# The Problem of Gender Inequity: The Legacy of Deborah Rhode

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When I agreed to contribute an essay reflecting on the work of Deborah Rhode, I expected it to be in her honor rather than in her memory. She passed away unexpectedly at the age of sixty-eight on January 8, 2021.[1] The opportunity to reflect on her legacy thus takes on a new urgency—and even greater significance. The legal profession is better for the time she spent in it.[2]

I was fortunate enough to know Deborah first as a professor and later as a coauthor and a friend. She was only the second woman to join the faculty at Stanford Law School—following in the giant footsteps of Barbara Babcock.[3] Deborah served on the faculty for over forty years, as well as in significant board and leadership positions throughout the academy and the broader profession, including an important stint as president of the Association of American Law Schools from 1998 to 1999. In every position she held, Deborah advocated for equity and inclusion, as well as for fundamental changes to the legal profession that would make it more ethical, fair, and humane.[4]

Deborah wore twin hats as a scholar, devoting equal time to legal ethics and gender law. The most-cited legal ethics scholar

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1 Clay Risen, *Deborah Rhode, Who Transformed the Field of Legal Ethics, Dies at 68*, N.Y. TIMES (Jan. 18, 2021), https://perma.cc/6EWW-PUCF.

2 For a deep dive into Deborah's interest in ethics and leadership, see John Roemer, *The Moral Force of Deborah Rhode*, STAN. MAG. (Aug. 23, 2017), https://perma.cc/T3CZ-YV5W.

3 *See* Katharine Q. Seelye, *Barbara Babcock, a Force for Women in the Law, Dies at 81*, N.Y. TIMES (May 11, 2020), https://perma.cc/D6HG-4Y86.

4 As chair of the American Bar Association's Commission on Women in the Profession, Rhode spearheaded the production of two important reports. *See generally* DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION (2001); DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE (2001).

for many years running and the author of thirteen books on professional responsibility, her imprint on that field is undeniable.[5] Among other contributions, Deborah was a powerful voice for the argument that the legal profession's tight controls on who can perform legal services is a key reason why many people in our society are denied access to justice.

Her contributions to gender law were just as deep and significant. Like many in the field of gender law, Deborah longed for a world in which women were full, equal members of society. She became passionate about women's issues after watching her own mother struggle to obtain an education and a career after time at home raising Deborah and her sister.[6] She was an eyewitness to the harm caused by stereotypical attitudes that first pressured women to find husbands rather than careers and then sidelined them for their "choices." She vowed never to be a woman who needed an allowance from her husband—and, though married for more than four decades, she certainly never was. Deborah's earliest passions revolved around the need to address poverty and racial justice; her lifelong focus on access to justice was deeply informed by those early commitments.[7] But while a student at Yale—she was among the first women to attend after the school became coeducational—she was also turned onto women's rights after a professor recommended that she read Simone de Beauvoir's *The Second Sex* in 1970.[8] The spark lit by that book remained bright for Deborah throughout her life and career.

Deborah is widely recognized as one of the most significant contributors to the field of gender law. The field did not begin in earnest until the 1970s, when women's rights advocates first succeeded in getting courts and legislatures to recognize rights of sex equality. Beginning in 1971, the Supreme Court recognized that

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5 Lyle Moran, *Stanford Law Prof Remembered as Leading Ethics Scholar and Advocate for Access to Justice*, ABA J. (Jan. 12, 2021), https://perma.cc/4LQS-ZGVM; Brian Leiter, *10 Most-Cited Legal Ethics/Legal Profession Faculty in the U.S. for the Period 2013-2017 (1st draft)*, BRIAN LEITER'S L. SCH. REPS. (Oct. 15, 2018), https://perma.cc/KR65-3GAM.

6 Deborah describes this and other experiences in an oral history interview, conducted as part of the AALS Section on Women in Legal Education Oral History Project. Association of American Law Schools, *Deborah L. Rhode - Women in Legal Education Project*, YOUTUBE (Jan. 9, 2021), https://www.youtube.com/watch?v=aYezmTxDFvk.

7 Her contributions to this field are too numerous to mention and outside the scope of this Essay. For a brief introduction to her work in this area, see generally DEBORAH RHODE, ACCESS TO JUSTICE (2004); Deborah L. Rhode & Benjamin H. Barton, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955 (2019).

8 Ass'n of Am. L. Schs., *supra* note 6.

sex-based classifications were very likely to reflect stereotypes and assumptions about women that had led to their inferior treatment by the government throughout history—recognition that led to the adoption of heightened scrutiny and the invalidation of most of the sex-based classifications that filled up state and federal code books.[9] Around the same time, advocates won key legislative victories—such as the Equal Pay Act of 1963,[10] Title VII of the Civil Rights Act of 1964,[11] and Title IX of the Education Amendments of 1972[12]—and key court rulings to establish a broad scope for these new antidiscrimination laws.[13] The result of these judicial and legislative developments was a rapid transition from a country with no positive law of sex equality to one with significant equality guarantees over the course of less than a decade. The field of gender law was born of these developments—and of the work of people like Deborah Rhode.

The constitutional and statutory guarantees of sex equality were the scaffolding, but the substance of gender law would be built out over time by advocates, lawyers, and scholars. The field was built by those who identified areas of inquiry, developed the theoretical approaches necessary to understand the nature of gender discrimination, and drew theoretical and doctrinal connections across a variety of contexts. Deborah was expertly engaged in all of these tasks. She had an incredible eye for interesting stories and controversies and the rhetorical skill to capture the at-

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9 The Supreme Court began the movement toward heightened scrutiny in *Reed v. Reed*, 404 U.S. 71, 75–76 (1971), and *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973), before settling on intermediate scrutiny for sex-based classifications in *Craig v. Boren*, 429 U.S. 190, 197–99 (1976).

10 Equal Pay Act of 1963, Pub. L. No. 88-38, 7752 Stat. 106256 (codified at 29 U.S.C. § 206(d)).

11 Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. § 2000e to 2000e-17).

12 Education Amendments of 1972, Title IX, Pub. L. No. 92-318, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–88).

13 *See, e.g.*, International Union v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (invalidating as sex discrimination an employer's fetal-protection policy, which prohibited nonsterile women from holding jobs involving lead exposure in a battery manufacturing plant); Price Waterhouse v. Hopkins, 490 U.S. 228, 239–42 (1989) (interpreting Title VII to prohibit employment decisions motivated by sex-role stereotyping), *superseded on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66–67 (1986) (establishing that sexual harassment is an actionable form of intentional sex discrimination); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (establishing the sex-plus theory of discrimination that can be used to challenge employment policies or decisions based on sex plus a neutral characteristic).

tention of others. She was fascinated by culture and relied on reflections of it to understand and teach the field. As her students and colleagues can attest, she had a carefully curated collection of cartoons and other images to accompany every lecture and presentation—a sometimes-lighthearted reminder of the very substantive point that gender law is neither developed nor applied in a vacuum. In her scholarly writing, she tackled nearly everything: bias in the legal profession, the history of the legal profession, glass ceiling issues, structural and unconscious bias, sexual harassment, pregnancy discrimination, women in leadership, bias in courtrooms, gender discrimination in education, and appearance discrimination.[14] And she was one of the first people to tie these issues together as a field of study. An early monograph, *Justice and Gender*, became an important sourcebook for those researching or teaching gender law. In that book, Deborah comprehensively explored "the law's responses to [gender] discrimination within their broader cultural context" and sought to "reorient legal doctrine from its traditional focus on sex-based difference toward a concern with sex-based disadvantage."[15] Those twin aims are seen throughout Deborah's larger body of work. The persistence of gender inequity was undeniable—and unacceptable.

Deborah deployed this strategy in a wide variety of contexts, making the case that gender affects every single aspect of women's lives—and every public, private, and social institution. She explored the complicated interplay between law and cultural perceptions of gender as well as the challenges of using law as a tool for radical social change. In a fitting retort to her first dean

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[14] Her signature contributions to the study of gender law include DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN EVERYDAY LIFE (2010) [hereinafter THE BEAUTY BIAS]; DEBORAH L. RHODE, WOMEN AND LEADERSHIP (2016); DEBORAH L. RHODE, WHAT WOMEN WANT: AN AGENDA FOR THE WOMEN'S MOVEMENT (2014); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989) [hereinafter JUSTICE AND GENDER]; DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY (1997); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007); Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207; Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991) [hereinafter *The "No-Problem" Problem*]; Deborah L. Rhode, *Women's Rights and Social Wrongs*, 14 HARV. J.L. & PUB. POL'Y 13 (1991); Deborah L. Rhode, *Media Images, Feminist Issues*, 20 SIGNS 685 (1995); Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986); and Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993).

[15] JUSTICE AND GENDER, *supra* note 14, at 1.

at Stanford, who suggested she teach a "real" subject like negotiable instruments rather than the course in sex discrimination she had proposed, Deborah helped build the field and cement its place in law school scholarship and teaching. Today, it is unquestionably a "real" subject worthy of study.

In a short essay, it is impossible to do justice to Deborah's contributions, which were so broad and varied. Indeed, her signature talent was the ability to explore varied individual topics concretely and yet tie them together coherently. Her synthetic strengths were on full display in two early books—*Justice and Gender* and *Speaking of Sex*—that became foundational texts in the field of gender law. Like her other writings, these books were written in a manner that was accessible and inviting, a quality that helped propel her to the top of citation-count lists. She made the problems of gender inequity real for her readers rather than miring them in high theory.

Her efforts to document and explain problems of inequity were not accidental. One early insight of hers captures so much of what she thought, what she did, and why. In a 1991 article in the *Yale Law Journal*, Deborah wrote of the "'no-problem' problem"—a term she used to convey a disturbing level of societal comfort with sex-based disparities, which appeared to many to be "natural, functional, and, in large measure, unalterable."[16] Too few, she suggested, saw the disparities as a problem that merited a legal or social response; those that did see a problem "conceive[d] it too narrowly" by ignoring either the many forms of disadvantage that existed despite neutral rules and practices or "the intersection of gender with other patterns of subordination such as class, race, ethnicity, and sexual orientation."[17] The narrowing matters, she wrote, because it "reinforces attitudes that deny its existence"; the establishment of individual equality rights "fortifies the illusion that collective problems have been resolved."[18] The failure to perceive a problem is itself, she argued, a problem. Rather than join the hordes who accepted the progress narrative around women's rights, Deborah began the important work of exploring "legal norms that reflect and reinforce these ideologies of denial as well as the feminist challenge that they present."[19]

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16 *The "No-Problem" Problem*, *supra* note 14, at 1734.

17 *Id.*

18 *Id.* at 1735.

19 *Id.*

In later work, Deborah took seriously the obligation to first convince her audience that there was a gender problem. Her popular book *The Beauty Bias* is illustrative of her approach to the study of gender law. She begins with a stunningly exhaustive review of the empirical evidence related to appearance discrimination. She begins with evidence of "nearly universal preferences such as clear skin, facial symmetry, and hour-glass figures."[20] She continues with a detailed and nuanced exploration of the biases based on body weight, attractiveness, and sex—and the very real harms from higher costs (e.g., extra airline seats) to lost job opportunities due to false assessments of competence and intelligence.[21] She also explores the intersection of appearance discrimination with gender, a study that reveals evidence of standards that are nearly impossible for women to meet. They must conform to sex-specific dress and grooming standards, which are often expensive and time-consuming to satisfy. They must be feminine and attractive—but not enough to tempt men or make their wives jealous. They must conform to beauty standards of youth, regardless of the effects of aging. Their appearance is scrutinized in a way that men's appearance is not—and if they do not make it appear effortless, they will be "ridiculed as vain for their efforts to measure up."[22] But the existence of gender-based appearance discrimination is only part of the problem. It encourages women to undertake expensive and sometimes dangerous body alterations. It forces women into a feminine persona that may deny them rights of individual expression. It can even be dangerous—a point Deborah drives home with compelling facts about toxic cosmetics, foot-damaging shoes, risky plastic surgery (including one to increase "toe cleavage"), eating disorders, steroid abuse, and even a single year in the nineteenth century when three thousand women were burned alive because of flammable petticoats.[23] And women who resist these pressures suffer a variety of penalties, including lost job opportunities.

Deborah's gift for seizing on a simple, culturally resonant example to make a sophisticated point is on full display in this book. High heels, she explains, reflect the high degree of sex differentiation embodied in dress codes and norms, the unstated require-

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20 THE BEAUTY BIAS, *supra* note 14, at 7.

21 *See id.* at 27–28.

22 *Id.* at 11.

23 *Id.* at 4, 36, 39.

ment that even professional women live up to the ideals of femininity, and the harm inflicted on women by society's unforgiving standards.[24] In marshaling examples (often with clever or shocking images to accompany them) that resonated with her audience, Deborah understood that half the battle in gender law is shaking people of the comfort that they have developed with a sex-stratified society and their unwillingness to question the norms and practices that operate to the systematic disadvantage of women. No doubt her history as a champion debater prepped her for this task.

Unlike many legal scholars, Deborah applied her theories and ideas outside traditional academic work, where they could be used to effect real change. Perhaps most notable is the central role she played in three different reports of the American Bar Association—*The Unfinished Agenda*, *Balanced Lives*, and *Sex-Based Harassment*.[25] Each was a significant project designed to uncover and then eliminate the remaining barriers to gender inequity in the legal profession. As in her academic work, Deborah gathered and presented empirical data to document the existence of bias and disparities along every available axis. And, like in most of her work, she communicated her findings and recommendations in language that could be easily understood and that would resonate with her audience.

As ready as Deborah was to expose the inherent disadvantage for women in many societal norms—and solve the "'no problem' problem"—she was nuanced in her theories about the demands of equality and proposals for reform. As a general matter, she focused on practices and rules that impaired equal opportunity, judged people based on irrelevant characteristics rather than their ability and effort, or exacerbated disadvantages based on immutable characteristics. In this she was not so different from many other feminist legal theorists, who drew on notions of both formal and substantive equality to argue for social and legal reform. But Deborah was not an absolutist and often worried that overregulation could chill individuality and free expression. In the context of appearance discrimination, for example, she tried to draw the line that would best allow women to express their authentic selves, whether that involved stilettoes and makeup or not. She struggled with the tension between individual autonomy

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[24] *Id.* at 154–55.

[25] *See generally* DEBORAH L. RHODE, SEX-BASED HARASSMENT: WORKPLACE POLICIES FOR THE LEGAL PROFESSION (2002).

and the subordination of women as a group. When Deborah asked, "Can't we criticize appearance-related practices without criticizing the women who find them necessary?" she suggested that the tension could be resolved, in line with her rejection of absolutism.[26]

Throughout her four-decade career as a legal scholar, Deborah never wavered in her commitment to women's autonomy and equality. She agreed with Justice Ruth Bader Ginsburg that "[w]omen belong in all places where decisions are being made."[27] Toward the end of her career, she began to focus on broad themes, such as leadership, adultery, character, and ambition. These projects allowed her to combine her interest in cultural norms and legal theory and to write, as she enjoyed, for a broad audience.

Deborah Rhode died too young, a loss that will reverberate in the legal academy for a long time. But we are all the better for the contributions she made to gender law. The task remains for the rest of us to carry forward with her insights and her desire for change.

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[26] THE BEAUTY BIAS, *supra* note 14, at 84, 88–89.

[27] Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (May 5, 2009), https://perma.cc/T6TB-2VQE.