

# **“INVISIBLE” CONSTRAINTS ON LAWYERING AND LEADERSHIP: THE CASE OF WOMEN LAWYERS**

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## **I. INTRODUCTION**

It has been a strength of patriarchy in all its historic forms to assimilate itself so perfectly to socioeconomic, political, and cultural structures as to be virtually invisible.<sup>1</sup>

This essay is an exploration of “invisible” constraints on ideas about the proper role for women in the legal profession. It focuses first on the historical struggle for women’s admission as lawyers in Canada in the early part of this century (the issue of whether women could be lawyers at all), and secondly on the current status of women lawyers in Canada (the issue of whether women can become leaders in the legal profession). In both cases, there is some evidence that “invisible” ideas about the proper role for women, which prevented their acceptance as “lawyers” in the early years of this century, may impede their success in becoming “leaders” in the profession in the 1980’s and beyond. For this reason, these invisible constraints have both historical and current significance for women, and men, who are lawyers.

This essay also represents an effort to bridge two separate parts of my research activity about women lawyers, one historical and one more current, and to examine the connections between them. For several years, I have been interested in the legal aspects of the history of the first Canadian women admitted to the legal profession. The types of legal arguments presented and usually rejected, the reasons given for negative court decisions on the question of women’s admission to legal practice, and the content of statutory amendments to legislation about qualifications

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<sup>1</sup> J. Kelly, *The Doubled Vision of Feminist Theory* in *WOMEN, HISTORY AND THEORY: THE ESSAYS OF JOAN KELLY* (Chicago: Univ. of Chicago Press, 1984) 51 at 61.

to practise law have provided a rich source of ideas about the role of such women in the early twentieth century. More recently, I have become interested in the social and cultural contexts of these legal decisions, and the significant extent to which the reasons given by courts mirrored opinions and ideas expressed in secondary legal literature of the time. Indeed, the similarity between the views expressed in the law journals and in judicial decisions raises important questions about the contextual shaping of judicial decisions, both then and now.

The other part of my research has focused more specifically on the current status of women as lawyers in Canada, and the significance of the dramatic increase in the numbers of women entering the legal profession here since about 1970. In this context, issues about the structure and organization of the profession and of law firms, the professional ethos of law practice, and the roles expected of and accepted by lawyers in different kinds of law practices all have importance for women members of the profession now and for the future. Moreover, to the extent that these structures and ideas were designed and implemented by an exclusively male profession, it is important to determine whether a significant change in the gender composition of the profession may require changes of structures and ideas, and how such changes may occur. In this context, theoretical literature about the sociology of organizations and the nature of societal change provide interesting models for examining the potential for change in the legal profession.

Thus, in thinking about women lawyers, both in terms of historical and current struggles for acceptance, the issue is whether there are invisible ideas about the proper role for women which just as surely impede women's achievement of leadership roles in the profession now as once prevented them from being lawyers at all. Or, as Joan Kelly argues, are we now at a moment in history when we can not only "see" how the patriarchal system works, but also . . . act with that vision — so as to put an end to it."<sup>2</sup>

## II. WOMEN LAWYERS: A HISTORICAL PERSPECTIVE

When Clara Brett Martin became the first woman in the British Commonwealth to be admitted to the legal profession in 1897, she expressed a wish that her accomplishment might "open the way for others

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<sup>2</sup> *Ibid.* at 62.

of my sex".<sup>3</sup> In fact, there is little evidence that Clara Brett Martin's achievement had any effect on similar decisions in other provinces in Canada. In three of these provinces (New Brunswick, British Columbia and Quebec), the issue of women's admissibility to the profession was litigated in the twenty years immediately after Clara Brett Martin became a lawyer in Ontario<sup>4</sup>, and in all three provinces, the applications for admission to the legal profession by women were denied by the courts. In New Brunswick and in British Columbia, however, Mabel Penury French was eventually successful in achieving admission as a lawyer as a result of subsequent legislative action<sup>5</sup> expressly providing for the admission of women as members of the legal profession.

### 1. *The Nature of the Legal Claims:*

Despite the similarity in the outcomes of the three litigated cases, the claims made by the applicants were quite different. Mabel Penury French had been admitted as a student-at-law in New Brunswick in 1902

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<sup>3</sup> Quoted from an interview with Clara Brett Martin published in the *Buffalo Express* about 1896, in C. Backhouse, *'To Open the Way for Others of my Sex': Clara Brett Martin's Career as Canada's First Woman Lawyer* (1985) 1 C.J.W.L. 1 at 22. Backhouse provides an excellent account of Clara Brett Martin's efforts to obtain approval for her admission as a lawyer from the Law Society of Upper Canada, and her ultimate success as a result of legislative amendments expressly permitting women to be admitted as members of the legal profession in Ontario. Clara Brett Martin's efforts resulted in two statutory amendments in Ontario, one permitting women to be admitted to law practice as solicitors: *An Act to Provide for the Admission of Women to the Study and Practice of Law*, S.O. 1892, c. 32, s. 1 and a further amendment permitting them to practise as barristers-at-law: *An Act to Amend the Act to provide for the admission of Women to the Study and Practice of Law*, S.O. 1895, c. 27, s. 1.

<sup>4</sup> In New Brunswick, Mabel Penury French's application was denied in 1905; see *In re French* (1905), 37 N.B.R. 359 (S.C.). Her application for admission as a lawyer in British Columbia was also denied in 1911 and a subsequent appeal to the Court of Appeal was dismissed; see *Re French* (1910-12), 17 B.C.L.R. 1 (C.A.). In 1915, Annie Macdonald Langstaff's application for mandamus to permit her to sit the examination preliminary to her becoming a student-at-law in Quebec was denied and this decision was upheld (with different reasons) on appeal; see *Langstaff v. Bar of Quebec* (1915), 47 R.J.Q. 131 (C.S.), and (1916), 25 R.J.Q. 11 (B.R.).

<sup>5</sup> In New Brunswick, the *Act to remove the Disability of Women so far as relates to the Study and Practice of the Law*, N.B.S. 1906, c. 5, provided that:

"1. Notwithstanding [sic] any law, regulation, by-law or custom to the contrary, women shall be admitted to the study of the law, and shall be called and admitted as barristers and attorneys, upon the same terms, and subject to the like conditions and regulations as men.

Section 2 of the Act gave retrospective approval to any women admitted to the study of the law prior to the enactment of this legislation.

In British Columbia, see S.B.C. 1912, c. 18. The legislative amendment in British Columbia used the same title as that in New Brunswick, and section 1 of the British Columbia legislation was identical in wording to that in New Brunswick, except that the British Columbia Act used the word "solicitors" where the New Brunswick Act used the word "attorneys". The British Columbia Act did not contain the retrospective clause (section 2) which appeared in the New Brunswick Act.

and had successfully completed all her studies and examinations when she requested the Council of the Barristers' Society of New Brunswick to recommend her for admission as a lawyer. The Council considered her request and passed a resolution recommending her for admission as a lawyer, "subject to the opinion of the court as to her sex being under existing laws a bar to her admission . . .".<sup>6</sup>

The Barristers' Society ratified the Council's resolution and authorized Mr. Connell, President of the Society, to present it to the court with the authorities relevant to the issue of whether a woman was eligible for admission as a lawyer. At issue was the meaning of the word "persons" in the *Barristers' Society Act*<sup>7</sup> which regulated admission to the practice of law, and both Mr. Connell and two other barristers argued forcefully that the word should be interpreted broadly so as to permit French to become a lawyer. Despite these arguments, however, the court unanimously concluded that the legislature's use of the word "persons", construed in the context of an exclusively male legal profession, could not have been intended to permit women's admission to the practice of law.

When French subsequently sought admission as a lawyer in British Columbia, her application was considered both on its own merits and as a request for transfer from New Brunswick to British Columbia. The British Columbia legislation, like that in New Brunswick, authorized the admission of qualified "persons",<sup>8</sup> but the details of the qualifications

<sup>6</sup> *In re French*, *supra*, note 4 at 359.

<sup>7</sup> C.S.N.B. 1903, c. 68; subsection 13(1), authorized the Society to make rules for "the admission of persons to the study of the law and the periods and conditions of study". (It is interesting that section 15, which excused from the Society's examinations any candidate holding a Bachelor of Civil Law degree from King's College in Saint John, used the masculine pronoun throughout.) The Rules and Regulations of the Barristers' Society, found in the Appendix to 36 N.B.R. also used the masculine pronoun when referring to candidates for admission to law practice. However, two sections of the *Interpretation Act*, C.S.N.B., 1903, c. 1, seemed to make masculine pronouns referable to females as well as to males: subsection 8 (31) provided that the word "person" included "any party or person . . . to which the context is capable of applying"; and section 10 stated that "Every word . . . importing the masculine gender [may extend] to females as well as males".

<sup>8</sup> Paragraph 37(3)(a) of the *Legal Professions Act*, R.S.B.C. 1897, c. 24 provided for the admission to law practice of "any person" who met the qualifications described therein. As well, paragraph 37(3)(b) provided for the admission to practice of:

[a]ny person being a British subject of full age, good conduct and repute, who has been duly called and admitted to practise . . . as a Barrister-at-Law in any of Her Majesty's Colonies, Dependencies, or Provinces of Canada; . . .

The section went on to describe the further qualifications and provisos, including, for example, that "he shall have resided in the Province during the said period of six months. . . ."

Subsection 10(13) of the British Columbia *Interpretation Act*, R.S.B.C. 1897, c. 1, provided that "Words importing . . . the masculine gender only shall include . . . females as well as males, and the converse." Subsection 10(14) also provided that "The word 'person' shall include any body corporate or politic, or party, . . . to whom the

were described in the statute with the use of masculine pronouns. The court concluded that "the Interpretation Act could not be used to bring about so radical a change"<sup>9</sup> in the law, and denied French's application for admission. Following the court's rejection of her application, however, French continued to work in a Vancouver law firm, and by chance her plight was drawn to the attention of Evelyn Fenwick Farris, an activist and co-founder of the University Women's Club of Vancouver.<sup>10</sup> It was because of Farris' persistence that the British Columbia legislature eventually passed an amending statute permitting women like French to practise law there.<sup>11</sup>

By contrast with French, Annie Macdonald Langstaff commenced her litigation after graduating from the Faculty of Law at McGill University.<sup>12</sup> She presented herself for the examination preliminary to becoming a student-at-law on July 7, 1914 and when the board of examiners refused to permit her to take the examination, she issued a writ of mandamus against the Bar of the Province of Quebec requesting a court order permitting her to take the examination.

In the Supreme Court, the Bar "strenuously"<sup>13</sup> opposed the application on three grounds, including the fact that Langstaff was a woman, "and what was still more objectionable, a woman under marital authority".<sup>14</sup> In considering this ground, the court decided that the use of the

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context can apply according to law."

According to a later source, French knew that she could "demand recognition as an interprovincial courtesy but wanted to be admitted by right and not by favour." See C. Mullins, *Mabel Penury French* (1986), 44 ADVOCATE 676 at 677. In the Court of Appeal, counsel for the Law Society of British Columbia (opposing French's application) suggested that French would obtain a "right and privilege denied to British Columbia women" if she were to be admitted pursuant to paragraph 37(3)(b). In the end, neither route was successful.

<sup>9</sup> *Re French, supra*, note 4 at 8.

<sup>10</sup> R.J. Pazdro, *Of British Columbia Suffragists and Barristers* (1980), 2:4 CAN. WOMEN'S STUDIES, 15 at 17.

<sup>11</sup> *Ibid.* For details of the statutory amendment, see *supra*, note 5.

<sup>12</sup> See B. Baines, *Women and the Law* in S. Burt, L. Code, and L. Dorney, CHANGING PATTERNS: WOMEN IN CANADA (Toronto: McClelland & Stewart, 1988) 157 at 159-60. Despite her rejection by the Quebec Bar, Annie Macdonald Langstaff worked for a law firm until she retired in 1965 at the age of 78. She was never admitted to the legal profession because by the time the Quebec legislature enacted the amending statute (for the admission of women) in 1941, both a law degree and an undergraduate degree were required for admission; Macdonald Langstaff had a law degree, but not an undergraduate degree. Baines, at 163, quoting M. Gillet, WE WALKED VERY WARILY: A HISTORY OF WOMEN AT MCGILL (Montreal: Eden Press Women's Publications, 1981) at 309. For general information on the history of women and the professions in Quebec, see M. Dumont *et al.*, QUEBEC WOMEN: A HISTORY (Toronto: The Women's Press, 1987) at 220.

<sup>13</sup> *Langstaff v. Bar of Quebec, supra*, note 4 at 132.

<sup>14</sup> *Ibid.* at 133. According to the case report at 132, however, Dame Langstaff was "separated as to property from Samuel Gilbert Langstaff". According to Baines, *supra*, note 12, at 163, quoting Gillet at 305, it has been suggested that "In a Province that did not grant divorce and that 'protected' its women to such an extent that husbands' authorizations in writing were required before they could contract any obligations, the fact that Annie Langstaff was separated from her husband set the seal on her lost cause."

masculine pronouns in the legislation could not be construed so as to include the feminine,<sup>15</sup> in the absence of proof of intent on the part of the legislature and citing both English and French laws to this effect.<sup>16</sup> Having denied Langstaff's application to sit the preliminary examinations, Mr. Justice Saint-Pierre expressed the hope that "her ambition in life should be directed towards the seeking of a field of labor more suitable to the sex and more likely to ensure for her the success in life to which her irreproachable [sic] conduct and remarkable talents give her the right to aspire."<sup>17</sup>

Thus, all three of the women's challenges to the courts were unsuccessful, even though their cases were otherwise quite distinctive. Whether the applicant had completed Society examinations (as French in New Brunswick) or a university law degree (as Langstaff in Quebec); whether the application was an original application for admission (as French in New Brunswick) or one for admission also by way of transfer (as French in British Columbia); whether the legislation used gender-neutral language and referred to "persons" (as did the legislation in both New Brunswick and British Columbia) or more specifically masculine pronouns (as in Quebec); and whether the profession supported women's admission as lawyers (as they apparently did in New Brunswick) or opposed it (as in both British Columbia and Quebec), resulted in no different consequences for the outcome of the three cases in the courts. In each case, the courts denied the claim that women could be lawyers,

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<sup>15</sup> The *Bar of the Province of Quebec Act* S.Q.(1886), c. 34 provided for the admission to the study or practice of the profession in Section Sixth [sic]. *E.g.* Section 43 provided that the candidate for admission to practice:

"[S]hall mention his name, surname, age, residence, whether he is a British subject by birth or naturalization, the date of his admission to study, of the registration of his certificate and of his indentures, . . .

The Civil Code of 1785 of France, chapter IV provided, however, for the admission of "persons" as barristers, and the Schedule to the Code provided expressly that "The masculine gender includes both sexes, unless it appears by the context that it is only applicable to one of them." Similarly, R.S.Q. 1909, art. 21 provided that "The masculine gender includes both sexes, unless it appears by the context that it is only applicable to one of them."

<sup>16</sup> The court referred to the U.K. decision *Bebb v. Law Society* (1913), 29 T.L.R. 634, 109 L.T. 36 (Ch. D.); aff'd [1914] 1 Ch. 286, 83 L.J. Ch. 363 (C.A.); and also to the French Civil Code. In relation to the French law, Mr. Justice Saint-Pierre stated:

"I will admit however that in France the obstacle in the way of the admission of the female sex to the exercise of the profession of the law which existed under the old "coutumes" and even under the Code Napoléon have since been removed, but it must be remembered that it was through special legislation that this result was obtained and not in virtue of the old coutume, nor yet under any of the law as embodied in the Code Napoléon, although it contained a disposition similar to that which is to be found in article 17th of our own code.

*Supra*, note 4 at 142.

<sup>17</sup> *Langstaff*, *ibid.* at 145.

upholding the male exclusivity of the legal profession until legislative action expressly permitted women to become lawyers.<sup>18</sup>

## 2. *The Legal Reasoning Denying the Claims:*

Despite the factual differences in the three cases, the legal reasoning on the part of the judges is remarkably similar. In French's case in New Brunswick, five judges heard the arguments and three wrote decisions.<sup>19</sup> The arguments included references to authorities which supported women's exclusion from the practice of law<sup>20</sup> and to those which recognized women's admissibility as lawyers.<sup>21</sup> Mr. Connell, on behalf of the Barristers' Society, also noted that Ontario had passed enabling legislation but that five states of the United States had admitted women as attorneys without enabling statutes.<sup>22</sup> His submissions were supported by another counsel who argued that there was no authority binding on the court which held that women were not at common law entitled to be admitted as attorneys in British courts.<sup>23</sup>

By contrast, Mr. Skinner, recorder of the city of Saint John, who also argued for the admissibility of women as lawyers, suggested that

<sup>18</sup> For an analysis of male exclusivity in the legal profession, see A. Sachs and J. H. Wilson, *SEXISM AND THE LAW: MALE BELIEFS AND THE LEGAL BIAS IN BRITAIN AND THE UNITED STATES* (New York: Free Press, 1979). In all provinces in Canada, women were admitted to the legal profession only after legislative amendments. The first women lawyers were admitted to practise in Alberta and Manitoba in 1915, in Saskatchewan in 1917, in Nova Scotia in 1918, in Prince Edward Island in 1926, and in Newfoundland in 1933. Women were not, however, admitted to the legal profession in Quebec until 1942. For a survey of women in the legal profession in Canada, see C. Harvey, *Women in Law in Canada* (1970-71) 4 MAN. L.J. 9, especially at 17-20.

<sup>19</sup> *In re French*, *supra*, note 4. Mr. Justice Tuck and Mr. Justice Hanington wrote separate opinions; Mr. Justice McLeod and Mr. Justice Gregory concurred in the opinion written by Mr. Justice Barker.

<sup>20</sup> *Ibid.* at 360. The authorities cited by Mr. Connell as *amicus curiae* for the Barristers' Society included *Chorlton v. Lings* (1868), L.R. 4 C.P. 374; *Beresford-Hope v. Sandhurst* (1889), 23 Q.B.D. 79 (C.A.); *Bradwell v. Illinois* 16 Wall. 130 (U.S. 1872); *Robinson's Case* 131 Mass. 376 (1889); *In re Leonard* 53 Am. Rep. 323 (Or. 1885); and 3 AM. AND ENG. ENCY. (2nd ed.), 285, 286 and 287.

<sup>21</sup> *Ibid.* The authorities cited by Mr. Connell included *Ricker's Case* 66 N.H. 207 (1890); *In re Hall* 47 Am. Rep. 625 (Conn. 1882); *Re Thomas* 13 Lawyers' R. 538 (Colo. 1891); and *Cummings v. Missouri* 4 Wall. 277 (U.S. 1866).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* Mr. Bustin is not further identified in the report of the decision. In his argument, he suggested that *Chorlton v. Lings* and *Beresford-Hope v. Sandhurst* were not relevant to the issue of the admissibility of women as lawyers: "[I]f they are not excluded by the common law on the ground that a woman is ineligible to hold a public office, and it is submitted they are not, for the office of an attorney-at-law is not a public office. . .".

In the article by Mullins, *supra*, note 8 at 676, Mr. Bustin is identified as Stephen Bustin, the senior partner at Bustin & Porter in Saint John — the law firm where French was articulated. Mullins' account also reported that French "led her classes" at King's College Law School in Saint John, from which she graduated with a bachelor of civil law degree in June 1905.

the court should decide the case "on the real merits" since there was no English authority that was binding and the American authorities were "about evenly balanced".<sup>24</sup> Further, the Ontario statute was "somewhat peculiar" and might be taken as declaratory.<sup>25</sup> Thus, in considering the real merits, he suggested that:

The trend of the recent legislation, both political and judicial, is to remove the disabilities of women and open to them every avenue leading to avocations which may enable them to earn a livelihood. Why delve into the dark ages for a precedent to justify holding them incompetent or by law disqualified from exercising a calling to which we have every reason to believe, from their successes in our universities and in the professions which have been opened to them, they will bring to bear equal intelligence, greater diligence and devotion to duty than men?<sup>26</sup>

In responding to the submissions of counsel, Chief Justice Tuck dismissed the arguments based on "the advanced thought of the age and the right of women to share with men in all paying public activities"; as he stated laconically, "they did not mention either police constables or the army."<sup>27</sup> For his part, he thought that women should not compete with men and that they should attend to "their own legitimate business."<sup>28</sup> He concluded that the word "persons" in the statute applied only to males since "it was never in the contemplation of the legislature that a woman should be admitted an attorney of this court."<sup>29</sup> Mr. Justice Hanington generally agreed, noting that in most other jurisdictions, the admission of women as lawyers had been accomplished by statutory amendment. Thus, in his view:

The remedy in this case is with the legislature and not with this court. Whatever our individual opinions may be as to the advisability of extending the right to women, we are bound by the law of this country as we now find it.<sup>30</sup>

These negative views about the admissibility of women as lawyers were even more strongly expressed in the decision of Mr. Justice Barker. Citing *Bradwell v. Illinois*<sup>31</sup> and *Robinson's Case*<sup>32</sup> at some length, he affirmed the idea of separate spheres for men and women, "founded in the divine ordinance as well as in the nature of things",<sup>33</sup> and concluded that there was no right at common law for women to practise as attorneys.

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<sup>24</sup> *In re French*, *supra*, note 4 at 360.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 360-361.

<sup>27</sup> *Ibid.* at 361.

<sup>28</sup> *Ibid.* at 362.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at 363.

<sup>31</sup> *Supra*, note 20.

<sup>32</sup> *Ibid.*

<sup>33</sup> *In re French*, *supra*, note 4 at 365-366.



He also concluded that the statute's use of the gender-neutral word "persons" could not signify the admissibility of women to the legal profession because when the statute was first enacted in 1846, no women were lawyers and therefore the word "persons" meant only men. Thus, in his view, the statute had never been intended to make "the radical change" suggested by the applicant, and "by every rule of construction applicable to such a case th[e] court [was] bound to hold that no such change [had] been made."<sup>34</sup>

Both the argument about the existence of a right at common law and the argument as to whether the word "persons" in the statutes contemplated women reoccurred when French sought admission to the legal profession in British Columbia. Counsel for the Law Society submitted that women had no common law right to be admitted as lawyers, and that the use of the word "persons" in the statute was not sufficient as an express statutory authority for the admission of women; he cited *In re French* in New Brunswick as authority for both these arguments.<sup>35</sup> By contrast, counsel for French argued that the passage of legislation in both Ontario and in New Brunswick was merely declaratory of the existing law. He also argued that the word "persons" should be broadly interpreted, and that the B.C. statute made provision for the admission by transfer of barristers and solicitors, duly qualified, from other provinces; since French was a barrister and solicitor, duly qualified in New Brunswick, she was clearly entitled to be admitted.

At the initial hearing, Mr. Justice Morrison agreed with the Law Society that the words of the statute could not be interpreted so broadly as to admit women as lawyers, and on appeal, the three judges in the Court of Appeal unanimously agreed with the initial decision.<sup>36</sup> According to Chief Justice MacDonald, the "trend of authority at common law [was] that women [were] not eligible" for admission as lawyers.<sup>37</sup> There was no authority supporting the applicant's position in Canada or in England, and although there were some American authorities in her favour, the one decided by the Supreme Court of the United States [*Bradwell v. Illinois*] denied the applicant's claim. Even if there were "cogent reasons for a change based upon changes in the legal status of women, . . . [the court would be] usurping the functions of the Legislature rather than discharging the duty of the Court, which is to decide what the law is, not what it ought to be."<sup>38</sup>

Mr. Justice Irving agreed. In deciding that the word "persons" did not include women, he referred to *In re Duke of Somerset*,<sup>39</sup> a decision

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<sup>34</sup> *Ibid.* at 371.

<sup>35</sup> *Re French*, *supra*, note 4.

<sup>36</sup> *Ibid.* Both Chief Justice MacDonald and Mr. Justice Irving wrote decisions on the appeal, and Mr. Justice Galliher concurred in the decision to dismiss French's appeal.

<sup>37</sup> *Ibid.* at 4.

<sup>38</sup> *Ibid.* at 4-5.

<sup>39</sup> (1887), 34 Ch. D. 465.

in 1887 concerning the inability of a woman to be guardian ad litem to an infant; and the *MIRROR OF JUSTICE*, a legal book believed to have been written at the time of William the Conqueror.<sup>40</sup> He also referred to the statutes of British Columbia concerned with the admission of lawyers, and concluded:

To my mind, having regard to the common law disability above referred to, this fact that no woman has ever been admitted in England, is conclusive that the word 'person' in our own Act was not intended to include a woman. The context of our Act refers to a profession for men, and men alone.<sup>41</sup>

Thus, the fact that amending legislation had been enacted in both Ontario and in New Brunswick to enable women to be admitted to the legal profession demonstrated that the British Columbia statute would similarly require amendment to accommodate French's wish to become a lawyer there.

The reasoning in Langstaff's case in Quebec is remarkably similar to that in both cases involving French, even though Langstaff's case involved the interpretation of the Quebec Civil Code. At the initial hearing, Mr. Justice Saint-Pierre dismissed Langstaff's application for mandamus, and his decision was confirmed on appeal. However, one judge in the appeal court, Mr. Justice Lavergne, dissented from this conclusion, the only judge to do so in any of the three litigated cases about women lawyers.

In relation to the issue of whether women could be admitted as lawyers, counsel for Langstaff argued that the use of the masculine

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<sup>40</sup> *Re French*, *supra*, note 4 at 6. Citing *PULLING ON ATTORNEYS*, 3rd ed., at 8, he stated that this work stated that "femes ne poient estre attorneys". Mr. Justice Irving referred to this work as the *MIRROR OF JUSTICE*, but it is referred to as the *MIRROR OF JUSTICES* in a note in A. Pulling, *THE ORDER OF THE COIF* (London: William Clowes and Sons, 1884). Pulling acknowledges that "the antiquity and even the authenticity" of the book have been "the subject of controversy":

The book first appeared in a printed form in 1642; but there are numerous very old MS. copies, one among the Harl.MSS. in the British Museum. . . In the English printed edition, 1768, by William Hughes of Gray's Inn, the 'Mirror of Justices' is boldly stated to have been written in the old French long *before the Conquest*. . . . (Emphasis in original)

<sup>41</sup> *Ibid.* In the later case of *Bebb v. Law Society*, *supra*, note 16 at 629 there was considerable disagreement about the authority of the *MIRROR OF JUSTICES* between counsel in the case. However, the Master of the Rolls, Cozens-Hardy stated conclusively that:

The Mirror may not be, and I think is not a work of the highest possible authority, but the reference to the Mirror, and seeing what antiquity has said, does not in the least, in my view, take away from the opinion of Lord Coke. And the opinion of Lord Coke on the matter of what is or what is not the common law is one which requires no sanction from anybody else.

The three judges in the *Bebb* case also unanimously concurred in the conclusion that women could not be admitted as solicitors in England.

pronoun should be interpreted so as to include both sexes,<sup>42</sup> and that there was nothing in the context justifying male exclusivity in the legal profession. Indeed, "it would be contrary to the spirit of the Canadian system of law and particularly to that of the province of Quebec to permit said tendency to be controlled [sic] and hampered by antiquated rules and usages. . . ."<sup>43</sup> In his decision, Mr. Justice Saint-Pierre carefully noted that his role was not to decide whether it would be "more fair and more reasonable" to permit women to become lawyers, but only whether the legislature had intended to include women when it used the male pronoun in the statute.<sup>44</sup>

In ascertaining the legislature's intention, Mr. Justice Saint-Pierre decided that he must have regard to "the context and purpose of the whole act:"<sup>45</sup>

Now, taking that rule as a guide, who would presume to assert that in the *Militia Act*, for instance, or in the Acts dealing with the *organization of the police force* or of the *fire brigade*, the pronoun "He" should be construed as including the female as well as the male sex?

. . .

A woman may be as brave as any man, and scenes which are in the present time, daily depicted to us, show that many of them are proving their usefulness as nurses on the field of battle; but the physical constitution of woman makes it plain that nature never intended her to take part along with the stronger sex in the bloody affrays of the battle field.

. . .

I would put within the range of possibilities though by no means a commendable one, the admission of a woman to the profession of solicitor or to that of *avoué*, but I hold that to admit a woman and more particularly a married woman as a *barrister*, that is to say, as a *person who pleads cases at the bar before judges or juries in open court and in the presence of the public*, would be nothing short of a direct infringement upon public order and a manifest violation of the law of good morals and public decency.<sup>46</sup>

In addition to these concerns, the judge declared that the absence of women, "either in literary France, or in practical England" in the legal profession demonstrated the inappropriateness of such a role for women. "Who were the best judges of their fitness for such struggles, if they themselves were not?" he asked.<sup>47</sup> Citing *Bebb v. Law Society*,<sup>48</sup> he thereupon dismissed the application.

The initial decision in *Langstaff* is particularly interesting for its reasoning because by 1915 there was an English authority denying wom-

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<sup>42</sup> Paragraph 9 of art. 17, Civil Code, provided that "the masculine gender includes both sexes, unless it appears by the context that it is applicable to only one of them." See also the Petitioner's submissions in *Langstaff*, *supra*, note 4 at 137.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* at 137-138.

<sup>45</sup> *Ibid.* at 139.

<sup>46</sup> *Ibid.* (Emphasis in original).

<sup>47</sup> *Ibid.* at 140.

<sup>48</sup> *Supra*, note 16.

en's eligibility to practise law: the *Bebb* case, reported in the previous year. Thus, unlike the situation in French's two cases, there was a legal precedent in England on the issue of women in the legal profession when it came before the court in Langstaff's case. Yet, because Langstaff's case arose in Quebec, the only Canadian province where such an English precedent was not authoritative, it was merely cited and was not determinative of the outcome.

More significantly, as the passage quoted from the judgment of Mr. Justice Saint-Pierre demonstrates, the Langstaff case was argued during World War I, at a time when many prevalent ideas about roles for both men and women were being challenged by the necessities of war. Yet, despite actual evidence of new roles being assumed by women in the War, Mr. Justice Saint-Pierre preferred to sanction continuing distinctions in work appropriate to men and women. Indeed, his views about the inability of women to participate in the public aspects of a barrister's role strongly reflect the "separate spheres" doctrine enunciated by Mr. Justice Barker in French's case in New Brunswick, words then borrowed from *Bradwell v. Illinois* decided in 1873. Thus, even though the English decision in *Bebb v. Law Society* was not regarded as authoritative in Langstaff's case, the common law tradition which recognized long-standing distinctions between men and women exercised a powerful influence on the legal reasoning in the case.

The existence of new ideas about roles for women is, however, more evident in the appeal court decision, where Mr. Justice Lavergne dissented from the majority's conclusion to dismiss the appeal.<sup>49</sup> Focusing exclusively on the issue of whether women were eligible to practise law, Mr. Justice Lavergne stated that only the law of the Civil Code was relevant to determine the issue, and that according to that law, women were eligible for admission as lawyers.<sup>50</sup> In his view, the fact that the law expressly stated that women could not be notaries,<sup>51</sup> could not be elected to Parliament, and could not serve on juries meant that the leg-

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<sup>49</sup> *Langstaff* (B.R.), *supra*, note 4. Five judges heard the appeal (Chief Justice Archaibeault, Mr. Justice Trenholme, Mr. Justice Lavergne, Mr. Justice Carroll, and Mr. Justice Pelletier) and four wrote judgments.

<sup>50</sup> *Ibid.* at 12. According to Lavergne, J., decisions from England, the United States, and other Canadian provinces were not relevant to the decision. As he stated: Je n'ai pas, je considère, à m'enquérir de la nature du droit dans les autres pays, ou dans les autres provinces. Notre loi est notre Code civil; c'est aussi l'acte d'interprétation de Québec savoir l'article 21 des S. ref., 1909.

<sup>51</sup> *Ibid.* at 13. The legislation concerning admission to the Bar was adopted the same year as the statute about admission as a notary, and the notarial statute had provided expressly: "Pour être notaire il faut être du sexe masculin. . . ."

islature's failure to prohibit women from becoming members of the legal profession signified an intent to permit them to do so:

Le candidat à l'étude du droit peut être ou du sexe masculin ou du sexe féminin sans distinction. . . . Si le législateur avait voulu dire qu'une femme ne pourrait être avocat, il l'aurait dit.<sup>52</sup>

Despite these views, the majority of the court agreed with the conclusion in the lower court and dismissed Langstaff's appeal. According to Chief Justice Archambeault, the fact that no women had been admitted to the Bar demonstrated the absence of legislative intent to include women in the interpretation of eligibility requirements for the practice of law. Accordingly, it was a matter for the legislature and not for the court.<sup>53</sup>

The consistency of outcome and (almost perfect) unanimity in legal reasoning in these three cases mask the fact that the judges exercised choices in their decisions. The absence of any authoritative precedent in French's case in New Brunswick, for example, created an opportunity for a more generous interpretation of the word "persons" in the statute. Her qualification as a barrister and solicitor in another province in Canada similarly provided an opportunity for her to be admitted pursuant to the gender-neutral transfer provisions of the statute in British Columbia. And the reasoning of the sole dissenting judge in Langstaff's case on appeal offered a compelling justification for interpreting the statute more liberally than the majority of judges chose to do.

Thus, in choosing to accept some earlier decisions as precedents while rejecting others, and in choosing to accept one version of legislative intent rather than others, the judges in these cases were expressing preferences among competing legal arguments.<sup>54</sup> What is at issue then is the reason for their choice: why did they choose to maintain the *status quo* of male exclusivity in the legal profession rather than permit women to become lawyers too?

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<sup>52</sup> *Ibid.* See also at 14, where Mr. Justice Lavergne considered the practices of other countries, and noting that women were able to practise as lawyers in many states of the United States, suggested that "[o]n ne dira pas que les États-Unis sont des pays barbares." And, in an effort to get to the real issue, he concluded:

En quoi l'idée d'admettre les femmes à cette profession, pourrait-elle répugner? Je dis cela simplement en réponse au savant juge de première instance, qui me paraît scandalisé de ce qu'il ait pu entrer dans l'idée d'une femme de se faire admettre à l'étude du droit. Je n'en dirai pas davantage, je crois que les femmes devraient être bienvenues à être admises aux professions libérales, notamment à celle du Barreau.

<sup>53</sup> *Ibid.* at 20.

<sup>54</sup> The nature of judicial choice was explored more fully in an earlier article on the admission cases and the *Persons Case*; see Mossman, *Feminism and Legal Method: The Difference it Makes* (1986) 3 AUST. J. OF L. AND SOCIETY 30; and (1987) 3 WISC. WOMEN'S L.J. 147.

### 3. *The Context of Legal Decisions about Women as Lawyers:*

The relationship between community ideas and judicial decision-making is one of complexity and constant change, and it is difficult to demonstrate causal connections precisely.<sup>55</sup> Yet, the broad social context within which judicial decisions occur provides at least some evidence of community values and generally-accepted ideas about the choices required of judges in the legal system. In this context, the secondary legal literature in Canada in the early twentieth century offers valuable insights about the issues before the courts in these cases about women and the practice of law.

In the late nineteenth century, the legal profession in Canadian provinces communicated by means of law journals which reported on topics of interest both in Canada and abroad. The CANADA LAW JOURNAL, for example, reported in 1869 on the admission of Arabella Mansfield to the bar of Iowa,<sup>56</sup> and a decade later on the successful passage of legislation permitting women to be admitted to the bar of the United States.<sup>57</sup> In both these reports, there is a mixture of light-hearted levity

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<sup>55</sup> For an excellent analysis of the law's "uneven development" in relation to changing societal conditions, see C. Smart, *Feminism and Law: Some Problems of Analysis and Strategy* (1986) 14 INT. J. OF SOC. OF L. 109.

<sup>56</sup> See (1869) 5 CAN. L.J. 307. In part of a letter to the editor, it was suggested that:

This will gladden the eyes of John Stuart Mill; in fact, the philosopher is thrown away in benighted (sic) England, he should go to the land when (sic) the rights of married women are fully understood, and there learn a thing or two on the subject of his last hobby. . . . But really it is hardly fair to the rest of the profession in Iowa, to permit a charming fair one to pit herself against a learned brother in argument before a jury of twelve men. The latter would simply have no chance at all. . . . (Emphasis in original)

<sup>57</sup> See (1879) 15 CAN. L.J. 146. A short note reported that Myra Bradwell (of the *Chicago Legal News*) was very cheerful about the passage of the legislation. The note stated that:

She contests the proposition that it will be necessary to have a nursery attached to the Court-room, and addressing herself to her noble brothers-in-law, promises on behalf of professional womankind that they will be very respectful, and prays in technical language 'don't *man-dam-us* before we have had a hearing.

The same note reported that Bella Lockwood had become the first woman to have her name placed on the roll of Attorneys of the Supreme Court. Interestingly, the next year, the CANADA LAW JOURNAL reported that Bella Lockwood had herself moved the admission ("in a clear audible tone") of a lawyer from South Carolina who was a negro (unnamed in the report). As it happened that Joel Parker, a democratic candidate for presidential nomination, was admitted on the same day, the report exclaimed:

The most visionary prophets of the last decade would scarcely have ventured to predict that a negro upon motion of a woman, who is a qualified counselor before that court, would have been enrolled among the counselors of the Supreme Court of the United States together with a democratic candidate for the presidency.

See (1880) 16 CAN. L.J. 160.

about women as lawyers which masks latent fears about potential changes implicit in the end of male exclusivity in the legal profession.

The tone of editorial writing in Canada became more pointed in 1892 when Clara Brett Martin sought admission as a solicitor in Ontario. One writer suggested that it would be difficult for her to qualify because "there is no way of compelling a solicitor to article clerks. . . and without office training it would be useless to attempt to qualify as a solicitor."<sup>58</sup> The writer conceded, however, that she might qualify by attendance at the Law School (Osgoode Hall), but suggested that:

Here the position is still embarrassing. One can hardly imagine the grave and staid principal lecturing to a bevy of ladies on the inability of married women to contract, the measure of damages in breach of promise cases, the very grave necessity for corroborating their own oaths as to the promise, the mysteries of 'the Clitheroe case', and sundry other matters peculiar to themselves and their gentle sex. Equally awkward will it be for the Real Property lecturer to explain the origin and varieties of estates tail, the limits of the rule against perpetuities, the requisites of an estate by the courtesy. . . .<sup>59</sup>

The writer also noted, with some relief, that "the Bar is still closed, however. . . ."<sup>60</sup>

Six months later, the same journal presented an editorial note on the Benchers' decision to admit women as solicitors, reporting that the decision had been achieved by a vote of 12 to 11, and criticizing the Benchers for making a decision on such "an extensive and radical question of politics" without a vote of the profession generally. The strength of feeling against the Benchers' decision is evident in the concluding words of the note:

We feel confident that the good sense of the Profession is against the measure. To argue that many women practise law in the United States is of no avail. Monkeys are mimetic. Men should act upon reason and judgment.<sup>61</sup>

A month later, the editor of the *WESTERN LAW TIMES* echoed these views, suggesting that if women were suited to be solicitors, there was no reason to prevent their admission as barristers, or their appointment as judges or election as legislators, or to question their fitness to serve on juries.

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<sup>58</sup> (1892) 12 CAN. L.T. 111 at 112.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> (1892) 12 CAN. L.T. 296 at 297. The same journal includes short reports about the legislative action and the problems with the wording of the amendment. *See also* at 219-220.

"The truth of course is that they are not fitted for any of these positions" asserted the editorial.<sup>62</sup>

These sentiments reoccurred with force when the Ontario legislature amended its legislation again to permit the Law Society to make rules for the admission of women as barristers. Because "admission to the Bar means a qualification for the Bench", an editorial in the CANADA LAW JOURNAL in 1895 suggested that it was inappropriate for women to be barristers. To allow women to become barristers but prevent them from seeking appointments to the Bench was "unreasonable", so the only "legitimate way of keeping women off the Bench is by excluding them from the Bar."<sup>63</sup> In this way, the editorial writer answered his own rhetorical question: "Is the public prepared to see, and is it in the public interest that it should see, female judges on the Bench?"<sup>64</sup>

In February 1897, however, the CANADA LAW JOURNAL, gallantly rising to the occasion, published a congratulatory note to Clara Brett Martin on her call to the Bar of Ontario. The note expressed some diffidence about whether to refer to her as "brother" or "sister", but wished her success in "her chosen profession."<sup>65</sup> Yet, consistent with the earlier concerns of the journal's editorial writers, the note also stated:

At the same time it will not be disloyal to her as now one of the brethren of the gown, also to express the hope that she may be the one brilliant exception to the time-honoured rule which has hitherto closed our ranks to those who are not of the male persuasion.<sup>66</sup>

Despite the wish that Clara Brett Martin would be a "brilliant exception", other women in Ontario also chose to become lawyers. Their numbers were initially small, leading one commentator in 1918 to express the view that "[t]he admission of women to the practice of law has had in Ontario no effect upon the Bar or the courts; the public and all concerned regard it with indifference. . . ."<sup>67</sup> In a note in the CANADIAN LAW TIMES

<sup>62</sup> (1893) 4 W.L.T. 1 at 1-2. In a subsequent issue, the same journal inserted a comment on the report of Ontario's decision which appeared in the LONDON LAW JOURNAL. The LONDON LAW JOURNAL had reported that the decision to admit women as lawyers in Ontario had occurred "with the largest majority yet recorded." The editor's note in the WESTERN LAW TIMES asserted that:

The expression the 'largest majority yet recorded' is most misleading. The resolution was carried by the casting vote of the chairman, practically under duress, and against the wishes, we firmly believe, of the overwhelming majority of the legal profession in our sister province.

See (1893) 4 W.L.T. 30.

<sup>63</sup> (1895) 31 CAN. L.J. 253 at 254.

<sup>64</sup> *Ibid.*

<sup>65</sup> (1897) 33 CAN. L.J. 133.

<sup>66</sup> *Ibid.*

<sup>67</sup> William Renwick Riddell, *Women as Practitioners of Law* (1918) 18 J. COMPAR. LEGISLATION 200 at 205. This article contains an excellent summary of the process by which Clara Brett Martin was admitted as a lawyer in Ontario, as well as details about some of the early women lawyers in Ontario and in the United States.



about this article's conclusion, however, the editor suggested that "[p]erhaps the vigilance of the male lawyers has something to do with the failure of the ladies to create a revolution in the profession. . . [since] male barristers have pursued and married three out of the eight ladies on the books of the Law Society of Upper Canada."<sup>68</sup>

Thus, just as the judges in the admission cases began their legal analysis with the idea that the legal profession was male only and that women were not suited to its demands, so the writers in the law journals expressed their preference (both vehemently and more light-heartedly) for the retention of a male legal profession. Moreover, the views of these writers of legal editorials are helpful in illustrating the broader social context, within which judges considered the claims of women for admission as lawyers, and in explaining the reasons for their judicial choices. "Invisible" behind their legal arguments and other comments was a fundamental acceptance of different roles for men and women, and a clear understanding that the legal profession's male exclusivity was "founded in the divine ordinance as well as in the nature of things".<sup>69</sup>

Thus, ideas about differentiated gender roles provide the key to understanding these cases about the admission of women to the legal profession. The challenge to male exclusivity in the legal profession occurred within a context of industrial change that, particularly after World War I, provided new opportunities for women for paid work.<sup>70</sup> At the same time, however, ideas about "separate spheres" remained prevalent, especially among upper and middle class professionals including lawyers and judges.<sup>71</sup> As is evident in the comments in Langstaff's case, judges were acutely aware of new roles for women at the same time that they dismissed them as exceptional in the face of wartime needs. Just as in philosophy the idea of separate spheres for men and women was expressed as the distinction between the public and the private,<sup>72</sup> so in law it reinforced the idea that the legal profession was "for men only".

In early twentieth century Canada, the idea of "lawyer" was male, both in legal theory and in the ideas of most members of society; and since women were not male, it was incomprehensible that they should be lawyers. For this reason also, the male standard of the idea of "lawyer"

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<sup>68</sup> (1919) 39 CAN. L.T. 223.

<sup>69</sup> Mr. Justice Barker in *In re French*, *supra*, note 4 at 365, quoting *Bradwell v. Illinois*, *supra*, note 20.

<sup>70</sup> See, e.g. G.S. Lowe, *Women, Work and the Office: The Feminization of Clerical Occupations in Canada, 1901-1931* in V. Strong-Boag and A.C. Fellman, *RETHINKING CANADA: THE PROMISE OF WOMEN'S HISTORY* (Toronto: Copp Clark Pitman, 1986) at 107.

<sup>71</sup> Constance Backhouse has demonstrated how lawyers and judges distinguished the roles of women in the context of enforcing statutes about prostitution and rape. See e.g., C. Backhouse, *Nineteenth-Century Canadian Rape Law 1800-1892* in D.H. Flaherty, ed., *ESSAYS IN THE HISTORY OF CANADIAN LAW*, vol. 2 (Toronto: The Osgoode Society, 1983) 200.

<sup>72</sup> See e.g., J.B. Elshtain, *PUBLIC MAN, PRIVATE WOMAN* (Princeton, N.J.: Princeton Univ. Press, 1981).

was used as the basis for the amending statutes enacted in both New Brunswick and British Columbia, both of which provided for the admission of women "on the same terms as men".<sup>73</sup> In this way, the legislative amendments confirmed that the idea of lawyer was male at the same time that they permitted women who conformed to the "male lawyer" standard to be admitted to the legal profession. In such a context, the admission of women to the legal profession in Canada represented a formidable challenge to male exclusivity in the profession, but one which did not fundamentally challenge the existing male standard of lawyering. Women succeeded in becoming lawyers in Canada, but only by failing to overcome the "invisible" structures of patriarchy.<sup>74</sup>

### III. WOMEN AND LEADERSHIP IN THE LEGAL PROFESSION

Despite these inauspicious beginnings for women lawyers, however, much had changed for women in the legal profession by the 1980's. By 1987, for example, there were over 3500 women who were current members of the legal profession in Ontario, representing about 18.6% of the total number of lawyers in the province.<sup>75</sup> Moreover, since law schools had experienced a significant increase in the number of women applicants over the preceding two decades, close to 50% of law school entry classes in Ontario in 1987 were women.<sup>76</sup> On the basis of such equality in numbers, most observers might readily agree with the optimism of a comment written several decades earlier:

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.<sup>77</sup>

#### 1. *The Current Status of Women Lawyers in Canada:*

Yet, there is already some evidence that this confident assertion may prove misleading. Both in Canada and in the United States, women lawyers appear to be less well-represented in the prestigious and highly-

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<sup>73</sup> *Supra*, note 5.

<sup>74</sup> *Supra*, note 1.

<sup>75</sup> According to the records of the Law Society of Upper Canada, there were 19,441 members in good standing (that is, excluding deceased, suspended, and disbarred members) on June 30, 1987 and 3625 of those were women. See LSUC computer printouts: analysis of members by sex and status.

<sup>76</sup> In January 1986, the *Globe and Mail* reported that the first year class at the University of Windsor included more than 50% women for the first time, while the entrance rates for women at other common law schools in Canada hovered "around 35 to 45%". See M. Strauss, "Women law students outnumber the men at Windsor faculty" *Globe and Mail* (January 29, 1986) at A16. The report also noted that the civil law universities had admitted more women than men to their first year programs for a number of years, l'Université de Laval, since 1979 and l'Université de Montréal, since 1981.

<sup>77</sup> These words were written by Mary Appleby, then a student at Osgoode Hall Law School, in the student newspaper *Obiter Dicta* in 1934.

paid sectors of the legal profession.<sup>78</sup> In the hearings before the ABA Commission on Women in the Legal Profession in 1988, for example:

[S]everal witnesses emphasized the great strides women have made in entering and succeeding in the profession, [but] most participants at the hearings expressed frustration and disillusionment that the 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.*<sup>79</sup>

Similarly, in their study of lawyers in Toronto, Hagan, Huxter and Parker concluded that women were disproportionately represented in the lower levels of the legal profession in subordinate positions with little autonomy in their work.<sup>80</sup> Although there is still relatively little data because of the recent entry of large numbers of women to the profession, the study concluded that women had almost as great a chance as men to reach the *top* of the profession but that there were significant disparities of rep-

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<sup>78</sup> A recent poll of lawyers in Canada disclosed that 57% of lawyers believed that women are discriminated against in their law offices; and 71% believed that most allegations of discrimination in law offices are substantiated. See "Gender Discrimination: A Tricky Question" *Canadian Lawyer* (March 1988) 8. The report of the poll included comments from an Edmonton lawyer who stated that "an Alberta justice has been overheard as saying that the 'experiment' of having women in the profession was a failure and they should now return to the kitchen."

<sup>79</sup> (Emphasis added) "Summary of Hearings, ABA Commission on Women in the Profession" (February 1988) at 2 [hereinafter *Summary of Hearings*]. For further information on women in the legal profession in the United States, see the special report on *Women in Law: the Glass Ceiling* in A.B.A.J. (June 1988).

<sup>80</sup> J. Hagan, M. Huxter and P. Parker, *Class Structure and Legal Practice: Inequality and Mobility among Toronto Lawyers* (Unpublished paper, 1987). This study characterized working conditions in terms of capitalists and working class categories. According to this characterization, the authors concluded:

Women are significantly and disproportionately under-represented among the managerial bourgeoisie, the supervisory bourgeoisie, and small employers, while they are significantly and disproportionately over-represented among semiautonomous employees, workers and the surplus population. If the latter three classes are combined, 61.8 per cent of the women are included, as compared to 32.5 per cent of the men. So women are about twice as likely as men to be found in this combined 'underclass'.

This conclusion is not unlike that reached by Barry Adam and Kathleen Lahey in their earlier study of the graduates of Ontario law schools in 1974. See B. Adam and K. Lahey, *Professional Opportunities: A Survey of the Ontario Legal Profession* (1981) 59 CAN. BAR REV. 674. The demography of the Canadian legal profession is also reviewed in H. Arthurs, R. Weisman and F. Zemans, *Canadian Lawyers: A Peculiar Professionalism* in R. Abel and P. Lewis, eds, *LAWYERS IN SOCIETY*, vol. 1, *THE COMMON LAW WORLD*, (Berkeley: University of California Press, 1988) 123, at 133. The authors briefly summarize some information about women in the profession, concluding that women are not found "in proportionate numbers in all types of practices".

resentation by gender at the *lower* end of the profession.<sup>81</sup> Moreover, even for those women who reached the higher levels of the profession, the study results showed that they did "not benefit as much in their earnings as [did] men when they practice[d] in traditionally male areas, when they gain[ed] experience, or when they [became] partners in firms."<sup>82</sup>

These findings are similar to the results of a national study of lawyers' earnings in Canada.<sup>83</sup> Based on census figures for 1971 and 1981, the study showed that in 1981, female lawyers were five years younger, on average, than male lawyers, but that a much smaller percentage of female lawyers were married, with larger proportions either divorced, separated or single.<sup>84</sup> Over one-half of the female lawyers were salaried, compared with thirty per cent of the males, and a larger percentage of female lawyers practised in cities.<sup>85</sup>

In comparisons of earnings, moreover, the study found that male lawyers earned more than female lawyers: for 1980, female lawyers in private practice earned an average of \$24,509 while male lawyers earned an average of \$42,405.<sup>86</sup> These numbers must be further assessed, of course, to take account of the younger ages of female lawyers as a result of their more recent entry to the profession. However, even comparisons of lawyers by age groups in this study showed that the earnings of female lawyers started at a lower level (\$22,000 at age 30 in 1980) and rose much more slowly than did the earnings of male lawyers:

Consequently, although female lawyers earn about 27 per cent (\$8000) less than male lawyers at age 30, the differential increases to 37 per cent (\$15,000) by age 35, and to 39 per cent (\$20,000) by age 40. The largest differential (about \$23,000) occurs at age 50.<sup>87</sup>

The study attempted to account for a number of variables which might affect the differences in earnings of men and women lawyers, but concluded that there was an "earnings differential" of approximately \$9000

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<sup>81</sup> Hagan, *et al.*, *ibid.* The study measured the proportion of men and women in the "working class" of the profession from entry to six years, and then from six to eleven years of practice. Up to six years, 56.7% of women and 43.3% of men worked in the working class category; after six years of practice, 23.5% of women remained in the working class, compared to 13.5% of the men. As the study also demonstrated, "Women relative to men lawyers are significantly and disproportionately in the surplus population, both before (2.4 compared to 9.8%) and after (1.6 compared to 9.3%) the six year break-point." *Ibid.* at 24.

<sup>82</sup> J. Hagan, "Highlights from a Study of Toronto Lawyers" (CBAO Annual Institute, Program on Women in the Legal Profession: February 1988), at 2.

<sup>83</sup> D. Stager and D.K. Foot, *Earnings and Employment of Female Lawyers* (Unpublished: 1987). An excellent summary of surveys and information sources on lawyers in Canada is found in D. Stager, *STATISTICAL INFORMATION ON LAWYERS IN CANADA* (Ottawa: Statistics Canada, 1986).

<sup>84</sup> Stager and Foot, *ibid.* at 6.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 8.

<sup>87</sup> *Ibid.* at 8-9.

(in 1980) which was not explained by the variables in the model. The authors agreed with another commentator who had noted that:

[A]lthough this residual has traditionally been called discrimination, it is really 'a measure of our ignorance', and that the male/female differential is 'a complex matter that yields its secrets only grudgingly'.<sup>88</sup>

The disadvantaged position of women lawyers in Canada is similar to that in other jurisdictions. In a comparative study of lawyers in several different countries,<sup>89</sup> Richard Abel found that there were cross-cultural similarities in the high rate of women's entry to the profession over the past two decades,<sup>90</sup> and also in the difficulties experienced in obtaining apprenticeship positions and permanent employment,<sup>91</sup> and in disparities

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<sup>88</sup> *Ibid.* at 12, referring to R.K. Filer, *Sexual Differences in Earnings: The Role of Individual Personalities and Tastes* (1983) 19 J. HUMAN RESOURCES 408. In discussing this aspect of discrimination, Stager and Foot, *ibid.* at 11, also acknowledged the homogeneity of legal education and training, and the possibility that such homogeneity may reduce other variables so as to permit the identification of sex discrimination in the legal profession more readily than in some other occupational groupings. As they stated:

Because the professional education and training of lawyers is more homogeneous than for most other major occupations, it is possible to examine the male/female earnings differential for evidence of discrimination in a setting where the occupation, industry and education variables are so narrowly defined that sample heterogeneity can be greatly reduced.

The authors also suggest, at 13, that hours worked and field of work may have some impact on the differential, although they were unable to be conclusive about this explanation.

<sup>89</sup> R.L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay* (1985) 1 AMER. BAR FOUND. RES. J. 5.

<sup>90</sup> According to Abel, *ibid.* at 22, 23; "the number of male law students doubled between 1962/63 and 1980/81 while the number of female students increased 24 times" in the same period in Canada. The pattern of women's entry to the legal profession in Canada after 1970 occurred in a number of other western countries at the same time, in some cases even more dramatically. In the U.S.A., for example, Abel reported that "male enrollment in law school actually declined at an average rate of 0.1% a year in the 1970's, whereas female enrollment increased at an average annual rate of 41.4%. Male entry to the profession also declined after 1973, and *all* further increases in the rate of growth are attributable to new women lawyers." (Emphasis in original). For details of similar statistics for other jurisdictions, see *ibid.*

<sup>91</sup> *Ibid.* at 39. The author reported difficulties in a number of jurisdictions, including Canada:

Decisions by lawyers to take on apprentices or hire new entrants are less visible and centralized, allowing greater scope for the expression of prejudice. The fragmentary evidence strongly suggests that women are becoming concentrated in positions that are less prestigious and remunerative, that deal with personal plight, and that can be held part time.

For details of problems reported in other jurisdictions, see *ibid.* at 39-40.

in income.<sup>92</sup> After assessing the unequal position of women lawyers in a number of different jurisdictions, Abel concluded:

It seems to be true almost universally that once the legal and sociocultural barriers against women lawyers were removed, they entered the profession in numbers approximating those of men. . . . Yet once they leave the meritocratic arena of formal education and examinations, they once again encounter prejudice and role conflict. The result is that qualified women lawyers fail to enter practice, leave early, or accept less attractive positions. These forms of inequality will not change until there is a transformation of the sexual division of labor.<sup>93</sup>

This disquieting conclusion is echoed in the recent work of Carrie Menkle-Meadow, who has conducted cross-cultural research on women in the legal profession, concentrating primarily on western industrialized nations.<sup>94</sup> Significantly, she found that "women [were] disproportionately located in different spheres of the profession in virtually every country," but that they were uniformly found in the "lowest echelons" of the profession in each country (although what constituted the lowest echelons varied from one country to another).<sup>95</sup> In light of these findings, she warned that it is not appropriate to assume that increased numbers of

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<sup>92</sup> Abel, *ibid.* at 40, attributed women lawyers' lower earnings to their lack of representation in the hierarchy of work in the legal profession, and provided statistics demonstrating the income differentials for a number of jurisdictions. As other commentators, however, he noted the need to adjust the data for age.

<sup>93</sup> *Ibid.* Abel recommended cross-cultural research on the impact of a substantial minority of women in the profession for the first time in history. Indeed, in another article, he referred to the entry of women into the legal profession since 1970 as "nothing short of revolutionary". See R. Abel, *The Contradictions of Professionalism* in Abel and Lewis, eds, *supra*, note 80 at 202-203. For further consideration of these ideas, see also C. Menkle-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process* (1985) 1 BERKELEY WOMEN'S L. J. 39; and *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law* (1987) 42 U. MIAMI L. R. 29.

Menkle-Meadow (and others) would, however, disagree with Abel's implicit suggestion that law schools offer a "meritocratic arena of formal education and examinations"; see C. Menkle-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go to Law School'* (1988) 38 J. OF LEGAL ED. 61, and other articles in that issue devoted to "Women in Legal Education — Pedagogy, Law, Theory, and Practice". In Canada, see C. Boyle, *Teaching Law as if Women Really Mattered, or, What About the Washrooms?* (1986) 2 C.J.W.L. 96; and M. O'Brien and S. McIntyre, *Patriarchal Hegemony and Legal Education* (1986) 2 C.J.W.L. 69.

<sup>94</sup> C. Menkle-Meadow, *The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession* (1987) 24 OSGOODE HALL L.J. 897; and CBAO Annual Institute, Program on Women in the Legal Profession: February 1988. For information on lawyers in Third World nations, see R. L. Abel, *The Underdevelopment of Legal Professions: Review Article on Third World Lawyers*, (1982) AMER. BAR RES. FOUND. J. 871.

<sup>95</sup> Menkle-Meadow, *ibid.* at 907-908; CBAO Annual Institute *ibid.* at 15.

women entering the profession will necessarily result in equality of opportunities for women; instead, she recommended that:

[W]e must examine the meaning of the entrance of women into the legal profession from more than the perspective of quantitative sociology. As we collect data and observe gender differences in location and type of practice, favoured tasks, and specialties, we should be prepared to examine the transformative potential of these social facts.<sup>96</sup>

## 2. *Beyond Increased Numbers — “Invisible” Structural Barriers:*

In assessing the “transformative potential” of these social facts about women in the legal profession, it is helpful to consider recent literature which analyzes barriers to women’s achievement of leadership roles in other societal contexts. In the context of theories about the sociology of organizations, for example, Rosabeth Moss Kanter has written extensively of the structural constraints within organizations which systematically exclude from promotion and advancement all those who are not “like” existing leaders in the organization.<sup>97</sup>

In her major study of the organizational structure of a large American corporation in the 1970’s, Moss Kanter identified a number of features analogous to those of a modern law firm. For example, in her study of managerial roles in the corporation, she characterized tasks to be performed on the basis of whether they were “routine” or whether they required the exercise of discretion; as she reported, wherever discretionary decision-making was required within the corporate structure, the organizational response was to ensure homogeneity of personnel, in order to eliminate at least one aspect of uncertainty.<sup>98</sup>

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<sup>96</sup> Menkle-Meadow, *ibid.* at 918. This conclusion mirrors that of the ABA Commission on Women in the Profession. In its Summary of Hearings, the Commission noted “the persistence of gender discrimination in the legal profession”, and emphasized the need to recognize that the increased numbers of women entering the legal profession had not yet resulted in the removal of frustrations and barriers for women. *See supra*, note 79.

<sup>97</sup> R. Moss Kanter, *MEN AND WOMEN OF THE CORPORATION* (New York: Basic Books, 1977). *See also* Moss Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective* (1978) 1 HARV. WOMEN’S L.J. 1; and *Structuring the Inside: The Impact of Organizations on Sex Differences* in B. Forisha and B. Goldman, *OUTSIDERS ON THE INSIDE* (Englewood Cliffs, N.J.: Prentice-Hall, 1981) 75.

<sup>98</sup> *See* Moss Kanter, *MEN AND WOMEN OF THE CORPORATION*, *ibid.* at 47ff. As defined by Moss Kanter:

Uncertainty can stem from either the time-span of decisions and the amount of information that must be collected, or from the frequency with which non-routine events occur and must be handled. The impossibility of specifying contingencies in advance, operating procedures for all possible events, leaves an organization to rely on personal discretion. (It is also this pressure that partly accounts for the desire to centralize responsibility in a few people who can be held accountable for discretionary decisions.)

*Ibid.* at 52.

The uncertainty up the ranks . . . puts trust and homogeneity at a premium. The personal loyalty normally demanded of subordinates by officials is most intense at the highest levels of organizations. . . . The lack of structure in top jobs makes it very important for decision-makers to work together closely in at least the harmony of shared understanding and a degree of mutual trust. . . . [T]he solidarity that can be mustered through common membership in social networks, and the social control this provides, is a helpful supplement for decision-makers.<sup>99</sup>

According to Moss Kanter, because the corporate response to discretionary decision-making was to choose new senior managers who were most "like" existing senior managers, the "more closed the circle, the more difficult it [was] for 'outsiders' to break in."<sup>100</sup>

Moss Kanter also examined the idea of power in the corporation and its effect on men and women.<sup>101</sup> She documented the expressed preferences of both men and women employees to work for male managers, rather than for female ones, because male managers were more readily perceived to be part of the power structure of the organization. "[I]n the context of organizations where women do not have access to the same opportunities for power and efficacy through activities or alliances",<sup>102</sup> the employees' expressed preference for men was clearly a preference for power. This structural barrier also affected women's abilities to achieve leadership roles within the organization.

Nonetheless, despite such barriers, a few women in Moss Kanter's study did succeed in becoming senior managers of the corporation. Her

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<sup>99</sup> *Ibid.* at 53. Moss Kanter expressly noted the need for "homogeneity of class and ethnic background and prior social experiences" in relation to this comment; she applied it more specifically to women in Part III of her book.

<sup>100</sup> *Ibid.* at 68.

<sup>101</sup> Her definition of power as "the ability to get things done, to mobilize resources, to get and use whatever it is that a person needs for the goals he or she is attempting to meet" is suggestive of power in a hierarchical setting. However, she also refers to power as a means of "empowering more people through generating more autonomy, more participation in decisions, and more access to resources", a definition which results in increasing the total capacity for effective action rather than for domination. *Ibid.* at 166.

See also R. Moss Kanter, *Changing the Shape of Work: Reform in Academe*, in PERSPECTIVES ON LEADERSHIP (Washington D.C.: American Ass'n for Higher Education, 1979) 3. The idea of power has also been examined by a number of feminists: see e.g., J. Jaquette, *Power as Ideology: A Feminist Analysis*, in J. Stier, ed., WOMEN'S VIEWS OF THE POLITICAL WORLD OF MEN (Dobb's Ferry, N.Y.: Transnational, 1982) 9; N.C.M. Hartsock, *Political Change: Two Perspectives on Power* in BUILDING FEMINIST THEORY: ESSAYS FROM QUEST (New York: Longman, 1981) 3; T. McCormack, *Toward a Nonsexist Perspective on Social and Political Change* in M. Millman and R. Moss Kanter, eds, ANOTHER VOICE: FEMINIST PERSPECTIVES ON SOCIAL LIFE AND SOCIAL SCIENCES (Garden City, N.Y.: Anchor Press/Doubleday, 1975) 1; I.E. Deutchman, *Socialization to Power: Questions about Women and Politics*, (1986) 5:4 WOMEN AND POLITICS 79; and A. Duffy, *Reformulating Power for Women* (1986) 23 CAN. REV. SOC. AND ANTH. 22.

<sup>102</sup> Moss Kanter, MEN AND WOMEN OF THE CORPORATION, *supra*, note 97 at 199-200.



assessment of these "token" women of the corporation, numerically small by comparison with men who were senior managers, offers an interesting analogy to the position of those few women who are currently in senior positions within the legal profession. Moss Kanter identified the proportional representation of male and female workers in the corporation using a scale of participation rates from "dominant" to "token" representation. On this scale, she classified as "skewed" those groups with a large preponderance of one type over another, up to a ratio of about 85:15; in such a situation the numerically smaller group were likely to be "tokens" and the larger group "dominants". By comparison, in "tilted" groups with a ratio of about 65:35, dominants became just a "majority" while tokens became a "minority". Only at a ratio of 60:40 to 50:50 would a group be considered "balanced".

In Moss Kanter's analysis, the significance of different ratios for groups within organizations was their effect on the behaviour of individuals within the groups. In particular, Moss Kanter identified the serious effect on "tokens", the numerical minority within "skewed" groups, who suffered the double difficulty of invisibility in terms of their individual characteristics and at the same time the ascription of the general characteristics of "all women": "tokens can never really be seen as they are, and they are always fighting stereotypes. . . ." <sup>103</sup> As Moss Kanter concluded, "People's treatment, then, is not automatically fixed by inflexible characteristics but depends on their numbers in a particular situation." <sup>104</sup>

Thus, the structural constraints of roles, power and numbers significantly affected the position of men and women in the corporation. What appeared to be "sex differences" in the roles of men and women in the corporation were, according to Moss Kanter's analysis, the result of structural features of corporate organization. Concluding, moreover, that individual-based initiatives would never overcome these structural barriers, she recommended systematic structural change within the corporation: "batch" rather than one-by-one hiring of women managers; the deliberate creation of role models for women managers; opportunities for networking by women managers; more flexible organizational structures; better education of corporate leaders about tokenism; and support programs for women. <sup>105</sup>

The existence of structural, systemic barriers constraining women's opportunities for advancement within the corporation led Moss Kanter to conclude that such changes were likely to occur only as a result of

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<sup>103</sup> *Ibid.* at 230.

<sup>104</sup> *Ibid.* at 241. For details of the stresses and costs to tokens, *see generally ibid.* at 212-240.

<sup>105</sup> *Ibid.* at 281-283.

"outside intervention".<sup>106</sup> This conclusion has frequently occurred in studies of women's roles in other contexts such as political activism. In a cross-cultural study of women in politics designed to analyze reasons for women's disproportionately small representation in the political process (relative to their numbers in the population), Cynthia Fuchs Epstein<sup>107</sup> identified a range of factors frequently cited to explain women's underrepresentation in "the ranks of the elite": women's "inherent incapacity" to be assertive and dominant; social factors which "direct women away from the public sphere to family-centred activities"; time problems and role strains flowing from "women's sex-role-associated duties"; the lack of "opportunity structures" for women to acquire appropriate skills; and others.<sup>108</sup>

For Epstein, these and other factors constitute a system for discouraging and disempowering women from seeking access to power and elites. Suggesting that positive intervention to assist women is necessary, she argued that the dominance of men in politics has remained essentially unchallenged because it has been regarded as "natural":

Some groups object to programs that guarantee women and other minorities a chance for better access to elite positions. Yet, in the past, elite gatekeepers were effective in maintaining existing hierarchies — in sifting and sorting out unwanted groups. These were seen as 'natural' processes rather than as programs. Perhaps this is because the *maintenance* of systems, which require attention and input to keep them going, does not attract as much notice as the *alteration* of systems. Thus, because men have been successful in maintaining their domination of women, little notice has been taken of the methods used to maintain that dominance.<sup>109</sup>

Both the analysis of Moss Kanter and that of Epstein focus on "invisible" barriers which impede women's access to power and leadership roles. Despite some differences in their analyses, both studies identify systemic features in organizational structures which deter or prevent women from succeeding as men do. Such a structural analysis is helpful in understanding the current position of women as lawyers

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<sup>106</sup> *Ibid.* at 260ff. Moss Kanter was not overly optimistic about change occurring from within because of the structural features of the corporation itself:

[A]s long as the steep multi-leveled hierarchies that tend to accompany large size remain, it is impossible to remedy many inequities of compensation or opportunity, let alone empower more people or share decision-making more widely. When the model is hierarchical rather than collegial, there would also appear to be real limits on the extent to which it is possible to expand anyone's power, other than for those people who already have the managerial monopoly.

*Ibid.* at 286.

<sup>107</sup> C.F. Epstein, *Women and Elites: A Cross-National Perspective* in C.F. Epstein and R.L. Coser, *ACCESS TO POWER: CROSS-NATIONAL STUDIES OF WOMEN AND ELITES* (London: George Allen and Unwin, 1981) 3.

<sup>108</sup> *Ibid.* at 3-4. For further discussion, see *ibid.* at 5-15.

<sup>109</sup> *Ibid.* at 6 (emphasis in original).

since their numbers in the practising legal profession are still small<sup>110</sup> and their numbers in the higher echelons of large law firms are even smaller. Visualizing the situation of women lawyers in structural terms has some potential to depersonalize the issue of sex discrimination in the profession and to permit a clear focus on systematic efforts to overcome the problems of structural barriers to equality. As well, such an analysis recognizes the need for systemic change, rather than individualized efforts to assimilate to male standards; that is, while practising law like a man may be of some limited use to women, there is a need for change in the structure of law practice too.<sup>111</sup>

Particularly in the context of law, however, such a structural analysis also has some limitations. Because its solutions depend on outside intervention, it is unclear how such pressures will be forthcoming in a self-regulating profession. The assumption of a political will "outside" the profession which may demand such changes may be illusory at best. Second, the focus on barriers also seems to assume that they can be removed. In both cases, there is an underlying sense of rationality about the issue of appropriate sex role divisions in society and their reflection in the constraints experienced by women lawyers. In marked contrast to such rationality about existing "separate spheres" for men and women, however, it may be that there are less rational, but similarly "invisible", constraints on the idea of leadership which make it difficult (even impossible) for women to achieve positions of leadership in the legal profession.

### 3. *Lawyers and Leadership — "Invisible" Barriers in Ideas:*

In the search for a rationale for "invisible" barriers for women in the legal profession, it is also important to focus on the significance of ideas about sex and sex roles in society. "Why . . . does one see the world in the way that one does; and what factors contribute to one's seeing it differently at another moment in time?"<sup>112</sup> How do our ideas

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<sup>110</sup> The 18.6% of the profession who were women in 1987 would represent Moss Kanter's "tilted" category; but it is only a few years since the percentage of women lawyers has been more than 15%, the ratio below which the category would have been "skewed". See *supra*, notes 75-76 and text accompanying note 104.

<sup>111</sup> There is a rich literature about the roles of men and women in organizations, and the effects of socialization on their behavior patterns: See *e.g.*, the bibliographical material in the section on organizations in M. Jarrard and P. Randall, *WOMAN SPEAKING: AN ANNOTATED BIBLIOGRAPHY OF VERBAL AND NON-VERBAL COMMUNICATION* (New York: Garland, 1982).

<sup>112</sup> S. Farganis, *SOCIAL RECONSTRUCTION OF THE FEMININE CHARACTER* (Totawa, N.Y.: Rowman and Littlefield, 1986) at 25-26. Farganis offers an analysis of the sociology of knowledge focused on Viola Klein's *THE FEMININE CHARACTER*, a book concerned "with the relationship between writings about women and the social conditions out of which these writings are fashioned and within which they are placed." According to Farganis, at 9, "Perception, determined by the times in which one lives, changes as reality is reordered, which reordering is itself a consequence of the acceptance of new ideas." Farganis also considered the work of Mannheim, Kuhn, and Marx (among others) in relation to her thesis.

about men and women (and prevailing notions of activities appropriate to each of them) affect our perceptions of their differences and potential abilities? In her study of the social reconstruction of "the feminine character", Sondra Farganis stated succinctly the view of those who assert that the male/female duality of our society operates negatively for women:

Certain terms in Western discourse . . . have been gendered: men have been seen as public persons, as reasonable, as persons of intellect and persons with a culture; women have been seen as private persons, irrational or passionate, as persons of the body and persons in line with nature, as persons in a culture. One must think past these false categories and begin to redefine terms like power and reason: one must conceptualize the former in terms that encourage persons to think in terms of power to not power over. . . .<sup>113</sup>

If we regard sex roles as socially constructed by our experiences, rather than objective in their origins and formulations, it is possible to contemplate as well the idea of leadership as one defined by our experiences of those who have always been leaders: men.

In a number of recent studies of leadership, researchers have identified differences between men and women, both in their outward styles of leadership and in their self-perceptions as leaders.<sup>114</sup> Chapman reported, for example, on Megargee's study of the influence of sex roles on the manifestation of leadership.<sup>115</sup> In his study in 1969, Megargee paired persons who had previously been tested to determine their degrees of dominance. When "high dominance" men and women were paired with persons of the same sex, 75% of high dominance men and 70% of high dominance women took the leadership role in the tasks assigned. When high dominance men were paired with low dominance women, 90% of the men assumed the leadership role, but when high dominance women were paired with low dominance men, only 20% of the women assumed a leadership role.<sup>116</sup>

As Chapman noted, the research results suggested that "society does not expect women to express dominance, particularly in situations where women are required to interact with men in order to accomplish specified goals." Moreover, if women feel reluctance about expressing themselves as leaders, their default probably reinforces the assumptions (of both men

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<sup>113</sup> *Ibid.* at 193; Farganis attributed these ideas to A.M. Jaggar, *Towards a More Integrated World*, (Unpublished paper presented to the Douglass College Women's Studies Seminar, January 1985).

<sup>114</sup> M. Loden, *FEMININE LEADERSHIP* (New York: Times Books, 1985); M. Macoby, *THE LEADER* (New York: Simon and Schuster, 1981); and J.B. Chapman, *Male and Female Leadership Styles: The Double Bind* in J. Ramaley, ed., *COVERT DISCRIMINATION AND WOMEN IN THE SCIENCES* (Colorado: Western Press for Amer. Assoc. of Advancement of Sciences, 1978) 97. My special thanks to Cheryl Kristjanson for sharing with me her research and ideas on women and leadership.

<sup>115</sup> E.I. Megargee, *Influence of Sex Roles on the Manifestation of Leadership* (1969) 53 J. OF APPLIED PSYCH. 377; quoted by Chapman, *ibid.* at 102.

<sup>116</sup> Megargee, *ibid.*

and women) "that women are incapable of effective leadership within an organization".<sup>117</sup> The same conclusion appeared in a book published at about the same time, in which a leading management theorist described the model of the successful manager in our culture as "a masculine one", describing him as "aggressive, competitive, firm, [and] just" and not "feminine . . . soft or yielding or dependent or intuitive in the womanly sense."<sup>118</sup> Moreover, in such a context, women leaders may often face a "double bind":

[I]f the female manager adopts accommodative leadership behaviors . . . she will be criticized for being 'motherly', indecisive, or weak. Conversely, if she adopts task-oriented behaviors, she will be criticized for being pushy, unfeminine and temperamental. Faced with this lose-lose conflict, the woman leader, in all likelihood, will experience extreme frustration and resort to a fairly passive existence in the organization, accepting her role as a mere transient in the mainstream of organizational leadership.<sup>119</sup>

Thus, the conflict for women between expectations based on their roles as women and those related to male models of leadership presents some difficulties for women seeking leadership roles within organizations. In the context of women lawyers, such conflicts were specifically identified in the hearings of the ABA Task Force on Women in the Legal Profession:

Witnesses expressed their belief that women must still work harder and be better than men in order to be recognized and succeed. Individuals also testified that women walk a fine line between being regarded as too feminine (and thus not tough, lawyerlike or smart) or too tough (and thus unfeminine or not the kind of woman male colleagues feel comfortable relating to).<sup>120</sup>

At the same time, however, the appropriateness of male models of leadership has also been increasingly challenged, particularly by feminists who suggest that there are more appropriate "female" qualities of leadership. In the work of Nancy Hartsock<sup>121</sup> and Carol Gilligan,<sup>122</sup> for example, women's knowledge and experiences are examined and legiti-

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<sup>117</sup> *Ibid.* In this article, Chapman reviewed a number of older studies about sex roles and behaviour, including V.E. Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics* (1973) 57 J. OF APPLIED PSYCH. 95; and I.D. Steiner and E.D. Rogers, *Alternative Responses to Dissonance* (1963) 66 J. OF ABNORMAL AND SOCIAL PSYCH. 128. See also N.J. Adler and D. Izraeli, *WOMEN IN MANAGEMENT WORLDWIDE* (New York: M.E. Sharpe, 1988).

<sup>118</sup> D. McGregor, *THE PROFESSIONAL MANAGER* (New York: McGraw-Hill, 1967) at 23; as quoted in Chapman, *supra*, note 114 at 105. For a different perspective, see Adler and Izraeli, *ibid.*

<sup>119</sup> Chapman, *supra*, note 114 at 110.

<sup>120</sup> *Summary of Hearings, supra*, note 79, at 3-4.

<sup>121</sup> N.C.M. Hartsock, *MONEY, SEX AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* (New York: Longman, 1983).

<sup>122</sup> C. Gilligan, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Cambridge, Mass.: Harvard University Press, 1982).

mated as different from, and sometimes superior to, those of men: "[women's] ways are not only different but better . . . in the sense of liberating or negating a contrary male way of being that is competitive rather than cooperative, authoritative rather than democratic, life-denying rather than life-giving . . . ." <sup>123</sup> In such a context, the concept of leadership is dramatically transformed to one of "empowerment of others" rather than "power over others".

Regardless of the model of leadership that is adopted, however, societal ideas of appropriate sex roles for men and women present "invisible" constraints for women who aspire to leadership. Because most previous experience of leadership has been male, women who want to become leaders must often demonstrate both that they can provide leadership on the male model and also that they are able to offer leadership in ways which are different from, and superior to, the male model of leadership. In doing so, women must demonstrate their ability to "assimilate" the male model of leadership at the same time as they demonstrate how their own qualities of leadership are in fact preferable. In both cases, however, the existing male model remains the standard, either as the measure of women's conformity or the extent of their differences.

In the context of women in the legal profession, the importance of these comments is their implicit recognition of the maleness of societal ideas about leadership. Although women have finally succeeded in becoming lawyers in ever increasing numbers, the "invisible" constraints of male leadership models have made them markedly less successful in becoming leaders in the profession. Because of the social construction of the idea of leadership on a male model, few women are perceived as leaders and those who achieve leadership do so only by accepting the male standard of leadership. In such a context, "thinking like a man" is a high compliment only if women lawyers deny that they have anything to offer as leaders in the profession which is different from the qualities of leadership offered by men.

What process is needed to transform the legal profession, only recently emerging from its male exclusivity, to a profession which welcomes and values essentially "female" qualities? If "[w]hat the feminine has come to mean is a result of a socially arrived at definition, made legitimate as a consequence of the power and influence of those in a position to define it", <sup>124</sup> what is needed to transform our ideas about female qualities of power and influence? As Menkle-Meadow has suggested, can we move beyond the question of increasing numbers of women lawyers — the question of quantitative sociology — to an exploration of "the transformative potential" of the social facts about women in the legal profession? <sup>125</sup>

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<sup>123</sup> Farganis, *supra*, note 112 at 174; citing Hartsock, *supra*, note 121; and Jaggar, *supra*, note 113.

<sup>124</sup> Farganis, *ibid.* at 196.

<sup>125</sup> Menkle-Meadow, CBAO Annual Institute, *supra*, note 94 at 30.

## IV. WOMAN LAWYERS: TOWARD "TRANSFORMATIVE POTENTIAL"

I think all lawyers must agree  
 On keeping our profession free  
 From females whose admission would  
 Result in anything but good.  
 Because it yet has to be shown  
 That men are fit to hold their own  
 In such a contest, I've no doubt  
 We'd some of us be crowded out.<sup>126</sup>

When this verse was published almost one hundred years ago, women were not permitted to practice as lawyers anywhere in the British Empire. In less than 100 years, women in Canada have successfully challenged the male exclusivity of the legal profession, losing initially in all three court cases but gaining the right to practise in all the provinces as a result of legislative action. Since 1970, moreover, increasing numbers of women have chosen to seek careers as lawyers so that, for the first time in history in Canada, the legal profession faces a problem — and an opportunity — because it is no longer an exclusively male profession, either in law or in terms of numbers.<sup>127</sup> Yet, the issue still to be resolved is the role for women in the profession: whether women will become leaders only by assimilation to male standards of lawyering, or whether, on the other hand, the nature of practice and of leadership will be transformed by their presence. In this sense, the moment of reckoning has arrived.

Both Moss Kanter's structural analysis of organizations and research on the social construction of sex roles offer useful ways of understanding the "invisible" barriers preventing women lawyers' achievement of leadership roles in the legal profession at the end of the twentieth century. Structural analysis suggests the need for systemic changes, "outside" intervention and organizational strategies to increase the numbers of women in leadership roles and to ensure their access to power in such roles. Theories about the social construction of sex roles focus on the

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<sup>126</sup> As quoted by Mullins, *supra*, note 8 at 676; the author indicated that the poem first appeared in *Grip* in 1892, according to R. Cook and W. Mitchinson, eds, *THE PROPER SPHERE: WOMEN'S PLACE IN CANADIAN SOCIETY* (Toronto: Oxford University Press, 1976) at 167.

<sup>127</sup> Richard Abel has identified a number of demographic changes in the legal profession, resulting in younger average ages as well as increased numbers of women. He also has identified a "lag" in the numbers of ethnic law graduates, and has suggested that:

These demographic shifts are of considerable importance. They reveal a profession that still does not reflect the class or ethnic composition of heterogeneous stratified societies. They reveal a substantial minority of women occupying inferior positions. And they reveal a youthful profession still governed almost exclusively by elderly males . . . These tensions of class, ethnicity, gender, and age pose acute problems for professional associations.

*Supra*, note 89 at 41.

attitudes and behaviours of men and women in different situations and suggest the need for education about stereotyping and positive role models for both men and women in leadership positions.

While both these approaches offer assistance in understanding the barriers to women's achievements in the legal profession reflective of their increasing numbers, they differ in the extent to which they use male achievements as the target for women's leadership ambitions. Structural analysis suggests that an increase in the numbers of women exercising leadership and power will enhance opportunities for individual women but it does not necessarily challenge existing male models of leadership. Theories of the social construction of sex roles, by contrast, require some reflection about "inherent" and "learned" abilities and permit some assessment of the extent to which leadership may be exercised in different ways by men and by women.<sup>128</sup>

This distinction is important, because it is fundamental to any strategy for increasing women's leadership to decide whether, on one hand, women must have opportunities to acquire male attributes of "leadership" or whether, on the other hand, both men and women must learn to recognize "leadership" talents expressed by women which are currently invisible because they are different from expressions of leadership by men. In the first case, the strategy assumes that women and men exercise leadership in the same way, but women need to be assisted to learn the skills of leadership through training, opportunities, role models, mentoring, etc. In the second case, the strategy assumes that men and women exercise leadership in different ways and perhaps for different purposes, and that both individuals and organizations must be assisted to make better use of the leadership talents already being exercised but currently invisible.<sup>129</sup> The first strategy offers the possibility of increased opportunities and challenges for individual women in leadership positions while the second promises a fundamental reconstruction of ideas about "success" and "leadership" and the potential for transforming societal values about them. As the report of the ABA Commission on Women in the Legal Profession stated:

Several witnesses emphasized that the problems facing lawyers of both sexes, but especially women, in trying to combine professional demands

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<sup>128</sup> See e.g., F.L. Denmark, *Styles of Leadership* (1977-78) 2 PSYCH. OF WOMEN Q. 99; and A.R. Hauptman, *Styles of Leadership: Power and Feminine Values* in Forisha and Goldman, eds, *supra* note 97 at 114.

<sup>129</sup> In M. Rendel, *The Death of Leadership or Educating People to Lead Themselves* (1978) 1 WOMEN'S STUDIES Q. 313 at 318, it is asserted that:

We know that the achievements of men and women are perceived at different levels, those of women being rated as the lower even when the achievement is identical. This has been shown in a number of studies of the assessment of women's and men's work and *curricula vitae*.

Rendel cited a number of studies, including Deaux and Emsmiller (1974); Fiddell (1970); Lewin and Duchan (1971); and Simpson (1969).



with important human relationships and children, involve questioning the values and ethics of the profession. The concern is that, at a time when the pressures are growing for law firms to be successful businesses and for lawyers to produce even greater numbers of billable hours, lawyers are being dehumanized, unable to relate to clients and family members.

Witnesses believe that lawyers will lose their sense of perspective and ethics under the weight of pressures to produce billable hours and the stress of cutting back on family involvement. These witnesses suggested that women, by raising the crucial issues of family and workplace, can take the lead in helping to restore sanity, balance, and respect to the profession.<sup>130</sup>

How will the "transformative potential of the social facts" about women lawyers be expressed? In the Canadian context, some women in the legal profession have achieved leadership positions by their (at least outward) assimilation to the male model.<sup>131</sup> Others have consciously chosen different paths of leadership, deciding to work more cooperatively and in less paternalistic relationships with clients, choices that represent decisions to express their talents for initiative and responsibility in ways which reflect female rather than male models of professional work.<sup>132</sup>

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<sup>130</sup> *Summary of Hearings, supra*, note 79, at 9. A recent survey of lawyers in Quebec suggests that male lawyers as well as female lawyers are becoming more concerned to balance their professional responsibilities and family life. See S. Barron, *Balancing Act* (February 1989) NATIONAL 15.

<sup>131</sup> In the context of Moss Kanter's structural analysis, it is logical that male hierarchies within the legal profession would choose to promote those women who are most "like" them, *i.e.*, assimilated to the male model. There is all too little information about women who have achieved positions of leadership in the legal profession in Canada, but two comments might be made. First, the demographic information in Stager and Foot's research suggests that more women lawyers than men lawyers are unmarried, and this data might suggest that such women are more easily able to fit the male model of lawyer, *i.e.*, a person without the significant family obligations which most women are assumed to have. See *supra*, text accompanying note 83.

Second, a recent article in the CBA *National* about women judges suggested their inability to identify with other women because "The very fact these women are judges proves they have been professionally successful, and they may lack empathy with homemakers. . . ." More specifically, Louise Lamb's comment, quoted in the article, suggests the significance of the structural analysis in the context of women judges:

[Women judges] are drawn from a certain group, and feminist activity would possibly be held against them. The judiciary is still very much a kind of club.

C. McLeod, "Women Against Women: Female Judges Share Males' Myths and Misconceptions" NATIONAL (October 1988) 16. In a subsequent issue of the NATIONAL (December 1988) at 2, Louise Lamb explained in a letter to the editor that McLeod's article had "misquoted and distorted" her comments, stating that "neither sex has a monopoly on sensible and sensitive decisions regarding gender equality issues."

For some information on the success of women in achieving positions of leadership in the profession, see Arthurs, *et al.*, *supra*, note 80 at 133. They reported, for example, that "Male judges and magistrates outnumbered female by more than eight to one in 1981 — more than nineteen to one on the federal bench."

<sup>132</sup> See *e.g.*, the report on the eight-woman law firm in Toronto formed because "What we had in common is that we made similar decisions about how we want to practice and how we want to live our lives." — A quote from Mary Dunbar in M. Strauss, "How the Peanut Butter got on the Will" *Globe and Mail*, (26 January 1987) B1.

For the present, however, it is women in the former group who are more often seen as leaders by the profession and individual women continue to experience difficulties when they fail to conform, however understandably, to the male model of lawyering.<sup>133</sup>

At such a moment in the history of women lawyers, it is possible to assess both how much has been achieved and at the same time how much remains to be accomplished. For just as the concept of lawyer was male at the beginning of the twentieth century, preventing women from becoming lawyers at all, so the concept of leadership is male at the end of the century, preventing women from being recognized as leaders in their profession. Thus, the history of women in the legal profession is inextricably connected to their present concerns. As Gerda Lerner has suggested:

History gives meaning to human life and connects each life to immortality, but history has yet another function. In preserving the collective past and reinterpreting it to the present, human beings define their potential and explore the limits of their possibilities. We learn from the past not only what people before us did and thought and intended, but we also learn how they failed and erred.<sup>134</sup>

In understanding the "invisible" constraints on those involved in the early cases concerning the admission of women to the legal profession, we can begin to appreciate the possibility of similar, equally "invisible" constraints on our understanding of the nature of leadership within the profession. And, as Joan Kelly has suggested, our recognition of such constraints means that we are now at a moment in history when we can not only "see" how the patriarchal system works, but also . . . act with that vision — so as to put an end to it."<sup>135</sup>

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<sup>133</sup> Menkle-Meadow has suggested, *e.g.*, that many women lawyers who request maternity leave will receive it now, but that there is a sense in which most of them feel that thereafter they will never be "taken really seriously" by the firm. See Menkle-Meadow, *Women in Law? A Review of Cynthia Fuchs Epstein's Women in Law* (1983) AMER. BAR FOUND. RES. J. 189 at 197:

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."

For some information about maternity leave arrangements in Canadian law firms, see N. Boughton, "Rock-a-Bye Lawyer", *Canadian Lawyer* (October 1988). Significantly, it is in the area of maternity leave that women experience the full effect of the social construction of sex roles; a pregnant lawyer will often be simultaneously valued and respected *as a woman* for her decision to make home life a priority on one hand, and devalued *as a lawyer* for her failure to make work a priority on the other.

<sup>134</sup> G. Lerner, *THE CREATION OF PATRIARCHY* (New York: Oxford University Press, 1986) at 221.

<sup>135</sup> *Supra*, note 2 and accompanying text. Gerda Lerner, *ibid.* at 228-229, has also commented in the same way:

The system of patriarchy is a historic construct; it has a beginning; it will have an end. Its time seems to have nearly run its course — it no longer serves the needs of men or women . . .