

Remarks at the Betty Roberts Portrait Unveiling

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I am delighted to be here with you today to celebrate Justice Betty Roberts. In a few minutes, we will unveil Lynda Lanker's wonderful portrait of the Justice. But in a sense, no two-dimensional or static image is a true portrait of Betty Roberts: she was a woman perpetually in motion, always changing and ever-growing. Justice Roberts embodied in her life the Oregon state motto: "She flies with her own wings." Her legacy is the message that we too must rely on our own wings, and even more that it is important that we encourage all woman to dare to fly.

Five years ago, I had the honor to meet Justice Roberts here in Portland, when I was the second speaker – after Justice Roberts herself – at Lewis and Clark's Betty Roberts Women in the Law Program. The talk I gave was titled "Old Reasons, New Reasons, No Reasons", and it examined judicial review in a series of cases involving the family, gender roles, and sexuality. One of my central points was that when they address these issues, courts often seem to be driven as much by unexamined intuitions and deeply felt sentiment as by classic legal reasoning.

So consider these words from the Oregon Supreme Court the year that Betty Roberts arrived in Portland – 1956. The case was *State v. Hunter*, [208 Or. 282]. Jerry Hunter, described in the Court's opinion as "a person of the feminine sex," was charged with violating Oregon Revised Statute 463.130. That statute provided, in pertinent part, that "No person other than a person of the male sex shall participate in or be licensed to participate in any wrestling competition or wrestling exhibition." The Court unanimously rejected Ms. Hunter's constitutional challenge. Article I, § 20 of the Oregon provides that "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." But, the Court insisted that "class legislation" – that is, legislation that treats classes differently – "is permissible if it designates a class that is" what the Court described as "reasonable and natural." When classes really are different, the state is entitled to treat them differently, the Court wrote, "in the interests of the public health, safety, morals, and welfare." Now we come to the extraordinary paragraph in which the Court upheld Oregon's ban on female wrestling:

"In addition to the protection of the public health, morals, safety, and welfare" – and note that the Court never explained how this ban might serve those concerns – "what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She

had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employee or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?"

One might think, having characterized the statute that way, the Court would have struck it down as unjustified exclusionary legislation. But no. The Court concluded this way:

"Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not."

Here's the first striking thing about *Hunter* and Betty Roberts. The Court might have been describing Betty Roberts in that passage. You should read her memoir, *With Grit and By Grace*. If you look at the photographs in the book, you will see her "emerge from long tresses and demure ways to bobbed hair and almost complete sophistication." She recounts her adolescent rebellion playing girls' football and volleyball. Her stunningly candid account of married life shows her change "from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence." In politics she "matched her wits and prowess with those of mere man" and "in many instances [she] had outdone him." And in 1977, she found herself on an "island on the sea of life" that had previously been "reserved for man" – the Supreme Court of Oregon.

Here's the second striking thing about *State v. Hunter* and Betty Roberts. As a Justice, her opinion for the Court in *Hewitt v. State Accident Insurance Fund*, [294 Or. 33 (1982)], overrode the outmoded doctrine embraced in *Hunter*. "Surely no judge today," she wrote, "would attempt to justify a statute in the language used by this court then to hypothesize the statutory objective." While Representative and then Senator Betty Roberts had devoted much of her legislative career to confronting sex discrimination and denials of equal opportunity to woman, proposing a series of bill to ban sex discrimination in employment and public accommodations, providing for reproductive autonomy, and equalizing family law, the Oregon Supreme Court had not revisited the question of how the State's Constitution treated sex-based discrimination. Thus, when Justice Roberts arrived on the Court, she was, as she put it, "not hampered by recent holdings attempting to whittle away at stereotyped and outmoded notions of 'proper' roles for men and women. We are free in Oregon to begin our analysis of gender-based laws on a clean slate."

Justice Roberts made the most of that freedom in *Hewitt*. The case involved an unmarried couple, Floyd Hewitt and Marian Williams, who had been living together, and raising their child, when Williams was killed in an industrial accident. Hewitt then sought family workers' compensation benefits, which were denied because state law restricted benefits to unmarried couples only to situations where the surviving partner was female.

Justice Roberts' opinion for the Court held that "when classifications are made on the basis of gender, they are, like racial, alienage and nationality classifications, inherently suspect." These classifications, she explained, were often "based on unexamined societal stereotypes and prejudices" and they bore "no relation to ability to contribute to or participate in society." She found it "apparent" that Oregon's

restriction of benefits to unmarried women “is not based on intrinsic differences between the sexes. Rather, it reflects assumptions about the relative social roles and the probable dependency of men and women. . . . Accordingly we find the statute unconstitutional.”

I think it is no surprise that, of all the opinions she wrote during her time as a judge, *Hewitt* is the one Justice Roberts discusses most extensively in her memoir. It’s perhaps an important message especially for us lawyers in the room that the discussion doesn’t occur until page 241 of a 265-page book. The implicit message is that Justice Roberts could not have written that opinion earlier. She had to change – to recognize the problems with assumptions about social roles and stereotypes. And society had to change – so that woman like her could serve on courts and so their colleagues would be receptive to challenges to existing laws. Her opinion in *Hewitt* thus both changed, and reflected changes in, society. In the remainder of time I have with you today, I thought I would reflect on two other lessons that permeate *With Grit and By Grace*.

The first is the Justice’s choice of the word “grit.” She gives her definition in the context of a story about how her hopes of pursuing a Ph.D. in political science at the University of Oregon were dashed when the chairman of the department told her because she would likely be 45 by the time she finished: “You’ll only have 20 years to repay the taxpayers of Oregon for their investment in your education,” so he wouldn’t let her in (p. 52). On the drive back home to Portland to make dinner for her four children, she decided that she would look for other options. “Resolve and determination – some might call it ‘grit,’” she wrote, “took over.” That was when she decided to go to law school. And the rest is history . . . and her story too!

In recent years, social scientists, most notably Angela Duckworth of the University of Pennsylvania have begun to map and study what grit is. Their work has shown us that grit, more than innate talent or intelligence, may explain success in a variety of endeavors. In particular, grit consists in being able to sustain interest in and effort toward very long-term goals, even in the face of difficulties and disappointments. This is an important lesson, when it comes to both individual development and to the struggle for equality. It is what Dr. Martin Luther King meant when he said at the end of the Selma-to-Montgomery march that the moral arc of the universe is long, but it bends toward justice. We need, as people committed to racial justice or gender equality or inclusion of the marginalized in the great good fortune available in America to be smart and strategic – yes – but we need also to be gritty. And one of the other encouraging signs in some recent work is that grit is not entirely innate. We can develop it.

The second lesson I want to share from *With Grit and By Grace* involves the power of names. “What’s in a name?” Juliet asks herself standing on the balcony. “[T]hat which we call a rose / By any other name would smell as sweet; / So Romeo would, were he not Romeo call’d, / Retain that dear perfection which he owes / Without that title.” Justice Roberts makes the point, though, that in the law names and titles *are* important. She writes that “[t]he words we use to speak about persons, objects, or acts are always important, but in the law words take on an even greater significance.” (199). The example she gives is telling. As long as we called the problem “battered wives,” the public might think of it as “a private issue.” But once we called it “domestic violence,” it was transformed into a “public issue.”

At a number of points in the book, the Justice writes about her own surname and what it means for a woman to take – or not to take – her husband’s surname when she marries and what it means for a woman to abandon – or not to abandon – her husband’s surname when she divorces. She makes the point that women’s professional identities are tied to the name they have when they earn their reputations and the empowerment that comes from a woman’s *choosing* which name to use, rather

than having the law force that choice upon her. She may be one of the few women in America who included in her wedding announcement a letter describing the legal authority that let her keep the name Betty Roberts when she married Keith Skelton. And her story of how the Oregon State Bar and the Registrar of Elections and *The Oregonian* all resisted her choice until she forced them to back down would be funny, if it were not so powerful an indication of an outmoded view of women's roles in marriage – and of their inability to fly with their *own* wings. So it is no surprise that she repeatedly introduced legislative proposals to allow women to decide whether to adopt her husband's name if she married or to change her name if she divorced.

Important debates in constitutional law often turn on, or founder over, disagreements about nomenclature. What, for example, does “marriage” mean? The Justice writes that her experience taught her that each couple must “invent” its own marriage. During her time on the Oregon Supreme Court, the Justice came to know a number of lesbians in a variety of professional capacities and she writes with great sensitivity about how their relationships with their partners were just like marriages, and their breakups were as “emotionally devastating” as a divorce might be (231). So it is hardly surprising that, after her retirement – and nearly a dozen years ago – Justice Roberts celebrated the first same-sex marriage in Oregon. As with so many of her other acts, she was ahead of her time, but she was a herald of things to come. And as with so many of the other struggles to which she devoted both her grace and her grit, she was – to once again quote Dr. King – “a drum major for justice.”

As you know, I've been spending the past year in Washington, D.C., serving as a Deputy Assistant Attorney General in the Civil Rights Division of the Department of Justice. The Division has an institutional commitment to many of the ideals and goals that animated Justice Roberts: gender equality in employment, nondiscrimination in places of public accommodation, access to education for all Americans, protection of the mentally ill. Surrounded by all the white marble and monuments of the capital, I am repeatedly drawn back to the words of Pericles' funeral oration. He says, in rough translation that great men are commemorated not only by columns and inscriptions but also in the hearts of the people. We should make them our examples, and esteem courage to be freedom and freedom to be happiness even when they demand sacrifice.

The same thing is true, of course, of great women. So Justice Betty Roberts should be commemorated not only by the beautiful portrait we're about to unveil, but by our commitment to continuing her struggle to make this a more equal and more fair society. There's a reason this event is called a Portrait of Possibilities. It's up to each of us to transform those possibilities into reality.