They Fought the Law

by MICHAEL O'DONNELL

Equal
Women Reshape American Law.
By Fred Strebeigh.
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A colleague of mine recently argued an important civil rights case before the Supreme Court. In the hectic days before she left for Washington, as she reread every relevant decision and practiced clearing her throat, her attention was diverted by a niggling question: what would she wear to the oral argument? A fellow lawyer had set her to worrying by telling the cautionary tale of a female assistant solicitor general who some years earlier had shown up to court in what then–Chief Justice Rehnquist apparently regarded as an unlovely shade of brown. Halfway through her presentation, Rehnquist sent a note to the solicitor general, saying that he never wanted to see a government attorney wearing that color to the court again.

It would be too pat to conclude from this vignette merely that brown suits are bad and black ones good, that the Supreme Court is a fusty place or that Rehnquist was a nasty old grouch. The broader point is that there is a certain audacity to a profession that deals in grand pronouncements about equality while its most exalted captain upbraids a woman for sartorial choices he would likely not condemn if made by a man. Although Rehnquist was certainly no friend to women, neither was he alone in getting hung up on fashion as "lady lawyers" fought their way to the bar over the past seventy-five years. Harry Blackmun, who wrote the court's opinion in *Roe v. Wade*, frequently jotted notes about the outfits worn to court by female attorneys. ("White dress, youngish, nice girl," he wrote of one in 1972.) And Felix Frankfurter, a giant of the court, turned down a young attorney named Ruth Bader Ginsburg when she applied for a clerkship with him in 1960. She had graduated near the top of her class from Columbia Law School, but her grasp of the law didn't figure in Frankfurter's decision. "I can't stand girls in pants!" he reportedly said. "Does she wear skirts?"

Ginsburg is one of the central figures of Fred Strebeigh's monumental new book, *Equal*, which tells the story of women's struggle for equality through the courts and their rise in the legal profession. Ginsburg, of course, did just fine without Frankfurter's clerkship; in fact, she went on to become the single most important figure in the modern women's legal movement. She was one of the country's first female law professors, co-founded the ACLU's Women's Rights Project, argued a half-dozen pathbreaking gender-equality cases in the Supreme Court (including *Frontiero v. Richardson*, in 1973, and *Weinberger v. Wiesenfeld*, in 1975) and currently serves as that court's only female justice, where she has repaid Frankfurter's favor by hiring two or three women per term for her quartet of law clerks. Remarkably, Ginsburg granted Strebeigh open access to her pre-judgeship files, a decision that turned an excellent book into an indispensable one that will be an invaluable resource for the full biographies to come.

Ginsburg's great achievement as a litigator was to intensify the court's scrutiny of laws that treated men and women differently. Courts had traditionally employed two levels of analysis when reviewing constitutional challenges to laws that distinguished between different groups of people. "Rational basis" review was deferential to legislatures and the laws they passed, whereas the searching standard of "strict scrutiny" was reserved for laws that discriminated based on race or national origin, and usually meant doom for the law being challenged. In her briefs to the court, Ginsburg cleverly described the rational basis test, which was used for gender classifications, in tough language, and the court parroted her phrases in its opinions, creating a sort of lazy man's scrutiny: rational basis with teeth, as the law professors say. The laws that Ginsburg overturned in this way were quotidian—for instance, a Social Security regulation that undervalued women's work by paying less to the surviving husband of a deceased female breadwinner than to the surviving wife of a male breadwinner. Nevertheless, the decisions made great precedents. Eventually the court settled on applying "intermediate" or "heightened" scrutiny to laws that discriminated based on gender.

Another line of equal rights cases fared less well—perhaps because the impassioned female attorneys packed shotguns when they really needed Ginsburg's sniper's rifle. Many state disability and unemployment insurance programs once excluded coverage for conditions relating to pregnancy, even denying claims for completely unrelated illnesses if the woman happened to be pregnant at the time. Challenges to these rules crashed into the brick wall of one of the most baffling and inane pieces of legal sophistry ever written: Justice Potter Stewart's conclusion, in *Geduldig v. Aiello* (1974), that pregnancy exclusions did not violate the Constitution because they discriminated not against women but against "pregnant persons."

This loss led Congress to pass the Pregnancy Discrimination Act of 1978, which may have been just as well because statutes, unlike court decisions interpreting the Constitution, have the added advantage of democratic legitimacy. Strebeigh might have mentioned that the Pregnancy Discrimination Act was not the only women's rights victory in Congress after a loss in the court. The National Organization for Women, in a series of aggressive Supreme Court challenges to violent antiabortion protesters, prompted Congress to pass the Freedom of Access to Clinic Entrances Act in 1994.

Even though Strebeigh tells these litigation histories extraordinarily well, it's his detailed research and knack for piecing together tales of backstage advocacy that make *Equal* such an outstanding book. In one tale, Strebeigh recaps the machinations of a female law clerk working for a male judge on the California Supreme Court during a sex discrimination case in 1970. After the petitioners filed a shoddy brief, the clerk, Wendy Williams, stretched the ethics rules by calling a law professor friend and persuading her to file a brief to supply additional support. The court ruled for the plaintiff, striking down the state's revocation of a liquor license for a bar that had scandalously employed female bartenders ("alewives, sprightly and ribald," Frankfurter would have called them). Another such tale features Catharine MacKinnon, whose father was a judge on the US Court of Appeals for the District of Columbia Circuit, a powerful federal appellate court. In 1975 MacKinnon was using family privileges working in the court's library on a law school paper about sexual harassment—a

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novel term at the time—when she was approached by the female law clerk of another judge on the court. The clerk had heard about MacKinnon's paper and asked if she could borrow it, since her own research for a pending case had uncovered no authorities on the topic. MacKinnon agreed and was later pleasantly surprised to see some of her language appear in a landmark opinion prohibiting sexual harassment under Title VII of the Civil Rights Act of 1964.

Although Strebeigh does not say so expressly, Williams's and MacKinnon's stories undercut the notion that gender discrimination, a man-made problem, was also a problem solved by men. No one can deny the tireless efforts of female advocates, but the assumption has usually been that women made their best case while men made the decisions, much as whites and not blacks had the final say over ending slavery. One pictures Ginsburg, perhaps wearing a ribbon in her hair or, as she has lately done, a kerchief at her throat, standing alone before nine male justices in the 1970s. Here are just two examples—the book contains many more—of male judges relying on female law clerks or students to help decide key cases about women's equality. This aspect of *Equal* in particular ought to be told widely.

If the courtroom battles were dramatic, Strebeigh's section on women in the legal profession makes for the book's most infuriating reading. One of the striking points for young readers—those of MacKinnon's generation will need no reminders—is how pervasive and flagrant gender discrimination was so late in the twentieth century. At the start of 1968 only 5 percent of American law students were women, and a prominent property law casebook published that year opined that "land, like woman, was meant to be possessed." As late as 1983, the prominent Atlanta firm King & Spalding scuppered its plans to hold a wet T-shirt contest for its female summer associates, settling instead on a bathing suit pageant. Of the winner, one male partner told a reporter, "She has the body we'd like to see more of."

A key step in integrating this frat-boy profession was a lawsuit brought by female law students in 1975 against the New York City law firm Sullivan & Cromwell, which like many big firms systematically rejected female applicants with stellar résumés while hiring less qualified men. Strebeigh expertly covers every angle of the complicated litigation, including Sullivan & Cromwell's savvy decision to hire liberal labor attorney Ephraim London for its defense. His tactics included calling the female lawyer for the plaintiffs a "yahoo" and "puerile"—shenanigans that few federal judges will abide. Constance Baker Motley was no exception: she was an African-American civil rights legend, the only female judge on the US District Court in southern New York and a miracle draw for the plaintiffs. The defense asked Motley to recuse herself because, in counsel's words, "I believe you have a mindset that may tend, without your being aware of it, to influence your judgment." Here Strebeigh's analysis is particularly acute:

> [A] crucial realization…was emerging about man-made law: Male lawyers like London supposed (and in this case had the nerve to argue, on behalf of an all-male partnership) that the standard for unbiased judging was white and male. If a judge diverged in sex (female) and race (colored), a male lawyer could try to remove her for embodying "bias" not common in judicious white males.

Judge Motley, needless to say, denied London's motion.

Still, it is worth considering, if only to test the nonsense reflex, why women were assumed to be unsuited to judging and, for that matter, to lawyering. Prejudice against female judges seemed to include the thought that women could not corral or even intimidate male attorneys in the way that a good stern judge—all jowls and white whiskers—was expected to do. When law firms did start to hire women in the '60s and '70s, they usually placed them in trusts and estates departments, where the work involved preparing wills, navigating delicate issues like death and inheritance and handling detailed paperwork. Women were deemed not confrontational or aggressive enough for the man's game of litigation. Increasing integration has shown these assumptions to have been false; female judges and attorneys can be ferocious too, and they have certainly kept pace with their male counterparts. And if women have altered the belligerent masculine ethos of lawyering, that is not necessarily a bad thing; the increasing trend toward mediation, which many credit to women, has resolved countless legal disputes with less time and cost than horn-locking in court. In other words, the years-old biases against female attorneys sailed

onward, untested, but upon testing turned out to be no more reliable than the suppositions that gays can't be soldiers, blacks can't be doctors and white men can't jump.

Although women now account for nearly half of all American law students, there are lingering biases against them in the hierarchy of the profession: they are still woefully underrepresented in law firm partnerships (18.3 percent), general counsels' offices (18.4 percent), law school deans' suites (19.8 percent) and judgeships (26.9 percent). For progress to continue, the profession must continually re-evaluate its assumptions about the relevance of gender to legal tasks and above all end the mommy track, which denies partnership to mothers. It's a problem that all lawyers know about but few openly acknowledge—with the notable exception of the Project for Attorney Retention, whose detailed studies about sex disparity in law firms have lent a modicum of empirical rigor to an emotional issue.

Strebeigh concludes with a section on the Violence Against Women Act of 1994 (VAWA), which provides federal support for state investigations and prosecutions of rape, domestic violence and other crimes targeting women. VAWA also sought to make up for the shocking persistence in many states of anachronisms like the "utmost resistance" standard, which precluded a rape conviction unless the woman used all her physical strength to prevent penetration, and the marital rape exemption, which held that a husband cannot be charged with raping his wife. The statute combated these dated standards by creating a right to sue in federal court anyone who attacked a woman because of her gender. Opponents to the proposed law feared that this provision would flood the federal docket, and, remarkably, Rehnquist lobbied against it, publicly arguing that it would undermine states' traditional prerogative in this area of law. Congress passed it anyway, and in 2000 Rehnquist wrote the court's 5–4 decision (joined by Justice Sandra Day O'Connor) in *United States v. Morrison* that struck down the provision authorizing federal suits. The court's dubious rationale was that Congress had exceeded its constitutional authority—even though the Fourteenth Amendment gives Congress broad power to pass civil rights legislation. In today's meager discourse about legal issues, most of us just nod along cynically when politicians mention the Rehnquist court's "federalism revolution." *Equal* puts the term to work, vividly illustrating how the conservative court's efforts to shift power away from the federal government and toward the states frequently had the convenient effect of invalidating progressive federal laws.

Notably absent from the book is any significant discussion of abortion rights, which in this country have largely been won in courts rather than legislatures. Some readers, viewing reproductive freedom as the most fundamental of women's rights, may see the omission as a major oversight, although Strebeigh may simply have wanted to avoid retelling a familiar story. On the conceptual level, though, Strebeigh's decision makes sense: much of the constitutional discussion in the book centers around the Fourteenth Amendment's straightforward equal protection clause, whereas abortion rights are based on the murkier and more malleable due process clause—which, on its face, says nothing about abortion. Many important legal advances, including abortion rights but also, lately, protections for gays and lesbians, would wobble less today if they rested on the sturdier foundation of equal protection, with its relatively clear textual guarantee. Leaving aside abortion law allows Strebeigh to avoid having to untangle legally (as opposed to politically) knotty problems.

If this decision was defensible and even savvy, that does not mean *Equal* is immune to criticism. One is loath to venture a word in support of Rehnquist, whose consistent votes against women's interests did far more harm than his outfit-sneering, but Strebeigh, in his zeal, occasionally swipes at the late chief justice for the wrong reasons. Strebeigh calls out a Rehnquist opinion for omitting vulgar profanity from the case record, and for referring to 100-year-old Supreme Court decisions by using the royal "we" (as in, "we held in that case"). But both habits are actually common among the justices, who prize decorum and a sense of institutional continuity. Strebeigh also accuses the Bush administration of nominating the hapless Harriet Miers to the court in 2005 so that Bush could hide behind the failed attempt to appoint a woman when he went on to pick a man, which is what he wanted all along.

This is a bizarre and unsupported charge; there is plenty of room for criticizing the Miers pick on grounds of cronyism and incompetence without digging for the buried treasure of conspiracy theories. But these are quibbles, because by and large, Strebeigh demonstrates exceedingly fine judgment in his analysis of the court. ■