

1998

## Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession

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PORTIA GOES TO PARLIAMENT:  
WOMEN AND THEIR ADMISSION TO MEMBERSHIP IN THE  
ENGLISH LEGAL PROFESSION

CHRISTINE ALICE CORCOS\*

I.	INTRODUCTION .....	309
II.	THE STRUCTURE OF THE ENGLISH LEGAL PROFESSION IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES.....	315
	A. <i>In General</i> .....	315
	B. <i>Other Countries of the Union</i> .....	316
	1. Scotland.....	316
	2. Ireland .....	321
III.	SIMILARITIES WITH THE PROFESSION IN OTHER COUNTRIES.....	322
	A. <i>Other Countries of the Commonwealth</i> .....	323
	1. Canada.....	323
	2. Australia .....	324
	3. New Zealand .....	326
	4. South Africa .....	326
	B. <i>France</i> .....	326
	C. <i>Belgium</i> .....	333

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IV.	THE CONTROVERSY OVER PROPOSED LEGISLATION .....	333
A.	<i>Early Attempts by Women to Gain Admission to the English Bar</i> .....	336
1.	Private Attempts.....	336
2.	Early Attempts in Parliament .....	337
a.	<i>Support for Women Attorneys in the Profession</i> .....	337
b.	<i>Objections Based on Custom and Existing Legislation</i> .....	340
B.	<i>Arguments For and Against the Admission of Women to the Profession</i> .....	348
C.	<i>Existing Legislation and Its Interpretation</i> .....	361
1.	Attempts to Obtain Admission Through the Courts.....	361
2.	<i>Bebb v. Law Society: The Trial Court Case</i> .....	362
3.	The Court of Appeals Case .....	368
V.	CHANGES IN THE POLITICAL AND SOCIAL ENVIRONMENT .....	379
A.	<i>Attempts to Legislate Admission</i> .....	383
1.	The Parliament (Qualification of Women) Act of 1918.....	384
2.	The Sex Disqualification (Removal) Act of 1919.....	385
3.	Barristers and Solicitors (Qualification of Women) Bill.....	386
B.	<i>The Admission of Women to the Legal Profession</i> .....	393
VI.	CONTINUING DEBATE.....	395
A.	<i>Women as Members of Circuit and Session Messes</i> .....	395
B.	<i>The Issue of Women's Dress in Court</i> .....	399
VII.	THE ENTRY OF WOMEN INTO PROFESSIONS RELATED TO LAW .	404
A.	<i>The Judicial Branch</i> .....	405
B.	<i>Juries</i> .....	406
C.	<i>The Legislature</i> .....	406
1.	House of Commons.....	406
2.	House of Lords.....	409
D.	<i>The Police</i> .....	412
VIII.	CONCLUSION .....	413

*This bond doth give thee here no jot of blood;  
The words expressly are "a pound of flesh:"  
Then take thy bond, take thou thy pound of flesh;  
But, in the cutting it, if thou dost shed  
One drop of Christian blood, thy lands and goods  
Are, by the laws of Venice, confiscate  
Unto the state of Venice.<sup>1</sup>*

## I. INTRODUCTION

By pleading for the literal application of the law in *The Merchant of Venice*, Portia hopes to avoid the bloody result of a bad bargain. In pointing out that Shylock is entitled to "a pound of flesh," but nothing more, she identifies the justice that an advocate requests and a judge grants in applying the law, if the parties are willing to accept the foreseeable result of that application. Perhaps believing that with admission would come acceptance,<sup>2</sup> the would-be Portias of the late nineteenth and early twentieth centuries pled for the literal application of the laws that would have allowed them to appear as attorneys in the English courts.<sup>3</sup> While their own lawyers desired the literal outcome of the applicable statutes, the judges and the official representatives of the organized bar did not.<sup>4</sup> Their reluctance to accept the legitimate outcome of properly drawn and enacted legislation allowed them to formulate a legal theory that successfully prevented the admission of women to the English legal profession for nearly fifty years after Parliament decreed that the status quo should be changed.<sup>5</sup>

The character of Portia in Shakespeare's *The Merchant of Venice* is one of the most familiar figures to be classed as a "woman lawyer" in literature or in life, even though she is not a member of the bar.<sup>6</sup> The reference is so common that Horace Rumpole's dubbing of Phyllida Trant Erskine-Browne as "the Portia of our Chambers" is immediately understandable to English-speaking readers.<sup>7</sup> Yet, any recognition of the right

1. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, lines 307-13 (William Lyon Phelps ed., Yale University Press 1923).

2. The literature makes it clear that this was not the case. See *infra* notes 17, 443-64 and accompanying text.

3. See ALBIE SACHS & JOAN HOFF WILSON, *SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES* 27-33 (1978) (discussing cases where women applied for positions of law agent, barrister and solicitor in the English courts).

4. See *id.*

5. See *id.* at 40-53 (discussing the "myth of judicial neutrality" and how the fact that the judiciary was exclusively male made judicial neutrality towards women's involvement virtually a myth).

6. See SHAKESPEARE, *supra* note 1, act 4, sc. 1, line 170. Portia's famous scene begins here. See generally Isabel Giles, *The Twentieth Century Portia*, 21 *CASE & COM.* 353 (1914) (discussing the future of women attorneys in the twentieth century).

7. JOHN MORTIMER, *Rumpole and the Right to Silence*, in *RUMPOLE À LA CARTE* 103, 121 (1990); see Giles, *supra* note 6, at 352 (providing a reproduction of an oil painting by Sir John Millais titled "Portia"); David Cuthbert, *Last Call For Rumpole: Tonight's 'Mystery' Marks the Beginning of the End for Leo McKern's Turn as the Wiley Old Barrister of the Old Bailey*, *NEW*

of women to be admitted to the English legal profession was a rarity until the late nineteenth century, after various states of the United States,<sup>8</sup> and then the provinces of Canada,<sup>9</sup> admitted women. Perhaps this delay is understandable in a country whose national symbol is a litigant.<sup>10</sup> Recently, contemporary women lawyers have become a subject of much study, in both serious historical and legal literature,<sup>11</sup> and in discussions of popular culture.<sup>12</sup> Their problems with the male-dominated legal culture continue to occupy our attention.

ORLEANS TIMES-PICTURE, Apr. 13, 1995, at E1 (discussing a television show based on John Mortimer's *Rumpole*). Patricia Hodge, an actress who plays Phyllida in the show, bears an uncanny resemblance to the model in Millais's painting.

8. See *infra* notes 255, 371 and accompanying text. The battle was won state by state, however, and admission to the practice of law did not imply that states were willing to admit women to ancillary professions such as notary public. See *Bickett v. Knight*, 85 S.E. 418 (N.C. 1915) (holding that women are ineligible for the public office of notary public since women are not voters in the state); see also *Recent Cases: Public Office—Can a Woman Be a Notary Public?*, 64 U. PA. L. REV. 95, 105 (1915) (examining cases prohibiting women from public office positions and discussing the theory behind the restriction of women from the position of notary public).

9. See *infra* Part III.A.1.

10. "John Bull" is the main character in the political allegory and satirical pamphlets written by John Arbuthnot and published in 1712 by John Morphew. See JOHN ARBUTHNOT, *THE HISTORY OF JOHN BULL* (Alan W. Bower & Robert A. Erickson eds., 1976). In the pamphlets, Bull sues Lewis Baboon, where the lawsuit represented the war with France.

11. See CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1981) (analyzing the ways in which women attorneys are treated by their colleagues and their families, the pressures they face, and the manner in which they deal with problems); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996) (providing an extensive bibliography for U.S. materials); see also ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992) (detailing legal education at Harvard Law School and its effect on ideals); LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 103-69 (1997) (providing important bibliographic information); Robert Granfield, *Contextualizing the Different Voice: Women, Occupational Goals, and Legal Education*, 16 LAW & POL'Y 1 (1994) (examining gender differences among students attending Harvard Law School).

12. See, e.g., Christine A. Corcos, *Women Lawyers*, in *PRIME TIME LAW* (Robert Jarvis and Paul Joseph eds., 1998); Diane M. Glass, *Portia in Primetime: Women Lawyers, Television, and L.A. Law*, 2 YALE J.L. & FEMINISM 371 (1990) (examining the image of women lawyers in the television drama, *L.A. Law*, viewed in the historical context of women's depiction on television); Louise Everett Graham & Geraldine Maschio, *A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film*, 84 KY. L.J. 1027 (1966) (exploring cinematic images of women lawyers); Judith Mayne, *L.A. Law and Prime-Time Feminism*, 10 DISCOURSE 30 (1988) (discussing the depiction of female attorneys on television); Carolyn Lisa Miller, "What a Waste. Beautiful, Sexy Gal. Hell of a Lawyer.": *Film and the Female Attorney*, 4 COLUM. J. GENDER & L. 203 (1994) (analyzing films which feature female attorneys); Carole Shapiro, *Women Lawyers in Celluloid: Why Hollywood Skirts the Truth*, 25 U. TOL. L. REV. 955 (1995) (examining women lawyers in film because they illustrate the way visual images help maintain gender roles); Ric Sheffield, *Taking Exception to Six Decades on Film: A Social History of Women Lawyers in Popular Culture 1930 to 1990*, 14 LOY. L.A. ENT. L.J. 73 (1993) (suggesting that stereotypical depictions of women lawyers in film may influence or reinforce the stereotypes about female attorneys in practice to the detriment of society and the legal profession); Elaine Weiss, *Who's Missing in This Picture?*, BARRISTER MAG., Winter 1989-90, at 4 (reviewing the treatment of women lawyers in film and television).

The "double standard" which continues to confront women professionals generally has also been explored humorously in films and television broadcasts. See, e.g., *BABY BOOM* (United Artists

The question of admission of women to the English Bar is not simply an interesting side issue in legal history. It illustrates the familiar battle of an excluded group for inclusion in a larger society that has traditionally maintained control by becoming self-defining.<sup>13</sup> In the case of barristers, this self-definition was exacerbated by the fact that only the Inns of Court were authorized to bestow the designation of "barrister" and the Inns of Court, because they were self-regulating, insured their control of the profession. In addition, judges were chosen from the barrister class, and judgeships were for life barring gross misconduct.<sup>14</sup> An early twentieth century American woman attorney made the point eloquently:

It is a well known fact that no man really understands a woman, and yet until recently we have had only men to decide what is right and wrong as far as we are concerned. Is it not only natural that men, looking at things from their standpoint, will often make mistakes? If there is one place where women ought to be it is in law. Our laws for women are made by man. How can man do justice to a creature which he frankly admits no man ever understands?<sup>15</sup>

Much of the discussion on the fitness of women to practice law in England parallels contemporaneous discussion of the actual performance of female attorneys in countries that had already admitted women, notably France and the United States. The English Bar thus demonstrated that while it followed certain peculiarities of thought on the subject, most dictated by the structure and history of the English common law, the quality of its debate reflected the spirit and the style of its brethren in other lands.

Because the battle is for inclusion into the legal profession, that is, the profession that decides what issues are properly the focus of the law and what issues are not, participation in it represents an essential goal for any marginalized group. "Medicine, Science, Arts, had all been thor-

1987); *Baby Boom* (NBC television broadcast, Sept. 1986-Jan. 1989); *TOOTSIE* (Columbia 1982); *VICTOR/VICTORIA* (Metro-Goldwyn-Mayer 1982). For a discussion of the double standard in English legal history, see Ann Sumner Holmes, *The Double Standard in the English Divorce Laws, 1857-1923*, 20 *LAW & SOC. INQUIRY* 601 (1995). The 1987 film *ADAM'S RIB* (MGM/UA Home Video 1987) is primarily about the legal double standard.

13. See generally Daniel Duman, *Pathway to Professionalism: The English Bar in the Eighteenth and Nineteenth Centuries*, 13 *J. SOC. HIST.* 615 (1980) (discussing the mechanics of self-definition).

14. See 15 *SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW* 244 (A.L. Goodhart & H.G. Hanbury eds., 1965).

15. *Women in the Law*, 58 *OHIO L. BULL.* 133, 134 (1913). Some male lawyers are still not trying very hard to understand women's frustrations. See generally Elizabeth A. Delfs, *Foul Play in Courtroom: Persistence, Cause and Remedies*, 17 *WOMEN'S RTS. L. REP.* 309 (1996) (analyzing the parameters of foul play). However, one popular commentator asserts that laws and society in general benefit women more than men. WARREN FARRELL, *WHY MEN ARE THE WAY THEY ARE* 161-68 (1986). While Farrell's reasoning fails to take into account the historical and cultural reasons for what he sees as favoritism, his position illustrates the anger and confusion that many men, not just professionals, feel toward the "mixed messages" that they believe women send.

oughly explored before Law was thought of. This was probably due in part to the fact that the Law itself prevented women from entering its precincts, and numerous initial difficulties had to be removed . . . .”<sup>16</sup> As women admitted to the bar in England and other countries discovered, however, the right of admission was not a guarantee of social or professional acceptance.<sup>17</sup>

Thus, the nature of the anti-feminist argument over the admission of women bears scrutiny. It expresses the understandable fears and resentments of men who had labored for centuries, taken economic, social and political chances, and sometimes risked their lives to acquire certain rights and positions in the political and legal system. A group which demanded inclusion in that system but which had not, as men saw it, “paid its dues,” was making excessive and unacceptable demands. Many male “gatekeepers” of the system saw attacks on all fronts, including the profession of law, and were offended and dismayed. They shared and expressed, along with their male colleagues in other countries, a concern that women were not, indeed could not be, adequately socialized or educated to be members of a profession that formulated and interpreted society’s rules.

The battle over women’s admission to the bar in England also illustrated the willingness of the English judiciary to make law while it denied that it was doing so. By placing the interpretation of what it deemed to be custom and the common law above the plain meaning of certain relevant statutes, the English judges involved forced Parliament to consider an issue that it thought it had already settled. By redefining the question as one that the appellant really did not present and asserting that they were asked to decide it, the judiciary both trivialized the issue and temporarily redirected the attention of the profession. The attempt to repel women from the profession was only temporarily successful, however, because it failed to take into account both the political and philosophical strength of the women’s movement and support for that movement from men for whom the equity arguments outweighed fears about either the inadequacy or potential competition from women. Further, by

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16. G. Flos. Greig, *The Law as a Profession for Women*, 6 COMMONWEALTH L. REV. 145, 147 (1909).

17. The literature on the marginalization of women attorneys continues to grow. Apart from the extensive “glass ceiling” studies that are available, some writers have begun to study the situation of women law school academics. See Farley, *supra* note 11. The phenomenon has even begun to engender its own jurisprudence. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995) (exploring women’s integration into large corporate law practices and their mobility within firms); Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17 (1994) (examining, in part, the glass ceiling that women law partners face). On English women attorneys, more specifically, see David Podmore & Anne Spencer, *Women Lawyers in England: The Experience of Inequality*, 9 WORK & OCCUPATIONS 337, 339-42 (1982) (discussing the entry of women into the profession and the reactions of opponents).

refusing to accept the plain meaning of the statute at bar, the judges involved in the litigation over the admission of women to the bar denied these Portias the outcome obtained by their namesake, a literal interpretation of the law.

Although several writers have produced exhaustive (and exhausting) histories of the English legal profession, the question of women's admission is disposed of in a few pages or worse yet, paragraphs.<sup>18</sup> Contemporary writers are more concerned with the current status of women lawyers;<sup>19</sup> yet, much of the discrimination today's female attorneys experience is rooted in the reluctance of many male barristers and solicitors to welcome them to begin with, or work with them to make those accommodations necessary to encourage their full participation in the profession. Continued acceptance of traditional gender roles is a major barrier to many women attorneys. Yet, an understanding of its origins is necessary to its effective neutralization. Otherwise women attorneys will continue to be shunted into those legal specializations deemed "appropriate" for females.

A 1985 survey of the members of the Association of Women Solicitors found that the proportion temporarily retired from practice in order to raise children ranged from 8.6 per cent of those 36-40 years old to 17.4 per cent of those 31-35. Furthermore, those in private practice took short maternity leaves (an average of 5.2 months, but only 2.4 months for partners), and though 87.2 per cent returned to the same job, only 53.7 per cent kept the same hours; 22.7 per cent of those in private practice were working part time, and 34 per cent of those with children thought their career prospects were changed by motherhood.<sup>20</sup>

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18. See, e.g., RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 172-76 (1988); MICHAEL BIRKS, *GENTLEMEN OF THE LAW* 276-78 (1960); cf. Norman St. John-Stevias, *Women in Public Law, in A CENTURY OF FAMILY LAW: 1857-1957*, at 256, 276-78 (R.H. Graveson & F.R. Crane eds., 1957) (providing a more in-depth discussion of women in the legal profession). Some may question the importance of studying or writing legal history. For those for whom the answer is not intuitive, we should remember that much of present day law is based on assumptions, sometimes mistaken ones, about the past. Challenging those assumptions in an intellectually honest way will make the present more comprehensible and the future, possibly, more just. John Orth offers a practical reason that will be persuasive to those for whom the Whig interpretation of history is most comfortable. See John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287 (1991). Orth writes: "The obvious reason for thinking about law historically is that it helps us to solve problems in the present." *Id.* at 287. The rest of his essay points out more subtle but powerful reasons for studying history, not the least of which is to learn in what cases we make decisions or write policy based on biased or incorrect information. *Id.*

19. See, e.g., ABEL, *supra* note 18, at 173-76; David Podmore & Anne Spencer, *The Law as a Sex-Typed Profession*, 9 J.L. & SOC'Y 21 (1982) (offering a careful analysis of the consequences to the legal profession of overidentification with one sex).

20. ABEL, *supra* note 18, at 174 (citing Pauline Molyneux, *Association of Women Solicitors - Membership Survey*, 83 LAW SOC'Y GAZETTE 3082 (1986)). Molyneux's survey does not reveal whether married male solicitors made any changes in their work schedules to accommodate child rearing. See Molyneux, *supra*. Molyneux's advice to ambitious female lawyers is to "delay starting a family until they are partners." *Id.* at 3084.



Women solicitors tend to concentrate their practices in the areas of probate and trust, family law, and domestic conveyancing, although litigation is by far the most popular area,<sup>21</sup> possibly because of its high visibility.<sup>22</sup> A 1982 study suggests that this "bunching" in specializations is at least partly due to "conceptions of the appropriate roles and qualities of women in the labour force . . . . The 'servant' image inhibits the promotion of women to 'master' positions whilst the image of women as sex objects militates against their being taken seriously as persons in their own right."<sup>23</sup> Neither the authors of this study nor a 1986 survey<sup>24</sup> explain why litigation, one of the more aggressive specializations, is so popular; although the litigator's easily recognizable image as a dominant figure in law may be part of the attraction.

21. See, e.g., ABEL, *supra* note 18, at 175 (citing Molyneux, *supra* note 20). Other commentators have stated:

Just as women police officers (until relatively equal work was recently introduced in return for equal pay) found that little work came their way besides "women's" offences (prostitution, shop-lifting) and "juveniles," so women lawyers are disproportionately involved in family and divorce work, or "back room" routinized work. . . . The over-representation of women lawyers in "back room" work has also been justified by the claim that "clients would object" to dealing with a woman.

Podmore & Spencer, *supra* note 19, at 27. Note that in some cases, a woman lawyer may provide a stronger symbol than a man. In the film, *Jagged Edge*, lawyer Teddi Barnes points out that the jury will be influenced by seeing her client, an accused wife-murderer, carrying her briefcase and taking her advice. *JAGGED EDGE* (RCA/Columbia Pictures Home Video 1985).

22. See Molyneux, *supra* note 20, at 3083.

23. See Podmore & Spencer, *supra* note 19, at 24. The perception that women are much more likely than men to leave the workplace for the demands of childrearing also figure into the disinclination to promote them into positions of authority. The statutory period for maternity leave is generous: "[A]n employee's maternity leave period continues for the period of fourteen weeks from its commencement or until the birth of the child, if later." Employment Rights Act of 1996, ch. 18, pt. VIII, § 73 (Eng.). Employees with two years or longer also have "the right to return to work at any time during the period beginning at the end of her maternity leave period and ending twenty-nine weeks after the beginning of the week in which childbirth occurs." *Id.* § 79.

It might in fact create serious business problems for an employer who makes the effort to hire women as fifty percent of its staff if, for example, a substantial part of half of the workforce were to take maternity leave on a rotating basis every few years.

Many senior partners will express reluctance to employ a woman solicitor because of the likelihood that she will have children and consequently the firm will suffer either by losing the solicitor altogether or by her taking time off to have the baby. It may be of some consolation to such senior partners that the average length of leave from the date of leaving until the date of return was only 5.24 months. For those respondents who were partners at the date of maternity leave, the period was much shorter being only 2.43 months. It should be borne in mind however that the employment protection legislation does not cover partners and in such cases the length of time off and arrangements for doing work during that period were matters for negotiation between the individual partner and her firm.

Molyneux, *supra* note 20, at 3083-84. From the employer's point of view the female employee covered by relevant legislation is taking nearly as much time as she is entitled to, without regard for the convenience of the employer. From the employee's point of view, she is attempting to fulfill the expectation of both her employer (faithfully returning to work when required) and of society (staying home with her infant and proving herself a "good mother"). Thus, the situation seems to become much more adversarial than perhaps it needs to be. This issue clearly needs more objective investigation.

24. See Molyneux, *supra* note 20.

## II. THE STRUCTURE OF THE ENGLISH LEGAL PROFESSION IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

### A. *In General*

The English Bar in the late seventeenth century was, as it is today, a bifurcated bar.<sup>25</sup> Divided into the twin professions of solicitor and barrister, the bar established and maintained a careful and rigorous distinction between the non-litigious role of the lawyer, eventually taken by the solicitor, and the litigious aspects, eventually taken by the barrister.<sup>26</sup>

We have seen that the distinction between the attorney who represents a person for the purposes of litigation, and the pleader who speaks for a litigant in court, is fundamental in early law. The idea that one man can represent another is foreign to early law. When first it is introduced it is regarded as an exceptional privilege, and the representative must be solemnly appointed. On the other hand, the idea that a litigant may get assistance from his friends or others to conduct his case in court is known to and recognized by early law. Thus the appointment by a litigant of an attorney, and the obtaining by the litigant of the assistance of a pleader, are two very different things; and so the class of attorneys and the class of pleaders naturally tended,

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25. See generally BIRKS, *supra* note 18 (discussing history of the legal system); 6 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 431-81 (1924) (discussing the general history of the English Bar in the latter half of the seventeenth century); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* pt. II (1929) (discussing the history of the law courts and the legal profession). For a discussion of the English Bar in the Jacobean and early modern period, see C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE 'LOWER BRANCH' OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND* (D.E.C. Yale ed., 1986); J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES: 1558-1714* (D.E.C. Yale ed., 1986); DAVID LEMMINGS, *GENTLEMEN AND BARRISTERS: THE INNS OF COURT AND THE ENGLISH BAR: 1680-1730* (1990); BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND: 1603-1641, A POLITICAL STUDY* (1973). For a discussion of the Victorian period, see RAYMOND COCKS, *FOUNDATIONS OF THE MODERN BAR* (1983). See also, e.g., Daniel Duman, *Pathway to Professionalism: The English Bar in the Eighteenth and Nineteenth Centuries*, 13 J. SOC. HIST. 615 (1980) (suggesting that the bar developed its own model of professionalism before other occupations); W. Wesley Pue, *In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers*, 33 ALTA. L. REV. 730 (1995) (advancing the view that lawyers, Canadian lawyers in particular, are enamoured with history because it allows them to create and recreate more flattering images of themselves).

Currently, some movement is underway to change the structure of the English Bar. This discussion is not new. Some of the commentators who favored the admission of women into the profession also favored a dismantling of the distinction between solicitor and barrister, as had already been done in some other countries in the Commonwealth, as well as in the United States. On the structure of the legal profession in the Commonwealth during the period discussed in this essay, see C.E.A. Bedwell, *Conditions of Admission to the Legal Profession Throughout the British Empire*, 12 J. SOC'Y COMP. LEG. 209 (1912) (discussing the conditions of admission to the legal profession within the Commonwealth); Holford Knight, *The Organisation of the Bar in the British Empire*, 15 J. SOC'Y COMP. LEG. 161 (1915) (examining the structure of the Bar in the British Empire).

26. See 6 HOLDSWORTH, *supra* note 25, at 432, 504-05.

from a very early period, to become quite distinct. English law has retained this distinction throughout its history.<sup>27</sup>

For the most part, the profession in the British Empire was closed to women; although a few Commonwealth jurisdictions such as New Brunswick<sup>28</sup> and Newfoundland<sup>29</sup> in Canada, and Queensland<sup>30</sup> (which eliminated the bifurcated bar in 1881),<sup>31</sup> Tasmania,<sup>32</sup> and Victoria<sup>33</sup> in Australia admitted women during the period.

## B. *Other Countries of the Union*

### 1. Scotland

In 1900, eighteen-year-old Margaret Hall requested permission to sit for the first of two required examinations given by the Examiners of Law-Agents.<sup>34</sup> The organization refused, and Hall brought suit against the Incorporated Society of Law-Agents in Scotland.<sup>35</sup> The Society, surprisingly, volunteered that although “[a]ccording to inveterate usage and custom in Scotland, that practice has in all departments of the law been hitherto confined exclusively to men . . . [It did not] conceive it to be their interest or duty to maintain that women ought not to be enrolled as law-agents.”<sup>36</sup>

The *Hall* case, like the *Chauvin* case across the Channel,<sup>37</sup> turned on the court’s narrow interpretation of its power to act in what might be considered a purely administrative matter. In the *Chauvin* case, the French court refused to order the petitioner’s admission on the grounds that the law did not permit it to usurp the power of the relevant professional association.<sup>38</sup> In the *Hall* case, the court worried about its ability to take such a drastic step absent a very clear indication from the legislature that the admission of women as law-agents was contemplated when the statute was drawn, even though the professional organization in question did not oppose the admission of women.<sup>39</sup> The organization did, however,

27. *Id.* at 432.

28. See Bedwell, *supra* note 25, at 218 (citing Act Enabling Women to Practice Law, 1906, 6 Edw. 7, ch. 5, §1 (Eng.)).

29. See *id.* at 221 (citing 10 Edw. 7, ch. 16 (Eng.)).

30. See *id.* at 223 (citing 5 Edw. 7, no. 10 (Eng.)).

31. See 45 Vict., no. 5 (1881).

32. See Bedwell, *supra* note 25, at 224 (citing 4 Edw. 7, no. 14 (Eng.)).

33. See *id.* at 225 (citing 3 Edw. 7, no. 1837, § 2 (Eng.)).

34. *Hall v. Incorporated Soc’y of Law-Agents in Scotland*, 3 Fr. 1059 (1901).

35. See *id.* at 1059-60.

36. See *id.* at 1060.

37. See Christine Alice Corcos, *Lawyers for Marianne: The Nature of Discourse of the Entry of French Women into the Legal Profession, 1894-1926*, 12 GA. ST. U. L. REV. 435, 443-56 (1996).

38. See *id.*

39. See *Hall*, 3 Fr. at 1062-64.

“pass the buck” to the court by indicating some hesitation on the question of the admissibility of women to practice law in Scotland:

The respondents do not feel called upon to oppose the prayer of the petition. At the same time there may be a question whether women have a legal right to be admitted to practise the profession of the law. According to inveterate usage and custom in Scotland, that practice has in all departments of the law been hitherto confined exclusively to men.<sup>40</sup>

Custom apart, however, “[t]he respondents . . . do not conceive it to be their interest or duty to maintain that women ought not to be enrolled as law-agents.”<sup>41</sup>

Hall herself maintained that the law presently permitted the admission of women, but even if the justices disagreed with her interpretation, the court still had the power to admit women as part of its traditional role as regulator of the Scottish Bar.<sup>42</sup> She based much of her case on the wording of the Law-Agents Act of 1873<sup>43</sup> which held that “[f]rom and after the passing of this Act no person shall be admitted as a law-agent in Scotland except in accordance with the provisions of this Act.”<sup>44</sup> As Hall pointed out, “no person” applied equally to men and women (unless the court deemed for some reason not to recognize women as “persons” for the purposes of the statute):

The Act neither expressly nor by implication excluded women. It contained express notice of disability of minority, but none of disability of sex. Its terms, strictly construed, included women. The substantive used throughout was the general one, “person,” which was followed in accordance with English usage, even where the term applied to both genders, by the masculine pronoun “he,” “his” or “him.” Moreover, previous to the passing of the Act of 1873, Lord Brougham’s Act of 1850 had been passed, which provided that after 1850 “in all Acts words importing the masculine gender shall be deemed and taken to include females, unless the contrary as to gender is expressly provided.” The Act of 1873, construed in the light of Lord Brougham’s Act, included women. Lord Brougham’s Act was repealed and substantially re-enacted by the Interpretation Act, 1889, section 1.<sup>45</sup>

Further, even if the statute was not capable of the reading Hall gave it, she asserted that the court had, by custom and statute, the responsibility of admitting all law-agents who met the appropriate standards:

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40. *Id.* at 1060.

41. *Id.*

42. *See id.*

43. 36 & 37 Vict., ch. 63 (Eng.).

44. *Id.* § 2.

45. *Hall v. Incorporated Soc’y of Law-Agents in Scotland*, 3 Fr. 1059, 1061 (1901) (citations omitted).

It was competent for the Court, and within its discretion, to admit them. The Act of 1873 created no new duty in the Court, and gave it no new power with regard to this question. The duty of regulating the admission of persons desiring to practise as law-agents had been exercised by the Lord of Council and Session of their own motion ever since they first admitted agents to practise before the Courts, and simply as a matter of the administration of the Courts. . . . The Court had, ever since they had first admitted agents to practise either in the superior or inferior Courts, regulated their admission merely as one of the incidents of the administration of the Courts of the country without any further power conferred upon them by the Legislature than that of conducting the business of the Courts. . . . Seeing, then, that the admission of persons as law-agents had always been treated by the Lords of Session as one solely of administration in conducting the business of the Courts, it could not be said to be incompetent for the Court to admit women to practise law.<sup>46</sup>

By presenting the question of admission as one of simple administration, requiring little judgment on the part of the court except a willingness to "go along," Hall clearly hoped to diffuse the question on which the Society attached its refusal, that of technical inability to support admission, even though the Society had never really been requested to do so. Hall's initial petition to the Law-Agents had simply been for the right to sit "for the first of the two examinations which intending law-agents" were required to pass.<sup>47</sup>

Turning to the question of custom, Hall pointed to historical instances of female advocates, including that of Lady Crawford, who obtained an acquittal for her client.<sup>48</sup>

That the Court might not have been entirely averse to admitting women to the practice of the law, even in early times, might be gathered from the fact that the Justiciary records contained a report of a trial on 12th June 1563 in which the Lady Crawford appeared as advocate in the High Court of Justiciary for the defence of a prisoner who was ultimately acquitted.<sup>49</sup>

Note the addition of the phrase "even in early times," implying that in fact women could point to a long tradition of admission, even though the last documented instance was 350 years previous. The words suggested to the court that even the culturally benighted legal profession of Renaissance Scotland recognized the rights of able women in this regard.

Hall also answered other objections. Women were now able to earn the appropriate education at the University; therefore they could not be

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46. *Id.* at 1061-62.

47. *Id.* at 1059.

48. *Id.* at 1062 (citing SCOTTISH L. TIMES, Feb. 9, 1901, at 126).

49. *Id.*

said to be lacking in training.<sup>50</sup> Other countries, including the United States, admitted women to the bar, and even in Scotland women were admitted to the practice of medicine and allowed to hold other positions of authority.<sup>51</sup>

The Incorporated Society of Law-Agents responded by asserting that women never had been law-agents, or held any other office bearing on the practice of law.<sup>52</sup> Further, even after the Act of 1873, legislation regulating the practice of law always used the masculine form. "The masculine gender was used throughout the whole of the Acts of Parliament and Acts of Sederunt both prior and subsequent to the Law-Agents Act of 1873, and there was nothing to suggest that Parliament or the Court contemplated women acting as agents."<sup>53</sup>

In addressing the questions of interpretation posed by the Interpretation Act of 1889,<sup>54</sup> the Society cited two cases which clearly contravened the intent of the Act, *Beresford Hope v. Sandhurst*<sup>55</sup> and *Chorlton v. Lings*,<sup>56</sup> both of which assumed that Parliament could not have meant what it said. In *Beresford Hope*, the presiding justice held that in order to determine whether use of the masculine gender also included the feminine, as required by the Interpretation Act, "'the history of the matter' must be looked at."<sup>57</sup> In the suffrage case, *Chorlton*, "it was held that 'man' did not include 'woman,' notwithstanding the provision of Lord Brougham's Act."<sup>58</sup> As the *Bebb* court would later suggest,<sup>59</sup> the Law Society suggested Parliament simply could not have meant what it said. Thus, the court, which prided itself on its adherence to the letter of the law, must necessarily find that Parliament's actual language meant the opposite if to give effect to the literal meaning meant a change in the status quo.

As far as custom was concerned, "[i]t did not appear that women at any time prior to the present application sought to be admitted as agents."<sup>60</sup> Further, citing to the case of Sophia Jex-Blake, who had requested admission to medical school,<sup>61</sup> the Society quoted Lord Neaves, who

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50. See *id.* at 1062-63.

51. See *id.* at 1063.

52. See *id.*

53. *Id.* at 1064.

54. 52 & 53 Vict., ch. 63 (Eng.).

55. 23 Q.B.D. 79 (1889).

56. 4 L.R.-C.P. 374 (1868).

57. *Hall v. Incorporated Soc'y of Law-Agents in Scotland*, 3 Fr. 1059, 1064 (1901).

58. *Id.*

59. *Bebb v. Law Society*, 24 T.L.R. 634 (1913), *aff'd*, 30 T.L.R. 179 (C.A. 1913). See *infra* Parts IV.C.2, IV.C.3.

60. *Hall*, 3 Fr. at 1064.

61. *Jex-Blake v. University of Edinburgh*, 10 M. 549 (1873).

referred to the Roman law disabling women from acting as procurators, and further said that he never heard it suggested that a woman could be a member of the College of Justice. Reference to the Roman law, and to the reason for women being disabled, was made in an address of Sir Robert Spottiswood, Lord President of the College of Justice, to the members of the Faculty of Advocates, summer session, 1633.<sup>62</sup>

Regardless of the outcome of Jex-Blake's petition, women were ultimately admitted to medical school and to the practice of medicine. The dicta in that case, citing to the practice of the seventeenth century, was comparable to the arguments advanced in the *Bebb* case concerning Sir Edward Coke's pronouncements on the legal disabilities of women.

Further, the Society pointed out that "the respondents had communicated with the societies corresponding to their own in England and Ireland, and had been informed that no woman had been admitted to practise as a law-agent in these countries. No woman, it appeared, had hitherto sought to be admitted."<sup>63</sup> Yet, the Society concluded lamely, "[t]he respondents . . . did not . . . conceive it to be their interest or duty to maintain that women ought not to be admitted to practise the profession of law."<sup>64</sup> The Society did not make it clear whether it considered such a position legally questionable, or simply politically unwise.

While the judges of the Second Division agreed that, within the confines of the Interpretation Act, "persons" included both males and females,<sup>65</sup> it disagreed that Parliament meant what it said.

[I]n the case of an ambiguous term, that meaning must be assigned to it which is in accordance with inveterate usage. Accordingly we interpret the word as meaning "male persons," as no other has ever been admitted as a law-agent. If females are now to be admitted as law-agents, that must, in our view, be authorised by the Legislature.<sup>66</sup>

What was "ambiguous" about the use of the word "person" is unclear, given the very clear explanation in the Interpretation Act of 1889,<sup>67</sup> unless the court was requiring that Parliament anticipate which of its uses of the word might seem radical should it be interpreted to include women, and thus use the phrase "male and female" instead of "person." The other judges delivering the *Hall* opinion held that "before the Act of 1873 women were not eligible to be appointed law-agents, and that they are not made eligible by that Act."<sup>68</sup> With such language a judicial inter-

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62. *Hall*, 3 Fr. at 1064.

63. *Id.*

64. *Id.*

65. *Id.* at 1065.

66. *Id.*

67. 52 & 53 Vict., ch. 63 (Eng.).

68. *Hall v. Incorporated Soc'y of Law-Agents in Scotland*, 3 Fr. 1059, 1065 (1901).

pretation of custom and usage overrode a statute intended to address the shortcomings of that custom and usage.

Like the *Bebb* judges after them, these judges felt it necessary to protect Parliament from what they considered to be the unintended effects of its legislation, due to the incautious use of the word "persons." Nevertheless, by 1907 women were admitted to study law at one Scottish university, although they were not admitted to the profession until the passage of the Sex Disqualification (Removal) Act.<sup>69</sup> However, the number of women admitted as solicitors did not reach thirty percent until 1979.<sup>70</sup>

## 2. Ireland

Although it was still part of the Union in the early 1900s, Ireland offered women somewhat more latitude in participating in the legal profession than did England. "Women were entitled to appear in court and plead for themselves in cases in which they were concerned and some Irish women became well known for this in the latter half of the nineteenth century. . . ."<sup>71</sup> One woman even argued her own divorce appeal before the House of Lords.<sup>72</sup> Meanwhile, the Irish legal profession watched and waited.

Irish women had clearly been waiting for the opportunity to qualify for the bar.<sup>73</sup> In January 1920, the King's Inns admitted the first two women in Ireland to the study of law. One, Frances Kyle, distinguished herself by winning the leading scholarly prize for Irish law students then available.<sup>74</sup> Both she and her colleague were admitted to the bar in November of 1921,<sup>75</sup> six months before the first Englishwoman was admitted in England.<sup>76</sup> Kyle was also the first woman admitted to the bar of Northern Ireland.<sup>77</sup> By 1920 a woman was a magistrate in Northern Ireland and by 1923 the Irish legal profession had welcomed its first female solicitor.<sup>78</sup> In 1921 an Irish woman sat on a Dublin jury.<sup>79</sup> Generally

69. Sex Disqualification (Removal) Act of 1919, 9 & 10 Geo. 5, ch. 71, § 1 (Eng.); see also Alan A. Paterson, *The Legal Profession in Scotland: An Endangered Species or a Problem Case For Market Theory*, in 1 *LAWYERS IN SOCIETY* 76, 93 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

70. Paterson, *supra* note 69, at 113 tbl.3.12.

71. DAIRE HOGAN, *THE LEGAL PROFESSION IN IRELAND, 1789-1922*, at 147 (1986).

72. *Id.*

73. Hogan speculates that they participated actively but without recognition for some decades before admission. *Id.* This may well be true since Irish women quickly qualified for legal study and were admitted before English women, thus suggesting that they, like their English sisters, were not only "in the pipeline" but psychologically ready for admission.

74. *Id.*

75. *Id.*

76. See *infra* note 431 and accompanying text.

77. HOGAN, *supra* note 71, at 147.

78. Studies in the history of the Irish legal profession are still somewhat sparse. The major bibliography on Irish law is PAUL O'HIGGINS, *A BIBLIOGRAPHY OF PERIODICAL LITERATURE RELATING TO IRISH LAW* (1966), with subsequent supplementation; HOGAN, *supra* note 71, is a general



speaking, the situation of women barristers and solicitors in Ireland seems to parallel that of women lawyers in other countries. Women tend to make less money than men in the same position and with the same number of years of experience,<sup>80</sup> tend to cluster in particular areas of work,<sup>81</sup> and suffer the same kinds of discrimination, although it seems to occur less frequently in Ireland than in other countries.

As to experience and perception of bias and sexist attitudes, whether from solicitors, clients, judges or colleagues, there was some, but little, evidence of bias from all sources. Colleague bias was the most frequently mentioned, and it was particularly remarked that some older male barristers appear to have problems dealing with a female barrister. Also, a woman's attire might be commented on in a way which that of a man would not. There seems, however, to be little scope for individuality of dress. With the statutory exception of certain family law proceedings . . . the wearing of a wig and gown is obligatory in court. Indeed, this dress regime seems emblematic of an atmosphere in which there is great pressure to conform and censure of those who do not.<sup>82</sup>

### III. SIMILARITIES WITH THE PROFESSION IN OTHER COUNTRIES

In general, women's admission to the bars of most European and Commonwealth countries took place between the 1870s and the 1920s. Thus, the English movement to admit women was part of a multinational wave of discontent with the exclusion of women from political equality with men that also included demands for suffrage rights, child custody rights, property rights, and employment rights.<sup>83</sup> The "persons" cases,<sup>84</sup> in which British women repeatedly attempted to expand their political and civil rights, form a unified attack on male privilege and power.

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account. Generally, the collection BREHONS, SERJEANTS AND ATTORNEYS (Daire Hogan & W.N. Osborough eds., 1991), contains nothing for the late nineteenth or early twentieth centuries, but W.N. Osborough, *The Regulation of the Admission of Attorneys and Solicitors in Ireland, 1600-1866*, in BREHONS, SERJEANTS AND ATTORNEYS, *supra*, at 101, is of some interest. A good collection for general Irish legal history is THE COMMON LAW TRADITION: ESSAYS IN IRISH LEGAL HISTORY (J.F. McEldowney & Paul O'Higgins eds., 1990), which has a useful bibliography beginning at page 231.

79. HOGAN, *supra* note 71, at 147.

80. On women in the Irish legal profession, see Alpha Connelly & Betty Hilliard, *The Legal Profession*, in GENDER AND THE LAW IN IRELAND 212, 216-17 (Alpha Connelly ed., 1993).

81. *See id.* at 217.

82. *Id.* at 219.

83. The literature on each of these movements grows yearly. On the women's movement and the development of the recognition of women's rights in the U.S., see, for example, SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* (1989). On custody rights, see PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN & CUSTODY* (1986). On equal employment, see ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* (1993).

84. *See* SACHS & WILSON, *supra* note 3, at 22-35.

## A. Other Countries of the Commonwealth

### 1. Canada

The efforts to admit women to the Ontario Bar paralleled, to some extent, the battle in England. Clara Brett Martin requested admission to the Benchers,<sup>85</sup> a group of senior attorneys appointed by Ontario's "gate-keeper" law society to enforce its regulations.<sup>86</sup> In its decision of June 30, 1891, the Convocation of Benchers decided that it could not admit Miss Martin, based on its reading of applicable regulations.<sup>87</sup> The government's response was swift. The Prime Minister, Sir Oliver Mowat, asked the Ontario legislature to permit the Law Society of Upper Canada to admit women<sup>88</sup> as solicitors by affirmative language in an appropriate statute.<sup>89</sup> Martin duly applied and was eventually called to the bar, but not without further obstacles.<sup>90</sup> Her admission finally required two separate acts of the legislature,<sup>91</sup> which finally admitted her as both a solicitor and barrister on February 2, 1897, after the Ontario legislature passed further legislation enabling women to be barristers.<sup>92</sup>

An observer of the contemporary scene wrote:

If I were to sum up in a sentence the results of the admissions of women to the practice of law from my experience and inquiry, I would say that it has done some good, and no harm, while all prophecies of ill results have been falsified; that its effects on the profession and practice of law have been negligible, and that it is now regarded with indifference and as the normal and natural thing by Bench, Bar, and the community at large.<sup>93</sup>

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85. William Renwick Riddell, *Women as Practitioners of Law*, 18 J. COMP. LEG. & INT'L LAW 200, 201 (1918). On Martin's battle for admission, see Constance B. Backhouse, "To Open the Way For Others of My Sex"; *Clara Brett Martin's Career as Canada's First Woman Lawyer*, 1 CAN. J. WOMEN & L. 1 (1985), and on Canadian women lawyers of the early and mid-twentieth century, see Mary Kinnear, "That There Woman Lawyer": *Women Lawyers in Manitoba 1915-1970*, 5 CAN. J. WOMEN & L. 411 (1992).

86. On the Law Society of Upper Canada and the Benchers, see WILLIAM RENWICK RIDDELL, *THE LEGAL PROFESSION IN UPPER CANADA IN ITS EARLY PERIODS* 133-42 (1916). Riddell, who documented Martin's fight for admission elsewhere does not mention it in this overview.

87. Riddell, *supra* note 85, at 201.

88. The Law Society may in its discretion make rules providing for the admission of women to practice as solicitors. 55 Vic., ch. 32 (1892) (Eng.). See also Riddell, *supra* note 85, at 201-02.

89. Riddell, *supra* note 85, at 202.

90. *Id.* at 202 n.3.

91. See JOHN HAGAN & FIONA KAY, *GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES* 7 (1995).

92. Riddell, *supra* note 85, at 202.

93. *Id.* at 209.

Certainly English lawyers would have examined the Ontario statute. If women could be admitted in a part of the Commonwealth, why not in the Mother Country herself?<sup>94</sup>

## 2. Australia

Various territories of Australia admitted women to the legal profession long before their mother country did.<sup>95</sup> G.F. Greig, identified by the *Commonwealth Law Review* as "the first woman lawyer to practise in the Commonwealth,"<sup>96</sup> delivered cogent views on the difficulties of law practice for women. In her opinion, women's fuller participation in all occupations, not just in law, contributed to public morality.<sup>97</sup> "No sign yet appears of any approaching catastrophe, such as the wise men have predicted, and still predict."<sup>98</sup> A woman's ability to succeed in law simply repeats her ability to succeed in other professions, once given the chance. "The women who first determined to enter commercial life were those who were forced to immediately do something remunerative . . . and then each year found a new inroad made into higher and still higher positions."<sup>99</sup> Once they had proven themselves in business, they attacked the centers of learning and made their names in science and medicine.<sup>100</sup>

Yet law remained closed to Australian women far longer than it should have. "[T]o many, the main question is, are women capable of performing legal work? Well, why not? Personally I have never heard one rational reason against it, although I have listened to heaps of twaddle."<sup>101</sup> As Greig points out, "[f]or many years now we have been accustomed to see women figuring as exhibitioners and in the first class honour lists of our University, and the Law school is not more difficult than any other."<sup>102</sup> Greig pointed out the deficiencies of the male habit of ar-

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94. I have not been able to ascertain whether any female solicitor or barrister, having been admitted in a constituent country of the Commonwealth, made a request to be admitted to the Bar in England. The result would certainly have been interesting, though probably negative.

95. David Weisbrot, *The Australian Legal Profession: From Provincial Family Firms to Multinationals*, in 1 *LAWYERS IN SOCIETY*, *supra* note 69, at 244, 270-71 (giving a short history of the admission of women and their subsequent success in the profession).

Victoria removed the legal barrier in 1903, followed by Tasmania (1904), Queensland (1905), South Australia (1911), New South Wales (1918), and Western Australia (1923).

In New South Wales, the first woman was admitted to practice in 1921 (she had been the first woman law graduate (1902); in Victoria, the first woman was admitted in 1923 (she was appointed Victoria's first and only woman Queen's Counsel in 1965) . . .

*Id.* at 270.

96. See Greig, *supra* note 16, at 146.

97. *Id.*

98. *Id.*

99. *Id.* at 146-47.

100. *Id.* at 147.

101. *Id.* at 149.

102. *Id.*

guing that women never had been lawyers, therefore were incapable of performing adequately in that profession.

I notice that most men, when it comes to an argument as to what women could or could not do, generally argue "You have not, ergo you cannot." . . . They will rarely make allowance for the fact that men for generations have been trained to do what women are doing now for the first time . . . . Opportunity is everything with we mediocrities. . . . [A]ny man or woman of average ability, given the opportunity to thoroughly master any business, profession, or trade that he or she has some natural taste for, and he or she will become a capable mediocrity worthy of all respect.<sup>103</sup>

Given the same abilities and the same training, women could, in Greig's opinion, be the equals of men in any branch of the law, not just those with which some felt women had a natural affinity. Barristers had the more consistently interesting practices,<sup>104</sup> but the profession of solicitors offered steady work, and though some of it was tedious, some was rewarding and challenging, including the preparation of briefs for a barrister.<sup>105</sup> Ultimately, education could not take the place of experience and temperament.

The most successful solicitor, then, is not always the most erudite, he is the one who has a good working knowledge of the law that is daily applicable and knows exactly where to find anything else that is likely to crop up. In a word, he requires exactly the same qualities which go to make the successful business man in any other path of commercial life. And as women have succeeded in other businesses, why not in this?<sup>106</sup>

However, by the 1980s, women were still underrepresented in the profession.<sup>107</sup> As in other countries they were "bunched" in certain areas of practice, primarily those concerned with family law, except for estate planning.<sup>108</sup>

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103. *Id.* at 150-51.

104. *Id.* at 151-52.

105. *Id.* at 152-53.

106. *Id.* at 154.

107. Weisbrot, *supra* note 95, at 271. Weisbrot states:

In New South Wales in 1984, women constituted only 3.9 percent of partners in solicitors' firms and 8 percent of sole practitioners but 26.5 percent of employed solicitors. Stated another way, while 48.9 percent of male solicitors in private practice were partners and only 27.4 percent were employed, only 14.2 percent of women were partners and fully 70.8 percent were employed. According to figures supplied by the Women Lawyers Association of New South Wales, only about 78 of the 1,100 active barristers in that state in 1985 were women.

*Id.*

108. *Id.*

### 3. New Zealand

Unlike other member states of the Commonwealth, New Zealand never prohibited women from practicing law,<sup>109</sup> and the first woman to set up practice as an attorney in New Zealand was Ellen Melville in 1909.<sup>110</sup> However, women felt discouraged from entering the profession, primarily because of the attitude of male lawyers. A 1981 study by the Auckland District Law Society found that women faced discrimination based on assumptions about their family responsibilities and interest in furthering their careers.<sup>111</sup>

### 4. South Africa

While the first attempt to admit a woman failed in 1912,<sup>112</sup> the Cape Supreme Court determined that the word "person" did in fact include women, to the satisfaction of the plaintiff, Madeline Wookey.<sup>113</sup> A disappointed Cape Law Society obtained a reversal of that court's decision in *Incorporated Law Society v. Wookey*, which contains language reminiscent of that in the *Bebb* decision.

The second (of three) judge(s) . . . said that ordinarily the term "person" included women as well as men, but was often used to refer to one sex only. Looking at the statute in the context in which it was passed, it seemed inconceivable to him that if the Legislature had intended to introduce so great a change and to throw open the doors of the profession to women, it would not have done so in clear and unambiguous language, instead of leaving it as an inference to be drawn from the use of the word "person", which might or might not include women as well as men.<sup>114</sup>

## B. France

Generally speaking, the more virulent argument over the admission of women to the French legal profession took place after, not before admission.<sup>115</sup> While some debate took place between 1888 (the date of publication of an influential book on the subject)<sup>116</sup> and the denial of admission to Jeanne Chauvin in 1897, that event shocked the incoming government to the point that it made the passage of enabling legislation in

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109. Georgina Murray, *New Zealand Lawyers: From Colonial GPs to the Servants of Capital*, in 1 *LAWYERS IN SOCIETY*, *supra* note 69, at 318, 329.

110. *Id.*

111. *Id.* at 329-30.

112. See SACHS & WILSON, *supra* note 3, at 36.

113. *Id.*

114. *Id.* at 37.

115. See Corcos, *supra* note 37, at 437 (regarding the admission of women to the French Bar).

116. LOUIS FRANK, *LA FEMME-AVOCAT AU POINT DE VUE DE LA SOCIOLOGIE* (1898). This book went into at least two editions, the second appearing in 1898. See also *infra* notes 141-42 and accompanying text.

1900 a priority.<sup>117</sup> After the admission of women, the profession engaged in spirited debate, but the possibility of expelling women, once they were admitted, was very slight.

In England, the debate began at about the same period, but because of unified opposition in the profession as well as failure in the courts and in Parliament, women waited an additional twenty years for the right to practice law. Without the intervention of wartime necessities, it is likely that opposition to the notion of female solicitors and barristers would have continued for another ten or twenty years.

Like their French sisters, English female solicitors made very little initial impact.

The subsequent history of women as solicitors is rather an anticlimax; the fear of competition proved quite unfounded. The first woman solicitor was admitted in 1922 and the event went unnoticed. Since then the numbers admitted each year have risen steadily but very slowly. Even now fewer than forty women are admitted each year. In 1957 there were 560 women on the roll, of whom 337 held practising certificates. The solicitors' profession does not appear to attract women very much. Among practising solicitors the ratio of women to men is roughly one in fifty. A large number of these have family links with the profession, which no doubt exercised some influence upon their choice of career. At the Bar the ratio of women to men is nearer one in twenty-five, but this may be deceptive. It is likely that many of them have only been recently called to the Bar, and the proportion who become established in practice is probably much smaller.<sup>118</sup>

Similarly, when describing the French Bar in a short article, one commentator of the late twenties failed to note the presence of any women in the profession, demonstrating that women lawyers simply had not made much of an impression at the time.

The Bar council still nails to the cross any man who makes the slightest attempt at advertising. . . . No lawyer may bring an action for the payment of a fee unless he obtains the specific authorization of the Bar Council. . . . Lawyers, when they appear in Court, wear a black gown somewhat similar to, but more formal than that adopted by the American bench. . . . They represent a professional élite of educated gentlemen who have high ideals and who live up to them. To be an *avocat à la Cour d'Appel de Paris* or of the most remote provincial center is to stand forth among one's fellows. . . . The French lawyer

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117. See Corcos, *supra* note 37, at 443-44.

118. BIRKS, *supra* note 18, at 277-78 (reporting that the number of women lawyers, per hundred, in the U.S. as 2.48 in 1951 and in England as 2.1 in 1957; then comparing these ratios with the number of women in the English medical profession (1 in 6)).

may be said to have taken Holy Orders. His sacerdotal office is as indivisible as that of any priest of the Gospel.<sup>119</sup>

Even though they obtained the same education and fulfilled the same requirements as men, French women lawyers were still constrained to some extent by tradition or by other existing legal handicaps. An American observer of the time noted that

[t]he woman lawyer who is married, cannot practice law without the consent of her husband; and no woman is permitted to practice in the Court of Cassation (Court of Appeals). Should a woman lawyer have a case that would necessitate an appeal to the higher court, she is obliged to have a man bring the appeal for her. Queer, isn't it, the handicaps men place on women, while so often admitting their efficiency? In France, the country which writes in great letters of stone, "Equality, Fraternity, Liberty," over the gates of its capitol, we have men, when it comes to admitting the equality of the woman, only half-practising that which is their boast, and, like little Jack Horner, thinking they are great boys at that.<sup>120</sup>

English legal journals, however, followed the progress of French women lawyers with satisfaction and interest. As early as 1915 the *Solicitors' Journal and Weekly Reporter* noted the admission of the twenty-ninth female member of the profession.<sup>121</sup> They chronicled the success of Jeanne Rospars, the first woman to be accepted to the *Conférence des Avocats*,<sup>122</sup> and observed that she might well become the *bâtonnier* (head) of the Paris Bar.<sup>123</sup> The *Law Times* ridiculed the arguments of the opponents of female participation in the French legal profession. "They had discovered this formula, in the form of juridic axioms, which to-day makes one smile; for instance, *Robe sur robe ne vaut*. The profession of *avocat* was considered virile."<sup>124</sup> It also reported on the question of dress for *avocates*.

It was curious to see how she (Mme Petit, the first woman to be admitted to the French bar) bore her robe in the manner of one who had not expected to become an *avocate* to possess a robe. She justified women wearing the gown: "Since the *avocats* dress themselves as women, the women should be allowed to dress themselves as *avocates*."<sup>125</sup>

119. Pierre Crabites, *The French Bar From Within*, 14 A.B.A. J. 369, 371 (1928).

120. Mary M. Lilly, *The French Women Lawyers*, 21 CASE & COM. 431, 431 (1914).

121. *Current Topics: The Admission of Women to the French Bar*, 60 SOLIC. J. & WKLY. REP. 35, 35-36 (1915).

122. *Occasional Notes*, 154 LAW TIMES 123, 124 (1922).

123. See also *id.* (stating that Jeanne Rospars might as well be made *bâtonnier*); *The Legal Profession in France*, 14 LAW NOTES 149, 149 (1910) (stating that the presiding officer is known as the *Bâtonnier*, which in Paris is a position of great dignity, held by one of the conceded leaders of the bar).

124. *Occasional Notes*, *supra* note 122, at 124.

125. *Id.*

The American legal journal the *Green Bag* noted with enthusiasm the professional *début* of Hélène Miropolosky, which, it felt, added some *éclat* to the female half of the profession.

[I]t is said that she made a most pleasing appearance. She was attired in a simple black gown relieved by the conventional white barrister's bib. Her costume was further accentuated by the black toque which crowned her jet black hair. She appeared to every one an irresistible legal belle. . . . If the ladies of the United States would more generally emulate the example of the charming Mlle. Miropolosky, the beauty of woman would vie with the dignity of man in raising the general tone of the profession.<sup>126</sup>

However, neither English nor U.S. legal journals were unanimous in their support of the *avocates*, and some watched their progress with amused contempt. The *Green Bag's* acclaim of Miropolosky's admission to the Paris Bar occasioned this snippy response from A.H. Robbins in the *Central Law Journal*:

While every lover of the fair sex, and they are legion, wish for them the highest possible places in our civilization, we do not think the editor of the *Green Bag* has in any degree helped them in that direction when he encourages them to "emulate the example of the charming Mlle. Miropolosky." Whether women should forsake, under no circumstances, the ideals of home life, might be a debatable question. Surely many exigencies of her existence in these modern days often compel a woman to seek her living in gainful occupations, but neither the woman herself nor the world generally regards the situation as in any way elevating her. It is always a situation that calls for some apology. And of all the occupations usually performed by men which tend in some degree to embarrass a woman and detract greatly from her delightfully retiring and maidenly qualities, that of the legal profession probably heads the list.<sup>127</sup>

For Robbins, both woman's innate lack of ability to "think like a lawyer" and her (sex-linked) weaknesses combined to demonstrate her incapacity to perform adequately as an advocate:

Woman's failure in this profession has been notorious and is due to several reasons. First, a woman's emotional temperament utterly unfits her for unprejudicial analytical investigation; second, her sensitive disposition recoils and is shocked by the necessary rudeness and bitterness of contesting litigants; thirdly, her natural feminine instincts often embarrass her in her relations with other members of the profession and with witnesses; fourthly, the peculiar and frequent physical incapacity of women jeopardize their success in the trial of

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126. *The Call to Arms*, 21 GREEN BAG 597, 597 (1909).

127. A.H.R[obbins], *Jetsam and Flotsam: Women and the Law*, 69 CENT. L.J. 397, 397-98 (1909).



cases by making them unfit to meet the demands of the situation confronting them.<sup>128</sup>

The appeal to scientific bases to support his objection reveals itself in the writer's dispassionate references to female emotionalism and sensitivity and to her "peculiar and frequent physical incapacity." Objectionable traits are listed and classified as if they are the result of an objective study of the issue. The reference to menstruation lifts the argument above the accusation that Robbins is simply prejudiced against women lawyers: undeniably, human females undergo monthly biological changes for thirty to forty years of their lives.<sup>129</sup>

Robbins also rejects the "moral uplift" argument by asserting that women are superior to men by virtue of their gentler natures. If they attempt to compete with men at a professional level, they lose that superiority. They distract their male opponents through feminine wiles or they force men to abandon their chivalrous instincts in order to do their duty. In either case, women cause a dislocation of the system.

[T]o lawyers generally it is an occasion for much embarrassment to have to meet a lady as opposing counsel, and often, either of two things must result, to-wit, either the interests of their clients must suffer by reason of their unwillingness to take advantage of their fair opponent's mistakes, or they must crush their natural feelings and attitude toward the weaker sex and treat her as any other opponent to a point which they must consider rude toward a woman, although not so as between man and man. . . . The argument that woman's entrance would elevate the moral tone of the profession may, for the sake of the argument, be admitted, but such result could not possibly be reached without detracting to a large extent from the high standing women already enjoy. To a gentleman, a lady is an object, if not of worship, at least of the highest possible esteem. . . . For her to become, not merely a competitor as in some lines of business, but his active antagonist as she must do when she assumes the role of a barrister, is either to take advantage of her antagonist or to abdicate her throne. Either alternative degrades a woman in the estimation of the man she thus unfairly opposes.<sup>130</sup>

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128. *Id.* at 398.

129. One Canadian law school dean blatantly stated his belief that women students were at a biological disadvantage. According to one law student:

[T]he old Dean really had a lot of reservations about women going into Law. He called me in for a little chat and explained that although he knew that I was quite clever enough to do all these things it really wasn't suitable. I was baffled. He said, very embarrassed, "[W]ell, some times of the month you just might not be up to it."

Kinnear, *supra* note 85, at 425. Male students also made clear their firm conviction that women pursued law degrees to get a husband. "One woman, married and a little older, perplexed the men. 'A couple of fellows couldn't figure out what I was doing there. One of them said to me (he was not a very smart fellow), 'You've already got a husband. What are you doing here?'" *Id.*

130. R[obbins], *supra* note 127, at 398.

By trivializing women's desire to obtain civic and legal equality, Robbins fails to address their very real concerns. He evokes the most enduring of images of conflict between male and female, and one of the most frightening for men.<sup>131</sup> He suggests that the woman in competition with the man threatens not only his ability to remain true to his profession (she is a distraction) but to his natural code of honor (she tries his patience and his virtue).<sup>132</sup> A real lady could not possibly wish to "abdicate her throne," even though most women have sat on thrones through the ages only because of a particular relationship with men (marriage to a male sovereign) and not because of inheritance, and a real lady, he clucks, would not want to put a male adversary at the huge disadvantage of competing with her unchivalrously in order to win a case. Further, notice that Robbins sounds the familiar theme that women do not understand the rules of competition. They would necessarily play the game unfairly, as "active antagonists," while men are precluded by tradition and socialization from fighting back as they would with a male opponent. Too many accommodations would have to be made to allow a woman to compete at all in the legal area, much less to compete "fairly."

[H]er success must necessarily be relatively small as she is not in mind or body predisposed to the kind of work, mental and physical,

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131. See FARRELL, *supra* note 15 (casting the entire male-female relationship in terms of a continuing battle based on misunderstandings and conflicting assumptions about male and female roles). For Farrell, the culture tends to encourage and value women. For Joan Shapiro, another popular commentator, the opposite is true.

In our culture, boys . . . learn a sense of entitlement. After all, men are the important people in the world. . . . Because of this status, they learn that they are important. All we have to do is look around us, and especially on TV and in newspapers and magazines, to know that the most "important" people are men. Boys may say that they want to be a fireman or a policeman when they grow up. They also say that they want to be President of the United States. They very often learn that they *should* get the things that they want, and very often from women. We as women need to recognize our participation in this as we try to understand why men react to us in the ways that they do. We are, like it or not, a part of the culture that elevates men and devalues women. We absorb our cultural roles as well as do men. After all, we are the ones who lead men to believe that shirts appear, as if by magic, cleaned, pressed, and in their drawers! By living up to our role as helpers, nurturers, as the ones who meet men's ordinary daily needs, we cripple them in a sense. We handle them so quickly they don't even know they have these needs.

JOAN SHAPIRO, *MEN: A TRANSLATION FOR WOMEN* 54 (1992). If women relinquish this supportive role in order to "compete" with men in the arena in which they are the traditional leaders, men will naturally feel confused and betrayed.

132. This attitude is painfully obvious throughout all of the arts. In particular, the familiar plot of the woman attempting to compete with a man is depicted in movies (from Susan Hayward as an oil prospector in *TULSA* (Eagle-Lion 1949) to Jane Fonda in *COMES A HORSEMAN* (MGM/UA Home Video 1997)), in fiction (Scarlett O'Hara as a mill owner in *MARGARET MITCHELL, GONE WITH THE WIND* (1936)), and in ballet (the cowgirl who ropes as well as a man in Agnes DeMille's ballet *RODEO* (1950) can't get a date for Saturday night (see Maggie Hall, "Rodeo" *Hobbled by Sticking to Safe, Old Trail*, TAMPA TRIB., Mar. 30, 1997, at 4)). That women compete unfairly, usually by using sex as a weapon, is also a common message. The Demi Moore character in *DISCLOSURE* (Warner Bros. 1994) harrasses poor innocent employee Michael Douglas, and Carolyn Pohlhemus sleeps her way to the top in *PRESUMED INNOCENT* (Mirage Productions 1990), but she gets murdered for it. Michael Douglas catches hell again from a woman for sexual misconduct in *FATAL ATTRACTION* (Paramount 1987) wherein the rabbit dies once more.

which a successful lawyer is often called upon to endure. . . . We have no intention by our position in this article to indicate any opposition to the right of women to earn a livelihood whenever it becomes necessary in any business to which she may be physically and mentally equal and where she does not become a direct personal antagonist to one of the opposite sex. Our only purpose is to hold out to her a fair warning that we see no possibility of her permanent success as an active practitioner of the law.<sup>133</sup>

These arguments are remarkably similar to those advanced by French opponents of women's admission.<sup>134</sup>

One contemporary commentator concluded that French women lawyers of the period took the initiative to defend women and children charged with crimes directly traceable to the effects of poverty and powerlessness.<sup>135</sup>

The woman lawyer is everywhere in the criminal courts of Paris. She is a charming figure as she floats smilingly through the halls and corridors of the Assises of the Palais de Justice; and truly is she an angel of mercy to the women and children brought to these courts charged with crime. She pleads for them without hope of remuneration, and rarely, if ever, receives a fee for her services. The men lawyers voted this field of the law entirely to her, and most enthusiastically does she fill it. With my American commercialism, I could not help speculating as to whether or not the men would have so gallantly accorded this distinctive place in the law courts to the women had there been any money in this particular field. . . . This thought of helping women and children seemed to have been in the minds of all these French women lawyers, unorganized as they were; for with one accord, almost in one voice, they flung at me the question, "What are you women lawyers of the United States, with all your liberty, doing for the women and children of the United States, for," said they, "You lead, we follow."<sup>136</sup>

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133. R[obbins], *supra* note 127, at 398. Miropolosky herself seems to have been quite aware of her image. An American woman lawyer of the period noted, "When I told her I had seen notices of her in the American papers, she replied, with an alluring smile and the most delightful accent, 'Have I, then, so bad a reputation?'" Lilly, *supra* note 120, at 432.

134. See Corcos, *supra* note 37, at 472; FERNAND CORCOS, *LES AVOCATES* 163 (1926).

135. Jeanne Chauvin, the woman whose attempt to be admitted to the Paris Bar in 1897 ultimately forced the issue of female participation in the legal profession, made her *début* as an attorney in a criminal action. See *Occasional Notes*, *supra* note 122.

136. Lilly, *supra* note 120, at 431. However, some Canadian women attorneys of the period objected to their automatic inclusion in the ranks of family lawyers. "I did have to make a demand that I not do all the Family Work. I liked it no more than the men did and had to make that clear. Usually the women lawyers were landed with all the Family Work and not much else." Kinnear, *supra* note 85, at 429 (quoting an unnamed Canadian female attorney).

### C. Belgium

In 1882, Marie Popelin requested admission to the Brussels Bar.<sup>137</sup> As could be expected, the Council of Discipline refused to allow her to take the required oath, and the *Cour d'Appel* and then the *Cour de Cassation* upheld this decision. The court of appeals expressed itself in words that would be echoed in the debate over the admission of women to the English and French Bars and in the U. S. Supreme Court decision *Muller v. Oregon*.<sup>138</sup>

Seeing that the special nature of woman, the feebleness of her constitution, the modesty inherent to her sex, the protection which is necessary to her, her peculiar mission to humanity, the demands and the obligations of maternity, the training that she owes to her children, the control of the household and the domestic hearth entrusted to her efforts, place her in conditions little reconcilable with the duties of the profession of an advocate, and give her neither the necessary leisure, strength, nor fitness for the strifes and labours of the Bar.<sup>139</sup>

The *Cour de Cassation* reiterated this view. "Considering that under the old system conformably with the Roman law the profession of an advocate was considered as a masculine office, that the restraint imposed by good manners on the woman does not permit her to fulfil."<sup>140</sup>

While Popelin failed in her attempt, she inspired other women, particularly in France, and one Belgian attorney was moved to write an impassioned defense of the woman's right to practice law. Louis Frank's *La Femme-Avocat au Point de Vue de la Sociologie*<sup>141</sup> went into several editions and was studied by both sides in the debate over female admission, most particularly in the *Chauvin* case.<sup>142</sup> Belgium finally admitted women to the bar in 1922.<sup>143</sup>

## IV. THE CONTROVERSY OVER PROPOSED LEGISLATION

With regard to the admission of women to the English Bar during the period, male solicitors and barristers exhibited a range of attitudes.<sup>144</sup> Some believed that the profession in general should by right be opened to women, either because they had already proven themselves the intellectual equals of men or because such proof was irrelevant to the question.

137. Edward S. Cox-Sinclair, *The Bar in Belgium*, 24 *LAWMAG. & REV.* 17 (1909).

138. 208 U.S. 412, 421 (1908) (holding that the state had an interest in regulating women's working conditions because of their physical inferiority).

139. Cox-Sinclair, *supra* note 137, at 263 (citing a Dec. 12, 1888, decision of the *Cour d'Appel*).

140. *Id.* at 264. (citing a Nov. 11, 1889, decision of the *Cour de Cassation*).

141. FRANK, *supra* note 116.

142. See Corcos, *supra* note 37, at 443 n.51 and accompanying text.

143. See Luc Huyse, *Legal Experts in Belgium*, in 2 *LAWYERS IN SOCIETY*, *supra* note 69, at 225, 231. By contrast, Italy admitted its first woman lawyer, Lidia Poet, on August 9, 1883, after passage of the General University Act of October 8, 1876. See Vittorio Olgiati & Valerio Pocar, *The Italian Legal Profession: An Institutional Dilemma*, in 2 *LAWYERS IN SOCIETY*, *supra* note 69, at 336, 338.

144. See BIRKS, *supra* note 18, at 276-77.

Some held that women should be admitted, but directed to certain roles or encouraged to take up only certain types of law. And some were adamantly opposed to the entrance of women into the profession at all because they thought that women were intellectually, physically, socially and emotionally ill-suited to the practice of law.

In addition, because the profession was then, as it is now, somewhat overcrowded, some male solicitors feared that the admission of females to their ranks would make earning a living an even more precarious proposition.<sup>145</sup> The admission of women to the legal profession was a contentious issue primarily because it meant that women were requesting admission to the very profession that created, interpreted and administered society's official rules.

For many Englishmen the attitude toward the entrance of women into the profession was as recounted in a story of the period.

Mayor Baker (a contemporary Mayor of Cleveland, OH), lecturing at the law school, told a little story of an Englishman who was asked by an American, why the brass railings in the galleries of the House of Lords were not removed, as they obstruct the view of the Speaker. Horrified, the Englishman gazed at the American for a moment and then answered: "Why, they have always been there."<sup>146</sup>

"Because it has always been so" is an attitude quite understandable of the English lawyer, whose experience is primarily with the common law and with written law as expressed by the legislative branch. Lacking a written constitution for guidance, the English lawyer relies on the strict interpretation of Parliament's word as expressed by particular statutes, on the rules of interpretation set forth in the Interpretation Act, and on the presumed reluctance of judges to make law by inferring Parliamentary intent. At least, such is the common explanation of the workings of English law.

In the case of the admission of women to the twin English legal professions of solicitor and barrister, we have a prime example of the ability of English judges to make law without seeming to do so, and a reflection of the controversies that surround any legal issue consigned to statutory rather than constitutional regulation. The courts' insistence on both positive and unambiguous expression by Parliament of the intent to enable women to join the profession led to much more acrimonious debate and many more pieces of legislation than would have been the result had the courts been willing to find, for example, that legislation of

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145. "One correspondent wrote to the Solicitors' Journal complaining that 'a crowd of women are to be let loose further to cut up the profession'; another thought that such a proposal was 'sacrificing the profession on the present-day altar of 'sentimentality gone mad'." *Id.* at 276.

146. *Women in the Law*, *supra* note 15, at 133.

1877<sup>147</sup> and 1888<sup>148</sup> addressed the question of women's participation in the legal profession. Certainly they could have done so; just as certainly, English courts previously had interpreted statutes or common law to find other rights when they chose. In addition, in interpreting the act in question to exclude women, the courts arguably may have failed to give proper effect to the Interpretation Act of 1889,<sup>149</sup> as well.

The desire to control female behavior through proscription (women shall not be lawyers) and through prescription (women shall be unpaid caregivers and helpmeets to male attorneys) was part of the larger wave during that period of legislation intended to force women into particular avenues of activity, although it did not carry forward unquestioned. As early as 1844, Lord Brougham demanded to know on the floor of the House of Lords why such protectionist and paternal legislation was necessary. "Cannot a woman make a bargain? Cannot a woman look after her own interests? Is not a woman capable of understanding those interests, of saying whether or not she has stamina and strength to work?"<sup>150</sup> The writer Barbara Leigh Smith commented ten years later that while men's social and economic progress could be measured by the lessening of laws restricting their activities, the same could not be said for women, who

more than other members of the community, suffer from over legislation. A woman of twenty-one becomes an independent human creature, capable of holding and administering property to any amount; or, if she can earn money, she may appropriate her earnings freely to any purpose she thinks good. Her father has no power over her or her property. But if she unites herself to a man, the law immediately steps in, and she finds herself legislated for, and her condition of life suddenly and entirely changed . . . . "In short," says Judge Hurlbut, "a woman is courted and wedded as an angel, and yet denied the dignity of rational and moral being ever after."<sup>151</sup>

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147. The Solicitors Act of 1877 gave complete control to the Law Society of the preliminary examination for Solicitors of the Supreme Court of Judicature. The Solicitors Act of 1877, 40 & 41 Vict., ch. 25 (Eng.). It represented the culmination of several attempts to exert some uniformity and control over the profession of solicitor, beginning with the granting of a charter to the Law Society in 1831 and continuing through the Solicitors Act of 1843, which allowed the judges to regulate the administration of examinations. See Lord Hailsham of St. Marybone, *Solicitor's Profession and Qualifications*, 44 HALSBURY'S LAWS OF ENGLAND 7, 8 (4th ed. reissue 1995).

148. The Solicitors Act of 1888, 51 & 52 Vict., ch. 65 (Eng.) (giving custody of the Role of Solicitors to the Law Society).

149. 52 & 53 Vict., ch. 63 (Eng.).

150. 84 PARL. DEB. (3d ser.) 1315 (1844).

151. BARBARA LEIGH SMITH, A BRIEF SUMMARY IN PLAIN LANGUAGE OF THE MOST IMPORTANT LAWS CONCERNING WOMEN TOGETHER WITH A FEW OBSERVATIONS THEREON 13 (1854).

## A. *Early Attempts by Women to Gain Admission to the English Bar*

### 1. Private Attempts

In 1876 the Law Society, the organization charged with regulation of the profession,<sup>152</sup> denied membership to a woman candidate.<sup>153</sup> During the same period Lincoln's Inn denied ninety-two women permission to attend its lectures.<sup>154</sup> As early as 1879, a Society was founded "to promote knowledge of the law and to consider the abilities and disabilities of women as to the practice of the law in any of its branches."<sup>155</sup> The arguments for inclusion seem to have been based on the premise that the practice of law, at least as far as solicitors were concerned, was a private office since admission was regulated by private entities, albeit entities chartered by Parliament.

Eventually rejected by the courts,<sup>156</sup> this argument nevertheless foreshadowed the intercession of Parliament to recognize and regulate the law as a profession that had emerged as a particularly public function. That Parliament took this role eventually is ironic, since earlier it had rejected attempts by women to obtain civil equality, thus forcing their battle into the courts.<sup>157</sup>

Other women who attempted unsuccessfully to obtain admission to the profession included the "suffragette" Christabel Pankhurst.<sup>158</sup> Sometime in the 1890s, two women opened a legal practice in London, through which they provided some service to the bar, although they apparently did not practice law.<sup>159</sup> In 1902, Gray's Inn accidentally admitted Bertha Cave; when it realized its error it deliberately expelled her.<sup>160</sup> She appealed, and lost,<sup>161</sup> for the learned judges led by the Lord Chancellor

152. Solicitors Act of 1877, 40 & 41 Vict., ch. 25 (Eng.).

153. BIRKS, *supra* note 18, at 276.

154. In regard to a petition of 92 ladies praying to be admitted to attend law lectures, it was resolved "that in the opinion of this Bench it is not expedient that Women should be admitted to the Lectures of the Professors appointed by the Council of Legal Education." V THE BLACK BOOKS OF LINCOLN'S INN 178 (Ronald Roxburgh ed., 1968).

155. St. John-Stevas, *supra* note 18, at 271-72.

156. See *Bebb v. Law Society*, 29 T.L.R. 634 (1913). See also *infra* notes 292-97 and accompanying text.

157. St. John-Stevas, *supra* note 18, at 261-63.

158. Helena Kennedy, *Women at the Bar*, in THE BAR ON TRIAL 148 (Robert Hazell ed., 1978). See also St. John-Stevas, *supra* note 18, at 276-82. On Pankhurst's attempts to be admitted, see SACHS & WILSON, *supra* note 3, at 172-73.

159. See BIRKS, *supra* note 18, at 276 (identifying these women as Miss Orme and Miss Richardson and the location of their office as in Chancery Lane).

160. Kennedy, *supra* note 158, at 148.

161. *Id.* (citing PENSION BOOK OF GRAY'S INN (R.J. Fletcher ed., 1903)). However, the PENSION BOOK index gives several citations to "women in chambers," but all refer either to wives of members or to women of "questionable virtue" and uniformly indicate that the governing body of the Inn directed that these women be removed, no matter what their claims to residency. *But see* FRANCIS COWPER, A PROSPECT OF GRAY'S INN (1951) ("In 1903 a committee of judges had dismissed an appeal by Miss

applied the same reasoning as did the trial court and Court of Appeals in the *Bebb* case ten years later. No woman had ever been an attorney in England, and Bertha Cave was not going to be the first.

But Cave's attempt did not go unnoticed. In 1910 the *Solicitors' Journal and Weekly Reporter* published part of a letter advocating the admission of women which summarized the other jurisdictions which had already admitted them and urged his colleagues in the Law Society "not to follow the example of the society's revered *patres conscripti*, who in 1903, without assigning any reason, refused to entertain or listen to the application that was then made by Miss Cave to be allowed to enter her name on the roll of students . . . ."<sup>162</sup> Unpersuaded by the correspondent's arguments from equity and example, the *Journal* advanced the objection that admission was neither socially nor economically recommendable. "We venture to doubt whether, in the present overcrowded condition of the profession, it will be considered desirable, either in the interests of women or present male solicitors, that the profession should be opened to the female sex."<sup>163</sup>

## 2. Early Attempts in Parliament

### a. *Support for Women Attorneys in the Profession*

Two years later, after the tentative letter to the *Journal*, that periodical reported on Edward A. Bell's<sup>164</sup> paper on the admission of women to the profession, written in support of a like-minded bill introduced into Parliament. That bill, introduced by Lord Wolmer and also favored by Lord Robert Cecil<sup>165</sup> (who later took on the case of Gwyneth Bebb), would have permitted women to become both solicitors and barristers, but it failed to obtain the support of either the Law Society or a significant portion of the practicing bar.<sup>166</sup> Bell's paper foreshadowed the arguments that would be raised in support of Gwyneth Bebb's application and addressed most of the issues that concerned opponents and those neutral on the subject.

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Bertha Cave, a young lady whose application for admission to Gray's Inn had been refused by the Benchers.").

162. *Our Learned Sister*, 55 SOLIC. J. & WKLY. REP. 25, 25 (1910).

163. *Id.*

164. See Edward A. Bell, *Admission of Women*, 56 SOLIC. J. & WKLY. REP. 814, 814 (1912) (indicating that Bell also agreed to take Gwyneth Bebb as a clerk).

165. Neither party nor personal affiliations were an indication of a politician's stand on the issue of women's admission. Both Robert Cecil and David Lloyd George favored admission. On Lloyd George's role, see *infra* note 400 and accompanying text. On the politics of Robert Cecil (later Viscount Cecil of Chelwood), see LORD ROBERT CECIL, *ALL THE WAY* (1949); LORD ROBERT CECIL, *A GREAT EXPERIMENT* (1941); Jere Langdon Jackson, *Lord Robert Cecil: Apostle of the League*, in *PERSONALITIES AND POLICIES: ESSAYS ON ENGLISH AND EUROPEAN HISTORY* 94 (E. Deanne Malpass ed., 1977).

166. BIRKS, *supra* note 18, at 276.



First, Bell reported that other common law countries already admitted women. "I have been informed that there are no less than 20,000 women carrying on the profession of attorneys at law in the United States. A great number of women . . . also follow the vocation of notaries and, I believe, patent agents."<sup>167</sup> He also pointed out that women already served as advocates in some courts, "with marked ability."<sup>168</sup> He noted their abilities in the political arena and pointed out that some members of Parliament certainly favored the activities of women in the legal profession by stating that "quite recently the daughter of a present member of Parliament for a Welsh constituency acted as her father's *ex officio* Parliamentary agent, and gained the election for him."<sup>169</sup>

Bell directly addressed the question of statutory interpretation as well, criticizing in advance the ultimate decision of the court of appeals in the *Bebb* case.

I find on reference to the Solicitors Act, 1843, . . . which Act controls all subsequent Solicitors Acts, that the Interpretation Clause of this Act of Parliament distinctly provides "that every word importing the masculine gender only shall extend and be applied to a female as well as a male." Now I venture to assert that in law the interpretation of this Act gives women sound legal grounds upon which to support their claim to be admitted upon the Roll of Solicitors. It is on record that a lady has applied to the Law Society to be allowed to qualify for such admission; her application, however, was refused. I do not think any appeal to the law courts was made in this particular case. If such an appeal were ever made in any other case it would be a matter which would require an exceedingly refined judicial power of interpretation to read out of an Act of Parliament what I submit is a clear enactment enabling duly qualified women to be enrolled as solicitors.<sup>170</sup>

Bell clearly recognized the fear of competition as well as a genuine if somewhat hysterical anticipation of possible dilution of the quality of practitioners manifested by some of his colleagues.

I would urge upon members of this Society that the Bill which this resolution purports to support does not enable *any* woman to get on the Rolls; they have to render themselves eligible by good character and education and competent by qualifying examinations . . . Further, they have to present themselves for examination at the Law Society in London where . . . their demeanour and deportment can be taken into consideration. If women who have qualified themselves for the unromantic, serious and responsible profession of a solicitor, calmly and decorously request the responsible authority of this hon-

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167. Bell, *supra* note 164, at 814.

168. *Id.*

169. *Id.*

170. *Id.*

ourable Society to be allowed to become solicitors, why should that request be refused? . . . Why should woman be prevented from developing her life along the lines for which her particular capabilities may fit her, and in which she is most interested . . . ? I can hardly bring myself to believe that there is an underlying and unexpressed opinion—a selfish and timid attitude to mind—that the profession is overcrowded already. This could not be so when every man who is qualified is allowed to become a member as “of course.”<sup>171</sup>

Bell also pointed out that the *dulce domum* argument (that women were by nature fitted only for home and family)<sup>172</sup> which had been used to prevent women from pursuing other professions had been unsuccessful, and women had “taken up positions which, it is now admitted, they adorn and intensify by their ability.”<sup>173</sup> Concluding with a flourish, he stated,

[T]he enfranchisement of the sex, the force of modern circumstances, the progress of public opinion, the example of other civilised communities and the acknowledged average mental equality of women and men if they be trained for any particular calling, render the admission of women into the ranks of the legal profession a matter of time only. Granted these facts, I venture to assert on the ground not only of expediency, but of justice, that the Law Society, which has long been one of the pioneers of legal reform, should through its Representative Council support the Bill when it again comes before Parliament for the removal of the existing archaic and unjust restraint upon the admission of qualified and competent women into the ranks of the legal profession.<sup>174</sup>

That his arguments were persuasive seems evident from the inability of another solicitor present, identified as R. Ellett, to dispute them, but simply to repeat the arguments which Bell had addressed. Further, he insisted that the admission of women was a parliamentary question, a point on which he and Bell agreed.

If females were to be admitted to the profession, the step must be authorised by the Legislature, for the word “persons” in the Solicitors Act was interpreted to mean male persons. If ladies were to be admitted, it would be necessary for the council to support a Bill with that object. He asked if the proposition was in the interest of the profession. He had never heard that there was any lack of solicitors. The public could not be said to have demanded the change. And it was not in the interest of women themselves that they should enter so laborious a profession. The president had already referred to the smallness of the incomes of solicitors, and pointed out that in many cases they

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171. *Id.* On the fear of competition among French male attorneys towards women, see Corcos, *supra* note 37, at 466-67.

172. Bell, *supra* note 164, at 814.

173. *Id.*

174. *Id.*

were absolutely insufficient. If women were admitted it would obviously tend to reduce the remuneration.<sup>175</sup>

Appealing to the popular conception of women as natural chatter-boxes, he also asserted, "[t]heir great faculty of continuous speech would fit them better for the bar, and when the benchers had admitted them to that branch of the profession, it would be time to admit them as solicitors."<sup>176</sup> Let the rival branch have these interfering females! Deliberately misunderstanding Bell's reference to a pending bill, he said, "Mr. Bell spoke of a bill that was to be introduced into Parliament, and when that was done it would be time enough to consider whether it should be supported."<sup>177</sup> Other speakers announced themselves for or against Bell's position. C.E. Longmore made a practical argument in favor of admission: "Thousands of pounds were spent in educating women, and when the time came for them to put their exertions to some advantage they were shut out. He hoped they were not going to be afraid of the competition of women."<sup>178</sup>

The temporary setbacks in obtaining support from the Law Society and Parliament turned women's attention to a less formal means to obtain admission to the profession. Four women who had successfully completed the formal education required for solicitors agreed to request admission to the Law Society.<sup>179</sup> The Society's eventual refusal, based on the claims of custom, resulted in the judgment in *Bebb v. Law Society*.<sup>180</sup> But twenty years later, the same claim was rejected in a colonial court. In the British Mandate of Palestine, a woman requested admission to the bar. The Supreme Court of that jurisdiction held that since no regulation or statute prohibited the admission of women, she might be admitted. Custom was not a sufficient reason to exclude her.<sup>181</sup>

#### b. *Objections Based on Custom and Existing Legislation*

Generally speaking, objections to the entry of women into the legal profession were based on arguments of custom, and as a fallback, on the intellectual and physical inability or unsuitability of women to perform the duties of advocates. For many male opponents, a woman's intellectual inferiority consisted largely of assumptions about her inability to understand legal ways of thinking, which essentially institutionalized the male world view, and male notions of dispute resolution. Because women had never been trained in these ways of thinking, and would not,

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175. *Id.* at 814-15 (citing remarks of R. Ellett).

176. *Id.* at 815.

177. *Id.*

178. *Id.* (citing remarks of C.E. Longmore).

179. See BIRKS, *supra* note 18, at 276 (identifying the four as Miss Bebb, Miss Costello, Miss Ingram and Miss Nettlefold, "all of whom had brilliant careers at either Oxford or Cambridge").

180. 29 T.L.R. 634 (1913).

181. F.M.G., *Notes: Women at the Bar in Palestine*, 13 J. COMP. LEG. 128 (3d ser. 1931).

indeed, *could not*, develop them on their own, they could never demonstrate an aptitude for the practice of law. Since they had never demonstrated such an aptitude, it followed that they should not be admitted. Historically, women never had been admitted to the English Bar; therefore they should continue to be excluded. That these objections constituted a chicken-and-egg argument was not lost on supporters of the women's movement.<sup>182</sup>

These arguments were not unique to the English opponents of women's admission. Indeed they were shared by opponents in other common-law jurisdictions. The American attorney Mary Bartelme angrily pointed out their hypocrisy and self-serving nature in a 1911 address to the Illinois State Bar Association. What is interesting in her talk is that she speaks briefly but eloquently to each of the misapprehensions, objections, and mistaken assumptions that govern male resistance to women in the professions.

I am well aware of the many prejudices that exist against women entering different professions and fields of occupations, and also am aware that they exist largely among persons who have not given the matter serious consideration and whose sentimental opinions are based upon conditions that existed in the good old time of their forefathers, to which they would not return if they could. They are still bound by the tyranny of tradition.<sup>183</sup>

Further, she noted that one of the reasons that women were demanding the right to enter into traditionally male occupations was the result of male intrusion into occupations that had previously been primarily female, and that had provided most if not all of the paltry income that women were allowed to earn for themselves. This tit-for-tat argument is quite aggressive given the prevailing submissiveness of women even in the early twentieth century.

Not many years ago addresses were made and articles written advocating the prohibition of women in industrial and professional fields because they were trespassing upon the domain of men. They complained that women were out of their sphere, and yet many of the men

182. This attitude still permeates some legal thinking. See, for example, *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (holding that members of Congress had no standing to challenge the line item veto), in which Chief Justice Rehnquist opined that "several episodes in our history show that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id.* at 2321. If appellees' claim was sustained, presumably several presidents would have had standing to challenge the Tenure of Office Act, which prevented the removal of a presidential appointee without Congress' consent. *Id.* at 2321-22. But see the often repeated comment by Justice Holmes that

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

183. Mary M. Bartelme, *A Woman's Place at the Bar, Address Before the Illinois State Bar Association*, 43 CHI. LEGAL NEWS 370, 370 (1911).

who were advocating such measures and defining women's sphere, were opening mills and factories, dairies, bakeries and canneries which were taking out of the home the many activities that had been woman's contribution to the family household, and as a matter of economy and good business management will never be returned to the home. The spinning, weaving, knitting, making of butter, and to a large extent, the sewing, baking and canning are no longer done in the home . . . and women necessarily have followed their work in order that they may contribute their part to the maintenance of the family, and it is not because of their whims or wishes, their desire for feathers and frills and their loss or lack of love for home ties and family life, but because economic conditions have changed and they are forced to do their part . . . .<sup>184</sup>

The argument from equity is particularly powerful. Bartelme further accuses her audience of hypocrisy in suggesting that they listen closely to arguments of any sort only when they believe they are being espoused by men. Men in any occupation, she asserts, fear competition.

The question of competition is another factor that places barriers in the entrance of women to the professions or vocations heretofore wholly occupied by men. As an illustration . . . let me cite the experience of a woman teacher who wished the opinion of some experts on her theory pertaining to the treatment of certain scientific subjects. Her first requests were signed with her full name, and the replies to them were courteous but empty. She then wrote a letter signed with her initials, which brought forth this reply: "Dear Mr. A: I am tremendously interested in the question and consider it the most vital and important with reference to education now before the teachers of the country. You will have a hard fight for your position . . . . So many women teachers who ought to be tatting or doing other fancy work, are wedded to their pretty little courses in-, and they will fight for them like cats. I hope you will get your paper printed. Could I not help you?"<sup>185</sup>

Helena Normanton, a law graduate and supporter of women's admission, would make substantially the same arguments eight years later.<sup>186</sup> For Bartelme, female participation in professional and technical occupations promises more happiness for everyone in society, even though traditional social constructs may become less numerous.

The question, "Will women lose interest in wifehood and motherhood through entering these broader fields," may be answered. Yes. From the standpoint of marriage for shelter and support, or to escape the opprobrium of being an old maid, she may, but from the basis of marriage for wholesome companionship and love, I believe that in the ul-

184. *Id.*

185. *Id.* (dashes in original).

186. *Admission of Women to the Profession*, 146 LAW TIMES 428 (1919) [hereinafter *Admission of Women*].

not desire to see women in it merely because they were women. She desired to see them in it, and successful in it, because the work was of so great importance that the whole of human ability should be an open field from which the lawyer should be chosen.<sup>224</sup>

Normanton's abilities as a debater must have surprised her opponents. Traditionally upper-middle- and upper-class men, but not their socio-economically middle- and lower-class sisters,<sup>225</sup> received the kind of education that permitted them both to formulate and to express powerful argument.<sup>226</sup>

Normanton's most vocal opponent at the debate was Mr. J.A. Symonds, a Metropolitan Police Magistrate, who suggested that she did not fully understand the nature of legal practice, an argument that she was at a disadvantage to refute since neither she nor any other woman was a member of the bar.

[W]omen had not the judgment that was necessary for practising as lawyers. It was the man-in-the-street's, and . . . perhaps, the woman-

224. *Id.* At least some of the encouragement may have been due to the traditional animosity of journalists toward lawyers.

225. *But see* SUSAN J. LEONARDI, *DANGEROUS BY DEGREES: WOMEN AT OXFORD AND THE SOMERVILLE COLLEGE NOVELISTS* (1989) (discussing a study of upper middle class women during the period between the world wars and their record of accomplishment).

226. In her examination of the observable differences between U. S. men and women's scores on standardized tests, Beryl Lief Benderly suggests that a great deal of it is attributable to the lack of emphasis which American education and culture generally place on verbal skills for men, as opposed to the importance they have for the run of the mill Englishman. *See* BERYL LIEFF BENDERLY, *THE MYTH OF TWO MINDS: WHAT GENDER MEANS AND DOESN'T MEAN* (1987).

[I]n England and Scotland, grown men play word games on the radio; limericks and anagrams rank as national pastimes; the witty Ronald Coleman, not the stolid Gary Cooper, molded the notion of celluloid sex appeal. Schoolmaster—the admirable Mr. Chips—remains an honorable masculine calling, immune to the scorn Americans heap on ineffectual buffoons like the comic strips' Mr. Weatherbee or television's Mr. Pœpers or Mr. Conklin. British culture has traditionally tied social power and literary skill into a single urbane, upper-middle-class package. It trains young politicians in the crackling debates of the Oxford Union. It signals class and caste by subtleties of stress and syntax. That highly verbal culture—not surprisingly—produces males who do as well as females on verbal tests. But so do Nigeria, where British educational traditions continue, and West Germany, where men often teach in the primary grades.

*Id.* at 216-17. In spite of attempts to glamorize the teaching profession for young American boys through television series like *Room 222* (ABC television broadcast, Sept. 17, 1969 to Jan. 11, 1974) and *Lucas Tanner* (NBC television broadcast, Sept. 11, 1974 to Aug. 20, 1975), and films like *STAND AND DELIVER* (American Playhouse 1988), they still prefer "active" occupations like policeman or fireman, or if they are interested in teaching, college rather than elementary school teaching, as shown in their reactions to these characters on television. *See* Tom Dorsey, *Girls Searching for Role Models Get Little Help from Television*, *COURIER-J.*, July 22, 1996, at 3D. Further, men who evince an interest in spending time with small children (as in child care) are automatically suspect. Men still outnumber women in the legal profession, however, because of its high status, showing that they can acquire verbal skills when they see a payoff in status or salary, preferably both. The challenge that "overeducated" American women posed to the traditional dominance of the privileged males who earned the "gentlemen's C's" and went on to law school remains to be examined; however, it is certainly considerable. When I started law school, one male professor warned me not to expect more than a "gentleman's C", which he described as an acceptable grade. Whether he meant "in general" or "for a woman" I never knew.

law schools and pass the bar.<sup>191</sup> At the least, this success demonstrates the equality of the female intellect; at the most, its superiority.

Bartelme does accept the notion that women will prefer a civil practice to a criminal one, and within the civil law, areas such as real estate, probate and family law.<sup>192</sup> She assures her listeners that those male lawyers and legislators who take an interest in the working and living conditions of the less fortunate, including an alarming number of children, would find nothing but assistance and admiration from their female colleagues.<sup>193</sup> But for this American attorney, as for her sisters in England, who were attempting to enter the profession, traditional views of the female intellect and female ability must necessarily give way to the natural urges of women to better themselves as well as to interest themselves in the world around them and to make some positive change in the social and economic conditions to which they objected.

In 1982, two English sociologists noted that the inequities of which Bartelme spoke still existed:

When women enter a male-dominated profession they operate in an opportunity structure and in an internal labour market which is different to that of men. Coser has noted how women at work experience a "deficit in rewards" compared with men, and how the presence of women in an occupation or profession is inversely related to the rewards available. Women tend to be paid less and their opportunities for promotion are more restricted than those of men. They are unlikely to be permitted to do similar work to men of the same (or even inferior) education and status. The lower financial rewards of women in male-dominated professions are partly the result of their concentration in low-reward segments and partly the result of women's under-representation in the higher rank of such professions. The average income of barristers illustrates this. A survey carried out for the Royal Commission on Legal Services showed that the average income of women juniors in 1976/77 was £3,908 compared with £6,700 for men. For all barristers the figures were £4,137 and £8,039 respectively. Even when men and women barristers doing similar work were compared in the same survey, the average earnings of women were only 50-60% of those of men.<sup>194</sup>

The assumed lack of intellectual ability justified the continued exclusion of women from the profession, and the continued exclusion assured that the argument over lack of intellectual ability could never be addressed, much less put to rest. How, then, was the problem to be resolved?

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191. *Id.* She also notes that at that time a woman had achieved the highest grade point average yet at the University of Chicago Law School. *Id.*

192. Bartelme, *supra* note 183, at 370.

193. *Id.*

194. Podmore & Spencer, *supra* note 19, at 27-28 (footnotes omitted).

For some male attorneys, the fact that women never had been formally accepted into the bar was enough reason to continue to exclude them, even though they might make inroads into other professions, such as medicine. Proponents of the admission of women retorted that “[t]here were women lawyers in ancient Rome, and there was quite a chain of women lecturers and teachers of law in this country throughout the Middle Ages.”<sup>195</sup> One American lawyer made reference to “one Spanish woman receiving the degree of doctor of laws at the age of twenty-one.”<sup>196</sup> Nevertheless, as we shall see, when Gwyneth Bebb made this “historical” argument before the English courts, they found it unpersuasive.

The argument that women should not be allowed to practice law because they did not participate fully in military service was also a common one, and at first glance it looks fairly persuasive.<sup>197</sup> However, one of the major functions of the military is to settle disputes which have gone beyond words, that is, beyond the capacity of a specific dispute resolution system. To suggest that because women have not, cannot, or should not impose a solution through physical force they ought not to participate in finding solutions through argumentation or persuasion is extremely tortured logic. Yet because so many analogies and thought processes in the common law are drawn from the language of war or sports<sup>198</sup> (mock

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195. *Admission of Women*, *supra* note 186, at 428. The reference seems to be to three women in particular. Paul Fuller, *The French Bar II*, 23 YALE L.J. 248 (1914).

I find in an old volume, which I presume reliable, that long before the Theodosian Code (in the fourteenth century) women were accepted as lawyers in Rome, and that two of these, Amasia and Hortensia, acquitted themselves with great credit, while a third, Afrasia, was usually herself the litigant and so scandalized the judges by her loquacity, her effrontery and her outbursts of passion, that she was forbidden to speak in public [sic], a prohibition later extended to all women, and only modified by Theodosius to the extent of permitting them to speak in their own defense. Whether Afrasia is an argument against the new proposition or whether Amasia and Hortensia are a preponderating argument in its favor, I leave to your own judgment.

*Id.* at 262.

See also Nicolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 MICH. J. GENDER & L. 195, 203 (1995) (identifying the offending female as Carfania). Benke uses Carfania's case as a method of investigating traditional male and patriarchal objections to women's exercise of legal power, particularly as advocates. *Id.* at 203-40.

196. *Women in the Law*, *supra* note 15, at 133.

197. We can, however, speculate on the effect of “male attitudes” on women in predominantly male professions. Pilots are notorious for their sexual escapades, for example. One expert on military law suggests that some female military pilots may deliberately engage in sexually aggressive behavior in order to seem more like “one of the guys.” Conversation with Kenneth Murchison, in Baton Rouge, La. (July 3, 1997). On one female pilot's legal problems and subsequent discharge, see Ron Martz, *Military Justice: An Elite Career in Ashes; 1st Lt. Kelly Flinn Has Escaped a Possible Prison Term With a Plea Bargain, But Others Say They'll Keep Fighting on Her Behalf*, ATLANTA J. & CONST., May 23, 1997, at 18A.

198. On the use of sports metaphors in law school and legal communication, see Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (the issue was devoted to gender and law). “Men presume that everyone understands a sports analogy. I would never presume to use a knitting analogy.” *Id.* at 1337. Consider also the use of sports analogies in discussing substantive law, such as the “level playing field” in anti-discrimination cases.



war) such a comparison made sense to those opposed to the participation of women in the legal profession.

Technically, "adversary system" merely means that "neutral and passive factfinders . . . resolve lawsuits on the basis of evidence presented by contending litigants during formal adjudicatory proceedings." The phrase connotes more than its technical definition, however. A complex web of metaphor pervades the idea of the adversary system in a way that captures the hearts and minds of the lawyers who function within that system. In case law, academic literature, professional literature, and in popular culture, a trial is a battle and the lawyer the client's champion; a trial is a sports contest and the lawyer the client-team's winning coach or star player. Metaphors transform the trial lawyer from a mere person who presents information favorable to his client to a triumphant hero and change the other party to the dispute into the enemy.<sup>199</sup>

Some commentators are unwilling to accept as settled the premise that women are naturally less combative than men, but acknowledge that inability to engage in ritualistic verbal combat puts female attorneys at a disadvantage.

The premise behind this contentious system is that ardent, strident representation of both sides to a dispute is the best mechanism for unearthing all the relevant facts and defining all the relevant law while still respecting the rights of the individuals involved. And the further premise is that with the best case for both sides out on the table, whether in a congressional hearing room, or in a court before a judge, or in direct negotiations between opposing lawyers, the side with the greatest merit prevails. Therefore, in the interest of ultimate fairness, lawyers compete with all the skill, energy, and creativity at their command. Like football players or armed warriors, they are licensed to compete with the serious aim of defeating the opposing side.<sup>200</sup>

The similarities between this description of the ideal functioning of the adversary system and the ideal functioning of the traditional "trial by battle" in which one or both sides hired a "champion" to fight for him is obvious.<sup>201</sup> While the operating assumption was that God was on the side of right and justice, still each side hoped to increase the possibility of

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199. Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 225 (1995) (footnotes omitted) (quoting STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1 (1988)). Consider as well the use of sports analogies to describe the behavior of O.J. Simpson's criminal defense lawyers. Robert Shapiro and F. Lee Bailey, among others, were the defendant's "dream team." Lawrence Schiller notes that during their conferences with him, the attorneys frequently communicated with the former football player in sports terms, which enabled him to take active charge of his defense. Journalists also translated analyses of defense strategy into sports talk. See LAWRENCE SCHILLER & JAMES WILL WERTH, AMERICAN TRAGEDY 381-82 (1997).

200. MONA HARRINGTON, WOMEN LAWYERS: REWRITING THE RULES 129 (1994).

201. On trial by battle, see GEORGE NEILSON, TRIAL BY COMBAT (1890).

victory, recognizing the truth of the often-repeated dictum that God was on the side of the strongest battalions.<sup>202</sup>

[M]any women, drawn to the law by its promise of fairness, shun chronic engagement in battle. Bearing out the stereotyped image of woman as peacemaker, not warrior, they tend to shy away from the most adversarial arenas in the law and to gravitate toward those forms of practice that are most consultative and conciliatory, or those that are bound by harmonizing rules. This last includes fields such as securities, antitrust, bankruptcy, and tax, in which doing the work is like solving a puzzle.

....

Many women in big firms opt for a corporate law practice because it allows them to work cooperatively with groups of people who have conflicting interests but also a common interest in putting together a particular deal or solving a common problem.

....

But the more aggressively hard-edged the practice, with trial work at the extreme, the fewer women are involved. This is a fact, but the question is, Why. Has nature programmed men hormonally to do battle and women to avoid it? Or do women shun competition because the larger culture socializes them to dislike it, teaches them the their virtue lies in sympathy, understanding, patience, cooperation, and peacemaking rather than in combat? Or is it mainly a lack of practice? Would women feel more comfortable as competitors if their families and schools and communities placed girls in the same gladiatorial roles that boys assume from early childhood onward? Or is it that women, entering the legal profession with more social training than men in quiet dispute-settling, see the lawyer's reliance on adversarial procedures as excessive? Are women rejecting, as a matter of consciously formed critical judgment, the degree of competition they find in the law?<sup>203</sup>

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202. "J'ai toujours vu Dieu de côté des gros bataillons" ("I have always seen God on the side of the strong battalions"). Statement of Maréchal de la Ferté-Senneterre to Anne of Austria (Queen of Louis XIII of France), cited in BOURSALT, *LETTRES NOUVELLES DE MONSIEUR BOURSALT* 384 (1698). This statement is also often attributed to Napoleon, among others.

203. HARRINGTON, *supra* note 200, at 129-30. The author quotes two particularly telling comments from successful women attorneys on the similarities between law practice and sports or war.

[A] state court judge who graduated from law schools in the 1950s remarked, "I think doing trials isn't comfortable for women, as a trial draws on a playing-field mentality. Women prefer to settle. They don't like the winner-take-all philosophy—and, I think, rightly so . . ." A former law-review editor . . . doing civil litigation in a large, well-known firm . . . questioned the good sense of settling business disputes through adversarial procedures. "Litigation is strange," she said. "It's a strange way to settle problems. It's war. It's a game. I mean, there're these little battlefields and this is the way you're supposed to shoot the other person. It's just absurd . . . I'm good at it. Probably it's what I'm best at in the world, but it is sort of silly . . . and it's incredibly wasteful."

*Id.* at 132.

Deborah Tannen also points out that oral "ritual opposition" occurs today both in business and in law.

A modern-day equivalent of the bonding that results from ritual opposition can be found in business, where individuals may compete, argue, or even fight for their view without feeling personal enmity. Opposition as a ritualized format for inquiry is institutionalized most formally in the legal profession, and it is expected that each side will do its best to attack the other and retain friendly relations when the case is closed.<sup>204</sup>

We should not be surprised that male lawyers therefore expect this kind of relationship, and feel uncomfortable when it is not forthcoming, whereas for women lawyers verbal sparring is not only foreign but considered antithetical to "real womanhood."

### B. *Arguments For and Against the Admission of Women to the Profession*

As we can see, the debate over the admission of women to the bar had started long before Bebb stated her case and continued more virulently afterward. Just as in France and the United States, the arguments centered on two issues: (1) the fairness of refusing women admission to the bar while allowing them to pursue other professional avenues, particularly given their willingness to share the burdens of political and social life with men; and (2) the question of women's ability to meet the traditional standards of the profession (physical, psychological and intellectual).

That the contributions of Englishwomen to the war effort were taken as a demonstration of their intellectual and physical equality with men was clear as early as 1915 (the second year of the First World War).<sup>205</sup> One journal suggested that women ought by right to be admitted to the profession of solicitor if they were qualified by education and ability.

If women who have qualified themselves for the unromantic, serious, and responsible profession of a solicitor calmly and decorously request to be allowed to become solicitors, why should that request be refused? So far as the profession is concerned, there is nothing improper or inexpedient in allowing competent women to become solicitors. Why should woman be prevented from developing her life along the lines for which her particular capabilities may fit her and in which she is most interested, thus depriving the state of her services

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204. DEBORAH TANNEN, *TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK* 237 (1994).

205. The same justification was advanced in support of the admission of U.S. women, in an essay which also disapprovingly cited the results in *Hall, Cave and Bebb*. See Sophonisba P. Breckinridge, *A Recent English Case on Women and the Legal Profession*, 23 J. POL. ECON. 64, 67-70 (1915).

in any profession in which she may be fitted by nature or education to excel?<sup>206</sup>

The intellectual equality of women was also very much at issue during this period, not only in England but in other countries wrestling with the idea of integrating traditionally male professions. Critics advanced both attempts at serious study and anecdotal evidence to support their views. In France, for example, some of the debate concerned the supposed lack of intellectual capacity that theoretically accompanied women's smaller brain sizes.<sup>207</sup>

In the United States, female physicians and lawyers already worked actively and publicly to champion the cause of women, and their work was documented in the legal journals of the period.

For the first time in history a jury composed of women physicians recently sat as judges of the court for the insane at the Detention Hospital in Chicago. This jury saved two women from being committed to the insane asylum by their husbands. Women lawyers all over the country are hoping that the example of this Chicago jury may be followed in other cities, especially in cases in which the sanity of women is concerned. Sixty women lawyers of Chicago have placed their services at the disposal of Judge Heap of the municipal court, who is privileged to call any of them to defend girls brought before him. The women lawyers have organized the Public Defenders League for destitute girls, and they plan to appear for penniless women who are arrested and brought into the morals court.<sup>208</sup>

Another writer documented the work of women professionals, primarily judges and lawyers, in many special courts in cities such as New York and Philadelphia, for a meeting of the New Constitutional Society for Women's Suffrage.<sup>209</sup> Law reviews and other periodicals eagerly re-

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206. *Flotsam and Jetsam: Women as Lawyers—Modern View*, 51 CAN. L.J. 79, 79 (1915) (quoting the LONDON L.J.).

207. See FRANK, *supra* note 116, at 158. On the arguments for and against women lawyers generally, see Corcos, *supra* note 37, at 449-63.

208. *Editorial Comment: Women Physicians and Lawyers Set Good Example*, 22 CASE & COM. 63, 65 (1915). Husbands and fathers of women considered "insane," whether because of actual mental disability or because they objected to the behavior of men in their families, traditionally turned to the courts for permission to incarcerate these women. See HELEN SMALL, *LOVE'S MADNESS: MEDICINE, THE NOVEL, AND FEMALE INSANITY 1800-1865*, at 184-92 (1996) (discussing famous cases and social reaction to wrongful incarceration of wives during the late 1850s in England). The theme of non-conformist behavior as insanity runs through the literature of the nineteenth century. See SANDRA GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC* (1979) (discussing nonconforming behavior as portrayed in nineteenth century poetry and fiction); SMALL, *supra* (tracing the treatment during this period in medicine and literature of women who had gone mad due to abandonment by loved ones). On the English judiciary's attitude toward insanity, see JOEL PETER EIGEN, *WITNESSING INSANITY: MADNESS AND MAD-DOCTORS IN THE ENGLISH COURT* (1995).

209. See G. Hopkins (Mrs. Herbert Musgrave), *Women's Work in the Courts in the United States*, 15 J. COMP. LEGIS. 198 (1915). French women attorneys apparently also attempted to set up a children's court before the First World War. See Lilly, *supra* note 120, at 433. G. Hopkins later visited

ported the establishment and progress of law schools that admitted women.<sup>210</sup> However, some observers objected to the segregation of women into a special school, such as the Cambridge Law School for Women, even if it were “as nearly a replica of the Harvard Law School as it is possible to make it.”<sup>211</sup> Said Mary Agnes Mahan, ex-president of the Massachusetts Association of Women Lawyers,

Personally, I feel that women should have been admitted to the Harvard Law School. There was no necessity for a separate organization. . . . The phrase “First graduate law school in America exclusively for women” has no charms for me. The students will lose the benefit of contact with men’s views and opinions, and that benefit, under the circumstances, is inestimable. There have been generations of men lawyers; it’s a new field for women, in a way. There have been few Portias through the ages. I think coeducation in a graduate law course is almost an essential.<sup>212</sup>

Even though women were firmly established in the U.S. legal profession, the old debate over their aptitude continued, demonstrating that at least for some male attorneys, familiarity continued to breed contempt. In some cases women lawyers contributed opinions that smacked of special pleading. In the late 1800s, members of the Equity Club regularly received advice about safeguarding their health. One attorney believed that overwork had partly contributed to the death of her law partner,<sup>213</sup> echoing the theories of Edward H. Clarke in his widely read *Sex in Education: Or, a Fair Chance for the Girls*,<sup>214</sup> which

explained the supposed weaknesses of female physiology to the general reader. Wrapped in the banner of medical authority, *Sex in Education* was an assault on the new phenomenon of coeducation. Clarke warned that women’s reproductive physiology made it unsafe for them to undertake any intellectual activity with the same rigor as men. Excessive study, he explained, diverted energy from the female

England and spoke of the work of the “women’s courts” to interested members of the New Constitutional Society for Women’s Suffrage in Knightsbridge. See *Courts for Women*, 59 SOLIC. J. & WKLY. REP. 274, 274 (1915).

210. See *Graduate Law School for Women*, in 4 AM. L. SCH. REV. 54 (1918). Among them were the Washington College of Law, whose motto “Equal Opportunities for Men and Women” reflected its origin as an institution of higher education “founded primarily for women.” Its faculty included both male and female professors. *Id.* The Portia School of Law was in its seventh year of operation in the fall of 1915. Its dean, Arthur W. MacLean, pointed out to the eager entering class, 61 strong, the “advantages to women of the modern tendency against coeducation of the sexes, and toward the establishment of separate schools for men and women in all lines of intellectual endeavor.” *Id.* at 54-55. Apparently the advantages did not extend to an all-female faculty and administration.

211. *Id.* at 54.

212. *Id.* (quoting Mary Agnes Mahan).

213. See VIRGINIA G. DRACHMAN, *WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF EQUITY CLUB, 1887 TO 1890*, at 33 (1993) (construing Ellen A. Martin in reference to the death of Mary Frederika Perry).

214. EDWARD H. CLARK, *SEX IN EDUCATION: OR, A FAIR CHANCE FOR THE GIRLS* (1873).

reproductive organs to the brain, causing a breakdown in women's health and threatening the health of future generations.<sup>215</sup>

Additionally,

[t]he women lawyers of the Equity Club understood all too well that the warnings to Clarke and other physicians threatened their desires for professional careers. But, within the privacy of the Equity Club, where they could openly discuss their concerns about health, Equity Club members did not unanimously reject Clarke's ideas. Ellen Martin first brought the issue into the open in her letter to the Equity Club in 1888 when she warned her fellow club members about the delicacy of the female reproductive system. Sharing Clarke's view, she wrote: "I refer to the close relation between the brain and the organs peculiar to women, and to the fact that any trouble with those organs (and a celebrated anatomist says they seem made to get out of order) seriously affects the brain and the nervous system."<sup>216</sup>

Thirty years later, a 1915 address by attorney Selma Klein George of New Orleans, Louisiana, encapsulated many of the arguments concerning the necessity of women's participation in political and professional life.

If a moving picture could be made of the real influence exerted by woman in love, politics and the home, man would come better to understand the part she plays in the law. The far-reaching force and effect of woman's influence in every sphere of life cannot be over-rated. . . . Undoubtedly woman exercises a greater influence in the making of laws which are calculated for the betterment of society than the law-maker himself. She is the power behind the throne. And if this be so as to the creation of law, why should she not play an important part in the interpretation of, and the carrying into effect of its mandates?<sup>217</sup>

George was adamant that accusations that women were not the intellectual equals of men were the direct result of fear. Like Helena Normanton,<sup>218</sup> she identified much of the antagonism against women lawyers as an unreasonable fear of competition in general or as fear that men who are conscious of their social responsibilities toward the weaker sex would be put at a disadvantage in the courtroom.<sup>219</sup>

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215. DRACHMAN, *supra* note 213, at 31.

216. *Id.* at 33. For more on the debate, see *id.* at 34-37. French male opponents of women's participation in the legal profession made similar arguments. See Corcos, *supra* note 37, at 471; CORCOS, *supra* note 134, at 162.

217. Selma Klein George, *Woman and the Law*, 8 LAW. & BANK. 118, 118 (1915). The reference to "moving pictures" is an interesting one, given the novelty of this medium and indicates that it had already been recognized as a very powerful opinion-maker in early twentieth-century culture, even among the professional elite.

218. See *Admission of Women*, *supra* note 186, at 428 (discussing Helena Normanton's view that men feared competition with women in the legal profession).

219. *Id.*

In those states where woman is forbidden to practice law, about the only reason given by man is that they would persuade without argument. . . . Woman is in every sense the equal of man. The books with which our libraries are filled, the arts, the academies, show that their intelligence and learning nourishes all the world. . . . The law is supposed to be founded on common sense. If it has that for a basis, then it goes without saying that woman is equally as well prepared to interpret or to enforce the law as man.<sup>220</sup>

In fact, George went so far as to say that because women inspired so much of the "unwritten law," the custom, of the time, they

might have a like part in all that concerns the statute or written law. . . . Any real rivalry of the sexes even in the practice of law, is the sheerest folly and most unnatural nonsense. The genius of woman is not alone in her heart; it is equally in her head. . . . Woman truly commands. Contact with one that is highminded is acknowledged to be good for the life of any man. . . . I submit in conclusion that you must agree with me that in-sofar as the professions of life as concerned, woman is the "better half."<sup>221</sup>

The content of the debate in England was remarkably similar. During one particular open debate in London three years before Ivy Williams's admission, Helena Normanton argued that

if women were unfitted to enter the profession of the law they must be equally unfitted to enter the medical profession as doctors, for the mistakes of the doctor were very much more likely to be serious than those of the lawyer. If women were by temperament incapable of precision, care, judgment, observation, all these were faculties which a doctor needed. It came with a very ill grace from a lawyer to demand that his profession should be closed to women, when it was remembered that so many of the occupations which had been thrown open to women had been so opened by lawyers.<sup>222</sup>

Normanton charged that such reluctance on the part of the male attorney suggested that he "feared the competition of women" and maintained that such opposition was unknown outside the legal profession itself.<sup>223</sup>

[S]he could quite honestly say that she had never met anybody outside the legal profession who had in any way condemned her for wishing to become a lawyer. On the contrary she had been most persistently encouraged by a class of men whose opinion was important—the law reporters of the newspapers. She could not tell how many had urged her to persevere. They said they had seen many cases in the courts where a woman lawyer would have been extremely useful. . . . She took the profession of the law so seriously that she did

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220. See George, *supra* note 217, at 118-19.

221. See *id.* at 120.

222. *Admission of Women*, *supra* note 186, at 428.

223. *Id.*

not desire to see women in it merely because they were women. She desired to see them in it, and successful in it, because the work was of so great importance that the whole of human ability should be an open field from which the lawyer should be chosen.<sup>224</sup>

Normanton's abilities as a debater must have surprised her opponents. Traditionally upper-middle- and upper-class men, but not their socio-economically middle- and lower-class sisters,<sup>225</sup> received the kind of education that permitted them both to formulate and to express powerful argument.<sup>226</sup>

Normanton's most vocal opponent at the debate was Mr. J.A. Symonds, a Metropolitan Police Magistrate, who suggested that she did not fully understand the nature of legal practice, an argument that she was at a disadvantage to refute since neither she nor any other woman was a member of the bar.

[W]omen had not the judgment that was necessary for practising as lawyers. It was the man-in-the-street's, and . . . perhaps, the woman-

224. *Id.* At least some of the encouragement may have been due to the traditional animosity of journalists toward lawyers.

225. *But see* SUSAN J. LEONARDI, *DANGEROUS BY DEGREES: WOMEN AT OXFORD AND THE SOMERVILLE COLLEGE NOVELISTS* (1989) (discussing a study of upper middle class women during the period between the world wars and their record of accomplishment).

226. In her examination of the observable differences between U. S. men and women's scores on standardized tests, Beryl Lief Benderly suggests that a great deal of it is attributable to the lack of emphasis which American education and culture generally place on verbal skills for men, as opposed to the importance they have for the run of the mill Englishman. *See* BERYL LIEFF BENDERLY, *THE MYTH OF TWO MINDS: WHAT GENDER MEANS AND DOESN'T MEAN* (1987).

[I]n England and Scotland, grown men play word games on the radio; limericks and anagrams rank as national pastimes; the witty Ronald Coleman, not the stolid Gary Cooper, molded the notion of celluloid sex appeal. Schoolmaster—the admirable Mr. Chips—remains an honorable masculine calling, immune to the scorn Americans heap on ineffectual buffoons like the comic strips' Mr. Weatherbee or television's Mr. Pøepers or Mr. Conklin. British culture has traditionally tied social power and literary skill into a single urbane, upper-middle-class package. It trains young politicians in the crackling debates of the Oxford Union. It signals class and caste by subtleties of stress and syntax. That highly verbal culture—not surprisingly—produces males who do as well as females on verbal tests. But so do Nigeria, where British educational traditions continue, and West Germany, where men often teach in the primary grades.

*Id.* at 216-17. In spite of attempts to glamorize the teaching profession for young American boys through television series like *Room 222* (ABC television broadcast, Sept. 17, 1969 to Jan. 11, 1974) and *Lucas Tanner* (NBC television broadcast, Sept. 11, 1974 to Aug. 20, 1975), and films like *STAND AND DELIVER* (American Playhouse 1988), they still prefer "active" occupations like policeman or fireman, or if they are interested in teaching, college rather than elementary school teaching, as shown in their reactions to these characters on television. *See* Tom Dorsey, *Girls Searching for Role Models Get Little Help from Television*, *COURIER-J.*, July 22, 1996, at 3D. Further, men who evince an interest in spending time with small children (as in child care) are automatically suspect. Men still outnumber women in the legal profession, however, because of its high status, showing that they can acquire verbal skills when they see a payoff in status or salary, preferably both. The challenge that "overeducated" American women posed to the traditional dominance of the privileged males who earned the "gentlemen's C's" and went on to law school remains to be examined; however, it is certainly considerable. When I started law school, one male professor warned me not to expect more than a "gentleman's C", which he described as an acceptable grade. Whether he meant "in general" or "for a woman" I never knew.



in-the-street's, idea of law that it consisted in a man standing up in court and pleading. Every lawyer present would know that the most important part of a practising barrister's work was done long before he got into court. He had advised what should be done and how it should be done. . . . It was he who said to a client what a woman would not say. He would ask: "What do you want in this case?" The client would not have thought of that. Then, when the lawyer found that out it was often just what the other side wanted, and the case was settled without further trouble. That would never happen with one woman in the case, still less when there were two.<sup>227</sup>

He failed to state that knowledge of a barrister's "real" work is acquired through education and practice; men are not born with it. Even a lawyer's child would be likely to have only an imperfect knowledge of the actual content of a barrister's daily experiences.

Symmonds objected to what he considered to be a lack of understanding on the part of women of the shared background and experiences of the barrister class, learned as the aristocracy might say, "on the playing fields of Eton."<sup>228</sup>

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227. See *Admission of Women*, *supra* note 186, at 428-29.

228. Popular commentators have identified men's shared experiences and expectations as a continuing barrier to male empathy with female demands for equality. As one writer noted:

My brother, my father, and I were going for a walk. . . . My brother was asking my father questions about joining the army. Would he have to go? How old would he be? Would there be a war? Would he have to fight? I remember feeling very far away emotionally. As they talked, I knew that their conversation would not ever include me. For the first time, I was glad. I didn't want to be drafted and go to war, and I knew I would never have to. . . . My brother would never be able to have that same kind of relief. . . . Men are expected to be like soldiers all the time, and they come to expect this of themselves. They act brave and take charge even if others, including we women, don't overtly ask them to do so. . . . Understanding the metaphor of the soldier goes far in helping you understand men. That they are the ones who go to war is invisibly woven into the fabric of men's lives.

SHAPIRO, *supra* note 131, at 16-17. Similarly, in the area of sports, men share both language and experience.

They're (sports analogies) everywhere, and, I believe, men love to use them. They know they understand each other, a little bit like a secret code, although it's not so secret. We are all becoming familiar with things like, "We'll keep going till we score," or "The best defense is a good offense." These analogies are pervasive in all arenas. They are so much a part of the language of business that we don't even recognize them as such. Women in business soon learn to recognize them and use them. Men talk about touchdowns, time-outs, fouls, and how about plain old win and lose! And in government, there's always talk of being on the president's team or being a team player.

*Id.* at 211. Men use sports analogies as a traditional and effective way of keeping most women out of the conversation. Graham and Maschio point out the number of times that sports references in the film *THE ACCUSED* (Paramount 1988) exclude or marginalize women. Graham & Maschio, *supra* note 12, at 1042.

Note also the analogy between sports and war in the "best defense is a good offense" remark. As Maréchal Foch wrote in a report to Maréchal Joffre after the first battle of the Marne, July 1914: "Mon centre cède, ma droite recule, situation excellente, j'attaque" ("My center is crumbling, my right is retreating, situation excellent, I attack!"). It is difficult to imagine a woman making such a bold statement; it ranks with the often-quoted remark about winning a case: "If the law is against you, argue the facts. If the facts are against you, argue the law. If both the facts and the law are against you, bang

Far was it from him to say that women were not conscientious. They had a deeper sense of conscience than the average man. It was more tender, more easily aroused, there was sympathy for right and justice. But he did say that women were wanting in that kind of honour which, speaking before many experts as he did, he ventured to call the honour of the profession. It was a thing to be learned. It was a thing learned on the playing-fields largely, on the cricket and football grounds of the public schools and elsewhere. It was a thing that women were greatly wanting in. She would do nothing that she thought wrong intentionally, but she would not know when she was doing that which was not quite right to do in the Profession. It was a profession in which one had to fight, to take advantage of his opponent if he could, to resort to what might be called tricks and dodges up to a certain point which was admissible, but there was a limit.<sup>229</sup>

Here Symmonds turned the "moral uplift" argument against women. Their sense of justice, their innate tenderness, was misplaced as applied to law. Because, as a practical matter, lawyers were not as concerned with compassion and equity as they were with promoting the "business of England" and with winning cases no matter what the rightness of the opponent's cause, Symmonds was perfectly willing to concede women's superiority in those areas.<sup>230</sup> Women's innate tendency to care for everyone concerned and to look for alternative solutions<sup>231</sup> would necessarily impair the proper workings of the system.<sup>232</sup>

While he did not specify it, he was also clearly concerned about a woman's ability to "shift gears," to pursue a particular argument for the good of the client without allowing it to carry over into the social or professional sphere outside the courtroom. The ability to "play a part" is one that male common law attorneys tend to learn relatively quickly, if only to grease the wheels of professional practice. The aggressive, unforgiving lawyer does not get far when the time comes for negotiation or for the granting of favors. "Playing a part" on a team is also part of the good sportsmanship that boys learn early; it has not necessarily been part of women's shared culture since until relatively recently girls have not participated in team sports to the extent that boys do. Thus, although he would not have identified it as such, Symmonds' fear that women would not understand the unwritten rules of competition as practiced in law and modelled on sports and war was based in an unarticulated but understandable appraisal of deficiencies in women's socialization.

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on the table and yell like hell." See David L. Ratner, *A Brief Word in Response*, 16 *CARDOZO L. REV.* 1793 (1995).

229. *Admission of Women*, *supra* note 186, at 429 (quoting remarks by J.A. Symmonds).

230. *Id.*

231. The classic statement of this quality is given in CAROL GILLIGAN, *IN A DIFFERENT VOICE* 28-31 (1982).

232. See *Admission of Women*, *supra* note 186, at 428-29 (illustrating the failure of the settlement process that would take place if women lawyers were involved in the negotiations).

Note that the assumptions about women's habits of thought<sup>233</sup> are linked to the particular characteristics of the English common law. While opponents of the admission of women to the French Bar made the same argument, that women would not be "tough enough" or intellectually agile enough to make effective legal arguments on behalf of their clients, they could not make the arguments that advocacy was of paramount importance. Instead, they suggested that women's ability to think "rationally" was less than men's, therefore they could not apply the principles of French law adequately to defend their clients' interests.<sup>234</sup> They would instead fall back on traditional feminine wiles in order to influence judges.<sup>235</sup> Symmonds continued that he was not suggesting that

the woman's sense of honour in the ordinary affairs of life would not be as high as man's, but that honour which dealt with and related to the honour of the profession he thought she would be wanting in. It was for those who were in the profession to warn those who wished for this change of the danger of the course they were pursuing.<sup>236</sup>

But he objected to what he considered to be the lack of understanding women had of the supremacy of the law.

Miss Normanton had not said a word about the common law of England, which was the admiration of the whole world. . . . Another objection was that women were not law-abiding—that was of the deepest importance. There was no hope for the civilisation of the world surviving without deep respect of the law of the country—surviving the storms of world revolution which were sweeping from the East and threatening to overwhelm us. In this country the man had a deep reverence for the law, and was by nature a law-abiding creature. But the woman did not respect the law simply because it was the law. She showed this, it might be, by slapping a policeman's face. In his opinion it would be endangering this wonderful system of ours if the touch which was not law-abiding and not full of judgment should be permitted to interfere with the Ark of the Covenant.<sup>237</sup>

In this passage one sees not only a failure on the part of the speaker to recognize that the law involved has traditionally disenfranchised women while presuming to legislate their rights and conduct, but also an attempt to justify it on the grounds of secular legitimacy, on the grounds of tradition, on the grounds of natural law, on the grounds of political necessity and national security, and on the grounds of religion. It is a

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233. The question of real differences between male and female brains is still under discussion. See BENDERLY, *supra* note 226, at 3, 6, 7, 217; ROBERT NADEAU, *S/HE BRAIN: SCIENCE, SEXUAL POLITICS, AND THE MYTHS OF FEMINISM* (1996).

234. See Corcos, *supra* note 37, at 445 (discussing arguments to justify women's participation in professions generally).

235. *Id.* at 472.

236. *Admission of Women*, *supra* note 186, at 429.

237. *Id.*

masterful (no pun intended) use of language to evade the very real objections that women of the period had to the existing system of law. His suggestion that women would react with violence to the legitimate exercise of authority ("slapping a policeman's face") might well be a reflection of his own actual experience as a police magistrate, possibly arising from a notorious 1906 case,<sup>238</sup> but it failed to acknowledge the very real possibility that a woman's sole defense against an unjust situation might well be physical resistance. The slap, indeed, represents the woman's traditional response to objectionable male (usually sexual) behavior. For Symmonds, however, it signals an inappropriate, therefore illegal, use of violence, as opposed to men's self-defining, therefore legitimate, use of violence (restraint of the woman who slaps the police officer, for example, even though he may be enforcing a law that disempowers women).

Symmonds went on to suggest that while women could serve perfectly well on the bench (thus addressing Normanton's suggestion that he feared competition), they mistakenly assumed that participation in the profession would benefit them. Nothing, he asserted, could be further from the truth. Indeed, the practice of law might be injurious to their financial and emotional health.

On the bench he did not dread woman, it was as a practising lawyer, advising clients, that he feared her. Miss Normanton asked if it would be good for the community and for the Profession that women should be allowed to enter the Profession. He would ask whether it was good for the woman. The profession of the Bar was the hardest apprenticeship of any profession in the world. Women desirous of entering it were thinking of the successes they saw, he was thinking of the failures—not of the incompetent and unlearned, but of the men of ability, men of the greatest intelligence, who had hung on for years and had never attained the success they deserved, or even reached in many cases, a merited competence. And this failure was due merely to ill-luck, to having selected the wrong chambers, the wrong circuit, or from a dozen such causes. He did not want to see the young women of 19 to 27, 28, or 30 doing as he had seen the young fellows. They were better able to bear it than the young women.<sup>239</sup>

His protestations are hard to take seriously, since judges need even more common sense than practicing attorneys. It is difficult to see how a woman, lacking the judgment necessary to counsel clients, could have the judgment necessary to serve on the bench. Furthermore, it is a strange

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238. Miss Billington wished an interview with the Chancellor of the Exchequer, when a policeman intervened, she "slapped and kicked him." See *Miss Billington's Case*, 159 PARL. DEB. (4th ser.) 648-49 (1906), cited in 5 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 441 n.37 (Leon Radzinowicz & Roger Hood eds., 1968).

239. *Admission of Women*, *supra* note 186, at 429. Symmonds may, however, have meant that as a judge he did not fear women advocates. This interpretation, which bespeaks a patronizing attitude as well, is not, on the whole, much more satisfactory.

concession, since judges generally have much more power in the courtroom, and in the day-to-day control of the law, than attorneys.<sup>240</sup>

To counteract these arguments, Normanton responded that the supposed lack of honor among women was purely theoretical and speculative. What she did not point out was, of course, that a male notion of "honor" is considered. It was extremely hypothetical to say what people would lack in circumstances not known for long centuries.<sup>241</sup> As for the objection that women were not "law-abiding," although she did not quote Shakespeare's famous line, "First thing we do, let's kill all the lawyers,"<sup>242</sup> she made an analogous argument. Citing the chaos of contemporary Russia, she pointed out that "the first thing the Bolsheviks did when they got power in Russia was to hang every lawyer, man and woman."<sup>243</sup> Giving women a stake in maintaining the legitimacy of the legal order was a much more intelligent course than banning them altogether.

She would suggest that women lawyers would be a strength to society. If women once got these doctrines of anarchy into their heads and hearts, it would be a thousand times worse than when they were confined to the men. The more women were interested in the law the better for society and for themselves.<sup>244</sup>

As for Symmonds' thoughtful concern for the well-being of women:

[W]hat happened to a woman who failed in any profession? If a man failed in any capacity he had to go to the wall. That was the inexorable law, and it held good of the woman. Let every one be given any equal chance. It had been said that the profession of the law would take a great deal out of a woman. So did every profession—nursing soldiers at the front, and in many other instances. When she (Miss Normanton) made her application last year to the Middle Temple, it was refused with unanimity, but immediately the largest organisation of women in the country protested. That was an organisation which numbered two and a half million members, the National Council of Women Workers. There was a very large demand indeed amongst women for women lawyers. The serious opposition, such as there had been, had practically melted away, and she would like to leave the question—and it was a great question—in the long run to the consideration that it was for the good of the country as a whole and to the highest service of the community that, if proper service was ready to

240. See, e.g., Delfs, *supra* note 15, at 322 n.169 and accompanying text (providing examples of sexist behavior by male judges in contemporary courtrooms).

241. *Admission of Women*, *supra* note 186, at 429.

242. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2; see also *New York County Lawyers Association Honors Chief Judge John C. Knox*, 39 A.B.A. J. 424 (1953) (quoting the remarks of Edwin M. Ottenbourg which provide the real meaning and frequent misinterpretation of these lines).

243. *Admission of Women*, *supra* note 186, at 429.

244. *Id.*

be rendered to the State by any individual of any kind, the State should hesitate long and seriously before rejecting that proper service.<sup>245</sup>

Like other supporters, Normanton was clearly offended by the suggestion that women would be reduced to tears if they lost a case or faced real opposition in the courtroom.<sup>246</sup> Her words, and those of Miss Clondesley Brereton and others attending, ultimately persuaded the listeners to the debate.<sup>247</sup>

Among additional arguments advanced against both the right and the advisability of women becoming attorneys was that of the likelihood of marriage, which immediately conferred both a legal and social disability on the woman.<sup>248</sup> The small number of women likely to be interested in becoming attorneys, based on the number of impediments presented, itself became an argument against the admission of women to the bar. Opponents argued that so few women would be affected that the question was hardly worth addressing.<sup>249</sup> Even the supporters of female membership in the bar acknowledged that their numbers were so few that, as one Canadian commentator acknowledged:

I do not think that the most fervent advocate of women's rights could claim that the admission of women to the practice of law has had any appreciable effect on the bar, the practice of law, the bench, or the people. It is claimed that it was a measure of justice and fair play, that

245. *Id.*

246. French opponents of admission advanced a similar argument. See Corcos, *supra* note 37, at 469 (listing complaints related to the question of women's physical and mental fitness for the bar).

247. "The motion was carried, 35 votes being given in its favour and 28 against." *Admission of Women*, *supra* note 186, at 429.

248. Marriage was viewed as an impediment to other professions as well. When the Inter-Departmental Committee of the British Foreign Service examined the question of the admission of women to the service, it considered both the traditional prejudices against women in those positions, which it deemed unfortunate, and the very real obstacles that marriage might present to those women.

[E]ven if governmental regulations place no bar in the way of employing married women, a normal attractive young woman who wishes to marry may, nevertheless, find herself in the unfortunate predicament of being obligated to resign from the Service or to give up the man of her choice. The consequence of placing its foreign service officer in this dilemma is likely to result in a loss of efficiency for the Government, whether it be because of the resignation of an experienced officer or because she may be handicapped by the canker of a serious constraint, consequent upon her renunciation.

Ellery C. Stowell, *Editorial Comment: The Admission of Women to the British Foreign Service*, 30 AM. J. INT'L L. 499, 500 (1936).

249. Likewise, the report of the Inter-Departmental Committee of the British Foreign Service recommended against the admission of women.

Finally, His Majesty's Government do not consider that any injustice is being done to women by their continued exclusion from the Diplomatic Service. It is, to say the least, doubtful whether women are suited to this Service owing to the conditions prevailing; it is equally doubtful whether the admission of women would contribute any special advantage to the State; lastly, the size of the Service is so small that the general question of the employment of women is in any event hardly affected.

*Id.* at 501 (quoting the government's official pronouncement). French opponents of women's admission expressed the concern that only unattractive women would pursue a long-tenn career in the law, apparently an outcome too dreadful to be contemplated. Corcos, *supra* note 37, at 468.

it removed a grievance and has had no countervailing disadvantage. That claim may be fairly be allowed; in other respects, the admission of women is regarded with complete indifference by all but those immediately concerned.<sup>250</sup>

Even the most committed supporter of women's rights must have wondered how women raised in an intellectual, social and political ambience so different from men could adequately adjust to the standards of behavior inculcated in the class of men who traditionally became members of the English Bar. Women for whom the public school was foreign territory, and the training grounds of the British armed forces, the City, and the Houses of Parliament were complete mysteries, might very well fail to understand those unspoken mores that formed the shared environment in which English lawyers operated. In addition, the legal profession was anxious to maintain the status that it had spent centuries in acquiring through an emphasis on its connection with the traditional medieval university curriculum as well as the habits and fortunes of the landed gentry and the aristocracy.<sup>251</sup> Given that women's rights to hold land and titles were circumscribed to various extents, contemporary male attorneys were likely to accept intuitively that they should also be excluded from the professions, particularly law.

To allow individuals who had traditionally had no part in formally shaping that law to take part in its application and future development was certainly a leap of faith for even the most fervent male advocates of the equality of the fairer sex. The changes that these men anticipated included the traditional expectation of "moral uplift": women would bring a sense of moral purpose to the law, interesting themselves in "women's issues" such as marriage and probate, the care of children, domestic violence, prostitution, and education. Some women attorneys found this interest natural as well.

To-day men and women alike rejoice in the record of scientific achievements, in the progress made along educational lines. . . . But women at the same time are "wondering why" about many things. My point is this—that just as they, true to woman nature, have worked in the past, indirectly, to mitigate the overshadowing evils that have accompanied our advance every step of the way—so will they, under new conditions—working without any handicap, in the future and holding high positions in the state—concentrate upon certain problems which from their very nature appeal to womankind, and which the rank and file of men deplore half-heartedly. . . . [I]t is but natural that our sex should be acutely conscious to-day of the burdens

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250. Riddell, *supra* note 85, at 206.

251. See Wilfred Prest, *Why the History of the Professions is Not Written*, in *LAW, ECONOMY AND SOCIETY, 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW* 300, 315-16 (G.R. Rubin & David Sugarman eds., 1984) (elaborating on the meaning of the word "profession" to the lawyer).

that rest most heavily upon women and little children. Because of this, the evils of the industrial system loom up largely.<sup>252</sup>

Most men, however, did not recognize, or did not articulate, the possibility that women might actually refocus the attention of the law on other issues, or force a change in the debate that contemplated as yet unformulated solutions to traditional problems. Such approaches might bring about fundamental changes in the nature of the English common law; the men who supported the entrance of women into the English legal profession would have had difficulty anticipating them.

### C. Existing Legislation and Its Interpretation

#### 1. Attempts to Obtain Admission Through the Courts

Finally, one Englishwoman who had completed the appropriate education for the profession of solicitor and had been accepted as a clerk in accordance with the requirement of the Law Society (the certifying body for the profession),<sup>253</sup> requested admittance by taking her case to court, initially to the Supreme Court of Judicature. Her attempt, like that of Jeanne Chauvin in France,<sup>254</sup> Myra Bradwell in the United States (Illinois),<sup>255</sup> and Clara Brett Martin in Canada (Ontario),<sup>256</sup> forced the courts to

252. Giles, *supra* note 6, at 356.

253. See EDMUND BROWN VINEY CHRISTIAN, A SHORT HISTORY OF SOLICITORS 177 (1896) (providing a history of the Law Society).

254. See Corcos, *supra* note 37, at 447.

255. Bradwell v. State, 83 U.S. 130 (1872). See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 81-84 (1983). Joan Hoff gives a fuller account of Mansfield's admission in LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 162-63 (1991). Hoff also rehearses the story of Ada H. Kepley, the first American woman to graduate from an accredited law school and the objections to Bradwell's admission, namely that she was married. *Id.* at 163-70. See Barbara Allen Babcock, Clara Shortridge Foltz: "First Woman", 28 VAL. U. L. REV. 1231 (1994) (discussing the first woman admitted in California).

For other U.S. cases in which the bar denied admission to a woman admitted in another state, see *In re Maddox*, 50 A. 487 (Md. 1901); *In re Leonard*, 6 P. 426 (Or. 1885). But see *In re Application for License*, 55 S.E. 635 (1906) (intimating that judges who deny qualified women admission to the bar are lacking in common sense). See also *Admission of Women*, *supra* note 186; *Some Judicial Views of Woman's Sphere*, 15 LAW NOTES 103 (1911); *Women Lawyers and the Law*, 16 LAW NOTES 141 (1912). By July 1915, *Law Notes* was suggesting to the Georgia legal profession that it was much too late to deny women the right to enter the practice of law, no matter what its intentions. *Right of Women to Practice Law*, 19 LAW NOTES 62 (1915); see also Virginia G. Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America*, 88 MICH. L. REV. 2414 (1990) (discussing attempts to create a gendered, professional identity). French opponents of women's admission also objected that married women were barred from acting as attorneys, since their freedom of action was subordinate to their husbands' will. See Corcos, *supra* note 37, at 462.

As early as 1886, however, some male attorneys were considering the possible impact of women on the profession. In that year Mr. Charles C. Moore published a piece of overheated Victorian prose called *The Female Lawyer*, in which he speculated on the arrival in the town of Litchfield (home of the first U.S. law school) of a female attorney named Miss Mary Padelford, who, denied entrance to the Massachusetts Bar, obtains her license in Connecticut. Miss Padelford is painted as a very competent member of the profession, particularly in the area of "consultations, drawing deeds, bonds, will and other legal documents," but is unfortunately done in by the unchivalrous behavior of an adversary. After



consider whether admission to the practice of law is a public, not a private function, and as such whether it may be regulated by the appropriate jurisdiction. While the women requesting admission by court decree were uniformly unsuccessful,<sup>257</sup> their requests forced the various governments involved to acknowledge the end of an era in which the right to make law could no longer be determined simply by members of a very select and self-selecting group.<sup>258</sup>

## 2. *Bebb v. Law Society*: The Trial Court Case

After attending school in London and at Oxford University, where she earned honors in jurisprudence,<sup>259</sup> Gwyneth Marjorie Bebb decided to attempt to qualify as a solicitor. In order to do so, she needed the sponsorship of a practicing solicitor, who would accept her as a clerk for a

a bout with brain fever, she returns to Litchfield to marry a colleague, join him in his practice and live happily ever after. In deference to her feminine disabilities, however, the practice is divided up "between the partners to the entire satisfaction of both." Charles C. Moore, *The Female Lawyer*, 26 GREEN BAG 525 (1914) (citing the DAILY TIMES (Hartford), May 17, 1886). Virginia Drachman takes a rather sour view of this story, emphasizing Moore's assumptions about the woman lawyer's natural physical frailty and the appropriateness of her limited practice after her marriage. See DRACHMAN, *supra* note 213, at 32-33. While to late twentieth-century eyes the style of the story does seem outdated and the sentiments somewhat patronizing, Moore's willingness to allow his protagonist hero, a successful lawyer, to fall in love with and encourage the aspirations of the woman attorney in the story is refreshing. Indeed, given the continuing prejudices against women attorneys documented in works by Podmore & Spencer, *supra* notes 17, 19; SACHS & WILSON, *supra* note 3; and Kennedy, *supra* note 158; Moore may be more somewhat more progressive than he seems at first. *But see* D. Kelly Weisberg, *Barred From the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485 (1977) (addressing women's struggle to gain entry into the legal profession). Further, the career path chosen by Miss Padelford is quite similar to those chosen by some Canadian women lawyers up to the 1970s. See Kinnear, *supra* note 85, at 428-29.

256. See *supra* Part III.A.1.

257. It is significant that these women thought the courts might be sympathetic to their claims, since it suggests that they believed that their rights were at least as strong as those of men similarly situated. On the realization of the ability of courts to empower women with civil rights previously denied, see MICHAEL GROSSBERG, *A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA 155-67* (1996) (describing the attempt of a nineteenth-century Philadelphia divorcée to obtain custody of her children from her Swiss ex-husband).

258. On the history and regulation of French lawyers, see MICHAEL P. FITZSIMMONS, *THE PARISIAN ORDER OF BARRISTERS AND THE FRENCH REVOLUTION* (1987); LUCIEN KARPIK, *LES AVOCATS: ENTRE L'ÉTAT, LE PUBLIC ET LE MARCHÉ XXIIIÈ-XXÈ SIÈCLE* (1995). On U.S. lawyers, see ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965); *THE LEGAL PROFESSION: MAJOR HISTORICAL INTERPRETATIONS* (Kermit L. Hall ed., 1987); *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerard W. Gawalt ed., 1984). A comprehensive history of the Canadian legal profession has yet to be written; however, see Harry W. Arthurs et al., *Canadian Lawyers: A Peculiar Professionalism*, in 1 *LAWYERS IN SOCIETY*, *supra* note 69, at 123-77. On English lawyers, see 15 HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, *supra* note 14, at 223-47; Richard L. Abel, *England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors*, in 1 *LAWYERS IN SOCIETY*, *supra* note 69, at 23-75.

259. *Bebb v. Law Society*, 29 T.L.R. 634, 635 (Ch. 1913). The case was tried in the Supreme Court of Judicature, Chancery Division, on July 2, 1913, and appealed to the court of appeal, which heard the case on December 9 and 10, 1913, and delivered its opinion on December 13, 1913. *Bebb v. Law Society*, 30 T.L.R. 179 (C.A. 1913).

stated period of time.<sup>260</sup> Ultimately, she also needed some kind of official recognition from the Law Society that she would be admitted, once she completed all the requirements satisfactorily as defined by the Solicitors Act of 1843,<sup>261</sup> which established the requirements of membership in the English Bar, including minimum qualifications for training and membership.<sup>262</sup> Section 3 required would-be solicitors to have been “bound as a clerk to a solicitor.”<sup>263</sup>

She understood that there were firms of solicitors who were willing to take her as an articled clerk . . . . Mr. E.A. Bell, examined by Mr. Wright, said that he practised in the City as a solicitor, and that he belonged to the firm of Carter and Bell. He was willing to accept the plaintiff as his clerk.<sup>264</sup>

Section 2 of the Act required such work experience:

[N]o person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person or in his own name . . . unless such person shall have previously to the passing of this Act admitted and inrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this Act be admitted and inrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid.<sup>265</sup>

Nothing in this section, or indeed in the rest of the Act, stated that only men could become clerks. If a woman could complete the requirements laid out in the Act, she should theoretically be allowed to practice.

260. *Bebb*, 29 T.L.R. at 634.

261. 6 & 7 Vict., ch. 73, §§ 2, 3 (Eng.).

262. *Id.*

263. *Bebb*, 29 T.L.R. at 634.

264. *Id.* at 635. Bell's willingness to assist *Bebb* would still have been unusual in the England of the early 1980s.

A male sponsor will have mixed feelings about accepting a woman as protégé or as presenting her to his colleagues as a good proposition in the long term for a law partnership to take on. He will be unlikely to identify a woman as a potential partner or successor and will tend to prefer a male protégé who is assumed to be more committed to a career. Sponsors (like selectors everywhere) tend to pick protégés “in their own image”, [sic] which automatically reduces the chances of women. Moreover, a woman protégé is assumed to be potential “trouble” in other ways and the ideal type close relationship between sponsor and protégé may be less easy to maintain between members of the opposite sex, particularly when the views of the respective marital partners are taken into account.

Podmore & Spencer, *supra* note 19, at 29 (footnote omitted). John Mortimer's short stories *Rumpole and the Female of the Species*, in THE SECOND RUMPOLE OMNIBUS 324 (1987) and *Rumpole and the Miscarriage of Justice*, in RUMPOLE ON TRIAL 79 (1992), detail the difficulties of women in the profession.

265. Solicitors Act of 1843, 6 & 7 Vict., ch. 73, § 2 (Eng.).

According to Bebb's attorneys, Messrs. Stanley Buckmaster<sup>266</sup> and R.A. Wright, the Law Society's difficulty stemmed from the admittance of women to clerkships. If a woman could be admitted to a clerkship, then, assuming she completed her training satisfactorily, nothing prevented her from being admitted to the profession of solicitor.<sup>267</sup> They addressed the traditional objections to allowing women into the profession, specifically custom and statutory language.<sup>268</sup> Common law provided no support for the contention that women were excluded from the profession. Prior to the reign of Edward II, women could, and did, appear as advocates.<sup>269</sup> Apart from the Act of 1888, the only prohibitions against women entering the profession were inferred from tradition, and based on no required denial of the right.

The only Act which was in mandatory form was the Act of 1888. By section 10 of that Act the Master of the Rolls was bound to admit the plaintiff if she presented a certificate. That being the position, then, unless the Law Society could refuse to let her sit for the examination, there was nothing to prevent her from being admitted as a solicitor. The only right to inquire into the character and capacity of an applicant was the right given at the time of the final examination.<sup>270</sup>

Since Bebb was not requesting the right to exercise a public office, from which women were disqualified,

266. Later, he became Lord Buckmaster. See *DICTIONARY OF NATIONAL BIOGRAPHY*, 1931-1940, at 119-21 (L.G. Wickham Legg ed., Supp. 1949) (describing Lord Buckmaster's life).

267. *Bebb v. Law Society*, 29 T.L.R. 634, 635 (Ch. 1913).

268. *Id.* at 635.

269. The story of the woman who appointed another woman as her attorney and then removed her is often told. 1 *SELECT CIVIL PLEAS*, case 141, at 56 (William Paley Baildon ed., 1890). Generally speaking, the "attorney" was not a member of a recognized profession but simply one who spoke for another in court; thus any person could fulfill that role.

Originally the job is rather "casual." Even a woman could do it; in 1203 a woman puts her sister in her place and then removes her, but she is not called *attornata*. But in 1313 a man claims "per Isabellam de Uptone attornatum suum". Katherine Bompuz in 1306 was "appointed" attorney to receive a gold ring. Thus the word is originally not technical but lay, if not popularly coined, while all the words with which it soon has to compete were by this time—though they, too, had once been of popular origin—stamped with a jural character.

HERMAN COHEN, *A HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450*, at 134 (1929) (footnotes omitted) [hereinafter COHEN, *A HISTORY*]. Cohen also contributed an erudite two-part essay on the subject, *The Origins of the English Bar*, 30 *LAW Q. REV.* 464, 467 (1914); 31 *LAW Q. REV.* 56, 62-63 (1915).

The case of women advocates during Roman times is also often cited as evidence that women could and did serve as lawyers, although it also demonstrates the objections that men had to women attorneys, namely that they could be too energetic (therefore ill-suited to the practice of law). Quoting the *Siete Partidas* of Alfonso X, Cohen stated:

The code (1.8) is very emphatic in disqualifying any woman "however (wise or learned) (*sabidora*) from practising, "for two reasons; it is not decent for a woman to compete publicly with men, in arguing for another: then because the sages in the past prohibited it after their experience of California." This story seems to have had a fascination for Latin jurists.

COHEN, *A HISTORY*, *supra* at 422 (footnotes omitted).

270. *Bebb*, 29 T.L.R. at 634.

there was nothing to prevent a woman from performing a private duty, and the office of a solicitor was a private office. The disability extended only to the exercise of public functions. That women had not hitherto desired to exercise these functions merely meant that their qualifications had lain dormant, not that they did not exist. There was no disqualification either at common law or by statute.<sup>271</sup>

The two advocates also presented a carefully constructed case on the question of statutory language, arguing that since women were not specifically exempted from becoming solicitors by the Act, that Bebb should be allowed to qualify, or in the alternative, that if women were not allowed to practice as solicitors by the terms of the Act, they could not be held to be in violation of it, should they fail to be admitted and enrolled by the Law Society. "If the use of the masculine gender and the word 'person' in other parts of the Act did not include women, then women were not included under that section, and they could act as solicitors without being admitted and enrolled, and could not be punished for so doing."<sup>272</sup> Indeed, Ivy Williams, who would later become the first woman admitted to practice law in England, had challenged the profession with that argument in 1904:

There will be a band of lady "University lawyers." These University lawyers will say to the Benchers and the Law Society: "Admit us, or we shall form a third branch of the profession, and practise as outside lawyers." There is no law to prevent it. Ladies holding University law degrees, learned and skilled in the law, deservedly enjoying public confidence, could legally compete in vast fields of the solicitor's and counsel's most lucrative domains, and without infringing the law. And they need not trammel themselves with lawyers' trade union rules.<sup>273</sup>

Bebb, however, professed herself willing to comply with certain of the requirements, such as apprenticeship, although she maintained that she could be exempted from taking the preliminary examination.<sup>274</sup> Further legislation of 1877<sup>275</sup> and 1888<sup>276</sup> set forth clarification in regard to the

271. *Id.* at 635. Interestingly, no one seems to have remarked that the office of sovereign, the most public office in the realm, had been repeatedly and until 12 years before, spectacularly occupied by a person of the female sex. *But see infra* notes 303-04 and accompanying text.

272. *Bebb*, 29 T.L.R. at 634.

273. *Obiter Dicta*, 39 LAW J. 1 (1904) at 1. The reporter also quoted an American attorney who opined:

My own observation of women lawyers, based upon thirty years' experience at the Bar of Illinois and of the Supreme Court of the United States, is that they do not succeed; indeed, hardly appear as advocates, however useful they may become as office practitioners . . . . The few women I have ever seen in the Courts did not appear to me to be conspicuous examples of success; and one of them, who had, I believe, gained some notoriety, had done so in the Police courts by the sacrifice of qualities usually considered as feminine.

*Id.*

274. *Bebb*, 29 T.L.R. at 635. She was undoubtedly making reference to the Solicitors Act of 1894, 57 & 58 Vict., ch. 9, § 3 (Eng.).

275. Solicitors Act of 1877, 40 & 41 Vict., ch. 25, §§ 5, 7, 8 (Eng.).

fitness of applicants to sit for the required examinations and the necessity for a certificate to be presented to the Master of the Rolls attesting to acceptable completion of the requirements for entering the profession.

Like many other questions in which the exact classification of women figured, the meaning of the word "person" was crucial to the interpretation of the statute, and therefore to the entry of women into the profession.

Section 48 was the interpretation clause, and was very important. It enacted that "every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word 'person' shall extend to any body politic, corporate, or collegiate, municipal, civil, or ecclesiastical, aggregate or sole, as well as an individual; unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction."<sup>277</sup>

This "repugnancy" applied to section 2, the section setting forth the qualifications for the position of solicitor.<sup>278</sup> Further, Bebb's attorneys argued, nothing in section 48 was repugnant to section 2.<sup>279</sup> Note also, that the Interpretation Act of 1889, required that "unless the contrary intention appears,—(a) words importing the masculine gender shall include females; and (b) words in the singular shall include the plural, and words in the plural shall include the singular."<sup>280</sup>

The Law Society also pleaded custom and the interpretation of language as well as an inability to make such a momentous decision in objecting to Bebb's request.<sup>281</sup> Mr. Hughes, one of the barristers representing the Law Society, argued that

in this matter the Law Society was in the position of a public official. It was the registrar and was responsible for the register of solicitors. When the plaintiff and three other ladies presented their application the society felt that it was impossible to admit them without taking the opinion of the Court. With regard to the period before the modern Acts, there was no known instance of a woman practising as an attorney or solicitor. The right to have an attorney, instead of the obligation to appear in person, only developed very gradually . . . . The Act of 1843 was negative throughout. It proceeded on the footing that up to that time men, and men only, had acted as solicitors. Ordinarily, where words importing the masculine gender were used, they in-

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276. Solicitors Act of 1888, 51 & 52 Vict., ch. 65, § 10 (Eng.).

277. *Bebb*, 29 T.L.R. at 634 (quoting the Solicitor's Act of 1843, 6 & 7 Vict., ch. 73, § 48 (Eng.)).

278. *Id.*

279. *Id.*

280. Interpretation Act of 1889, 52 & 53 Vict., ch. 63, § 1 (Eng.). On English statutory interpretation, see PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 349 (G.F.L. Bridgman ed., 7th ed. 1929) (reprinting the Interpretation Act).

281. *Bebb*, 29 T.L.R. at 635.

cluded women, but that would not apply in this case, because it was not the custom for women to act as solicitors.<sup>282</sup>

Notice here the reversal of the traditional anti-female position that if a word is not used, this omission is deliberate and necessarily means that women are excluded. The Law Society acknowledged here that failure to specify that women were included was not fatal to the plaintiff's case.<sup>283</sup> Instead, it took the position that the omission resulted from the failure of the drafters to recognize that women might actually request inclusion.<sup>284</sup>

Such tortuous logic suggests bad faith on the part of a Law Society that knew the temper of the times was slowly turning against it. In support of its position, it could only cite a Scottish case interpreting a voting statute, *Nairn v. University of St. Andrews*,<sup>285</sup> in which women graduates of the University of Edinburgh were denied the right to vote for Parliamentary electors,<sup>286</sup> and another Scottish case, *Hall v. Incorporated Society of Law-Agents*,<sup>287</sup> whose reasoning ultimately paralleled that in *Bebb*, the Scottish equivalent of the Law Society had not opposed the admission of the petitioner.<sup>288</sup>

Similarly, when addressing the question of section 35,<sup>289</sup> Hughes argued that since the legislature did not specifically mention women, it could not have contemplated their inclusion in the profession.<sup>290</sup> "Person" within the meaning of the Act necessarily meant "male."<sup>291</sup>

For Mr. Justice Joyce, the question seemed to turn on whether the position of solicitor had any public duties associated with it.<sup>292</sup> If so, then women, being disqualified from exercising public offices, were necessarily disqualified from the profession. "According to common law, a woman was incapable of occupying a public office. . . . It had been said

282. *Id.*

283. *Id.*

284. *Id.*

285. 25 T.L.R. 160, 160 (Sess. 1908).

286. *Nairn*, 25 T.L.R. at 160.

287. 3 Fr. 1059 (Sess. 1901).

288. *Hall*, 3 Fr. at 1060.

289. Hughes stated:

That from and after the passing of this Act, in case any person shall in his own name or in the name of any other person sue out any writ or process, or commence, prosecute, or defend any action or suit or any proceedings in any court of law or equity, without being admitted and inrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offense shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly.

Solicitors Act of 1843, 6 & 7 Vict., ch. 73, § 35 (Eng.).

290. *Bebb v. Law Society*, 29 T.L.R. 634, 635 (Ch. 1913).

291. *Bebb*, 29 T.L.R. at 635.

292. *Id.*

that a solicitor did not exercise a public function, but he was very much mistaken if solicitors of standing were not qualified to exercise certain public functions.<sup>293</sup> His Lordship did not believe he was mistaken.<sup>294</sup> Indeed,

[h]is Lordship entertained no doubt as to the position of women before the modern legislation. He did not doubt that they were disqualified by reason of their sex from acting as solicitors. Then there was the Act of 1843. His Lordship read section 48, and said that such a clause as that was only to enable the drafting of the Act to be done more concisely than it might otherwise be. The same remark applied to the Interpretation Act. It was never intended to make such a revolution. There was no statute which showed any intention of the Legislature to alter the common law. The disability therefore still existed, and would exist until it was changed by the Legislature. The action must therefore be dismissed.<sup>295</sup>

Apparently, his Lordship felt no compunction about so actively interpreting the intention of the legislature, in contravention of the Interpretation Act of 1889.<sup>296</sup> To suggest that statutory language that specifically includes women was written simply for the sake of efficiency is to make a mockery of any possible legislative intent.<sup>297</sup>

### 3. The Court of Appeals Case

Bebb pursued the matter, and in 1913 the court of appeals upheld the finding of Mr. Justice Joyce.<sup>298</sup>

The action was brought by Miss Gwyneth Marjorie Bebb asking for a declaration that she was a "person" within the meaning of the Solicitors Act, 1843, and the amending Acts, and a mandamus to compel the Law Society to admit her to the preliminary examinations held by the Law Society under such Acts with a view to her becoming a solicitor.<sup>299</sup>

The appellate court focused on the question of interpretation of the statute, as the appellant's new counsel, Lord Robert Cecil, requested.<sup>300</sup> Further, the issue of the disqualification of women to hold public office was by no means clear.

293. *Id.*

294. *Id.*

295. *Id.*

296. 52 & 53 Vict., ch. 63 (Eng.).

297. This kind of Humpty-Dumpty jurisprudence (that a word means what a person chooses it to mean, LEWIS CARROL, ALICE'S ADVENTURES IN WONDERLAND, AND THROUGH THE LOOKING GLASS (1912)) recalls a 1947 Louisiana case in which the court refused to find the existence of undisclosed agency in spite of the fact that the relevant statute specifically provided for undisclosed agency. *See Sentell v. Richardson*, 29 So. 2d 852 (La. 1947).

298. *Bebb v. Law Society*, 30 T.L.R. 179 (C.A. 1913).

299. *Bebb*, 30 T.L.R. at 179.

300. *Id.*

His contentions were (1) that unmarried women had the same legal rights as men; (2) that at Common Law there was nothing to prevent women from becoming attorneys; and (3) that on the fair construction of the statutes on the subject they favoured the view that women were entitled to be admitted as solicitors. In Pollock and Maitland's *History of English Law* (first edition), Vol. I, p. 468, it was laid down that women had the same private rights as men, but that there was no place for women in public offices. If that was to be taken as being true as regards public functions, the words must be construed narrowly.<sup>301</sup>

Surprisingly, Mr. Cozens-Hardy, the Master of the Rolls, the official appointed to accept certificates from aspiring solicitors, volunteered from the bench that "women had acted as churchwardens."<sup>302</sup>

Cecil also made the rather obvious point that women had ruled the country, both as queens regnant<sup>303</sup> (i.e., in their own right) and as regents for absent kings or child sovereigns.<sup>304</sup>

Queen Eleanor had acted in 1253 as Keeper of the Great Seal. . . . Counsel then cited authorities to show that a woman had also acted as a hereditary Lord High Constable, by deputy, and as Marshal and Lord Chamberlain. There was authority that she could act as governor of a workhouse . . . a sexton . . . or an overseer. Thus there was no absolute sex disqualification which prevented women from holding public offices, but their right to do so depended on the circumstances of each case. They were excluded from military offices for want of physical capacity and could only hold them by deputy.<sup>305</sup>

301. *Id.*

302. *Id.* This comment was unpersuasive to at least one commentator. See *Notes: Women and the Profession*, 26 JURID. REV. 130, 131 (1914). On the duties of churchwardens as officers of the state, see generally WILLIAM LAMBARDE, *THE DUTIES OF CONSTABLES, BORSHOLDERS, TYTHINGMEN, AND SUCH OTHER LOWE AND LAY MINISTERS OF THE PEACE* (1599); JOHN LAYER, *THE OFFICE AND DUTIE OF CONSTABLES, CHURCHWARDENS AND OTHER THE OVERSEERS OF THE POORE* (1641); GEORGE MERITON, *A GUIDE FOR CONSTABLES, CHURCHWARDENS, OVERSEERS OF THE POOR, SURVEYORS OF THE HIGH-WAYS, TREASURERS OF THE COUNTY-STOCK, MASTERS OF THE HOUSE OF CORRECTION, BAYLIFFS OF MANNORS, TOLL-TAKERS IN FAIRS & C* (1679).

303. *Bebb*, 30 T.L.R. at 179. The most recent example was of course Victoria (1837-1901), who is the subject of many biographies, including CAROLLY ERICKSON, *HER LITTLE MAJESTY: THE LIFE OF QUEEN VICTORIA* (1997).

304. *Bebb*, 30 T.L.R. at 179. Among the most notable were Eleanor of Aquitaine, the wife of Henry II, who governed the kingdom during his absences fighting on the continent, Margaret of Anjou, the unpopular wife of Henry VI, who governed during his bouts of insanity, and Catherine of Aragon, who was named Regent while Henry VIII was off to fight with Francis I of France. Some historians have now begun to study the roles of queens as rulers, advisors and educators from the earlier Christian period through the middle Renaissance (roughly 500 C.E. to 1500 C.E.). See PAULINE STAFFORD, *QUEENS, CONCUBINES, AND DOWAGERS: THE KING'S WIFE IN THE EARLY MIDDLE AGES 115-90* (1983).

305. *Bebb*, 30 T.L.R. at 179 (citations omitted). The "Queen Eleanor" of Cecil's reference was Eleanor of Provence, the Queen of Henry III (reigned 1216-1272).



Cecil also addressed the case of *Beresford-Hope v. Sandhurst*,<sup>306</sup> one of the cases on which the Law Society had relied to demonstrate that women could not exercise any public office.

Lord Esher had expressed the view that a woman could not exercise any public function, and had relied on *Chorlton v. Lings*, but Lord Esher's dictum could not be supported by what was said by Willes, J., in that case, and was incorrect. If it was correct it would be difficult to see how female inspectors could be appointed under the Factory and Workshop Act, 1901, section 118.<sup>307</sup>

The case of *Chorlton v. Lings*<sup>308</sup> was a suffrage case, an early attempt to obtain the right to vote for women through an error on the part of the election commissioners. Mrs. Lilly Maxwell, a resident of Manchester, discovered that she had been erroneously entered on the electoral register and with the assistance of barrister Chisholm Anstey attempted to exploit that mistake by demanding the right to vote.<sup>309</sup> As Anstey developed the argument, the right to vote had traditionally been attached to property ownership rather than to gender.<sup>310</sup> More than five thousand other women eagerly seized on the opportunity, also claiming the right of suffrage.<sup>311</sup> The court of appeals rejected Mrs. Maxwell's petition, primarily because even if the right had ever existed, women had lost it by failing to exercise it.<sup>312</sup> This malicious argument paralleled the position that opponents of women's admission to the bar used to justify their exclusion. How can one exercise a right that one has been assured one does not possess? Such reasoning had the effect of codifying the custom of denying women the vote, forcing the decision back into the legislative arena. But it appealed to the *Bebb* court which adopted the "custom" argument in rejecting her position.<sup>313</sup>

At least one of the presiding magistrates, Lord Justice Phillimore, did not find Cecil's historical argument persuasive. Although the barrister cited both the Pollock and Maitland work,<sup>314</sup> a classic statement of the development of English legal history, and some of the *Yearbooks* of Ed-

306. 5 T.L.R. 472 (C.A. 1889).

307. *Bebb*, 30 T.L.R. at 179 (citation omitted).

308. 4 L.R. 347 (C.P. 1868).

309. Norman St. John-Stevan, *Women in Public Law, in A CENTURY OF FAMILY LAW 1857-1957*, *supra* note 18, at 256, 263-64.

310. *Id.* at 263.

311. *Id.* at 263-64.

312. *Chorlton*, 4 L.R. at 347.

313. *Bebb v. Law Society*, 30 T.L.R. 179, 180 (C.A. 1913). Eventually women did obtain a limited right to vote with the passage of the Sex Disqualification (Removal) Act of 1919, 9 & 10 Geo. 5, ch. 71, § 1 (Eng.).

314. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 216 (2d ed. 1903). On the difference between "countor" (or serjeant) and attorney, see EDMUND BROWN VINEY CHRISTIAN, *A SHORT HISTORY OF SOLICITORS* 3.4 (1896).

ward III,<sup>315</sup> his Lordship objected that “at that time there was no profession of attorneys, but a litigant could appoint anyone to be his attorney.”<sup>316</sup> Cecil acknowledged that was true, but that after the profession had formally emerged, women had still been employed as advocates. “Other authorities were Select Civil Pleas, Vol. 1., case 141, p. 56, when a woman appointed another woman to represent her, and Bracton’s Note Book, Vol. ii., case 342, p. 283, and Vol. III., p. 335.”<sup>317</sup> Cecil reiterated that the use of the word “person” in section 2 of the 1843 Act “included a woman”<sup>318</sup> and that section 48 mandated that the use of the masculine gender incorporated women as well.

[E]very word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word “person” shall extend to any body politic, corporate, or collegiate, municipal, civil, or ecclesiastical, aggregate or sole, as well as an individual, unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction.<sup>319</sup>

Again Lord Phillimore questioned Cecil, this time on the question of the rights of unmarried as opposed to married women to exercise the profession of solicitor.<sup>320</sup> Cecil pointed out that

his view was that it was a well-settled general rule of the Common Law that married women had no ordinary rights, and he did not contend that section 2 of the Act of 1843 conferred any new right, but that it confirmed and corroborated the right of an unmarried woman at Common Law to act as an attorney.<sup>321</sup>

As in France, the question of a married woman involved in a profession raised huge questions of autonomy and of conflict of interest, since a

315. *Bebb*, 30 T.L.R. at 179. See 13 Y.B. EDW. 3 186 (1339).

316. *Bebb*, 30 T.L.R. at 179. The role of attorney seems to have been an ill-defined and fluid one during the period.

[A] man is allowed to put forward some one else to speak for him, not in order that he may be bound by that other person’s words, but in order that he may have a chance of correcting formal blunders and supplying omissions. What the litigant himself has said in court, he has said once and for all, but what a friend has said in his favour he may disavow. The professional pleader makes his way into the courts, not as one who will represent a litigant, but as one who will stand by the litigant’s side and speak in his favour, subject however to correction, for his words will not bind his client until that client has expressly or tacitly adopted them. . . . Just because the pleader makes his appearance in this informal fashion, as a mere friend who stands by the litigant’s side and provisionally speaks on his behalf, it is difficult for us to discover whether pleaders are commonly employed and whether they are already members of a professional class.

POLLOCK & MATTLAND, *supra* note 314, at 190-91.

317. *Bebb*, 30 T.L.R. at 179; see also *supra* note 269.

318. *Bebb*, 30 T.L.R. at 179.

319. *Id.*

320. *Id.*

321. *Id.* at 179-80.

married woman was expected to conform to the wishes of her husband in matters of behavior, residence and other areas of life.<sup>322</sup>

"Person" was also used in section 26 of the Solicitors Act, 1860, which imposed penalties for wrongfully acting as a solicitor, and it was reasonable to suppose that it included a woman there. . . . In view of the rights possessed by women at Common Law it would require an express prohibition to prevent them from becoming solicitors. In several of the Colonies and in certain foreign countries women were permitted to act as solicitors.<sup>323</sup>

R.B. Finlay, who represented the Law Society, requested a clarification of the appellant's position regarding the 1843 Act.

[H]e understood that the appellant did not contend that there was anything in the Act of 1843 which conferred on women the right to be admitted as solicitors. Lord Robert Cecil said that he did not say there was sufficient in the Act of 1843 to remove any existing prohibition at Common Law, but that, in the absence of such a prohibition, it did confer on women the right to be admitted.<sup>324</sup>

From the discussion of the meaning of the statutes involved, the crucial issue clearly became the question of whether women were customarily advocates, or had customarily attempted to exercise such a role.

Sir R.B. Finlay said that he relied on the fact that there was not a single instance of a woman's having been admitted as a solicitor. This inveterate usage was of great weight, and the existence of such a long usage was relied on in Miss Bertha Cave's case noted in *The Times* of December 3, 1903, which was a case where Miss Cave had applied to be admitted to Gray's Inn, and in the Scotch case, *Hall v. Incorporated Society of Law Agents in Scotland*. If the appellant's contention was right, women would equally be entitled to be admitted to the Inns of Court, and no doubt this would make dining in hall far more amusing; but the real answer was that no one had ever been admitted.<sup>325</sup>

This type of specious argument is of course of the kind that was advanced to oppose the candidature of the daughter of Henry I to succeed her father as sovereign,<sup>326</sup> and of the daughters of Henry VIII to succeed

322. See Corcos, *supra* note 37, at 462; Lilly, *supra* note 120, at 431.

323. *Bebb v. Law Society*, 30 T.L.R. 179, 180 (C.A. 1913).

324. *Id.*

325. *Id.* (citation omitted).

326. This claimant was the Empress Maud, or Matilda, the only surviving and somewhat disagreeable child of Henry I, who challenged King Stephen for the throne. She eventually abandoned her claim in favor of her son, the future Henry II, but clearly his claim derived as much from his descent from her as the rightful queen as from his successful conquest. However, Stephen's claim was not without merit. He was male, and also had a male heir, and was considered amiable. Although the barons had sworn fealty to Matilda, they had not sworn obedience to her husband, Geoffrey of Anjou, and some preferred a known quantity (Stephen) to an unknown and younger man (Geoffrey). See CHRISTOPHER BROOKE, *FROM ALFRED TO HENRY III: 871-1272*, at 166-72 (1961).

him,<sup>327</sup> not only because their sex seemed to disqualify them, but also because of the dangers of their marriage.

Finlay's reduction of Bebb's application for equal admission to a prestigious profession to a simple request for social privileges suggests the desperation of an advocate who senses the shifting temper of the times. He did attempt to address the question of custom as it was codified in learned treatises and in contemporary case law:

The passages in Coke Litt. were really conclusive on the law. They contained definite statements that a woman could not be an attorney. . . . There was, in fact, something repugnant to the word "person" including a female—namely, the well-settled usage at Common Law. The cases showed that long usage ought to govern the law in these cases—*Chorlton v. Lings* and *Jex-Blake v. Edinburgh University*.<sup>328</sup>

The attraction of the argument of custom and the inertia of "well-settled usage" was enough to overcome Cecil's arguments:

Three grounds were alleged as proving disability. First, it was said that Lord Coke, in language which his Lordship said seemed to

327. These queens were Mary I (reigned 1553-1558), the daughter of Henry's first wife, the divorced Catherine of Aragon, whose marriage to her cousin Philip, the King of Spain, seemed to validate all the country's fears about having a Catholic and a married woman as head of state, and Elizabeth I (reigned 1558-1603), the daughter of Henry's second wife, the beheaded Anne Boleyn, who learned from her sister's difficulties that too much religion and a husband were a sure road to disaster for a queen regnant. On the children of Henry VIII, see CAROLLY ERICKSON, *BLOODY MARY* (1978); ELIZABETH JENKINS, *ELIZABETH THE GREAT* (1958); J.E. NEALE, *QUEEN ELIZABETH* (1934). I omit the ill-fated Jane Grey, whose claim derived from a badly drawn will of Edward VI, the son and heir of Henry VIII, and from acclamation by a Parliament that abandoned her after nine days. Her claim is actually interesting legally. See generally DAVID MATHEW, *LADY JANE GREY: THE SETTING OF THE REIGN* (1972); ALISON PLOWDEN, *LADY JANE GREY AND THE HOUSE OF SUFFOLK* (1985).

The next queen regnant was Mary II, of William and Mary fame, whose claim derived as much from Parliament as from her own descent from the discredited James II. After her death, her sister Anne should have succeeded but she very thoughtfully waited until the death of her brother-in-law, William III. See generally HENRI VAN DER ZEE & BARBARA VAN DER ZEE, *WILLIAM AND MARY* (1973).

Queens have been few and far between in English history, but females have passed their claims to the throne with very little question about their legitimacy to their descendants. Indeed, Princess Elizabeth, the daughter of James I and sister of James II, passed her claim, such as it was, through many generations to the Electress Sophia of Hanover, who was the ancestress of the Hanoverian (Windsor) line still on the throne today. See JOHN CANNON & RALPH GRIFFITHS, *THE OXFORD ILLUSTRATED HISTORY OF THE BRITISH MONARCHY* (1988). Recently, the Queen has expressed her support for a new law to end male primogeniture. See David Hughes, *New Law to End Male Right to the Throne*, *DAILY MAIL*, Feb. 28, 1998, at 5.

328. *Bebb*, 30 T.L.R. at 180 (citation omitted); see also *Jex-Blake v. University of Edinburgh*, 45 M. 549 (1873). Much of the opinion reflects similar concerns, and similar justifications, to those of the opponents of women's admission to the Bar.

As to the expediency of ladies becoming medical practitioners it is enough to say that it is a fair subject for difference of opinion. To suggest jealousy of the rivalry of women as entering into the objection would be altogether absurd. Those who entertain the objection no doubt conscientiously believe that the result would be to diminish the delicacy and respect by which the female character in well-bred society is so advantageously surrounded.

*Id.* at 564. See also SACHS & WILSON, *supra* note 3.

him not to be so doubtful as was suggested by counsel for the appellant, had laid it down 300 years ago that a woman was not allowed to be an attorney. . . . Lord Coke was speaking of attorneys not in the old sense in which the word would be used but of attorneys as a professional body regulated by statute and recognized and created by statute between four and five hundred years ago. It might be that the *Mirror of Justice* was not a work of the highest authority, but the reference to it did not in the least take away from the value of Lord Coke's opinion. An opinion of his as to what was the Common Law required no sanction from anybody else. That alone, therefore, was evidence of what the Common Law was, and at Common Law women were under a disability which prevented their being attorneys. Apart from this opinion of Lord Coke there was the fact that no woman had ever been an attorney. There had been a long, uniform, and uninterrupted usage. Such usage was the foundation of the greater part of the Common Law and the Court ought to be very loth to depart from anything supported by long usage. Although, therefore, there had been a most interesting discussion as to what was or was not a public office, his Lordship could not help thinking that all this discussion was beside the mark. His Lordship said that he decided this case on the fact that at the time of the passing of the Act of 1843 there was an existing disability which prevented women from being attorneys and which had not been destroyed by that Act.<sup>329</sup>

Such an argument would, of course, allow absolutely no change in the common law whatsoever. It certainly would not allow the revolutionary decision by Lord Mansfield granting freedom to a slave brought to England after the argument that "[t]he air of England is too pure for a slave to breathe,"<sup>330</sup> or of Chief Justice Holt in refusing to give effect to slavery in English domestic law, though the government of England might recognize it as part of the law of nations: "As soon as a negro comes into England he becomes free."<sup>331</sup> While the legality of slavery was still an unsettled question through the seventeenth and eighteenth centuries, such decisions called the practice into question, making the work of judges much less clear than the court of appeals in the *Bebb* case seemed to find it.<sup>332</sup> The judicial position was clear: Parliament could simply not have meant what it said, because if it had, the result would have been the admission of women to the bar. Women had never been lawyers; therefore, Parliament simply could not have been serious. Indeed, Mansfield and his like-minded brethren gave effect to a basic hu-

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329. *Bebb*, 30 T.L.R. at 180 (citation omitted).

330. *Sommerset v. Stewart*, 98 K.B. 499, 509 (1772). For a discussion of the "free air" language, see Jonathan A. Bush, *The First Slave (and Why He Matters)*, 18 *CARDOZO L. REV.* 599, 626, 629 n.82 (1996).

331. Stephen Sedley, *Persons Aggrieved*, *LONDON REV. OF BOOKS*, May 22, 1997, at 26. On Chief Justice Holt's continuation of Mansfield's jurisprudence, see Bush, *supra* note 330, at 626, 629 n.89. For more of Holt's language, see *Smith v. Gould*, 92 K.B. 338, (1706); *Smith v. Brown & Cooper*, 90 K.B. 1172, (1702).

332. *Bebb v. Law Society*, 30 T.L.R. 179, 179-81 (C.A. 1913).

man right through precisely the opposite conclusion. Absent a specific statement by Parliament regarding the acceptability of slavery, common law prohibited it.<sup>333</sup>

The legal historian Nicolaus Benke identifies this kind of intellectual behavior as one of his "Basics of the Patriarchal Program."<sup>334</sup> These "basics" include:

5. Be irrational. Establish some issues beyond rational discourse. Create your myths.
6. Be irrational. Create your logic, but break your own rules occasionally to assert your overwhelming power.
7. Immunize your fundamental concepts against critical attack by calling these concepts "natural" or "essential," thus disguising norms as phenomena or some physical reality and pretending they are valid regardless of historic conditions.
8. Whenever you express your concept of nature, exercise a monopoly in interpreting it.<sup>335</sup>

By deciding as it did, the court of appeals followed Benke's patterns of patriarchy. In interpreting the relevant statutes as requiring denial of Bebb's request for admission, the court followed rules 5, 6, and 7, thus mandating its adoption of rule 8.<sup>336</sup> To do otherwise seemed to relinquish the power over who could speak in English courts, thus relinquishing control over whose speech was official and legitimate. In denying admission to women, the court of appeal demonstrated that it believed the only official and legitimate speech was exclusively male, modelled on shared norms of education, experience and expectation. In Benke's analysis, the court's power created truth. It "express[ed] . . . truth and power as if they were crucial for the existence and welfare of society as a whole."<sup>337</sup>

Contemporary reaction ranged from great support for the *Bebb* decision to great criticism of it, both for its reasoning and for its result. One commentator noted with disapproval the introduction of legislation into Parliament but conceded that the profession as a whole was very unlikely to admit women *sua sponte*:

We venture to think that the majority of the Benchers in the Inns would be opposed to the innovation, and that, even among those who are in favour of it, there would not be many who would interpret their

333. For an analysis of the meaning of the *Somerset* decision, particularly with regard to the tradition of slavery in American common law, see William R. Cotter, *The Somerset Case and the Abolition of Slavery in England*, 79 HISTORY 31 (1994). After examining the various texts of the decision and the application of *Somerset* in the English courts through the first third of the nineteenth century, Cotter agrees that the opinion effectively ended *de jure* slavery in England. *Id.* at 54-56. For other discussions of the meaning of *Somerset*, see *id.* at nn.5-8; Edward Fiddes, *Lord Mansfield and the Somerset Case*, 50 L.Q. REV. 499 (1934); Jerome Nadelhaft, *The Somerset Case and Slavery: Myth, Reality and Repercussions*, 51 J. NEGRO HIST. 193 (1966); William Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 43 U. CHI. L. REV. 86 (1974).

334. Benke, *supra* note 195, at 201.

335. *Id.*

336. *Bebb*, 30 T.L.R. at 179-81.

337. Benke, *supra* note 195, at 201.

powers as justifying a course which is generally taken to be contrary to the common law. The claim of women to be admitted as solicitors, so far as it is founded upon the common law, has now been rejected definitely both by the English and the Scottish Courts. The Inns of Court claim absolute discretion as to whom they will call to the Bar, subject to a somewhat nebulous visitatorial authority of the judges, by whom the discretion to call to the Bar has, in theory, been delegated to them. The Benchers would probably, much as they dislike interference by the Legislature, refuse to make an innovation so entirely contrary to precedent except under the authority of an Act of Parliament.<sup>338</sup>

Making a sly allusion to Lord Robert Cecil's historical argument in favor of his client's position, this writer went so far as to suggest that even should women be admitted to the Law Society, this admittance might still not be sufficient to guarantee them a place in the profession:

Throughout the controversy it seems to be fairly generally assumed that if once the doors of the Law Society are thrown open to women, their demand to be called to the Bar must be admitted. We venture to suggest that such an assumption is unwarranted, and that few members of either branch would admit that the same qualities are required in each. Speaking for ourselves, we are still among the unconverted. Even the fact that a woman has acted as Constable of England, as sexton, or as churchwarden, leaves us cold.<sup>339</sup>

On the other side was a writer for the *Green Bag*,<sup>340</sup> the U.S. journal of legal comment, who suggested that the court of appeal had ducked the real issue, and in addition was guilty of extremely poor legal reasoning in coming to its decision.<sup>341</sup> Quoting the Master of the Rolls, the writer suggested a failure to acknowledge the importance of at least some of the facts presented:

"We have been asked to hold," said Cozens-Hardy, M.R., in *Bebb v. The Law Society*, "what I for one quite assent to, that in point of intelligence and education and competency, women—and in particular the applicant here, who is a distinguished Oxford student—are at least equal to a great many, and probably far better than many of the candidates who will come up for examination. But that is not really for us to consider." This fact, though not for the court to consider, might therefore be sufficiently significant to be judicially noticed if not considered. But it would not have been a fact of sufficient importance for passing remark if a high standard of professional attainments for women had not become a commonplace of modern society, and if a situation did not exist in England to-day, the character of which is attested by the fact that a considerable body of professional and lay

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338. *Notes: Women and the Profession*, 26 JURID. REV. 130, 130-31 (1914) (citations omitted).

339. *Id.* at 131.

340. Editorial, *The Admission of Women as Solicitors*, 26 GREEN BAG 298, 298 (1914).

341. *Id.*

opinion—it would be sufficient to cite Lord Haldane, Mr. Asquith, Sir John Simon, and Sir Stanley Buckmaster—favors the admission of women as solicitors.<sup>342</sup>

This commentator came close to suggesting that women's intellectual attainments were in fact commonly so much higher than men's in similar situations that this fact in itself had become custom:

[I]nstead of holding that the mental qualifications of women are not for the court to consider, the Court of Appeal, without going far out of its way, might properly have devoted some attention to contemporary conditions, with a view to determining whether the position of women in the modern world constitutes a situation to which the courts must give heed. The decision in this case was based on the "usage of the realm." But the "usage of the realm" is not simply a mass of ancient precedents which have come down from the earlier common law; it is made up of the vital, contemporaneous customs of an actual world. The entrance of women into innumerable pursuits to which they were formerly denied access has become, it would appear, one of those existing usages which a court may carefully consider in attempting to ascertain what the "usage of the realm" really is.<sup>343</sup>

To bolster this contention, the writer, like the advocates in the *Bebb* case, appealed to a learned writer, although his choice is the American Roscoe Pound:

The common law consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments of applications of them, which cannot now be distinctly traced back to any statutory enactments, but which rest for their authority upon the common recognition, consent, and use of the state itself . . . . In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form which fall within the letter of the language in which a particular doctrine or legal proposition is expressed.<sup>344</sup>

For this writer, the *Bebb* case illustrates an exchange of the traditional roles of the statutory and the common law. Instead of inflexibility and immutability, statutes such as the acts of 1877<sup>345</sup> and 1888<sup>346</sup> represent the new, that is, the opportunity of admitting women to the profession. The common law, for the judges involved, becomes the justification for the old, and loses the very character that has traditionally been its greatest strength—its flexibility and ability to accommodate social and political change when codified law cannot. Even so, suggests the *Green Bag*

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342. *Id.* (citation omitted).

343. *Id.*

344. *Id.* at 298-99.

345. *Id.* at 299.

346. *Id.*



author, had the judges wanted to give the proper effect to changing custom, they could have done so and still have ruled against Bebb:

The altered relation of women to trade and the professions does unquestionably constitute a new modern usage or custom which the law cannot ignore. It need not follow, however, that this custom has so fully established itself as to affect the legal profession as it has some other professions, and the Court of Appeal, if it had chosen to give it consideration, would not have had to decide in favor of the admission of women as solicitors. It could have said: "We are not led, by a survey of the situation now existing, to conclude that there has been any definite change in the custom of the realm with regard to the relation of women to the legal profession, notwithstanding certain tendencies that seem to be in that direction; these tendencies, in our judgment, have not had such an unmistakable result that we should deem ourselves at liberty to affirm the right of women to practise law; by doing so we should be substituting a custom of our own choosing for one already existing, and that we have no power to do." Thus the court could have come to the same result as that actually reached, by a sound process of judicial reasoning; and probably a greater number of people would be satisfied with the decision, as it would have demonstrated more cogently why this is a question for Parliamentary action and not one with which the courts are called upon to deal.<sup>347</sup>

The *Green Bag* further faulted the court for relying on a "casual dictum of Lord Coke which he may have borrowed from the *Mirror of Justices*"<sup>348</sup> and criticized it for bringing the system of justice into disrepute.<sup>349</sup>

So long as the employment of such reasoning survives, courts will continue to subject themselves to the danger of having their conclusions discredited when reached by crooked paths, even though the results may be intrinsically sound, and would be accepted if they were approached along a straight line of argument.<sup>350</sup>

In spite of the suggested line of reasoning that would have preserved the result, the implication is clear: the court could not legitimately reach a

347. *Id.* at 298.

348. *Id.* at 299.

Pleaders are serjeants wise in the law of the realm who serve the commonalty of the people, stating and defending for hire actions in court for those who have need of them. Every pleader who acts in the business of another should have regard to four things:— First, that he be a person receivable in court, that he be no heretic, nor excommunicate, nor criminal, nor man of religion, *nor woman*, nor ordained clerk above the order of subdeacon, nor beneficed clerk with the cure of souls, nor infant under twenty-one years of age, nor judge in the same cause, nor open leper, nor man attainted of falsification against the law of his office.

THE MIRROR OF JUSTICES 47 (The Publications of the Selden Society; William Joseph Whitaker ed., 1895) (emphasis added).

349. Editorial, *supra* note 340, at 299.

350. *Id.*

conclusion that would endure for any length of time, regardless of reference to statutory or common law.

#### V. CHANGES IN THE POLITICAL AND SOCIAL ENVIRONMENT

Supporters of women's admission were undaunted by an abortive attempt to pass a bill, introduced by Lord Wolmer, overruling the Law Society's actions in 1912.<sup>351</sup> After the decision of the court of appeals in the *Bebb* case, various women's rights advocates as well as the Committee for the Admission of Women to the Solicitors' Profession<sup>352</sup> requested support from the Lord Chancellor and the Prime Minister, Lord Haldane,<sup>353</sup> for a bill to admit women. The Committee consisted of such luminaries as Lord Robert Cecil, Sir Frederick Pollock (the historian), Mrs. Humphrey Ward, Mrs. Garrett Anderson (the physician) and other notables, as well as the four women involved in the *Bebb* case.<sup>354</sup> One member quoted Edward Bell's comment that 20,000 women were lawyers in the United States<sup>355</sup> and reminded the Lord Chancellor that all the universities in England admitted women except Oxford and Cambridge.<sup>356</sup> Other arguments advanced included those of emotion (women should have the opportunity of hiring solicitors of their own sex),<sup>357</sup> and positivism (women should be allowed to do anything not strictly prohibited).<sup>358</sup> The Lord Chancellor was sympathetic but cautious: "When he was in the other House he used to bring in a Bill for the removal of disabilities from women going far beyond that which they asked, and he still held to the principle of that . . . . Personally he was entirely in favour of the principle of the Bill . . . ."<sup>359</sup> However, as a member of the House of Lords, the Lord Chamberlain could not predict what might happen in the Commons,<sup>360</sup> but he pronounced His Majesty's Government generally in favor of the bill.<sup>361</sup>

A few days later the City of London Solicitors' Company passed a resolution to request the Law Society to oppose the bill,<sup>362</sup> and eventually it failed to pass,<sup>363</sup> undoubtedly because of the active opposition of both professional societies.

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351. BRIAN ABEL-SMITH & ROBERT STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965*, at 193 (1967).

352. BIRKS, *supra* note 18, at 277.

353. ELIE HALEVY, *A HISTORY OF THE ENGLISH PEOPLE IN THE NINETEENTH CENTURY: THE RULE OF DEMOCRACY 1905-1914*, at 505 (2d ed. 1961).

354. *The Admission of Women as Solicitors*, 58 SOLIC. J. & WKLY. REP. 418, 418 (1914).

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. BIRKS, *supra* note 18, at 277.

The bill's defeat simply exacerbated tempers on both sides. One correspondent to the *Solicitors' Journal* suggested that the issue ought to be further debated in the magazine: "One contributor, I notice, has grounded his objections upon considerations of the harm it will do us and, if you will allow me, I will endeavour to shew why such a view, in the special circumstances of the case, should not be allowed to prevail."<sup>364</sup> After pointing out the economic advantages of allowing women to pursue careers for which they were suited, he blasted the profession for failing to do as much for women as had physicians:

The doctors, as a community, have set a chivalrous example in widening the field of women's opportunities. The lawyers should do the same. If women are left to realise that their only hope lies in themselves, they should at least be able to count upon men to put no obstacles in their way.<sup>365</sup>

However, he objected to the admission of married women: "[I]n an overstocked profession in which there is barely enough work to go round, it is unfair that any home, through the joint contribution of husband and wife, should, as it were, enjoy double rations."<sup>366</sup>

Lord Buckmaster made additional futile attempts to reverse the *Bebb* decision through legislation in 1917 and 1918,<sup>367</sup> but was defeated by the Law Society's letter-writing campaign.<sup>368</sup> The First World War put further action on the issue on the back burner. By the end of the war, the amount of significant political opposition to the admission of women had dwindled to the point that the Sex Disqualification (Removal) Bill aroused much less comment.<sup>369</sup>

Ultimately two factors caused the change in the attitude of most members of the bar, most members of the government, and most members of the public. One was women's full participation in the war effort during the period from 1914 to 1918. Though proponents of women's entry into the legal profession might reject the notion as demeaning, the fact remained that women's contribution in every sphere of life and death<sup>370</sup> demonstrated that they understood and were willing to uphold the

364. Douglas M. Gane, *The Admission of Women to the Law*, 58 SOLIC. J. & WKLY. REP. 468, 468 (1914).

365. *Id.* at 469. But see the comments of Helena Normanton asserting the contrary in *Barristers and Solicitors (Qualification of Women) Bill*, 63 SOLIC. J. & WKLY. REP. 500, 501 (1919).

366. Gane, *supra* note 364, at 469.

367. ABEL-SMITH & STEVENS, *supra* note 351, at 193.

368. *Id.* On the Law Society's opposition, see LAW SOCIETY, ANNUAL REPORT 26-27 (1917); LAW SOCIETY, ANNUAL REPORT 36-37 (1919).

369. ABEL-SMITH & STEVENS, *supra* note 351, at 194.

370. Edith Cavell, an English nurse, was executed in Belgium by the Germans as a spy. This outrage galvanized even more willingness on the part of the British, if that were possible, to win the war against the arrogant Hun. See ROWLAND RYDER, EDITH CAVELL 223 (1975).

notions of duty and sacrifice. This participation seemed to answer the question of women's willingness to accept responsibility satisfactorily.

The second factor was the entrance of women into the legal profession in other countries whose traditions and standards of living seemed equivalent, or at least comprehensible, to the English, and the resulting commentary over the desirability of giving qualified women the same opportunity. In France, as in many of the United States and provinces of Canada, women had already been admitted, so that their wartime contributions, while valued, were more expected.<sup>371</sup> Likewise, their presence in the law was no longer quite such a disturbance.

There are probably only a few women, comparatively speaking, to whom the practice of law is congenial or fitting; the same to but a slightly less extent is true of men. It is but rarely that any other type will seek admission. The number of women in active practice will probably never be large. But we have passed the period when only a few especially qualified women braved the difficulties of securing admission.<sup>372</sup>

To the British, the contributions of its female citizens were a great, and pleasant, surprise. As a contributor to the *Solicitors' Journal and Weekly Reporter* noted, not only had many men died in various wars over the past century, so that the numbers of persons who traditionally populated the professions had diminished greatly, but the very lack of available men to support women and children meant that women needed to be able to earn their own livings.<sup>373</sup> Thus, the entry of women into the legal profession was a temporary necessity.

[S]ituated as men now are, with their numbers diminished and their careers thwarted, the support of women collectively . . . is probably outside their competence, and the sole alternative left to them is to admit women to all those centres of activity whence the means of subsistence is derived by the individual's own effort. The demand is upon every guild and body of men, and the profession of the law is not an exception.<sup>374</sup>

The author advocated a short experiment, allowing women to enter the solicitors' branch for a period of time, and then projecting an evaluation of their success to see if they should be encouraged to continue.<sup>375</sup>

This writer was not willing to countenance the complete equality of men and women in the profession for various reasons, most of which are

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371. The question of women's fitness for the bar was not settled until relatively late in the nineteenth century however, and it was a matter for judicial opinion until then. See *In re Kilgore*, 17 Pa. W.N.C. 563 (1886); *In re Goodell*, 39 Wis. 246 (1875); *Women at the Bar*, 27 LAW NOTES 124 (1923).

372. *Women at the Bar*, *supra* note 371, at 124.

373. *Women as Solicitors: An Emergency Measure*, 62 SOLIC. J. & WKLY. REP. 782, 782 (1918) [hereinafter *Emergency Measure*].

374. *Id.*

375. *Id.*

discussed in this article. Among them were serious doubts as to the ability of women to represent their clients as zealously as possible and the ability of men to represent their clients' interests in the face of such attractive distractions as a female adversary.<sup>376</sup> However, he (and this article was probably written by a man) found himself in agreement with the writer for the *Bench and Bar*,<sup>377</sup> a U.S. legal journal, that women could certainly perform many of the less "unfeminine" duties of the solicitor.<sup>378</sup> Like other commentators of the period, he used the military analogy to explain women's physical and intellectual shortcomings and to justify any inequality of treatment:

[T]he profession of law, like the profession of arms, has a strictly polemical basis, the sole difference lying in the choice of weapons. Litigation is warfare in which the property, the liberty, and even the life of the individual is at stake; as, in the case of war itself, the possessions, the freedom, and the very existence of the State are involved. The qualities called for in the defence of the individual are just those required for the protection of the community, only they operate through a different medium. Fundamentally, they reside in force, and it remains to be seen whether women are competent to exercise force in competition with men in one sphere when they have been shewn incapable of exercising it in another. . . . These considerations, however, apply only to the contentious side of professional life. Happily there is much that is pacific. . . . [C]onveyancing and the wide range of practice falling under the Solicitors' Remuneration Act is well within the moral and intellectual competence of women, and it would be better that they should apply themselves to this side of professional work.<sup>379</sup>

Even in the 1980s, this attitude was still prevalent: "Associated with this 'club' analogy is the 'masculinity' of the law and legal practice. This serves to make more difficult the successful performance of the occupational role by women."<sup>380</sup> Further, unlike E.A. Bell, many male barristers and solicitors in the 1970s and 1980s overtly or quietly blocked women's efforts to join their chambers:

[T]he main stumbling block is simply prejudice, and this reveals itself most strongly at the crucial stage in a woman's career, when she is looking for a tenancy. Many chambers openly admit a "no woman" policy, and continue to do so despite the Sex Discrimination Act 1975 (which does not apply to the Bar, since sets of chambers are not partnerships and tenants are not employed). One particular set of chambers which has always been known to have a no woman policy (amended to a "no other woman" policy after the daughter of the

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376. *Id.*

377. Editorial, *Woman in the Law*, 17 *BENCH & B.* 7 (1909).

378. *Emergency Measure*, *supra* note 373, at 787.

379. *Id.*

380. Podmore & Spencer, *supra* note 19, at 30 (footnote omitted).

Head of Chambers was admitted) has blatantly refused a woman applicant on the grounds of her sex.<sup>381</sup>

The situation was similar in Canada:

For almost all the years before 1970 legal education was dominated by the Law Society of Manitoba. Its essential feature was practical training: students were required to find a law office which would agree to admit them as articling clerks. It was advantageous for students to have contacts, generally through a family member or close family friend, within the number of established lawyers. Someone who had no ready-made contact would have difficulty finding a law firm to take her or him at the age of 20 or 21. The law firm would be testing the clerk as a potential long-term colleague. For women this system was more of a problem than for men. Because there were so few women already in the profession, there was no regular network. Women were regarded as a risk and widely expected to abandon the investment made in their training upon marriage.<sup>382</sup>

Women who were members of minority groups had an even more difficult time.<sup>383</sup> Those firms which eventually did agree to take on women clerks tried to limit their careers by offering them positions with little possibility of advancement.<sup>384</sup>

One American commentator attempted to turn the suggestion that women did not have as much reasoning ability as necessary to their advantage in the debate:

We are told that women are not logical, not analytical; that they jump at conclusions. Well, sometimes it is a good thing to jump—you get there quicker. After you get there you can reason backwards and invariably find you are right, just like proving an example in arithmetic. Again, it is all a question of habit, we haven't been trained in those lines. Is there any difference between the brain of the average woman and the brain of the average man, and is the gray matter in a man's brain so different that he alone can take up the profession of medicine or law?<sup>385</sup>

However, this approach is not particularly persuasive. To suggest that legal reasoning can be created after the fact is the kind of result-driven decision-making that women themselves found objectionable.

#### A. *Attempts to Legislate Admission*

In order to address the question of the inequality of women's political rights, the post-war government prepared a series of legislative ini-

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381. Kennedy, *supra* note 158, at 151.

382. Kinnear, *supra* note 85, at 423.

383. *Id.*

384. *Id.* at 425.

385. *Women in the Law*, *supra* note 15, at 134.

tiatives which removed the most crucial disabilities: the right of women to stand for election, the right of women to vote and the right of women to enter into the practice of law. Not all of these initiatives were unqualified successes. For example, initiatives limited the right to vote to women over the age of thirty,<sup>386</sup> although men were entitled to vote when "of full age and not subject to any legal incapacity" in addition to other residency requirements.<sup>387</sup>

### 1. The Parliament (Qualification of Women) Act of 1918<sup>388</sup>

The Parliament (Qualification of Women) Act attempted to enfranchise women by allowing them to participate in the making of law as part of the House of Commons: "A woman shall not be disqualified by sex or marriage for being elected to or sitting or voting as a Member of the Commons House of Parliament."<sup>389</sup> The Act thus addressed the concerns of a worried little article in the *Solicitors' Journal and Weekly Reporter*,<sup>390</sup> which rehearsed the history of women in public offices, and opined that:

Lord Esher's *dictum* as to the common law disqualification of women for the exercise of any public functions . . . is obviously much too wide. Women may hold the sovereignty, and have done so. They may hold certain lay offices in the Church . . . and, of course, may be patronesses of livings. But these are scarcely public offices in the State. They may be impanelled on a jury of matrons and not very infrequently this is done. There are also records of historical cases in which ladies have acted as sheriffs, returning officers, parish constables, overseers of the poor, and even commissioners of sewers. But it is doubtful whether their tenure of those offices was ever lawful. All the recorded instances occur in troubled times—between the Wars of the Roses and the conclusion of the Civil War, when every manner of illegality was occasionally committed by the powerful. It is probably the true constitutional view that, except as regards the succession to the throne, no right to hold any of these offices was really possessed by women at common law. The right to inherit the Crown is peculiar. It is wholly the result of the mediaeval doctrine that the King was paramount lord of all land in the kingdom, and therefore the rules of inheritance which applied to land applied also to the Crown. To-day, of course, the succession to the throne is regulated by a parliamentary

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386. Representation of the People Act of 1918, 8 Geo. 5, ch. 64, § 4(1) (Eng.).

A woman shall be entitled to be registered as a parliamentary elector for a constituency (other than a university constituency) if she—(a) has attained the age of thirty years; and (b) is not subject to any legal incapacity; and (c) is entitled to be registered as a local government elector in respect of the occupation in that constituency of land or premises . . . or is the wife of a husband entitled to be so registered. . .

*Id.*

387. *Id.* §§ (1)(a), (3).

388. 8 & 9 Geo. 5, ch. 47 (Eng.).

389. *Id.* §1.

390. *The Eligibility of Women For Parliament*, 62 SOLIC. J. & WKLY. REP. 532 (1918).

entail, the Act of Settlement, and the limitations which govern an ordinary tail general are applied to the Crown by the terms of that statute.

It may be assumed, then, that women were at common law disqualified from sitting in either House of Parliament. Such a fundamental rule of the common law cannot be altered by the judges; it is not one of those minor principles—mostly existing in the realm of commercial law and the law of torts—which are capable of undergoing expansion and development by mere judicial decision. Therefore an Act of Parliament is required to remove this disqualification. . . . [And t]here must be an express enactment in clear terms conferring the privilege claimed.<sup>391</sup>

## 2. The Sex Disqualification (Removal) Act of 1919<sup>392</sup>

Parliament may have intended the Sex Disqualification (Removal) Act to address all remaining questions on the disparity between the civil inequality of men and women. Apart from specifying that women could not be prevented from holding public office, it also addressed the question of women who wished to be admitted to the bar, but who had attended universities not conferring degrees on women. This was a common enough occurrence for older students who had pursued legal studies before education, let alone admission to the profession. The Act contemplated the following for females:

A woman shall be entitled to be admitted and enrolled as a solicitor after serving under articles for three years only if either she has taken such a university degree as would have so entitled her had she been a man, or if she has been admitted to and passed the final examination and kept, under the conditions required of women by the university, the period of residence necessary for a man to obtain a degree at any university which did not at the time the examination was passed admit women to degrees.<sup>393</sup>

The Act also applied to Scotland<sup>394</sup> and Ireland<sup>395</sup> through alteration of statutes governing local practice,<sup>396</sup> and Parliament intended it to be read

391. *Id.* at 532-33 (citations omitted).

392. 9 & 10 Geo. 5, ch. 71 (Eng.).

393. *Id.* § 2.

394. Note its immediate effect. See Paterson, *supra* note 69, at 93.

395. IRISH L. TIMES, March 15, 1919, at 66.

396. In the case of Scotland, the Act affected statutes such as The Local Government (Scotland) Act of 1894, 57 & 58 Vict., ch. 58 (Eng.); The Qualification of Women (County and Town Councils) (Scotland) Act of 1907, 7 Edw. 7, ch. 48 (Eng.); The County, Town and Parish Councils (Qualification) (Scotland) Act of 1914, 4 & 5 Geo. 5, ch. 39 (Eng.).

In the case of Ireland, it affected The Juries Act (Ireland), 1871, 34 & 35 Vict., ch. 65 (Eng.); The Local Government (Ireland) Act of 1898, 61 & 62 Vict., ch. 37 (Eng.); The Local Authorities (Ireland) (Qualification of Women) Act of 1911, 1 & 2 Geo. 5, ch. 35 (Eng.).



with the Solicitors Act of 1843.<sup>397</sup> The relevant text of the Act reads as follows:

A woman shall be entitled to be admitted and enrolled as a solicitor after serving under articles for three years only if either she has taken such a university degree as would have so entitled her had she been a man, or if she has been admitted to and passed the final examination and kept, under the conditions required of women by the university, the period of residence necessary for a man to obtain a degree at any university which did not at the time the examination was passed admit women to degrees.<sup>398</sup>

### 3. Barristers and Solicitors (Qualification of Women) Bill<sup>399</sup>

The Law Society met on March 28, 1919, to discuss the implications of the Barristers and Solicitors (Qualification of Women) Bill drafted by Lord Buckmaster, one of the lawyers who had represented *Bebb*, and backed by the Lloyd George Government.<sup>400</sup> The President of the Society suggested that the contributions of women in wartime (although they had been dismissed by some detractors as being of little evidence that women were intellectually capable of the demands of legal practice) were a great impetus toward the support of the bill by many members of the profession, who might not have been so inclined at the time of the *Bebb* decision:

If the Bill had been introduced five years ago he did not believe such a meeting as this would have been held, but since then a great deal had happened and the war, which had made so many changes in the country, had made few changes so great as that in the relationship of women to the economic work of the country. He thought it was no exaggeration to say that, had it not been for the women of the country and the services they had rendered, the war might never have been won—it certainly would have been very much protracted.<sup>401</sup>

Even Sir Homewood Crawford, a solicitor who opposed the bill, wrote that,

provided the Bar will by statutory enactment be as free to women as it is sought to make our branch, we ought not to place any further obstacle in the way of women attaining the object of their ambition. It should, however, be most clearly provided for by statute that both

397. See Sex Disqualification (Removal) Act of 1919, 9 & 10 Geo. 5, ch. 71, § 2(3) (Eng.).

398. *Id.* § 2.

399. See *Women as Barristers and Solicitors*, 53 IRISH L. TIMES & SOLIC. J. 66 (1919). This bill does not seem to have passed, but the enactment of the Sex Disqualification (Removal) Act accomplished the same end. Sex Disqualification (Removal) Act of 1919, 9 & 10 Geo. 5, ch. 71, § 1 (Eng.).

400. *The Law Society: Admission of Women as Solicitors*, 146 LAW TIMES J. & REC. 409 (1919) [hereinafter *Law Society: Admission*].

401. *Id.*

branches are open for the admission of women, and Lord Buckmaster's Bill in that respect requires strengthening.<sup>402</sup>

Samuel Garrett, who spoke in favor of the bill, pointed out that to deny women entrance into the profession of solicitor reflected

the want of touch, between their Profession and the public. That want of sympathy and want of touch was, in his view, at the root of most of the evils from which the Profession suffered, and he could not imagine anything more calculated to accentuate that want of sympathy and of touch than that they, in this moment of the country's history, when the large body of women had just been enfranchised and had taken part in a general election and had made their political opinion and still more their influence felt, that at this moment the society should punish to the world that they were going to seek to maintain an obstacle in the way of women earning their livelihood, if they choose to do so, in the solicitor profession. The whole sympathy of the country would be against them. . . . They could not stop the Bill, any more than a bumble bee could stop an express train, and the choice before them was whether they would welcome it and receive it with open arms, or whether they would be dragged at its tail, struggling and screeching like an angry child. . . . He begged them to remember that this was a matter which vitally affected the good name, the credit, and the reputation of the Profession.<sup>403</sup>

Garrett's pragmatic argument was not the only one advanced in favor of the bill. Sir Walter Trower, another supporter, sidestepped the question of women's intellectual ability by characterizing the opening of the Profession as "a question of equality of opportunity."<sup>404</sup> For him the possible complications brought on by a woman's lack of intellect or physical stamina, or marital status, would eventually disappear:

Whether women were better or worse than men, morally, physically, or intellectually, did not concern them. The question whether they would be hampered by matrimonial ventures did not arise. All these questions would be dealt with and tested by competition and experience. If women proved themselves to be as good at business as men, they would succeed; if not, they would fail. Men had no more to say on the subject; he hoped that in any case they would afford the women a cordial welcome. It had been said in that hall on previous occasions that the Profession was overcrowded, and that solicitors dreaded the competition of women in the field in which they were engaged. He did not think there was any man present who would venture to say personally that he objected to women's competition; that he was afraid of any woman competing with him.<sup>405</sup>

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402. *Id.*

403. *Id.* at 410.

404. *Id.*

405. *Id.*

E.A. Bell, the solicitor who had agreed to accept Gwnyeth Bebb as a clerk, suggested that women would have an uplifting effect on the atmospheres of court and law office.<sup>406</sup> Finally, a Mr. Braby suggested that although it might be true that women might not be suited to the practice of law, they would never have the opportunity to learn the profession if they had no access to it:

[P]eople could never learn to govern themselves, or to do the work they wanted to do, until they were given the opportunity of learning how to do it. Women must be given the opportunity of showing what they could do. He was quite sure that in a very short time, when they found the necessity for doing this class of work as it should be done, they would fit themselves for doing it as well as had the men. He believed there was one country, Thibet, where the entire government was in the hands of women; they even acted as policemen, and men were not allowed out after eight o'clock in the evening.<sup>407</sup>

One speaker with the unfortunate name of G.B. Crook announced himself against the bill, finding the objections to female solicitors overwhelming:

He was very sorry to have to say it, but the proposer and also the seconder of the motion had entirely failed to make out any case. The first argument which had been put forward was that the ladies had helped to win the war. Let that be admitted; if they had not done so would they have been worthy of companionship in any sense whatever? Was it not their hearths and their homes that the men went out to defend? Were not they as interested in the success of the war as were men? . . . Were [the ladies] anxious to become soldiers, or sailors, or policemen, or to do anything to support by force that law which they were seeking to administer? If ladies were to come in equally with men in the administration of the law and they were then to put upon men the enforcement of that law, would that be equality? No, it would be a case of privilege, and he understood that in these days privilege was to be abolished and not established.<sup>408</sup>

Crook's objection that women ought not to be solicitors until they showed themselves willing to take on the same roles as men was viewed as spurious by his listeners, who pointed out that as soon as women were allowed to do so, they did.<sup>409</sup> He finally attempted to justify his fallback position, the differentiation of the law as a profession completely separate from any other, by asserting that

All honour to Miss Nightingale and those nurses who had been Miss Nightingales during the war, but a nurse was one thing and a lawyer

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406. *Id.*

407. *Id.*

408. *Id.* at 410-11.

409. *Id.* at 411. Note that in the matter of military language, for example, women lawyers now tell "war stories," that is, accounts of their experiences, as readily as their colleagues who are men.

was another. Everyone present, as lawyers, knew that the business of the country came ultimately to the advice of the lawyer. . . . Parliament itself would have to shut up to-morrow if there were no lawyers there. . . . Unless the administration of the law was in the highest possible hands, how could it be expected to continue? If ladies were to be admitted to the membership of the Bar, of course it would follow that the Bench would be open to them, and there would be lady judges. How would the idiosyncrasy of the sex be got over in that case?<sup>410</sup>

For Crook, as for a dwindling number of opponents, pleasing differences of dress symbolized frightening differences in quality of thought.<sup>411</sup> Unable to demonstrate the truth of his assertion that the quality of the female thought process is deficient, Crook categorized it as different, therefore inadequate, and presented misreadings of history and his own opinion of divine intent as evidence:

Let them consider for a moment whether they would abandon allurements of dress. If ladies abandoned these and other allurements peculiar to them and depended upon their brains and not their bodies, then, of course, they would be equal persons with men. But ladies would never do so. There would be in the administration of the law all kinds of mixed motives, and how that would work out he would leave to the judgment of his hearers. It was certain it would not work out to the dignity of the law. When Queen Mary was on the throne she could not keep her axe off the neck of Lady Jane Grey, nor could Queen Elizabeth keep the axe off the neck of Mary Queen of Scots, any more than Eve could keep her hand off the apple. The judicial factor was not a part of woman; the Almighty never intended to instil it in her.<sup>412</sup>

A returnee from the Great War, Lieutenant Wood, responded that if women were poor lawyers they would have no clients,<sup>413</sup> a point also

410. *Id.*

411. *Id.*

412. *Id.* Crook's representation of the acts of these two queens of course misstated both the facts and the law in these cases. Mary had originally stayed Lady Jane's execution even though a court of law had condemned her for treason. Only after a second rebellion in her name (though admittedly without her knowledge or consent) was mounted to dethrone Mary had she agreed to the execution. As for Elizabeth, she had ample proof that the Queen of Scotland had plotted against her and had delayed for years agreeing to her execution, even though her counselors and Parliament urged her to do it. We may agree with Crook that neither Jane Grey nor Mary Stuart should have been executed, but the Queens involved were not more bloodthirsty, and arguably much less vengeful than their father Henry VIII, or coldly calculating than their grandfather Henry VII, or any number of male monarchs before them, who executed hundreds without even the semblance of fair trials. On Mary's relationship with Jane, see G.R. ELTON, *REFORM AND REFORMATION: ENGLAND 1509-1558*, at 373-75 (1977). On Elizabeth and Mary, see, for example, CAROLLY ERICKSON, *THE FIRST ELIZABETH* (1983) and ANTONIA FRASER, *QUEEN OF SCOTS* (1969).

On the question of professional dress, see *infra* Part VI.B. Mona Harrington also discusses the hidden messages of dress for female attorneys. MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 103 (1993). Deborah Tannen also points out the symbolism of dress, makeup and wording of marital status that convey meaning for both men and women. See TANNEN, *supra* note 204, at 107-31.

413. *Law Society: Admission*, *supra* note 400, at 411.

made by Normanton<sup>414</sup> and by the American lawyer Gertrude Handrick.<sup>415</sup> "If women as solicitors turned out to be incapable, he was sure the general public would not consult them . . . . The public said they believed in equality of opportunity; they believed that women should have equal rights with men, therefore that they should be allowed to enter the Profession."<sup>416</sup> Neither Lieutenant Wood nor any other speaker found acceptable the suggestion that women should be admitted as a "reward" for their service and support during the Great War:

[T]hey ought not to speak of their willingness to give the privilege to ladies of coming into the Profession as a war bonus. He abhorred the thought that it was giving something as a reward. He wanted women to have the privilege because he believed they had an inherent capacity and ability equal to that of men, and he could not see any possible valid reason why they should so long have been debarred from earning their living, as probably they were well able to do, in the same way as the other sex. . . . Why because a human being was born a woman should she be compelled to retire into oblivion and be debarred from exercising the gifts and talents with which she had been endowed?<sup>417</sup>

Some supporters of the bill nevertheless questioned whether women were generally capable of performing the duties necessary. W.A. Sharpe, Vice-President of the Law Society, while voicing support, admitted that like Mr. Crook he "criticised the sphere and the powers and the abilities of women. Those criticisms seem to be true . . . ."<sup>418</sup> However,

he thought that, whatever women might be, they had never been given the opportunity of trying how they could develop themselves and improve and expand their powers in the practice of the law. He was not an advocate for a woman becoming a solicitor, because in many respects he did not think the solicitor's a suitable occupation for a woman, any more than he thought a woman would make a good soldier. But he was not in the position of the man who would never go into the water until he could swim and therefore never learned to swim at all. He wanted to find out what those abilities were . . . .<sup>419</sup>

Neither Sharpe nor R.W. Dibdin, a member of the Society's governing council and an opponent of the bill, believed that many women would avail themselves of the opportunity of entering the profession.<sup>420</sup> Dibdin, furthermore, rearticulated the idea of a "reward" for women who had participated in the war effort, and suggested that perhaps women

414. *Admission of Women*, *supra* note 186, at 429.

415. *Women in the Law*, *supra* note 15, at 134.

416. *Law Society: Admission*, *supra* note 400, at 411.

417. *Id.* (statement of H. Monger).

418. *Id.*

419. *Id.*

420. *Id.* at 411-12.

would now want to be soldiers and a great many other things that they were no more suited for than for the practice of law:

What they had to decide upon, as being eminently acquainted with the needs and duties of the law, was either that women were suitable to be members of the Profession or they were not. . . . Personally, he believed they were quite unfit—for many reasons. This was saying nothing against them. They were quite unfit to serve in the army as soldiers, but many of the arguments ought to go as far as to say that if they wanted to go into the army we should be compelled in the same way to let them go. It was quite absurd . . . . They were all agreed that women should have equal opportunities with men in matters which they could manage equally well; but he did not think it would be to the interest of the country, to the interest of the Profession, or to the interest of women themselves, that they should become members of the solicitor branch . . . .<sup>421</sup>

Neither was evidence that women, who had already entered the medical profession successfully, particularly persuasive. Sharpe pointed out that few women actually practiced medicine<sup>422</sup> and Charles Mackintosh, another speaker, asserted that

the evidence of the medical profession would go to prove that women would not be likely to do better in the solicitors' profession, and that it was not likely that the solicitor's profession would attract them. The council had considered the matter, and they were satisfied that women would raise the tone of the Profession as a whole and that they would not be litigious when they had the opportunity. The solicitor's was a contentious profession, the medical profession was not. Women, as a rule, did not shine as litigants, and probably would not shine as advisers.<sup>423</sup>

With these comments, Mackintosh combined the "moral uplift" argument with the argument that women simply did not understand legal thinking, particularly in litigation, and thus found himself in a quandary. He could not conceive of a legal profession in which disputes might be resolved other than through the traditional (read: "male") means of argumentation and discussion. That a woman lawyer might approach a dispute differently and offer alternatives to litigation was not within his understanding. Indeed, such alternatives may not actually have existed at the time, since their origins would have been nurtured by lawyers who as yet did not exist. This lack of empathy with the possibility that the law as practiced by women might afford new and innovative methods of dispute resolution prevailed among the leaders of the profession forty years later. As expressed by the Bar Council in 1969, "[t]he fact has to be faced . . . that the profession of barrister requires the masculine approach (however

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421. *Id.* at 412.

422. *Id.* at 411-12.

423. *Id.* at 412.

fallacious it may be) to reasoning and argument, and women only succeed in such activities if they have a masculine disposition.'"<sup>424</sup> The Bar Council thus asserted its belief in a flawed but traditional legal argument than an attempt to reconfigure or reinterpret law to create new political and social opportunities.

H. Westbury Preston, the final speaker, agreed that most women would not prove to be capable of law practice and that the very requirements of entrance to the profession would keep them out.<sup>425</sup> His objection to the bill was that it did not go far enough. To him it was more logical that the bill be an

omnibus Bill. It was asked why should women be admitted to the Legal Profession and not to the profession of the architect, the accountant, or the Churoh [sic], and he failed to understand why it should be so. If there was any right behind the proposal it should apply to all professions. . . . Women in the past had been forced into one or two channels. It was very desirable in the interest of the country that the channels should be increased . . . .<sup>426</sup>

The debate ended with a vote of 50 for the admission of women and 33 against, including two members of the Council of the Law Society, R.W. Dibdin and W. Melmoth Walters.<sup>427</sup>

Certainly, English solicitors were not alone in their concern over women's abilities in the traditional area of litigation. The U.S. publication *Bench and Bar* noted that

[t]here may be some women who are adapted to advocacy, but we believe that the majority of those who obtain admission to the Bar are not, and further, that the time is hardly ripe for the entrance of many women into this particular department of practice. It still savors of the incongruous and jars upon what are called the "conservative" sensibilities, to see a woman plead in court, however ably she may perform her part.<sup>428</sup>

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424. Kennedy, *supra* note 158, at 158 (quoting BAR COUNCIL, SUPPLEMENTARY MEMORANDUM 4 (1969)).

425. *Law Society: Admission*, *supra* note 400, at 412.

426. *Id.* Mr. Preston proposed an amendment to that effect. *Id.* Apparently, the first woman to receive the doctorate in architecture was Marie Frommer in 1919. See *Spotlight on Women Architects*, SAN DIEGO UNION & TRIB., Oct. 18, 1987, at F28. Women were admitted into the priesthood of the Church of England, not without controversy, in 1994. See *Bells Ring as Church of England Ordains Women Priests: Ceremony Follows Long Debate and Sometimes Bitter Opposition*, ST. LOUIS POST-DISPATCH, Mar. 13, 1994, at 11A.

427. *Societies: The Law Society: Admission of Women as Solicitors*, 63 SOLIC. J. & WKLY. REP. 414, 418 (1919).

428. See Editorial, *supra* note 377, at 8.

However,

[i]n the other departments of legal work . . . women may find a wide field for usefulness, where they can easily compete with, and in some of which they may perhaps excel, the men. We refer especially to the field or fields of legal writing. These, as it seems to us, offer a splendid opportunity at the present time to the talents of the trained women lawyers. . . . Women lawyers, also, could hold their own with men, and might perhaps surpass them, as brief-writers. Large offices would find bright, reliable young women lawyers of great service in preparing lists of authorities and briefs of cases at all stages, and independent women practitioners could undoubtedly obtain much employment of this nature from busy lawyers with smaller establishments.<sup>429</sup>

Even some supporters of women lawyers, both in England and in the United States, believed that they ought to be channelled into areas of practice that made the most of their traditional image of femininity, just as supporters of women physicians believed that they were best suited to the practice of obstetrics, gynecology and public health. Some women attorneys even voiced this uncertainty:

One would suppose . . . that the majority of a woman lawyer's clients would be women. This has not been my experience, nor apparently the experience of most women lawyers. The average woman seems to prefer the legal advice of a man. Not infrequently she will ask the woman lawyer of her acquaintance for her opinion as to the matter in which she is interested and for hints as to how to proceed, but when it comes to taking definite legal action, she will retain a man. . . . In my opinion, there are certain branches of legal work which men are better equipped to handle than women, and this sphere should not be invaded by the latter. For instance, the vast majority of our criminal cases, and, more especially, general trial work and political litigation. But there is one field which, while it does not distinctly offer women a choice for legal practice, yet finds its most patent appeal among women lawyers. I refer to campaigns for and against legislation which directly affects the welfare of women and children, both in their legal status and their economic rights.<sup>430</sup>

Others, however, asserted that there were no essential differences between the capacities of men and women.

#### B. *The Admission of Women to the Legal Profession*

Ivy Williams, a graduate of the Universities of Oxford and London, was called to the Inner Temple, May 10, 1922, as England's first female barrister.<sup>431</sup> Williams "surpassed all previous records in the Bar Examina-

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429. *Id.* at 8-9.

430. Jean H. Norman, *Increasing Opportunities for Women Lawyers*, 12 OHIO L. REP. 255 (1914).

431. *Occasional Notes*, 153 LAW TIMES 336, 337 (1922). American legal journals of the period also heralded her admission. See *English Notes: Women Learned in the Law*, LAW NOTES, July 1922, at 76.



tions,<sup>432</sup> and had been active in the fight to gain women's admission.<sup>433</sup> Yet even the excellence of women advocates could not overcome language that implied that women could adequately represent only certain types of clients:

In the ten years following the enabling Act we read of women successfully pleading cases and on December 3rd., 1926, a woman advocate appeared with a brief in the Privy Council. To indicate the attitude towards women in Law we quote from an article in the Manchester Guardian (Weekly) of February 4th, 1927: "It is gratifying to find that so much of the work of the ordinary practising barrister is suitable for women. Some cases, indeed, involving the interests of women and children may be more sympathetically and successfully conducted by a woman."<sup>434</sup>

Shortly after Williams's admission, Carrie Morrison was admitted as a solicitor, after she passed all appropriate examinations and completed her clerkship.<sup>435</sup> She profited from the "reward" aspect of women's participation in the war. "Miss Morrison, in virtue of distinguished service in the Intelligence Department during the war, has been treated as an 'ex-service' student, and has had the term of her articles reduced to two years."<sup>436</sup>

Gray's Inn, which had tossed Bertha Cave's application aside nearly twenty years before, recognized the inevitability of admitting women on January 28, 1920 after the passage of the Sex Disqualification (Removal) Act. Francis Cowper enthusiastically stated:

Mrs. M.E. Share-Jones, the first woman student, joined the Inn. But the distinction of being the first woman was not to be hers. That was to be achieved by Miss Edith Hesling, admitted in October, 1920, and called on June 13, 1923. She became Mrs. Bradbury and her daughter Anne was herself admitted in 1948 and called on June 6, 1951. At Gray's Inn, more than any other Inn, women established themselves as part of the community on a footing of unembarrassed equality and a day came in Trinity Term, 1937, when the Treasurer, Lord Atkin, called to the Bar his daughter Mrs. Rosaline Youard.<sup>437</sup>

That the climate surrounding the question of female admission to the bar had changed to a certain extent was evident from a rather rueful editorial in the *Law Times* which compared Williams to a woman equally learned in the law who did not have the opportunity to practice.<sup>438</sup> The

432. Ruby M. Wigle, *Sisters in Law*, 6 CAN. B. REV. 419, 420 (1927).

433. As early as 1904, Williams had objected loudly to the exclusion of women from the profession. See *supra* note 273 and accompanying text.

434. Wigle, *supra* note 432, at 420.

435. *The First Woman Solicitor*, 86 JUST. PEACE 647 (1922).

436. *Id.*

437. COWPER, *supra* note 161, at 126.

438. *Occasional Notes*, *supra* note 431, at 377.

Honourable Charlotte Sugden, daughter of Lord St. Leonards, “assisted her father in the writing of the well-known text-books in which opinions find their expression which are scarcely less authoritative than the judgments of Lord St. Leonards.”<sup>439</sup> Miss Sugden appeared as a witness in the proving of Lord St. Leonards’s will, and “proved herself fully conversant with all legal technicalities and niceties, [and] in large measure determined the issue in the establishment of the will and of an important principle of the law of evidence . . . .”<sup>440</sup>

The question of married women at the bar continued to be a sticky one.

Until recently, women had to sacrifice marriage as well as motherhood to become solicitors: in 1921, 18 per cent of women solicitors were married compared with 74 per cent of men; in 1951, the proportions were 24 and 70 per cent; and as late as 1966, only a third of all women lawyers were married.<sup>441</sup>

As Theresa Doland (Cornelius), an American lawyer of the period, noted, when she eventually married:

[I] had been practicing law about four years and I had accumulated somewhat of a practice, and I thought the name “Theresa Doland” was just as much stock in trade as anything I had and I was loath to give it up. I have looked up the subject very carefully and have studied the law upon it and I am of the opinion, if I understand it, that there is only one person in the state of Michigan that can stop me and that is Mr. Cornelius.<sup>442</sup>

## VI. CONTINUING DEBATE

### A. *Women as Members of Circuit and Session Messes*

The “‘old boys’ network” in the English legal profession extended to the circuit and session messes, which were both professional and social organizations allowing members of the profession to join together in congenial surroundings and share conversation, meals and experiences.<sup>443</sup> These messes were described as “‘primarily social clubs,’”<sup>444</sup> and partially served the same function as does membership in a private country club today.<sup>445</sup> As one American lawyer explained:

439. *Id.*

440. *Id.*

441. ABEL, *supra* note 18, at 174.

442. Theresa Doland, *Remarks at the Thirty-Sixth Annual Meeting of the Michigan Bar Association*, 6 MICH. ST. B.J. 44, 45 (1926).

443. *Women Barristers and Bar Messes*, 155 LAW TIMES 151 (1923) [hereinafter *Women Barristers and Bar Messes I*].

444. *Id.*

445. “It’s hard to imagine that a woman could have been pushed out of her job in favor of a man who could golf, but that’s what happened to Susan Nichols in the early 1980s in a Philadelphia suburb.”

Every London barrister, early in his career, joins a circuit. He usually selects one where he may be somewhat known to the solicitors, and where, perhaps, his family have property or associations. Formerly and, in fact, long after the advent of steam, judge and counsel "rode the circuit"—as was done in the early days of our own county Bars. . . . Each circuit has its "mess" with interesting traditions of midnight carousels and records of fines of bottles of port inflicted upon members for various delinquencies. The modern mess, besides procuring special rates at the hotels, constitutes a sort of itinerant club; rendering possible a discipline for breaches of professional propriety by expulsion or denial or admission, which is the most drastic punishment short of disbarment.<sup>446</sup>

Membership in a circuit was both restricted and exclusive.<sup>447</sup> In order to maintain control of their members, the circuits increasingly imposed practices, including a type of blackballing, that allowed them to regulate appearances in particular courts and by particular barristers.<sup>448</sup>

Women barristers quickly realized that exclusion from these societies meant exclusion from a very important part of the routine activities of their colleagues.<sup>449</sup> Thus the question of women's entrance to these dining halls and reception areas became of great concern both to them and to their male colleagues.<sup>450</sup>

Immediately the limitations of legislation became apparent. The Sex Disqualification (Removal) Act of 1919,<sup>451</sup> which required formal professional acceptance of women, could not mandate their personal or social acceptance by the vocal minority of men who did not want them there.

The debate began almost immediately and writers waged it enthusiastically in the pages of the nation's legal journals. Intoned the *Law Times*: "The Law Society has admitted women members to all the privileges of membership and so have the Inns of Court. It is to be regretted that Circuit and Sessions Messes have not so far shown themselves

Carolyne Zinko, *Los Altos Hills Company Helps Put Women on Par*, S.F. CHRON., May 16, 1997, at P1 (discussing the role of country clubs to enhance business relationships).

446. THOMAS LEARNING, *A PHILADELPHIA LAWYER IN THE LONDON COURTS* 171-72 (1911).

447. ABEL, *supra* note 18, at 97.

448. Raymond Cocks, *The Bar at Assizes: Barristers on Three Nineteenth Century Circuits*, 6 KINGSTON L. REV. 36, 40 (1976).

449. Kinnear, *supra* note 85, at 411.

450. Exclusion was a problem for some Canadian women students at exam time.

One woman who graduated in the 1950s recollected that when the final examinations came to be written, the women were separated from the other students lest the men be distracted. "I was told by the Dean that . . . their whole lives depended on their success in the exams . . . . It would have been funny if it hadn't been so sick. Creating a stink would have done no good at all."

*Id.* at 433. At my own law school, "ladies' day," an occasion during the school year when only women were called on (or harassed, depending on one's view), was a vanished but still remembered tradition in the early 1980s.

451. 9 & 10 Geo. 5, ch. 71 § 1(b) (Eng.).

equally generous."<sup>452</sup> However, it pointed out that women would find it difficult to join a group that did not want them as members.<sup>453</sup> It suggested a compromise: women should not have to pay for circuit subscriptions if they cannot be admitted into the mess, but they might want to wait until more men were comfortable with the idea of their presence before pressing the issue.<sup>454</sup> After all, they lost little by so doing except "the doubtful pleasure of dining in inadequate numbers at what is a men's dinner."<sup>455</sup>

Like the suggestion that women were incapable of understanding the "rules of the game," attitudes that echoed these comments were still in evidence fifty years later.

The atmosphere of legal practice is strongly coloured by attitudes indicative of male arrogance. . . . [M]ale condescension is expressed through archaic courtesy and banter and by a refusal to take women's ideas and actions seriously. This phenomenon may be a generalised feature of our society, but it is emphasised by the club-like character and mannered quality of the legal profession and by the absence of women in positions of power within it. By all accounts the manners that maketh the legal man can in certain circumstances be most oppressive to the legal woman.<sup>456</sup>

The *Solicitors' Journal and Weekly Reporter* agreed with the *Law Times's* correspondent:

[T]here are privacies of mess life which render it inconvenient to mix the sexes. On the other hand, it is obviously not equitable to exclude women altogether from the opportunities of gaining experience thus afforded to the Common Law Bar, and no one has proposed to do so. Various circuits and sessions are adopting slightly different plans, but the general scheme seems to be the admission of women to full rights of membership, but without the right to attend mess, and consequently without any subscription or a reduced subscription. In this way women receive all the usual benefits as regards notice of sittings, postal arrangements, attendance in court, court briefs, admission to the poor persons' defence list, and the like; while the seclusion of the masculine mess is preserved. Women, of course, can form a mess of their own and adopt a Bar hotel of their own in each circuit town; although, except perhaps on the Home Circuit, their numbers are not likely to justify such a plan in the near future. On the whole, the proposed compromise—which falls [sic] to be considered by most Bars at an early date—seems fair and liberal.<sup>457</sup>

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452. *Women Barristers and Bar Messes I*, *supra* note 443, at 151.

453. *Women Barristers and Bar Messes*, 155 *LAW TIMES* 196 (1923) [hereinafter *Women Barristers and Bar Messes II*]. Not being Groucho Marx, the ladies insisted on exclusion.

454. *Id.*

455. *Id.*

456. *SACHS & WILSON*, *supra* note 3, at 179.

457. *Women Barristers and the Circuits*, 67 *SOLIC. J. & WKLY. REP.* 179 (1922).

The suggestion that women barristers ought to be satisfied with the idea of either limited membership in an existing order or full membership in a new order is a traditional one familiar to any minority group. Limited membership in the existing group consisted of privileges which the women were due in any case as full members of the profession. It carefully did not include those intangible but real benefits of membership that enhance professional relations through social interaction and nourish a career in a profession built on shared values and the ability to reach compromises through congenial and ongoing relationships. Likewise, creating a barristers' group consisting only of women members, while minimizing the problem of difficulties with males who did not want to associate with them, did not address the very question of the creation of and nurturing of professional and social relationships. Women barristers might very well get along famously, but they did not, to begin with, have the personal and professional connections that they needed to advance in the profession. Either suggestion required nothing more from the men involved than that they tolerate the existence of women in the profession, and that they grant only those privileges that a majority might well feel were not sufficient, but that a significant minority felt were far and away the most that women could expect. Both journals implicitly recognized this fact.

Neither the *Law Times* nor the *Journal* suggested that women might band together with like-minded men and start a mess which included both sexes, a suggestion that would have addressed the problem admirably and would have sent a clear signal to the holdouts. Further, it negated the impression that a separate women's mess would simply be the result of childish pique at not being included in an exclusive club. Eventually, one mess admitted women and breached the social wall:

[A]t a Grand Night of the Bar Mess of the South-Eastern Circuit, held at Lewes on the 2nd inst., the question of admitting women barristers to the mess was discussed, and decided by a majority in favour of their admission. The election of two women candidates—Miss Bright Ashford and Miss Llewellyn Davies—was then proceeded with, and both candidates were elected.<sup>458</sup>

Some restrictions continued until 1964, including exclusion from activities other than meetings and some meal functions.<sup>459</sup> In that year, the Midland Circuit still banned women from all activities, presumably because they “‘inhibit[ed] the atmosphere’ and ‘completely alter[ed] the character and nature’ of the messes”<sup>460</sup> and amazingly disapproved of female participation in the mess “because they felt ‘that in so doing [the

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458. *Women Barristers and Bar Messes II*, *supra* note 453, at 196.

459. Kennedy, *supra* note 158, at 156; see also ABEL-SMITH & STEVENS, *supra* note 351, at 431-32 (noting that some circuits only allowed women to attend meetings and some dinners).

460. ABEL-SMITH & STEVENS, *supra* note 351, at 432.

women] are in some way advancing their professional chances.<sup>461</sup> The Northern Circuit allowed women into meetings and selected dinners.<sup>462</sup> This combination of bad faith and misogyny resulted in the excoriation and expulsion of one young female who secreted herself in the hall during a males-only concert at Gray's Inn during which

vulgar jokes and songs combine[d] with large quantities of drink. . . . This kind of episode typifies the traditional flavour of the Bar which, with few exceptions, is an echo of the public school, the military mess and the gentlemen's club. Women are just not "chaps"; and the men are certainly not prepared to make any concessions to make women feel more welcome.<sup>463</sup>

Podmore and Spencer note, however, that even in the 1980s women solicitors and barristers continued to suffer from exclusion and hence, exclusion from the intangible but real advantages that membership in a profession dependent on social interaction could provide:

In some professions—particularly in the law, but in medicine also—the nature of social interaction is modelled on that of exclusive men's clubs. This "clubbable" atmosphere, which permeates the courts, barristers' chambers, solicitors' practices and local law societies, is a considerable barrier for women to overcome. . . . Exclusion from full participation in the "club" and its activities is certain to inhibit the careers of women lawyers.<sup>464</sup>

#### B. *The Issue of Women's Dress in Court*

The obvious symbolism inherent in allowing women to take meals with their male colleagues while riding the circuits was only one of the gender-related issues that confronted the profession. The garb of the English lawyer is one of the most distinctive symbols of that walk of life. The debate over whether women called to the bar should either be required or allowed to affect the robe and wig of the English barrister was somewhat heated.<sup>465</sup> For male opponents, the traditional barrister's dress symbolized exclusivity both through gender and through profession.<sup>466</sup> The traditional dominance and power of the male was reinforced through his control of the legal apparatus.<sup>467</sup> To allow women to practice law might have become a necessary evil. It did not follow that they should also be permitted to wear the costume of the law, thus creating an androgynous look that made it more difficult for onlookers to determine

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461. *Id.*

462. *Id.* at 431.

463. Kennedy, *supra* note 158, at 156-57.

464. Podmore & Spencer, *supra* note 19, at 29-30.

465. *Wig Debate*, BARRISTERS & SOLIC. J., Apr. 1, 1922, at 81.

466. *Id.*

467. *Id.*

which of the barrister class were legitimate and which were recent interlopers.

In Ireland, women wore the traditional wig, apparently without any comment, an outcome which the *Justice of the Peace* found "ludicrous. . . . It is generally assumed that no such outrage will occur here, and that women practitioners will be required to substitute for the wig a black biretta. The principle is clear. A women [sic] in Court as in church should have a head-covering, which technically a wig is not."<sup>468</sup> Entrusted with the duty of making this momentous decision was a committee of five "eminent judges," including the Lord Chief Justice and the Master of the Rolls.<sup>469</sup> Citing the *Daily News*, the *Barristers' and Solicitors' Journal* continued:

The five judges have so far had no feminine adviser to assist them at their deliberations. One of the proposals made by the Judges' Committee is that women barristers should wear a cap similar to that worn by the women graduates and undergraduates at Oxford, but the women students who are reading for the Bar are said to be in favour of wearing wigs, and it is probably that they will be asked their opinion before the judges' decision is made absolute. Some definite rules will also have to be laid down in regard to the dress to be worn under the gown. As it is against etiquette for barristers to wear light suits, it is probably that women will be prohibited from wearing coloured blouses and skirts, low necks, and short sleeves, when in the courts. . . .<sup>470</sup>

The editor of the *Irish Law Times and Solicitors' Journal* added that "[t]he question has not created any difficulty in Ireland, where lady barristers wear the same style of wig and bands as men. The effect is certainly far from ludicrous. It is regarded as very becoming to the lady wearers."<sup>471</sup> In the early 1990s, barristers were still debating the wig question:

The Commercial Bar Association, representing 500 commercial lawyers, argues that many consider wigs to be uncomfortable and outmoded, and that they can alienate and intimidate people in court.

They have backing from the highest echelons of the legal profession. In an interview with the BBC yesterday, the new Lord Chief Justice, Baron Taylor of Gosforth, admitted that the "18th century image enshrouding the law is one of the factors which makes us seem out of touch."

He added: "I do not believe we are really out of touch, but I have made no secret of the fact that I believe we should probably

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468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

shed wigs and robes. However, I would not fire into doing that without consultation and without seeing what we are going to do, which is not quite as simple as it may seem.

“One could just have ordinary suits or one could have the kind of gown they have in the United States, or various other alternatives which we have to look at closely.”<sup>472</sup>

However, some male barristers now find a female colleague’s wig an incredible attraction:

But for many the wig is an evocative and inseparable element of the practice of law, with all its faults. One male barrister said: “It’s about the sexiest thing a woman can wear. There is something about the severity of a wig that makes any woman look attractive.”

Woman lawyers, understandably, wish to distance themselves from such antediluvian attitudes. Helena Kennedy, one of the country’s best-known female QCs, said: “I feel strongly that part of the mystification of the law is added to by the wearing of the garb which alienates many people from the legal process.

“I want to see the wig go, particularly in criminal courts, where people can be very fearful. I think the majority of people in the profession are confident of their own success and don’t need the prop of fancy dress.”<sup>473</sup>

The Committee of Judges and Benchers of the Inns of Court ended by recommending the same dress for both men and women barristers, which upset some people in the legal press:

The Committee of Judges and Benchers of the Inns of Court who have been considering what would be the appropriate robes for women to wear in court after their call to the Bar have “expressed a wish” that the dress of women barristers in court shall conform to the following rules:—(1) Ordinary barrister’s wigs should be worn and should completely cover and conceal the hair. (2) Ordinary barrister’s gowns should be worn. (3) Dresses should be plain, black or very dark, high to the neck, with long sleeves, and not shorter than the gown, with high, plain white collar and barrister’s bands; or plain coats and skirts may be worn, black or very dark, not shorter than the gown, with plain white shirts and high collars and barrister’s bands.<sup>474</sup>

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472. Gervase Webb, *The Law Wants a Verdict on Wigs in Court*, EVENING STANDARD (London), Apr. 28, 1992, at 14.

473. *Id.* Sexuality as an undercurrent in the relationship of (male) lawyers to their chosen profession should be obvious from the traditional saying that the law is a jealous mistress. “I will not say, with Lord Hale, that ‘The Law will admit of no rival . . .’ but I will say, that it is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.” Joseph Story, *The Value and Importance of Legal Studies*, in MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 523 (William W. Story ed., 1852).

474. *Women Barristers*, 66 SOLIC. J. & WKLY. REP. 411, 411 (1922).



After reporting this unsatisfactory compromise, the *Solicitors' Journal and Weekly Reporter* objected to the sight of women in the traditional barrister's garb.<sup>475</sup> The wig was traditionally a man's head covering, not a woman's, sniped the *Journal*, and "as much out of place on a woman's head as any masculine article of attire—we forbear to particularize—on her body."<sup>476</sup>

This disapproval was as much a function of its unwillingness to deal with the niceties of the wig's positioning on the head as its objection to this change in custom. Sir Herbert Stephens' concerns about the manner of wearing the wig evoked the *Journal* to fuss:

The wig must "completely cover and conceal the hair." How shocking should a stray lock emerge! Sir Herbert says it cannot be done when the hair is "bobbed"; but how does he know what that means? And with other modes the wig will give a "hydrocephalous, ungainly, and ludicrous appearance." "Hydrocephalous" sounds forcible, though we are glad it is not of our using.<sup>477</sup>

The *Journal* defensively concluded:

It may be said that our criticism is destructive. . . . What have we to say constructively? But that is really for the Committee when the matter is referred back to the them—as it ought to be—for reconsideration. At any rate, they need not encourage the women to ape the men in their dress. Both Sir Herbert Stephens and Lieut-Col. Hawkes. . . offer suggestions—a biretta, or toque, or coif. But, no doubt, the best solution would be just his or her own natural hair for everybody.<sup>478</sup>

By contrast a New York judge objected to female hat-wearing in his court.<sup>479</sup> As one legal reporter pointed out, women traditionally wore hats even in places of worship; to fixate on the headgear, rather than on the thoughts coming out of the head it covered, seemed inordinately petty.<sup>480</sup>

Indeed, the traditional garb associated with the English Bar dates only from the 17th century.<sup>481</sup> Before that, the long gown seems to have

475. *Women Barristers and Wigs*, 66 SOLIC. J. & WKLY. REP. 401, 401 (1922).

476. *Id.*

477. *Id.*

478. *Id.* (citation omitted). Hair seems to be a continuing concern for critics of women attorneys. Note the inane discussions of Marcia Clark's new hairstyle during the O.J. Simpson trial. See *CNN & Company* (CNN television broadcast, Apr. 12, 1995). See also Charles J. Ogletree, Jr., *Johnnie Cochran & Marcia Clark: Role Models?*, in *POSTMORTEM: THE O.J. SIMPSON CASE* 117, 121, 124. (Jeffrey Abramson ed., 1996) (discussing undue attention given Clark's hairstyle and clothing throughout trial).

479. *Women Lawyers at the Bar with Hats On*, 14 LAW NOTES 122, 122 (1910).

480. *Id.* Virginia Drachman quotes nineteenth-century U.S. attorney Lelia Robinson as remarking that the hat was a tremendous tactical problem for a woman lawyer: "Shall the woman attorney wear her hat when arguing a case or making a motion in court . . . or shall she remove it?" Drachman, *supra* note 255, at 2414.

481. J.H. Baker, *The Origin of the Bar Gown*, 49 LAW GUARDIAN 17 (1969).

been worn traditionally by both "learned" persons and the male lay population.<sup>482</sup> Further, it seems that lawyers in general wore simple long gowns of various colors.<sup>483</sup> The familiar black robe seems to have gained favor only after the reign of Henry VII (1485-1509).<sup>484</sup> After the reign of Charles II (1660-1685), when it represented mourning for the dead king, the profession finally formally adopted it as official lawyers' garb.<sup>485</sup> Wigs seem to have come into fashion after the Inns of Court prohibited benchers, particularly the ebullient young adventurers of the Tudor and Stuart courts, from wearing "hats, cloaks, boots spurs, swords, daggers and long hair"<sup>486</sup> which symbolized the aggressive practices antithetical to a dispassionate and nonviolent dispute resolution regime. Because those so regulated were male, we may postulate that wigs became more associated with that sex than with the other, thus the argument that wigs are a male and not a female "head covering." Such an argument smacks of the contemporary assertion among French male *avocats* that a decree of the Paris Parlement of 1540 forbidding lawyers from sporting facial hair is proof that women should continue to be barred from the profession, since women have none.<sup>487</sup>

Once the committee made the decision that women and men barristers should dress alike, the bar discouraged women from retaining any marks of female attire:

Meticulous rules are imposed and their strict interpretation endlessly discussed. To be the very model of a perfect lady barrister means looking as indistinguishable as possible from one's male colleagues. Warnings are given at an early stage in one's career to remove dress rings and nail polish when appearing before a certain lady judge. "Dresses or blouses should be long-sleeved and high to the neck. . . . Wigs should, as far as possible, cover the hair, which should be drawn back from the face and forehead, and if long enough should be put up."<sup>488</sup>

Clearly the "sex kitten" or "siren" look is out of place.

482. *Id.*

483. J.H. Baker, *The History of the Gowns Worn at the English Bar*, 9 *COSTUME* 15 (1975).

484. *Id.*

485. *Id.*

486. Baker, *supra* note 481, at 17.

487. The argument states:

*On invoqua sérieusement un arrêté du Parlement de 1540 qui 'interdit aux avocats de porter la barbe et la moustache.' C'était donc que les femmes ne peuvent être avocates. Et cette objection nous étonne; l'arrêté suppose au contraire que les femmes ont, par avance, respecté le texte, puisqu'elles ne portent ni la barbe ni la moustache.*

[They cite seriously a decree of the Parliament from 1540 that "prohibits lawyers from having a beard or a moustache." This meant that women could not be lawyers. And that objection astounds us; the decree assumes on the contrary that women have in advance complied with its words, because they wear neither beards nor moustaches.]

CORCOS, *supra* note 134, at 19 (translation by author); see Corcos, *supra* note 37, at 455.

488. Kennedy, *supra* note 158, at 159 (citing *Notes for Guidance on Dress in Court*, in *BAR COUNCIL'S ANNUAL STATEMENT* 52 (1973)).

These rules are sacred to the heart of the older woman practitioner, going back to the days when admission to a man's world was such a privilege that women conformed even in their mode of dress.<sup>489</sup> To its credit the Special Committee refused to act as a watchdog of skirt lengths and referred the question of dress straight back to the Bar Council. It is extraordinary how much time is wasted on trivia of this kind while the real problems continue to be ignored.<sup>490</sup>

Like dress, language did and does carry meaning beyond the literal. The arrogance of the male lawyer continued to diminish the efforts of women attorneys into the 1970s and 1980s:

One County Court judge in Berkshire who had a notorious reputation as a misogynist used to refer to women barristers in open court as "chorus girls" and "silly girls". During a road accident case, where the woman driver was represented by a woman barrister, the judge gratuitously gave the court the benefit of his jaundiced view of women drivers. The male counsel for the plaintiff obsequiously inquired if the judge held the same views of women barristers. This sort of male togetherness is frequently used in a competitive way to undermine the professional confidence of women practitioners.<sup>491</sup>

## VII. THE ENTRY OF WOMEN INTO PROFESSIONS RELATED TO LAW

In general, the objections to women's entry or full participation in the legal profession paralleled objections to their entry or full participation in other professions.

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489. Kennedy, *supra* note 158, at 159-60. To a great extent this seems to continue to be true both in court and in law school. Christine Farley tells the story of a male colleague who counseled her to modify her style of dress in order not to convey the wrong impression to students concerning her expectations for class performance.

As he saw it, I either needed to in fact be nice, or, alternatively appear not to be nice. I explained to him that I had already decided that it was not my goal to be nice, and I wondered why students would draw the contrary conclusion when my actions had not betrayed my intentions. Then he commented on my appearance. Noting that I was wearing a sweater, he told me that as a young woman I could not afford to wear anything "soft." He suggested instead that I wear dark, "severe-looking" suit jackets.

Farley, *supra* note 11, at 344.

During a break from a winter 1995 CLE session a female Cleveland Heights judge admired my deep purple wool coat, then told me she hoped I realized I could never wear that color in court. On another occasion, a male colleague at my former law school and I were discussing dress with a law student. My colleague pointed out that my turtleneck sweater, blazer and wool skirt were quite appropriate and attractive for an academic environment but "of course" would never do in court, and that his own dark suit was marginal for a court appearance, but gave him a somewhat more severe image than he would have liked for classroom teaching.

490. Kennedy, *supra* note 158, at 159-60. However, some women as well as men regretted the loss of women's special, protected status. Mary Lathrop, the first woman admitted to the American Bar Association, commented: "I'm rather tired of rights. I'd love to have a few privileges." Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America*, 28 *IND. L. REV.* 227, 227 (1995).

491. Kennedy, *supra* note 158, at 157. See also Delfs, *supra* note 15 (discussing gender bias in the courtroom).

### A. *The Judicial Branch*

The horror that solicitors such as G.B. Crook felt at the thought of females on the bench<sup>492</sup> and the ambivalence that J.A. Symmonds expressed<sup>493</sup> were only two of the reactions to the thought of female magistrates. The English legal journal *Justice of the Peace* observed that the reception accorded the recently introduced Justices of the Peace (Qualification of Women) Bill

justifies the anticipation that this reform in our judicial system may be looked for at an early date. . . . The principle which is thus to have legislative effect given to it is an important one, although its adoption into the law of the land would not be likely to have anything like the direct result which followed from the recent concession of the parliamentary franchise to women.<sup>494</sup>

In its discussion of the proposed legislation, the journal pinpointed the problem with much of the long term parliamentary attempt to grant women equal civil and political rights.<sup>495</sup> The legislation drafted suffered from one of two flaws.<sup>496</sup> Either it was ineffectively written, so that those so inclined could find, with the assistance of like-minded judges, ways to circumvent the intended application of the statute,<sup>497</sup> or it was written so that it granted women a severely limited scope of participation.<sup>498</sup> Thus, Parliament often needed to revisit questions it had already considered:

[W]hile there is in theory no limit to the number of justices who may be appointed in any county, in practice the number is adjusted to what are likely to be the demands on the time of the holders of the office, and new members are appointed only as and when the step is necessary to keep the roll at its normal strength. The Bill merely provides that in making a selection to fill up such vacancies the claims of a woman to selection shall not be ignored because of the fact that she is a woman. The removal of the disqualification of women to sit as justices where they would but for their sex become justices *ex officio* is all the more notable that the common law disability of women in this respect has been so recently affirmed by Parliament. The Qualification of Women (County and Borough Councils) Act, 1907, section 1, when granting admission to local offices to women provided that a woman if elected as chairman of a county council or mayor of a borough should not by virtue of holding or having held that office be a justice of the peace.<sup>499</sup>

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492. *Law Society: Admission*, *supra* note 400, at 410-11.

493. *Admission of Women*, *supra* note 186, at 429.

494. *Women on the Bench*, 83 JUST. PEACE 246 (1919).

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.*

The journal predicted that women would, by virtue of newer legislation written to remove impediments to their occupation of judicial seats, decide cases before they argued them, although it expressed this thought in language that could be taken either as admiration or as disapproval: "It would not be out of keeping with their traditional disregard for common-place paths of progress if women attained to the bench before reaching the bar."<sup>500</sup>

## B. *Juries*

While participation on a jury is not a professional occupation, it does serve as a basic part of the English legal system. Thus, female participation on juries was a matter of continuing debate throughout the period. The Sex Disqualification (Removal) Act allowed the excuse of women "because of the character of the issues involved or the evidence to be given."<sup>501</sup> Some men apparently went to great lengths to avoid jury duty themselves, even putting their property in their wives' names.<sup>502</sup>

## C. *The Legislature*

### 1. House of Commons

The right of women over the age of thirty to vote for members of the House of Commons was granted through the Representation of the People Act of 1918<sup>503</sup> and their right to be elected to the Commons was established through the Parliament Act of 1918,<sup>504</sup> even though it was "not a fit place for any respectable woman to sit in."<sup>505</sup> In 1919, Nancy, Viscountess Astor,<sup>506</sup> became the first woman to be elected to that branch of the legislature, succeeding her husband, who had been elevated to the House of Lords.<sup>507</sup> The *Law Times* noted that in Lady Astor's case,

500. *Id.*

501. *Sex Disqualification (Removal) Bill*, 83 JUST. PEACE 330 (1919). See *Sex Disqualification (Removal) Act of 1919*, 9 & 10 Geo. 5, Ch 71, § 1(b) (Eng.) (stating women may be exempted "by reason of the nature of evidence to be given or the issues to be tried"). The Jurors (Scotland) Act was amended in 1920 to allow women to serve as jurors. See *The Jurors (Scotland) Act of 1920*, 10 & 11 Geo. 5, ch. 53, § 1(1) (Eng.).

502. See *Barristers and Solicitors (Qualification of Women) Bill*, 63 SOLIC. J. & WKLY. REP. 500, 501 (1919).

503. *Representation of the People Act of 1918*, 8 Geo. 5, ch. 64 (Eng.).

504. *The Parliament (Qualification of Women) Act of 1918*, 8 & 9 Geo. 5, ch. 47 (Eng.). As one American commentator pointed out, while women under 30 could not vote, they could be elected to the Commons at any age, which was also true of the Netherlands. See *Women Members of Parliament*, 13 AM. POL. SCI. REV. 114, 115 (1919) [hereinafter *Women Members*].

505. See *Women Members*, *supra* note 504, at 114.

506. Lady Astor was the former Nancy Langhorne, a member of an old, established Virginia family. See *DICTIONARY OF NATIONAL BIOGRAPHY*, 1961-1970, at 43 (Supp. 1981).

507. See *Occasional Notes*, 148 LAW TIMES 218, 219 (1919) [hereinafter *Lady Astor*]. The custom of women succeeding their husbands to a legislative position has since become somewhat notorious in the United States. In 1972, Lindy Boggs of Louisiana succeeded her husband, the late Hale Boggs, in

the personal equation invests her presence in the House of Commons with surroundings absolutely unique and unparalleled. The first woman member . . . who has been elected to that assembly for the discharge of Parliamentary duties was not, strange to say, born a British subject. Lady Astor is by birth an American citizen, and has become a British subject by marriage. She is accordingly qualified for election and sitting and voting in the House of Commons under the provisions of recent legislation by the fact of her marriage with a British citizen.<sup>508</sup>

That Lady Astor would not have been eligible for her seat had she not been married was an ironic circumstance not lost on the article's author. Further, her husband was the son of a naturalized British subject who only obtained his right to sit in the Lords upon the passage of the Naturalization Act of 1870,<sup>509</sup> which allowed naturalized citizens not born

the U.S. House of Representatives. See *Lindy Boggs to the Vatican*, THE HOTLINE, Apr. 18, 1997, at 142. Muriel Humphrey was named to her late husband's Senate seat on January 25, 1978. See Patricia Grice, *FYI: Time Capsule*, STAR-TRIB. (Minneapolis), Jan. 20, 1997, at 1B. Lurleen Wallace was elected governor of the state of Georgia in 1966, succeeding her husband George who could not succeed himself. See The Associated Press, Jan. 15, 1996, available in 1996 WL 4408437 (listing key dates in the life of former Alabama Governor George C. Wallace). Much earlier, Rose McConnell Long finished out her dead husband's Senate term. See Jane McKee, *The Roll Call Quiz*, ROLL CALL, July 17, 1995. Later, another Long widow, Cathy, succeeded her husband, U. S. Representative Gillis Long. See Mitchell Locin, *Clout Southern Style: When It Comes to Politics, Chicago Ain't Got Nothin' on the Pelican State*, CHI. TRIB., June 2, 1985, at C18.

Some of these women were undeniably able, and had simply put their husbands' careers ahead of their own political ambitions, as women have traditionally been expected to do. The jury is still out on others. One commentator wrote:

[T]he United States, in a strange and sentimental nepotism, prefers widows. Perhaps it is our idea that the American woman is a kind of clinging ivy to her husband's oak; that they are two minds with but a single thought, and that a constituency which has found itself admirably represented by a husband, unfortunately deceased, can have equal and identical perfection by electing his widow to take his place. Perhaps it takes a particular kind of ability to live with one of our masculine representatives at Washington; the characteristic of being a good mixer, say; of being able to deal with refractory and wilful personalities; and any one who survives that association may have durable and excellent personal qualities. Or perhaps we merely wish to pay a sentimental tribute, of the kind we offer when we subscribe to a memorial window: something to please the family.

Alzada Comstock, *Women Members of European Parliaments*, 20 AM. POL. SCI. REV. 379, 383-84 (1926). At least one influential contemporary commentator interprets this tendency more cynically, calling it the "Flashdance" phenomenon, after the popular film of the same name in which an aspiring dancer has her way to the top smoothed by a sympathetic, attractive, and wealthy suitor (a late-twentieth century retelling of the Cinderella story, CHARLES PERRAULT, CINDERELLA, OR THE LITTLE GLASS SLIPPER (1954)). See FARRELL, *supra* note 15, at 91-100 (1988).

In real life, almost all of America's one hundred wealthiest women made their personal fortunes on their husband's or father's death, and many women with power flashdanced to it on their husband's death, such as Helen Copley, who quit her job as a secretary when she married the president of Copley Enterprises on her husband's death, or female U.S. Senators such as Muriel Humphrey, elected with no prior experience upon the death of Hubert Humphrey; or Margaret Chase Smith, elected after the death of Senator Smith; or Katherine Graham of the *Washington Post*, or Joan Kroc of McDonald's.

*Id.* at 58-59. While parts of Farrell's book appear to be special pleading, he does point out many of the critical areas in which men's and women's socialization tend to promote misunderstanding.

508. *Lady Astor*, *supra* note 507, at 219.

509. The Naturalization Act of 1870, 33 Vict., ch. 14 (Eng.).

of English parents to sit in either House.<sup>510</sup> Further, as the wife of a peer and a member of the aristocracy, Lady Astor could be tried for crimes by the Lords by virtue of her sex, and yet she could not occupy a seat there. Her membership in the Commons, coupled with her husband's seat in the Lords, made legal nonsense of the old idea that husband and wife were "one person in law:"

A statute of Henry VI. declares the law to be that peeresses in their own right or by marriage shall be tried before the same judicature as other peers of the realm. . . . It would be an interesting question whether a peeress by marriage who was also a member of the House of Commons would, on a charge of felony, be of trial of nobility or trial as a commoner by a judge and jury. A wife in the House of Commons with a husband in the House of Lords upsets absolutely and completely the old idea of the rights and obligations involved in the marriage status. From the earliest times it has been laid down as a fundamental principle of law, a principle upon which the whole law relating to husband and wife . . . has depended, that by virtue of the marriage a husband and wife become one person in law. . . . Viscount Astor in the House of Lords and Lady Astor as the occupant of a seat in the House of Commons . . . are, though husband and wife, not one person in law. . . . The election of a married woman to the House of Commons may be regarded as a death warrant to all the disabilities entailed by coverture on the persons, the property, or the transactions of married women.<sup>511</sup>

An American observer of the period quoted Lady Astor's wry commentary on her political style and that of a female colleague:

Lady Astor's own description of her own methods is given in the following words by Marjorie Shuler in the *American Review of Reviews* for January 1924: "I get very keen on a thing and go after it. The men say 'There's that terrible woman'; and they run away from me. They turn to Mrs. Wintringham and say, 'There's that good, kind, homely woman; let's talk to her'. And Mrs. Wintringham just smiles and smiles, and skins them alive-but they don't know it."<sup>512</sup>

510. *Id.*

511. *Lady Astor, supra* note 507, at 219 (citation omitted). Nancy, Viscountess Astor, was the woman, who once told Winston Churchill, "Winston, if you were my husband I should flavor your coffee with poison." "Madam," Churchill replied, "if I were your husband I should drink it." Catherine Fitzpatrick, *Well Equipped*, MILWAUKEE J. SENTINEL, July 13, 1997, at 1.

512. Comstock, *supra* note 507, at 380. Comstock also discusses women members of the German, Swedish, Czechoslovakian, Finnish, Hungarian, U.S., Dutch, and Norwegian legislatures, noting that there is something odd about the geographical position of the countries in which these women members, deputies and senators, are to be found. They exist in a fringe around the north and east of Europe. France, Italy, Spain, and the other countries along the Mediterranean are out of it entirely. . . . To find the group of women legislators of longest standing, one must go up beyond the Scandinavian countries, to the Finns, who live farther north than any other civilized people in the world.

What is there about the barren north which stimulates women to go into law, medicine, and politics? And what is there about blue Mediterranean skies which keeps

Lady Astor soon had a third colleague, Mrs. Clara Phillipson. Political wags nicknamed the three female members of the Commons "Society" (Lady Astor), "Sobriety" (Mrs. Wintringham) and "Variety" (Mrs. Phillipson, who had been an actress).<sup>513</sup> The 1924 Labour Government brought in Margaret Bondfield, a former shop assistant whose interests were workers' rights and who became the first woman member of a British government.<sup>514</sup>

## 2. House of Lords

After the passage of the Sex Disqualification (Removal) Act,<sup>515</sup> the question arose concerning women's eligibility for the House of Lords as well. The *Solicitors' Journal* pointed out that the Sex Disqualification (Removal) Act was "framed in very general and wide terms"<sup>516</sup> and agreed that Parliament had only envisioned election to the House of Commons.<sup>517</sup> It may have seemed that the spirit of legislation like the Parliament (Qualification of Women) Act<sup>518</sup> and the Sex Disqualification (Removal) Act<sup>519</sup> which seemed to confer on women the same political rights as men should have addressed the problem of peeresses like Viscountess Rhondda,<sup>520</sup> but discussion in the Lords resulted in a decision to consign that issue to a specific enabling statute.

A committee appointed in 1922 found that no existing piece of legislation, including the Sex Disqualification (Removal) Act of 1919,<sup>521</sup> specifically removed the disability. In its eyes, membership in the House of Lords was neither a civil or judicial office or post, nor a profession or vocation:

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them out of the professions and out of politics, and induces them to spend their days running little shops?

*Id.* at 379. Weather may have something to do with it, but the religious and political orientations of these countries also encourage or discourage the recognition of and respect for women's achievements to varying degrees.

513. *Id.* at 380.

514. *Id.* at 380-81.

515. Sexual Disqualification (Removal) Act of 1919, 9 & 10 Geo. 5, ch. 71, § 1(b) (Eng.).

516. *Alteration of Women's Legal Status*, 64 SOLIC. J. & WKLY. REP. 250 (1920).

517. *Id.* The journal further clucked that a very similar piece of legislation passed in New South Wales did not correspond exactly with the British statute. "This question of sex-equality legislation seems to be one of those in which uniformity throughout the Empire would be desirable." *Id.*

518. The Parliament (Qualification of Women) Act of 1918, 8 & 9 Geo. 5, ch. 47 (Eng.).

519. Sex Disqualification (Removal) Act of 1919, 9 & 10 Geo. 5, ch. 71, § 1(b) (Eng.).

520. Regarding peeresses, Francis Palmer stated:

Peeresses, whether they be peeresses by birth, by creation, or by marriage, are entitled to the same privileges as peers, but if a peeress by marriage should afterwards intermarry with a commoner, she forfeits her privileges. By the Lords' Standing Orders, No. 53, it is ordered and declared by the Lords that privilege of Parliament shall not be allowed to minor peers, noble women, or widows of peers, saving their right of peerage.

FRANCIS BEAUFORT PALMER, *PEERAGE LAW IN ENGLAND* 152 (1978). Peeresses could, however, be tried in the House of Lords. *Id.* at 18 (citing 20 Hen. 6, ch. 9 (Eng.); 6 Geo. 4, ch. 66, § 12 (Eng.)).

521. 9 & 10 Geo. 5, ch. 71, § 1 (Eng.). Viscountess Rhondda commented rather sourly that the word "removal" "had never succeeded in getting outside its brackets." SHIRLEY M. EOFF, *VISCOUNTESS RHONDDA: EQUALITARIAN FEMINIST* 87 (1991).



A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise)

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 . . . .

The committee's procedure in reaching its decision was met with some derision:

[N]o report, however ably drafted, can alter the fact that the procedure adopted is open to grave objection. At the first hearing the then Attorney-General intimated that he could not dispute the soundness of Lady Rhondda's construction of the statute, and the Committee reported accordingly, whereupon the House recommitted the matter in order that a full Committee might hear the present Attorney-General argue against a submission that his predecessor in office had pronounced unassailable! Naturally the proceedings wore a certain air of unreality.<sup>523</sup>

Apparently, the committee also made the suggestion that legislative history was necessary to determine the exact intent of Parliament with regard to the Sex Disqualification (Removal) Act.<sup>524</sup> Since the Interpretation Act was intended to address just such questions, appeal to parliamentary debate was unusual and probably illegitimate.<sup>525</sup> Early in the debate over the 1919 Act, however, the *Justice of the Peace* sniffed that the press had misunderstood the intent of the bill and addressed itself particularly to the question of Viscountess Rhondda and other women holding titles in their own right:

If we may judge from the Press notices, clause 2 seems to be a good deal misunderstood. It merely provides that in the patent of any peerage granted in the future there may be a valid limitation authorising the holder, if a woman, to sit and vote in the House of Lords. The position of women who are now peeresses in their own right is not intended to be affected.<sup>526</sup>

It also noted that the Government might legitimately continue to close the civil and foreign services to women.<sup>527</sup>

The House of Lords proved the *Justice of the Peace* right in its interpretation. The Committee of Privileges of the House of Lords did not read the wording of this statute to include a peeress's right to sit as an

522. 9 & 10 Geo. 5, ch. 71, § 1 (Eng.).

523. *Lady Rhondda's Case*, 86 JUST. PEACE 255, 255 (1922).

524. 9 & 10 Geo. 5, ch. 71, § 1 (Eng.).

525. *Lady Rhondda's Case*, *supra* note 523, at 255.

526. *The Sex Disqualification (Removal) Bill*, *supra* note 501, at 330.

527. *Id.*

equal among that body.<sup>528</sup> While Viscountess Rhondda could both vote for and serve in the House of Commons, she could not take her seat as a peeress of the Realm. For the Committee, the Sex Disqualification (Removal) Act of 1919, was “not sufficient to carry out so momentous a revolution in the constitution of the House of Lords.”<sup>529</sup> For the *Law Times* this result was understandable but regrettable:

When such acknowledged experts [as Lord Haldane and Lord Birkenhead] differ, it is difficult to express any opinion, but it must now be taken that the House of Lords is the only place where women are forbidden to exercise any public function, and where men alone have “a seat, place, and voice.” In this country we have no Salic law, and a woman may fill the highest place in the Empire. Women as commoners may give their services to the State in the House of Commons, and no logical or other reason exists why a woman, a peeress in her own right, should be excluded from the other estate of the realm.<sup>530</sup>

In 1925, Lord Astor attempted to remedy the situation with a bill, which was defeated by a two-vote majority,<sup>531</sup> even though backers attempted to make a strong historical argument in support:

Ladies of birth and quality sat in council with the Saxon Witas. In Wightred's great council at Beconcild, A.D. 699, the Abbesses sat and deliberated, and five of them signed the decrees of that council along with the king, bishops, and nobles. In Henry III and Edward I's time four Abbesses were summoned to Parliament, viz.: of Shaftesbury, Berking St. Mary, of Winchester, and of Wilton, In the 35th [sic] of Edward III were summoned by writ to Parliament to appear there by their proxies Countess of Norfolk, Countess of Ormonde, Countess of March, Countess of Pembroke, Countess of Oxford, and Countess of Atholl. These ladies were called ad colloquium et tractatum: “The old prerogatives of the Crown have not perished, nor can they become obsolete through desuetude. Nullum tempus occurrit Regi.” Mr. Bagehot on one occasion recommended a persual of the pages of Comyn's Digest, or any other such book, under the title Prerogative; and Mr. Freeman has observed that it is hard to see how, except when they have been taken away by Act of Parliament, any powers which were exercised by Edward I (among them the summoning of women to the House of Lords) could be refused to Queen Victoria. If writs of summons to peeresses in their own right were issued in the exercise of the prerogative, the House of Lords would have no power, and probably no desire, to prevent the entry of these ladies into the Gilded Chamber.<sup>532</sup>

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528. *Id.*

529. *The Law and the Lawyers: Peeresses and Parliament*, 154 *LAW TIMES* 1, 1 (1922).

530. *Id.* Note the reference to the French, who admitted women in 1900. Shirley M. Eoff devotes several pages to the fight to enter the House of Lords. See *EOFF*, *supra* note 521, at 81-88.

531. *Peeresses in the House of Lords*, 29 *LAW NOTES* 97 (1925).

532. *Id.*

Note the rejection of the argument advanced in the *Chorlton* and *Bebb* cases, that a sort of latches barred women's rights in this area.

#### D. *The Police*

In February 1920, the Home Secretary established a committee to inquire into the entry of women onto the police force.<sup>533</sup> Its report appeared on July 24, 1920.<sup>534</sup> Commenting favorably on the performance of women during the war, the committee recommended that they be used particularly in cases of violence against women or children.<sup>535</sup> In a comment that seems to reiterate the suggestion that women simply "did not get it," the committee believed that women police officers should be

strongly impressed, as indeed all police officers should be, with the necessity of getting the victim's story unadulterated with the suggestions of the statement taker. Specializing in work of this kind is apt to give the latter a subconscious desire to get a statement so complete that it will exclude the defences which his or her experience teaches are usually set up, with the unhappy result, at least in the case of a child, that by the time she comes to give evidence in court, she is no longer telling her experience, but reciting a statement.<sup>536</sup>

It is tempting to see in this caution a suggestion that women police officers would be more sympathetic, thus less objective and less professional, in obtaining statements from young victims of abuse or violence. If this inference is accurate, was the committee also slyly suggesting that women police officers are not as intellectually or psychologically capable as male officers overall?

Certainly at least some of the members of the committee thought that women police officers were not as physically able to carry out all duties required of an officer. "The committee think [sic] that police-women should not be required to perform duties which necessarily involve the exercise of physical force and exposure to physical danger, and upon this they base a recommendation that, normally, the pay of police-women should be lower than that of policemen."<sup>537</sup> But, "[t]hey will find it difficult to convince the women of the justice of their view on this point. The women will probably argue that while men are fitter for some duties, they are fitter for others, and that both kinds of fitness should be

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533. *Women Police*, 84 JUST. PEACE 355, 360 (1920).

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.* Apparently women did not eat as much as men, or pay as much in rent, or care for as many children. This attitude was current among opponents of the *avocates* as well. See Corcos, *supra* note 37, at 468.

equally remunerated."<sup>538</sup> Indeed, such women would find support for that argument in the pages of the committee's own report.

The *Justice of the Peace* pointed out another contradiction in the committee's report regarding the responsibilities of women police officers:

The committee recommend [sic] that women employed to perform police duties should make the declaration of a constable in the same form as men, and that they should be invested with the legal powers and status of constables, but that regulations should be made in each force clearly defining the duties they will and will not be primarily expected to perform. It is a little difficult to see how constables sworn "to act as constables for preserving the peace, and preventing robberies and other felonies, and apprehending offenders against the peace," can be dispensed from the performace of part of their vow by regulations made to save them from the danger of carrying it out in its integrity. However, probably no one will quarrel with the practical compromise.<sup>539</sup>

### VIII. CONCLUSION

Like movements to admit women to the legal profession in other European countries, the English movement represented a natural outgrowth of the increasing demands of half the population for admittance to a system that both creates and reflects the political and social environment. The arguments for and against the admittance of women to the bar greatly resembled those advanced in other societies. Yet some arguments were more forcefully put forward because of the reliance on advocacy by the common law legal system. For example, the suggestion that the naturally aggressive stance of the English barrister and solicitor was not one that the English woman could easily replicate or understand. Yet proponents of women's participation countered this by asserting that women could add their own particular brand of kindness and understanding to the mix, an argument was also made in other instances,<sup>540</sup> and that is still heard today.<sup>541</sup>

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538. *Women Police*, *supra* note 533, at 360.

539. *Id.*

540. *See* Corcos, *supra* note 37, at 455.

541. Many new "self help" books dramatize the differences in male and female thinking. *See generally* FARRELL, *supra* note 15; JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (1992); SHAPIRO, *supra* note 131; TANNEN, *supra* note 204; DEBORAH TANNEN, *THAT'S NOT WHAT I MEAN: HOW CONVERSATIONAL STYLE MAKES OR BREAKS RELATIONSHIPS* (1986); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990). That some men continue to translate their wish to dominate into workplace behavior is documented in such serious but never solemn books as EMILY TOOTH, *MS. MENTOR'S IMPECCABLE ADVICE FOR WOMEN IN ACADEMIA* (1997), which includes a description of a phenomenon which she calls "peacocking": the tendency of males to "show off" at academic conferences by asking "questions" of female speakers that actually have nothing to do with the subject.

The English legal profession furiously discussed the issue of the admittance of women for over fifty years, and this resulted from both a lack of support at the governmental level for feminist causes and the power of the organized English Bar.<sup>542</sup> While women in the United States and Canada had only to convince one state or province at a time to admit them (no easy task), admission in one state was still, in a sense, total victory. While they had several routes open to them for admission, women in England still needed to convince an already sensitized majority of the nation's legal profession, including the most influential members of the legislature, the Inns, and the Law Society. In the end, what convinced a majority of the profession, if not to support, at least not to oppose the admission of women, was their contribution in the war effort and their clear willingness to share the burdens that men had heretofore formally recognized as theirs alone.

The battle for women's admission to the bar in England was harder and longer than in France. Two factors were crucial to its success. The performance of women during the war was an obvious justification, even though some male and female supporters maintained that political rights, in particular admission to a profession, should not be a reward for doing one's civic duty. As one analyst points out with regard to the suffrage:

The effect of the war was, however, precisely the opposite of that expected. Within two years and a half the conflict brought the suffragists an advantage which no amount of agitation had ever won for them, i.e., the official support of the government, and a few months more carried their cause to a victorious conclusion which would hardly have been reached in a full decade of peace. There were two main reasons for this turn of events. One was the necessity which the war imposed of undertaking a wholesale revision of the electoral system, leading to the decision to base the franchise upon personal right rather than property relationship, and inevitably suggesting an equality in rights, as individuals, of women with men. But the fundamental reason brought forward by the war for enfranchising women was the great variety and value of women's services to the nation during the conflict. This was the thing that won over thousands of former opponents, from Mr. Asquith down.<sup>543</sup>

For many men, including lawyers, actions speak louder than words.

Even more important were the decades of debate, during which all arguments for and against were trotted out and examined, and the weaker arguments against admission finally though quietly dismissed as insufficient to deny women an opportunity that equally qualified men had for centuries. The government which shepherded through the Sex Disqualification (Removal) Act had a much easier job than it would have had

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542. ELIE HALEVY, 2 *A HISTORY OF THE ENGLISH PEOPLE* 478-482 (1934).

543. F.A.O., *The British Representation of the People Act*, 12 *AM. POL. SCI. REV.* 498, 500 (1918).

twenty or ten years before because more of the sentiment of the profession, as well as the mood of the public, was behind women's admission. Some women thus began to think of the law as a possible career even though some social and professional barriers remained to be removed, and when the opportunity presented itself had readied themselves to take advantage of it.

In France, by contrast, the liberal government had no difficulty in righting what it considered to be a grievous wrong three years after it occurred. Yet the opinion of the majority of members of the profession was not yet in sympathy with the government's policy. Questions about women's competence lingered and fewer women pursued the possibility of a legal career during the first twenty years that it was open to them.

The arguments advanced against women's ability to practice law seem intuitively to mitigate against the equal ability of women to practice law, and to lend a semblance of legitimacy to the idea of "separate but equal." But this impression is mistaken. That women practice law differently from men is not an indictment, but a recognition of the differences of biology, gender, and socialization, and is particularly apt in the practice of the common law.

Facts and interpretations matter at common law. Thus is old law rethought and new law made. That the arguments used against the admission of women to the profession were so similar in England, the United States and France demonstrates that the pervasive opposition based on certain assumptions about the abilities and rightful place of women in society had no geographical or political boundaries. Further, legislation could not alter these shared societal assumptions any more than it affected the beliefs of male supporters of the women's movement that females should be allowed to practice law. In France, the debate took place after the admission of women; in the United States, before and during the admission, because it was accomplished jurisdiction by jurisdiction; and in England, before the admission finally came about. But in each case, the debate served as an emotional and psychological exercise necessary to the maturation of the profession.

Women like Gwyneth Bebb in England and Jeanne Chauvin in France, along with their male supporters, were ahead of their time by a few years, but their efforts eventually made possible the entry of women into the legal profession. They defined the scope of the debate that still goes on. Today's young women attorneys, who face the same kinds of pernicious arguments, may not recognize the danger for marginalized groups who wish to participate in the ongoing legal, political and social discussion that shapes our society. Some contemplation of the nature of the recurring arguments over gender issues that trivialize real differences in thinking and conceptualizing legal concepts will yield additional insights into the interactions of male and female attorneys as well as men and women in all spheres of life. The opponents of women lawyers may

have been right, after all, and the supporters wrong, primarily because the law continues to be "constructed as male:" that is, it is presumed to be "rational, logical, dispassionate, objective, professional, intimidating, and demanding."<sup>544</sup>

Further, the social skills that women cultivate in order to attract husbands serve them ill in the workplace.

"Time tested secrets for capturing Mr. Right," such as "don't call him first," "be quiet and mysterious," or always "let the man take charge," are not time-tested strategies for attracting clients' business and senior lawyers' admiration.

....

[T]his contradiction between feminist stereotypes and professional success has long left women in a double bind. They risk seeming too assertive or not assertive enough. The competitiveness and self-promotion that legal cultures reward are not the characteristics that society most values in women or that many women value in themselves.<sup>545</sup>

Until law, like society, finds a way to value the thought processes and contributions of one-half of the population, it will continue to see women as lesser partners if they maintain their "female" qualities and lesser women if they adopt "male" characteristics in order to succeed.

As long as success in law is identified with those characteristics, and women are not, women will continue to have difficulty in obtaining recognition for their achievements as well as the right to be mediocre, not superior, as practitioners. The double standard that dictated the exclusion of women from the legal profession in England and continues to underlie evaluations of women attorneys by some of their male colleagues is a standard that celebrates and condemns what we normally term "masculine" values, those which women are necessarily lacking.

[A] woman can be criticized both for being too powerless as a woman, and for being too forceful for a woman. . . . [W]hat is seen as assertive in a man is seen as aggressive in a woman. And even aggressiveness, which may be admired in men, is penalized in women. Rather, women should be deferential and they should smile. They should not tell people what they know. . . . They should be attractive

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544. Farley, *supra* note 11, at 389. Farley points out that adjectives consistently used to describe "law" as a discipline are also consistently used to describe male law professors. *Id.* at 349-50. See also Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 453 (David Kairys ed., 2d ed. 1990).

545. Deborah L. Rhode, *Fluttering Eyes Won't Cut It with Clients*, *NAT'L L.J.*, June 23, 1997, at A15 (quoting sociologist Cynthia Epstein). On continuing bias against female lawyers' styles in the workplace and its effect on their success, see JEANNE Q. SVIKHART, *FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS* (1997).

but not too pretty, agreeable but not too accommodating, assertive but not too aggressive, and knowledgeable but not too erudite.<sup>546</sup>

Whether women are better suited than men to an active search for alternatives to traditional means of legal dispute resolution than to the angry advocacy that sometimes prevails, or whether they are simply acculturated to prefer outcomes other than "win or lose," whether these alternatives are desirable, and which of them we can and should institutionalize are subjects which demand further exploration by both women and men. Women, like all traditionally marginalized groups, necessarily must change both the form and the substance of a profession they enter. What evaluation and use we make of this observation will inevitably shape the evolution of the law and of society.

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546. Farley, *supra* note 11, at 339 (footnotes omitted).