight that “man is the creator and controller of culture and its norms while woman is the Other whose place is fixed by him.”⁸ We observed that although men have thereby gained “the greater share of power and prestige, [they] are no less trapped in their assigned roles.”⁹

6 Ruth Bader Ginsburg was a member of the AALS Committee on Women in Legal Education, which had planned the Conference, *see* 1972 AALS PROCEEDINGS PART ONE, SECTION ONE 91–93 (1972), as well as a member of the AALS Executive Committee in 1972.

7 AALS SYMPOSIUM ON THE LAW SCHOOL CURRICULUM AND THE LEGAL RIGHTS OF WOMEN, ADVANCE NOTICE, 1972.

8 DAVIDSON, GINSBURG & KAY, *supra* note 1, at XI (citing MARGARET MEAD, MALE AND FEMALE 39 (1949) and SIMONE DE BEAUVOIR, THE SECOND SEX xvi (1949)).

9 *Id.* at XII.

So what role did we hope our casebook might play in addressing this situation? What we said then is easily recognized today as vintage Ginsburg:

Although we recognize the fundamental importance of cultural expectations to sex-based discrimination, we have chosen not to focus these materials on the direct confrontation of society's projection of sex roles. . . . because we believe that, as an initial device, the law is likely to be more effective as an aid in opening arenas for personal action. Conditions of contemporary living, among them curtailed population goals and reduction of necessary home-centered activity, have created a climate in which women and men who are not so captivated by traditional roles may be expected to create new traditions by their actions, if artificial barriers are removed, and avenues of opportunity held open to them. Hopefully in aid of men and women who are willing to explore their potential as human beings, we have directed our attention to the support law has provided for traditional roles, as well as the stimulus law might provide toward a society in which members of both sexes are free to develop their individual talents.¹⁰

Given this focus, it followed that we might have selected any area of the law as the vehicle for demonstrating the law's capacity for removing artificial barriers and opening avenues of opportunity for both men and women. Our choice was made pragmatically, driven in part by our areas of individual expertise, and by the fortunate coincidence that those areas were among the ones where sex roles were most firmly established: the family, employment, education, criminal law, and the overarching regulation of the nation's economic, political, and social order imposed by the federal constitution.

It's hard to imagine now, but we did everything by hand. Email did not exist, and neither did HeinOnline. But we were not without information about current events affecting our work: at one point, Ken sent us a note asking, "How does it feel to be writing a book that is being written every day in the pages of the *New York Times*?" More importantly, Ruth Bader Ginsburg and the ACLU Women's Rights Project were constantly on the lookout for significant cases that were included in the book. In the first

10 *Id.* at XII–XIII.

edition appeared *Reed*,¹¹ *Frontiero*,¹² and *Moritz*.¹³ Editing a casebook with an advocate as co-author is a bit like weaving the cloth before making the garment: it puts you in on the ground floor. My own work in divorce reform in California and later on the Uniform Marriage and Divorce Act also found its way into the book. The finished manuscript had 1020 pages, including the statutory appendix.

There was one final wrinkle. Roger Noreen, who had not disturbed us while we were writing the book, resurfaced as publication grew near. He believed the book would gain market appeal if either Ruth's name or mine was given first place in the list of co-authors. Ruth, who had learned that ending sex discrimination begins at home, was adamantly opposed to the idea. The co-authors should be listed in alphabetical order, and no priority should be given to either of the female authors over their male colleague. Roger yielded, and the book was published as Davidson, Ginsburg, and Kay.

II. Reception of the Book by Law Teachers and Students

The book's appearance was cause for celebration. Women students at Berkeley held a reception honoring its publication. Nancy L. Davis, who with Wendy Webster Williams and Mary Dunlap was soon teaching a course at Stanford on the subject, helped organize the event. The next year, Aleta Wallach published what can fairly be characterized as a "rave" review of our book, comparing it favorably to the one published a year earlier by Leo Kanowitz. Most salient for my purposes here today, she observed:

In the context of our continuing efforts to establish respected Women and the Law courses in the law school curriculum, it is obvious that wholly apart from any critical appraisal, the publication of two Women and the Law casebooks is a momentous event. The mere existence of these casebooks has legitimated the discipline itself and has made easily accessible the materials needed to facilitate the teaching of the growing

11 *Reed v. Reed*, 404 U.S. 71 (1971).

12 *Frontiero v. Richardson*, 411 U.S. 677 (1973). Even though *Reed* was handed down earlier, *Frontiero* was Ginsburg's first argument before the Supreme Court.

13 *Comm'r v. Moritz*, 469 F.2d 466 (10th Cir. 1972) *cert. denied*, 412 U.S. 906 (1973). *Moritz* was the federal tax case that Marty Ginsburg had called to Ruth's attention: he told the story on the occasion of his being awarded the ABA Section of Taxation's Distinguished Service Award. See Martin D. Ginsburg, *Distinguished Service Award Presentation*, 25 ABA SEC. OF TAX'N NEWSQUARTERLY 7 (Summer 2006), reprinted in *In Remembrance: Martin D. Ginsburg, 1932-2010*, 29 ABA SEC. OF TAX'N NEWSQUARTERLY 24 (Summer 2010).

number of law school courses on Women and the Law.¹⁴

Her observation was borne out by a young entry-level professor who told me that her Dean had been unwilling to let her offer a course in Women and the Law, because he couldn't understand what there was to teach after the first day of class. When she brought our book to show him, he gave his permission. At Hastings, where Leo Kanowitz was teaching the course from his book, the students asked him to use our book instead. Leo, generous to a fault, agreed to do so. One of the most wonderful events occurred in Wisconsin immediately after our book appeared, but I didn't learn about it until September 11, 2000.

I was in Madison doing interviews about Professor Margo Melli, one of the early women law professors about whom I am currently writing. I had scheduled an interview with Linda Roberson, who had been Margo's student, R.A., and close colleague on many projects. She came to the interview bringing a copy of the first edition of our book under her arm. She reported her own disappointment and that of some of her classmates who had graduated in 1974, and could not take a course taught from our book. So she and about eight or nine other recent graduates decided to teach it to themselves:

[We] solemnly ordered copies of the book, and got together once a week to go through it. We assigned readings for each week, and one of us was responsible for talking about the readings, and doing additional preparation. We worked through the casebook in 1974 and 1975—one semester's time—until we finished it. And ever since then Ruth Bader Ginsburg and Herma Hill Kay have been two of my most incredible idols. The book has been sitting on the bookshelf next to my desk for 26 years.¹⁵

III. The Book's Evolving Coverage: 1974–2012

Two years after the anniversary of Justice Ginsburg's appointment at Columbia, our casebook will have been consistently in print for 40 years. In that time, it has gone through seven editions. The Davidson, Ginsburg, and Kay collaboration marked only the first edition. After its publication, both Davidson and Ginsburg left law teaching: she moved

14 Aleta Wallach, Book Review, 10 HARV. C.R.-C.L. L. REV. 252, 254 (1975).

15 Interview with Linda Roberson, in Madison, Wisconsin (Sept. 11, 2000). Used with permission of Linda Roberson. Naturally, I autographed the first edition for her, and later sent her a copy of the 2002 fifth edition to keep it company on her shelf. It was the least I could do.

to the federal bench, while he joined government service on the executive-administrative side. I brought out the second and third editions in 1981 and 1988 as a sole author. When I became Dean of Berkeley Law in 1992, it soon became obvious that I did not have time to continue that practice. Happily, Professor Martha S. West of the UC Davis law faculty agreed to join me as a co-author. Together, she and I brought out the fourth, fifth, and sixth editions, in 1996, 2002, and 2006. Much to my regret, she then decided to retire both from law teaching and casebook editing. I was not then (or now) ready to retire, so I began thinking about a new co-author. I remembered a Boalt graduate then on the Seton Hall Law faculty, Professor Tristin K. Green, who was visiting at Berkeley in 2009. I had read some of her work in employment discrimination and was impressed. I invited her to join me in producing the seventh edition. She accepted, and shortly thereafter moved from Seton Hall to the University of San Francisco, thus making our collaboration very convenient. Together, we gave the casebook its first major substantive revision since the mid-1980s, and its content now more closely reflects the evolution of the field itself, as well as the volume of its increased litigation: the seventh edition is 279 pages longer than the first.

Looking at these seven volumes has produced a disquieting generalization: the first edition reflected the evolving constitutional theories developed by Ruth Bader Ginsburg the advocate; the fourth edition, appearing as it did three years after Ginsburg had joined the Court, reflected her work as a jurist; and the seventh edition reflects the work of a new conservative Supreme Court majority that now too frequently features Justice Ginsburg in impassioned dissent.

Foreword: One Third of the Court. This brief essay sets the tone of the seventh edition as it both celebrates and speculates about the future impact on the law now that the Court's membership is one-third female. Significantly, the "O'Connor" Court has become the "Kennedy" Court, a development that has produced more Ginsburg dissents to be included in the book's five chapters. The future course of the Court's constitutional critique of sex-based classifications is presently uncertain.

Chapter One: Constitutional Limits on Sex-Based Discrimination. Reflecting the Supreme Court's increased activity in fashioning the constitutional limits on the use of sex classifications by state actors, both in terms of new coverage and a more nuanced analysis, this chapter is now almost entirely composed of cases from the High Court, many of them either argued by Ruth Bader Ginsburg as an advocate in the 1970s, or written by Justice Ginsburg after 1993. Her path-breaking opinion in *VMJ*¹⁶ is given full treatment, as it represents what is and may remain the high point of the Court's "skeptical

16 *United States v. Virginia*, 518 U.S. 515 (1996).

scrutiny” of sex classifications. It is followed by a greatly expanded Text Note on Women in the Military, which reflects the increased presence of women in the armed services, but also records their continued exclusion from combat positions that often lead to higher rank, as well as the continued failure of all branches of the services and the service academies to curb the widespread sexual harassment of women.

Chapter Two: Sexual Interaction Within the Family. The law regulating family relationships was becoming less rigid when the first edition appeared in the mid-1970s, as the national debate over no-fault divorce, abortion, and the ratification of the Equal Rights Amendment put a spotlight on the status of women as homemakers, mothers, and workers. Today, as the debate centers around same-sex marriage and family life, a conservative counterweight has exerted its influence against an emerging trend toward greater flexibility in family forms and childrearing practices. A newly-realigned federal Congress rigidly divided along ideological lines was elected in November 2010, and its actions on federal programs affecting women and children has produced what some have called “the war on women.” The seventh edition catalogues the significant increase in abortion restrictions and regulations that has taken place in states around the country, while the Court’s 5-4 decision in *Gonzales v. Carhart*¹⁷ (Justice Ginsburg dissenting) does not give reassurance that a woman’s right to choose whether to bear a child will continue to enjoy constitutional protection.

Chapter Three: Women and Employment. Professor Tristin K. Green has reorganized this chapter to give greater clarity to the structure of Title VII employment discrimination litigation,¹⁸ dividing the coverage between individual discrimination and systemic discrimination before focusing on the statute’s specific applications to sex discrimination claims. Again, the cases analyzed are largely the work of the Supreme Court, and like that Court’s constitutional decisions, the theme changes from *VMI*’s skeptical scrutiny to a reliance on procedural regularity that is susceptible of masking implausible statutory arguments. Examples are *Ledbetter*¹⁹ and *Wal-Mart*,²⁰ both of which produced Ginsburg dissents. A new Text Note on Women in Lower Level Jobs added by Tristin Green and an updated Text Note on the Role of Unions in Employment Discrimination concludes the coverage.

17 *Gonzales v. Carhart*, 550 U.S. 124 (2007).

18 Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e *et seq.* (1964).

19 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

20 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Chapter Four: Educational Opportunity. Both co-authors worked on parts of this chapter. Its coverage continues to promise the greatest and most far-reaching avenue for lasting change. Title IX,²¹ newly created when the first edition appeared, is coming into its own today as an engine for restructuring the way children are taught to learn, college students learn to play, and all educational institutions wrestle with the crucial decisions of how to hire, promote, and compensate faculty. The law is developing rapidly in this area, fueled by the Court's willingness in 1992 to imply a private cause of action for damages under the statute, and is encompassing situations only dimly comprehended in 1972. Examples include the regulation of peer sexual harassment, and the careful monitoring of funding of men's and women's sports.

Chapter Five: Women and Crime. Unlike the other chapters, this one is almost entirely composed of state and lower federal court decisions. The all-male Supreme Court's 1981 decision in *Michael M.*,²² which upheld the constitutionality of a California statutory rape law that punished only male offenders, is the single exception. The coverage here has expanded beyond the first edition's emphasis on regulation of sexuality and differential sentencing to include greater examination of the topics of violence against women, and of opportunities available to women in law enforcement. The section on prostitution now includes both First Amendment defenses against regulation as well as a note on trafficking in women and children.

CONCLUSION

In conclusion, Justice Ginsburg, it is with great pleasure that I present a copy of the seventh edition of our casebook, autographed by both co-authors, to you.

21 Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

22 *Michael M. v. Superior Court*, 450 U.S. 464 (1981).