Portia's Progress: Women as Lawyers - Reflections on Past and Future

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This article reviews the history of judicial decisions concerning the admission of women to the legal profession in Canada and elsewhere. It further explores the impact of history on women as lawyers and particularly the use of arguments about gender differences. Some implications of these arguments for women currently practising law are also considered in light of recent literature about the essential nature of men and women's ethical development. Current issues for women — and men — who are practising law are explored as well.

Les Progrès de Portia

Le présent article passe en revue l'histoire des jugements juridiques sur l'admission des femmes comme avocates, prononcés au Canada et ailleurs. Il examine l'effet de l'histoire sur les avocates, et notamment l'utilisation des arguments alléguant les différences entre les deux sexes, arguments dont il considère également les incidences pour les femmes qui exercent actuellement la profession d'avocate, à la lumière des travaux récents sur la nature essentielle du développement éthique chez les hommes et les femmes. Enfin il traite de quelques questions qui se posent aux femmes — et aux hommes tout aussi bien — qui exercent aujourd'hui.

I. ADMITTING WOMEN AS MEMBERS OF THE LEGAL PROFESSION

The 'persons' cases were aptly named because they were about whether women were included in the legal interpretation of the word 'persons'. . . . Not surprisingly perhaps, the three earliest of the 'persons' cases were initiated by two women who wanted to become lawyers.¹

In 1897, Clara Brett Martin was admitted as a lawyer in Ontario, the first woman to be admitted to the practice of law in the British Commonwealth.\(^2\) Her admission to the legal profession was achieved only after a determined effort on her part\(^3\) to achieve the necessary legislative reform, but her success in Ontario did not noticeably improve the opportunities for women to enter the legal profession in other jurisdictions in Canada.

Mabel Penury French was similarly denied admission to the profession by the courts in both New Brunswick (1905)\(^4\) and British Columbia (1912)\(^5\), and like Clara Brett Martin, achieved her goal of admission in both these provinces only after legislative action.\(^6\) Ironically, the minutes of the Benchers in British Columbia for April 1, 1912, ignoring her special accomplishment, record the call of "twenty gentlemen, including Mabel Penury French."\(^7\)

The first women lawyers were admitted in the western provinces shortly after Mabel French's admission in British Columbia: in Manitoba and Alberta in 1915, and in Saskatchewan in 1972.\(^8\) The eastern provinces admitted the first women as lawyers a little later: in Nova Scotia in 1918, in Prince Edward Island in 1926, and in Newfoundland in 1933.\(^9\) In Quebec, where the court had

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\(^{2}\) Clara Brett Martin was admitted as a barrister and solicitor in 1897. Her original petition for admission was denied by the Law Society of Upper Canada, but the Ontario Legislature eventually passed two statutes, one permitting the admission of women as solicitors in 1892 (55 V. c.32, s.1) and the other permitting their admission as barristers-at-law in 1895 (58 V. c.27, s.1). For an excellent account of Clara Brett Martin's efforts to become eligible for admission to the legal profession, see Constance Backhouse, "To Open the Way for Others of my Sex: Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985), 1 Can. J. Women and the Law 1.

\(^{3}\) See Backhouse, supra note 2, 7-21.

\(^{4}\) In re French (1905), 37 N.B.R. 359.

\(^{5}\) In re French, [1912] 1 D.L.R. 80.

\(^{6}\) Alfred Watts, Q.C., History of the Legal Profession in British Columbia (1869-1984) (Law Society of British Columbia, 1984), 133-34. Watts notes the concerted efforts to obtain the necessary amendments in British Columbia. He also records that the Law Society "rather ungraciously, and contrary to what had happened to (sic) New Brunswick, [collected] its costs" in the appeal to the Court of Appeal. Id. For the statutory amendments, see 6 Ed. VII, c.5 (1906) for New Brunswick; and 2 Geo. V, c.18 (1912) for British Columbia.

\(^{7}\) Watts, id., 134.

\(^{8}\) Cameron Harvey, "Women in Law in Canada" (1970-71), 4 Man. L.J. 9. According to Harvey, Melrose Sissons and Winnifred M. Wilton were the first women lawyers admitted in Manitoba, and Lillian Ruby Clements the first in Alberta. The first women to earn LL.B. degrees in these provinces were Mrs. I.R. (Adamson) Hunt, Q.C. in Manitoba in 1917 and Ethel Fagan in Alberta in 1921. The first woman admitted to the legal profession in Saskatchewan was Mary Cathcart, while the first to complete the LL.B. degree there was Elsie Hall in 1920. Id., 17.

\(^{9}\) In Nova Scotia, the first woman admitted was Frances Fish; in Prince Edward Island, Roma Steward; and in Newfoundland, Louisa Maud Saunders. Harvey, id., 17.
denied Annie Macdonald Langstaff's application for admission in 1915,\textsuperscript{10} women were not admitted as lawyers until as recently as 1942.\textsuperscript{11} Even then, there was "violent opposition" on the part of members of the Quebec bar to the legislative amendment permitting women to become lawyers.\textsuperscript{12}

During the early years of this century, women were routinely denied admission as lawyers in other parts of the British Commonwealth as well. In 1901, a court in Scotland denied the admission of a woman as a Law Agent,\textsuperscript{13} even though the relevant statute used the gender-neutral word "persons" in describing the admission requirements. In the same case, the court discounted counsel's submission that there was an ancient precedent in the appearance of Lady Crawford as an advocate in the High Court of Scotland in 1563.\textsuperscript{14}

Similarly, in 1903, when Bertha Cave applied to join Gray's Inn as a barrister, the Benchers of the Inn denied her application.\textsuperscript{15} On her appeal to a special tribunal, the Benchers argued that no female had ever been admitted to the Inns of Court, and the tribunal decided, in the absence of a precedent, to deny her application accordingly.\textsuperscript{16} A few years later, the Law Society in England denied an application from a woman to become a solicitor, even though the Solicitors' Act referred to the admission of "persons." When Ms. Bebb applied to the court for a declaration as to her eligibility, the three judges of the Chancery Division concluded that there was no precedent for the admission of women, despite the use of the word "persons" in the statute, and denied her application.\textsuperscript{17} It was only after World War I that women in England became eligible to join the legal profession there.\textsuperscript{18}

\textsuperscript{10} Langstaff v. Bar of Quebec, (1915), 25 Que. K.B. 11.
\textsuperscript{11} The first women to be admitted were Elizabeth C. Monk and Suzanne R. Filion. Harvey, supra note 8, 17.
\textsuperscript{12} From the memorandum prepared by Elizabeth C. Monk in 1965, and quoted at some length by Harvey, supra note 8, 18-20. According to Monk, "despite the dire foreboding of the earlier generation of members of the Bar, the profession has survived the infiltration." Id.
\textsuperscript{13} Hall v. Incorp. Society of Law Agents (1901), 3 Session Cases, 5th ser., 1059.
\textsuperscript{14} Albie Sachs and Joan Hoff Wilson, Sexism and the Law (Martin Robertson, 1978), 27-28.
\textsuperscript{15} Id., 28.
\textsuperscript{16} The Times (3 December 1903); as quoted by Sachs and Wilson, supra note 14, 239.
\textsuperscript{18} The enactment of the Sexual Disqualification Removal Act of 1919 created the opportunity for women to be admitted as lawyers; see (1922), 58 C.L.J. 245, as quoted by Harvey, supra note 8. See also Jocelynne Scutt, "Sexism in Legal Language" (1985), 59 Australian L.J. 163 for some information on women lawyers in Australia.
However, women had been admitted as lawyers in some parts of the United States in the latter part of the nineteenth century. In 1870, Ada Kepley was the first woman to obtain a university degree in law when she graduated from the Union College of Law (now Northwestern).\(^{19}\) The previous year, in 1869, Arabella Mansfield became the first woman to be admitted to the bar of any state when Iowa admitted her as a lawyer.\(^{20}\)

However, in 1873 the U.S. Supreme Court confirmed a lower court decision that Myra Bradwell was not eligible for admission to the Chicago bar.\(^{21}\) Similarly in 1875, the Wisconsin Supreme Court denied Lavina Goodell admission to the state bar,\(^{22}\) and then reversed its own decision in 1879 and granted her a license to practice law.\(^{23}\) In 1894, the U.S. Supreme Court upheld a lower court decision denying Belva A. Lockwood the right to practice law in Virginia on the ground that the word “person” meant “male person.”\(^{24}\) Moreover, women remained ineligible for admission to many university law schools in the United States until quite recently: Columbia first admitted women law students in 1929, Harvard not until 1950, the University of Notre Dame in 1969 and “the last male bastion, Washington and Lee University in 1972.”\(^{25}\)

Even in Ontario, however, where the admission of women as lawyers was permitted after 1897, the number of women admitted to the legal profession was not significant for many decades. The records of the Law Society of Upper Canada show that only one woman was admitted as a lawyer in each of the years 1902, 1907, 1908, and 1913.\(^{26}\) Thus at the outbreak of World War I, there were only 5 women (including Clara Brett Martin) who had been admitted as lawyers in Ontario. By 1920, a total of 22 women had been admitted, and an additional 49 were admitted in the decade 1921-30. In the following decade, however, only 32 women joined the profession, but the numbers increased again for 1941-50 when 48 women became lawyers. The numbers increased steadily but slowly after 1950, with 64 women joining the legal profession for 1951-60 and 98 for 1961-70.\(^{27}\)

Thus by 1970, a total of 313 women had been admitted as lawyers in Ontario in the 73 years after Clara Brett Martin’s initial admission.


\(^{20}\) Id.

\(^{21}\) 83 U.S. (16 Wall) 130 (1873).

\(^{22}\) In re Goodell, 39 Wis. 232 (1875).

\(^{23}\) In re Goodell, 48 Wis. 693 (1879). See also Sachs and Wilson, supra note 14, 96-97.

\(^{24}\) In re Lockwood, 154 U.S. 116 (1894). See also Weisberg, supra note 19, 232.

\(^{25}\) Weisberg, supra note 19, 232.

\(^{26}\) Printout of numbers of women admitted to the bar of Ontario obtained from the computer records of the Law Society of Upper Canada.

\(^{27}\) Id.
success. Since 1970, moreover, the numbers have increased much more rapidly. Most university law schools in Ontario now admit between one-third and one-half women to the LL.B. programs each year, and there have been corresponding increases in the number of women admitted to the bar as lawyers.\footnote{At Osgoode Hall Law School in the fall of 1985, 128 of 320 students were women (40%); according to Andrew Ranachan, the Admissions Officer for the school, “if all the women who were accepted had registered, more than half of the first year student body would be women.” \textit{Obiter Dicta}, October 21, 1985.} For the first time, in the fall of 1985, more than 50% of the entering class of an Ontario law school were women students — at the University of Windsor law school.\footnote{As reported by the \textit{Globe and Mail}, January 29, 1986. The \textit{Globe} story also reported that women students have outnumbered men in the university law schools of Quebec for a number of years: there have been more women than men in the first year classes at Laval since 1979 and at the University of Montreal since 1981. The story also quotes Professor Brent Cotter at Dalhousie University as asserting that “The quality of women who apply \[to law schools in common law Canada\] is somewhat better than the quality of the men.”}

II. THE IMPACT OF HISTORY ON WOMEN AS LAWYERS

History is a retelling of the human experience. To give meaning to that experience, we focus the beams of memory and research on certain events, people, and places, leaving others in the shadows.\footnote{Veronica Strong-Boag and Anita Clair Fellman, \textit{Rethinking Canada: The Promise of Women’s History} (Toronto: Copp Clark Pitman, 1986), 1.}

From a historical perspective, women have been lawyers in Canada for only a very short time. It is not yet one hundred years since Clara Brett Martin was admitted in Ontario, and just over forty years since Elizabeth Monk was admitted in Quebec. As a result, most women who are lawyers in Canada today will be “first generation women lawyers” in their families. A few may have a mother who became a lawyer and a very few may have a grandmother.\footnote{The possibility that there is a woman lawyer who is now a “third generation” practicing woman lawyer in her family may be unlikely, since impressionistic evidence suggests that women who became lawyers in earlier generations made clear choices between marriage and family on one hand or the practice of law on the other. Thus a “third generation” woman lawyer would be likely to have had a non-practicing lawyer for a grandmother, and even perhaps a mother.} Yet, most women lawyers now in practice in Canada will be the first female persons in their families to enter the legal profession.\footnote{There are a number of interesting case studies of such women lawyers in the United States in Jill Abramson and Barbara Franklin, \textit{Where They Are Now: The Story of the Women of Harvard Law 1974} (New York: Doubleday, 1986); the authors generally assess the women who entered Harvard Law School in 1971 and graduated in 1974.} Thus, the absence of familial role models
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for women lawyers may have contributed to some unique stress faced by women as lawyers, because their role as lawyers is new, not only to those who are women lawyers, but also to male lawyers and to society as a whole.

Moreover, the number of women lawyers in the profession has been significant for just over a decade. Although women began to enter law schools in large numbers in Ontario (and in the rest of Canada) in the late 60's and early 70's, it is only within the last decade that the number of women called to the bar of Ontario in any one year has been over one-third of the class. Many women now entering the profession have not experienced the barriers faced by Clara Brett Martin or the difficulties sometimes encountered by women who became lawyers in the 30's and 40's, or even the 50's and 60's. Like Mary Appleby, who wrote of her expectations in Obiter Dicta in 1934, new women lawyers now join the legal profession confident that “the time will come in the not too distant future when women will win equal distinction with men in every phase of the practice of law.”

Even as the numbers of women lawyers increase, however, the

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33 See Rosabeth Moss Kanter, “Reflections on Women and the Legal Profession: A Sociological Perspective” (1978), 1 Harvard Women’s Law J. 1. For a different perspective, see Winter, “Women Work Harder, Are Paid Less, but They’re Happy” (1983), 69 ABAJ 1384. More recently, the ABA Commission on Women in the Profession reported that “most participants at the hearings expressed frustration and disillusionment that barriers are still great and that progress has been far slower than expected. Witnesses cautioned that we must not be lulled into complacency about the status of women in the profession simply because the numbers of women entering the profession continue to increase.” Summary of Hearings, ABA Commission on Women in the Profession (February 1988). For further information see the special issue on “Women in Law,” ABAJ (June 1988).

34 Abramson and Franklin report a survey conducted by the American Bar Association in 1984 which revealed that 65% of male lawyers had no female colleagues at work. The same survey showed that the median income for male lawyers was $53,000 and that for women lawyers it was $33,000. Forty-five per cent of men queried said that the influx of women into the profession was only a “somewhat favourable” development and would have only minor consequences; in contrast, 70% of the women surveyed called it an “extremely favourable” development and predicted major consequences. See Abramson and Franklin, supra note 32, 299.

35 See printout of sex of members by year of call, Law Society of Upper Canada, Materials on Women in the Legal Profession (1986), B-1.


37 Obiter Dicta, January 17, 1934.

38 In her review of Cynthia Fuchs Epstein, Women in Law (New York: Basic Books, 1982), Carrie Menkle-Meadow stated the issue baldly:

we are informed that the numbers of women entering legal practice has
issue of what equality means for women in the legal profession remains elusive.\textsuperscript{39} Moreover, there are some indications that the opportunities for women in law are not in fact equal, and that there may be some subtle distinctions based on a male standard of what it is to be a lawyer. Professor Menkle-Meadow has suggested, for example, that:

Some law firms proudly proclaim their commitment to maternity leaves and 'flexible' working arrangements for women lawyers with children, but many women who have availed themselves of such plans have quietly acknowledged that they are never again accepted as serious members of their firms . . . if women want to be successful in the corporate firm context they are going to have to do it by adopting the male work norms.\textsuperscript{40}

A man who wanted to have flexible work hours to accommodate family responsibilities might well be treated just the same. Yet the equal treatment of men and women, in the context of a prevailing social pattern where women have significant family responsibilities and men do not, underlines that equality here really means that women (and men) must conform to the male norm or definition of what it is to be a successful lawyer.

In exploring the nature of women's place in the legal profession of the 1980's, the history of their admission as lawyers is therefore critical. At the turn of the century when women began to challenge male exclusivity in the professions\textsuperscript{41}, the reason that was routinely increased dramatically in the past ten years . . . One is tempted to ask, so what? What difference does it make that there are now many more women law students, lawyers, law professors, and judges? What difference for the profession, what difference for women, what difference for the practice of law . . . and what difference for society?


\textsuperscript{40} See Sachs and Wilson, supra note 14, for an analysis of the underlying rationale for male exclusivity in the professions.
given to justify prevailing arrangements was that women were different from men. In Mabel French's case in the Court of appeal of New Brunswick, for example, Mr. Justice Barker adopted the "separate spheres" doctrine of Bradwell v. Illinois, decided by the U.S. Supreme Court in 1873:

... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.... The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.

This judicial statement accepted the existence of a fundamental difference between male and female which determined appropriate roles for men and women in society at large, confining women to the private sphere while reserving the public sphere for men.

The only appropriate response to assertions like Mr. Justice Barker's from women like Clara Brett Martin, Mabel Penury French, and Annie Macdonald Langstaff was that women were not different from men in any aspect relevant to being a lawyer. Their assertions that women were not different from men and that women could practice law too were ultimately successful. Yet, from the perspective of history, their effort to succeed with these
arguments helped to confirm for everyone, men as well as women, that the definition of "lawyer" was essentially male, and that women who chose to become lawyers had to conform to such a (male) standard.

The adoption of this standard has had a significant impact on women lawyers, and has sometimes even discouraged frank discussion of equality for women lawyers. When Professor Harvey conducted his survey on women in the profession in the early 1970's, Marguerite Ritchie, Senior Advisory Counsel in the Department of Justice in Ottawa, cautioned him about relying on all the responses he would receive:

You may discover that some replies indicate an apparent lack of discrimination; in many cases I have found that women are unwilling to admit discrimination, either because they are trying to conceal the fact from themselves or because they must play the role of 'Uncle Tom' and that their chances of promotion depend absolutely upon their conformity to and acceptance of the existing patterns.46

Yet, despite this reluctance to express their concerns, most women lawyers have experienced some difficulties because of the prevailing (male) standard in the profession. When young lawyers are expected to work very long hours, it is married women47 with families more often than married men with families who find this expectation so overwhelming.48 In this context, a woman lawyer can "succeed" only by conforming to the male standard of lawyering: a competent professional without significant family interests or responsibilities.49

Thus, the history of women's entry into the legal profession had a lasting impact on ideas about women as lawyers. The need to ignore "differences" to overcome legal arguments supporting male exclusivity in the legal profession inevitably affected both men's and women's perceptions of "lawyering" as male activity. For this reason, questions about whether it makes any difference that Clara Brett Martin surmounted all obstacles to be admitted to the legal profession, or whether it is significant that large number of women are now entering the legal profession must take account of the gendered nature of lawyers' roles. If the definition of a successful lawyer remains constant, then it matters very little whether there are more women who are lawyers, or none at all. On the other hand, if women as lawyers have something different to offer to

46 As quoted in Harvey, supra note 8, 13. Ritchie is the author of two articles on latent sexism in legislative drafting: "Alice Through the Statutes" (1975), 21 McGill L.J. 685; and "The Language of Oppression — Alice Talks Back" (1977), 23 McGill L.J. 535. The latter article is a response to a critique of her first article; see Elmer Driedger, "Are Statutes Written for Men Only?" (1976), 22 McGill L.J. 666.
47 See Carillo, "Lawyers as Mothers" (1983), 10 Barrister 7.
48 Epstein, supra note 38.
49 See Abramson and Franklin, supra note 32, 21-70.
the profession and to the community, then their participation in the profession matters very much indeed.

Such a question may be approached from several different perspectives. From the perspective of individual life choices and opportunities, it is significant that women may now become lawyers, whether or not they must conform to an existing male standard in doing so. The roles apparently open to women in the 1980’s, including those as lawyers, are roles that could not have been contemplated a few generations ago. These new opportunities for women have intrinsic value for individuals, a sentiment epitomized in the statement of an Osgoode student who wrote in 1966 that she saw no reason “more than her male colleagues [why she] had to justify particularly why she was at law school — she was there for the same idealistic or materialistic reasons.”

Beyond the importance of career choices for individuals, what is the significance of a profession which has been exclusively male being rapidly transformed into one composed equally of men and women. If we put aside the history of women’s entry into the profession, and the arguments about sex differences used both to thwart and to achieve that goal, we might try to imagine what would be the definition of “lawyer” if women as well as men had been involved from the beginning in articulating it. Would it make any difference to the pattern of legal work, to the style of “successful” advocacy, to the ethical standards accepted by legal professionals? Beyond the value of liberty for women (like men) to have individual choices and opportunities for satisfying work, do women as lawyers have anything to offer now that is different from the contributions men have made historically?

III. “DIFFERENCE” AND “EQUALITY” FOR WOMEN LAWYERS

The liberal belief in formal equality leaves untouched issues of power and privilege.

Some recent work by psychologist Carol Gilligan has offered some stimulating ideas about these questions. Gilligan conducted studies of the development of moral and ethical ideas in children and young adults. Unlike many psychological research projects in this field, Gilligan used both male and female subjects, and carefully noted differences in their responses.

One of the most interesting examples in her research concerned the responses of an eleven-year-old boy called Jake, and those of

50 Miss M.V. MacLean, Obiter Dicta, January 1966; as quoted by Harvey, supra note 8, 13.
51 Katherine O’Donovan, supra note 39.
52 Carol Gilligan, In a Different Voice (Cambridge, Mass.: Harvard University Press, 1982).
53 According to Gilligan, theories on ethical development proposed by psychologists such as Piaget, Kohlberg, and Erickson are based on studies using male subjects only.
a little girl of the same age called Amy, to a hypothetical ethical dilemma.\textsuperscript{54} The hypothetical dilemma concerned a man called Heinz whose wife was dying of cancer; her death could be prevented by a special drug, available at the drug store nearby, but Heinz could not afford to buy it. The dilemma presented to the children was whether Heinz should steal the drug.

Jake responded that life is more important than property, and that Heinz should therefore steal the drug. Amy’s response was much less assured. She appeared to be diffident about resolving the problem, and hesitated to make a choice between the parties. Her “solution” to the dilemma posed by Gilligan was a suggestion that perhaps Heinz and the druggist should try to talk about it, so that the druggist could come to understand the problem from Heinz’s perspective. Perhaps they could work out a mutually satisfying solution, such as a credit transaction or a loan, or the possibility that Heinz could work part-time for the druggist.

In Gilligan’s psychological terms, Jake has explored the hypothetical dilemma with the “logic of justice” while Amy has used the “ethic of care”; and Amy scores lower in terms of psychological theory than Jake because she is unable to separate the abstract values from the people involved and the relations between them.\textsuperscript{55} In terms of psychological theory, Jake’s “separateness” and ability for abstract reasoning, contrasted with Amy’s “connectedness” and propensity for reasoning in terms of relationships, derives from their different experiences in growing up; a boy must separate his sexual identity from his mother while a girl need not do so. Even so, Gilligan does not claim that the two voices are exclusively gender-based, although the different voice she describes has been empirically associated with women.\textsuperscript{56}

In terms of lawyering, Jake’s “mode of thought” appears to be that of a good lawyer. He abstracts the values from the personal dilemma presented to him, identifies the issues, and decides which party's interest should take priority. By contrast, Amy’s response is harder to assess. She is slower to respond and more indecisive than Jake. She will not accept the hypothetical as given, but wants to change the facts or get more facts. She is uncomfortable with her role as decision-maker, and wants the parties themselves to be involved in finding the solution. She is concerned about the impact of the decision on the longer-term relations of the parties; she worries that if Heinz steals the drug, he will go to jail, and that will prevent him from caring for his wife.\textsuperscript{57}

\textsuperscript{54} Gilligan, supra note 52, 25-29.
\textsuperscript{55} Id., 30-31.
\textsuperscript{56} But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex. (Emphasis added).
\textsuperscript{57} Id., 2-3.
Is Amy a good lawyer? Carrie Menkle-Meadow’s response is positive. In her view, Amy is a good lawyer, albeit a different one, because she does not accept the inevitability of the existing system:\footnote{Carrie Menkle-Meadow, “Portia in a Different Voice: Speculations on a Woman’s Lawyering Process,” [1985] Berkeley Women’s L. J. 39.}

Instead of concluding that a choice must be made between life and property, [as Jake does] . . . Amy sees no need to hierarchically order the claims. Instead, she tries to account for all the parties’ needs, and searches for a way to find a solution that satisfies the needs of both. . . . In short, she won’t play by the adversarial rules. She searches outside the system for a way to solve the problem, trying to keep both parties in mind.\footnote{Id, 51.}

According to Menkle-Meadow, Amy also rejects her role as neutral third party arbiter, confined to using only the information she has available in making her decision. Amy’s concern to have the parties talk to each other “to appreciate the importance of each other’s needs”\footnote{Id.} suggests to Menkle-Meadow the importance of alternate dispute resolution techniques, and the possibility that:

. . . the growing strength of women’s voice in the legal profession may change the adversarial system into a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser.\footnote{Id, 55.}

On the basis of Gilligan’s analysis, therefore, the admission of women to the legal profession carries with it the possibility of transformation, both within the legal profession and also in the legal system itself. Rather than a negative concept used to exclude women from entering the profession, the idea of “difference” in Gilligan’s terms is a positive and transforming concept.

Yet, despite the attractiveness of difference as a transforming concept, many women lawyers have ambivalent reactions to Gilligan’s analysis. Although there is some feeling of identity with Amy’s wish to solve problems in a more creative way, there is also reluctance to fully embrace the idea of “difference”, used so often in the past to prevent women from fully participating in public life. Menkle-Meadow’s hesitation, for example, is evident in her conclusion that Gilligan’s ideas should be accepted only tentatively at present:

. . . how will the ‘women are different’ argument play itself out in current legal disputes? Many of us feel the differences every day. What we deplore is when they are used to oppress or disempower us or when they are used as immutable stereotypes that prevent

\footnote{Menkle-Meadow also explores in her paper the effect of women lawyers on the structure and style of law practice, the nature of legal reasoning, and the content of laws.}
recognition of individual variations. . . . My point of view is that while we are observing the differences we might ask if we have something to learn from them.62

Christine Boyle’s analysis of the feminist judge in the context of sexual assault cases implicitly takes up Menkle-Meadow’s challenge.63 According to Boyle, the experience of men and women in relation to sexuality may be quite different, and a feminist judge “would [therefore] avoid propositions that are abstracted to the level that they are gender neutral when she is dealing with an area in which gender is significant.”64 On this basis, Boyle argues that the different experiences of men and women with sexuality may need to be taken into account expressly in cases of sexual assault.

In another context, recent research has suggested that men and women demonstrate different patterns of talking in groups, an important feature of professional life for lawyers. In a study of students at Harvard, men spoke more often than their women peers, for longer periods, and tended to interrupt more frequently.65 And Epstein’s concluding comments in her study of women in law66 similarly articulated an important difference of perspective between men and women lawyers.67

In contrast to this recognition of inherent difference, Catharine MacKinnon has suggested that the different voice identified in Gilligan’s research clearly represents the voice of women as dominated in our society by men, not an inherently different voice but one that is constructed from existing power relationships between men and women. In her view, the different voice is not the voice of someone who has chosen to be more interested in preserving relationships than in determining rights, but rather

62 Id, 63.
64 Id, 103.
66 Epstein, Women in Law, supra note 38, 385.
67 Id., 385:

Lodged as they are in a web of many interwoven roles, women, more than men, often take a view that extends beyond the traditional legal mentality — developed by law schools — that Edmund Burke . . . claimed sharpened men’s minds by making them narrow. Many women lawyers today have not been permitted the luxury of narrowness because, as outsiders, they have been sensitized to the insular qualities of law
someone who has no rights and of necessity has developed a concern for relationships.\textsuperscript{68} For MacKinnon, the crucial issue is the power of men to "define" and the corresponding powerlessness of women; for her, the issue of gender for women lawyers is the same as for all women:

Gender then becomes a question of how people who do not have power are going to get some. . . . It is about how this romance with gender, elaborately played out as either sameness or difference, is going to be turned into something that is not going [to keep us where we have been placed], but rather like something which values us for what we are without keeping us there; not our freedom to be masculine, but our right to have access to [what men have] whether we do with it what they have done with it, or not.\textsuperscript{69} (Emphasis in original)

In addition to MacKinnon’s concerns, there are also concerns about alternative dispute resolution (such as that evident in Amy’s decision-making and Menkle-Meadow’s assessment) that may “privatize” the legal process, thereby enabling sex discrimination to occur without public scrutiny.\textsuperscript{70} In the context of the legal system as a whole, such “privatization” of decision-making may further diminish the bargaining power of those who are less powerful, frequently women.

Some of these concerns are appropriate. As MacKinnon has pointed out, the idea of difference assumes a standard, just as the idea of equality assumes a standard. And just as the standard in the difference debate at the turn of the century was male, so is the standard in the equality debate in the 1980’s:

[Male power is what] Aristotle missed in his empiricist notion that equality means treating likes alike and unlikes alike. . . . Why should you have to be the same as a man to get what a man gets simply because he is one? . . . [The] question is, Why does maleness provide an original entitlement, not questioned on the basis of its gender, so that it is women . . . who want to make a case of unequal

\begin{enumerate}
\item \textsuperscript{68}I do not think that the way women reason morally is morality ‘in a different voice’. I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don’t just speak differently. A lot, you don’t speak. Your speech is not just differently articulated, it is silenced, gone.
\end{enumerate}
treatment? . . . who have to show that they are men in every relevant respect. . . . 71

Thus, the central question remains unanswered, awaiting further research and analysis: what difference does it make that Clara Brett Martin succeeded in becoming a lawyer in 1897, and what difference should it make that the legal profession increasingly includes large numbers of women as well as men? Beyond the individual careers of individual women lawyers, what impact will the advent of a significant number of women in the legal profession have on the practice of law, on legal rules and concepts, on the roles lawyers play in our society? Most importantly, will women who become lawyers be just like men who are lawyers, or will they bring a new dimension to lawyering?

Surely this question is one that should be addressed thoughtfully and with imagination as we approach the 100th anniversary of Clara Brett Martin's achievement: "to open the way to the bar for others of my sex. . . ." 72

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71 MacKinnon, supra note 68, 37.
72 Newspaper clipping, Buffalo Express (undated); as quoted by Backhouse, supra note 1, 22.
DISCUSSION