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## WOMEN, LAW, AND ETHICS\*

BERTHA D. JOSEPHSON\*\*

When we speak of women entering the legal profession, I think it is important to remind those of you entering or considering the legal profession that you are entering a small but courageous, honorable, and persistent group. Although women have joined the ranks of the legal profession in unprecedented numbers over the past fifteen or twenty years, women lawyers have been practicing and making a mark in the legal profession as long as it has existed on this continent.

A wonderful source of information about women in the law is the book *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present*.<sup>1</sup> Karen B. Morello, the author, reports that the first woman lawyer in America was Margaret Brent.<sup>2</sup> Brent arrived in the colonies in 1638 and settled in Maryland amassing one of the New World's largest real estate holdings.<sup>3</sup> She was known as a shrewd negotiator and a skilled litigator, appearing in over 124 court cases in eight years.<sup>4</sup>

She also became a respected leader during a period of political strife.<sup>5</sup> In the early 1600's, she was appointed counsel to the governor of Maryland.<sup>6</sup> Given that such a position for women was unprecedented, the colonists were at a loss as to how to address such a wo-

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\* This Article is a revised version of a speech given on February 23, 1991, for the Women's Law Conference at Western New England College School of Law, Springfield, Massachusetts.

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1. KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT* (1986).

2. *Id.* at 3.

3. *Id.* In the New World land meant power. Owning land was a source of political power, as well as a source of wealth, because "voting . . . was conditioned on the ownership of real property." *Id.* at 4.

4. *Id.* at 3, 6.

5. *Id.* at 3-6. Governor Leonard Calvert had been temporarily called back to England in 1643. *Id.* While he was away, two Virginian colonists unlawfully took control of the province. *Id.* Upon his return he was able to retake control of the province, but died shortly thereafter. Chaos ensued. *Id.*

6. *Id.*

man. The court records refer to her as Gentleman Margaret Brent.<sup>7</sup>

She believed it her duty as the governor's attorney to have a vote and voice in the Maryland Assembly and formally made that demand on January 1, 1648.<sup>8</sup> Although her demand was denied, she is recorded as protesting all proceedings in which she had no voice, making her the first woman to take a stand for women's rights in America.<sup>9</sup>

It was not until 1869 that the next woman lawyer appeared, although in the intervening years a number of women pleaded their own cases in court.<sup>10</sup> Two admirable examples were Elizabeth Freeman and Lucy Terry Prince. In 1783, here in Massachusetts, Elizabeth Freeman, a slave, appeared on her own initiative, demanding her freedom.<sup>11</sup> She claimed that under the Massachusetts Bill of Rights, as a native-born American, she was free and equal.<sup>12</sup> Although no record of her words exists, the court was so impressed with her argument that it granted her the relief she sought—her freedom.<sup>13</sup>

In 1795, Lucy Terry Prince addressed the United States Supreme Court and is believed to have been the first woman to do so.<sup>14</sup> Prince, an African-American woman, successfully defended a land claim before the Court.<sup>15</sup> Previously, she had failed in her attempt to gain her son's admission to then all-white Williams College.<sup>16</sup>

Throughout the 1800's, women continued to try to gain many rights denied them, including the rights to "vote, serve on a jury, get a professional education, hold elective office, enter into a contract, obtain custody of their own children, [and] control their own money."<sup>17</sup> Although the law was generally hostile to women, the legal profession was not. In fact, women in the nineteenth century often reported that their male colleagues in law school or at the bar were supportive. In 1869, Belle Babb Mansfield, at twenty-three years of age, passed the

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7. *Id.* at 3. She is also reported to have looked after the welfare of many of the colonists' children and was appointed guardian of a young Native American girl, whom she named Mary Brent Kitomagund after her sister, Mary Brent. *Id.* at 4.

8. *Id.* at 6.

9. *Id.* at 6-7.

10. *Id.* at 8.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Another woman is reported to have argued before the United States Supreme Court around the same time. Myra Clark Gaines of New Orleans argued her inheritance case against Daniel Webster and won. *Id.* at 8 n.\*.

15. *Id.*

16. *Id.* at 8.

17. *Id.* at 9.

Iowa bar and officially became recognized as the first woman attorney in the United States.<sup>18</sup> However, she was denied admission to the bar due to an Iowa statute limiting the practice of law to white men.<sup>19</sup> She took the matter to court and won.<sup>20</sup> A progressive male judge applied "another Iowa statute which held that 'words importing the masculine gender only may be extended to females,'"<sup>21</sup> thereby allowing her to become licensed to practice law in the state of Iowa. One year later, the Iowa legislature removed the gender restrictive language.<sup>22</sup>

Not all women fared as well. Around the same time, Myra Colby Bradwell tried to gain admission to the Illinois bar using the same argument as Belle Babb Mansfield.<sup>23</sup> She lost her argument in the Illinois Supreme Court and in the United States Supreme Court.<sup>24</sup> The Illinois Supreme Court refused her admission on the grounds that married women were not permitted to enter into their own contracts.<sup>25</sup> The court concluded that women could not be bound to the contractual obligations of an attorney and therefore were prohibited from practice.<sup>26</sup>

The United States Supreme Court also denied her admission to the Illinois bar.<sup>27</sup> In language that has appalled feminists ever since, the Court, in *Bradwell v. State*,<sup>28</sup> said of women a little over a hundred years ago:

Man is, or should be, woman's protector and defender. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, [would disintegrate if a woman were to have] a distinct and independent career from that of her husband. . . . [A] woman [has] no legal existence separate from her husband.<sup>29</sup>

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18. *Id.* at 11.

19. *Id.* at 12.

20. *Id.*

21. *Id.* (citing the IOWA CODE § 1610 (1851)).

22. *Id.* at 12-13.

23. *Id.* at 15. Bradwell relied on Illinois statutes that provided that the use of masculine gender includes females as well as males. *Id.* at 16-18.

Bradwell was the wife of a Cook County Court judge and had passed the Chicago bar in 1869. One year earlier, she began publication of the *Chicago Legal News*, the first law journal published in the West. *Id.* at 14.

24. *Id.* at 16-21.

25. *Id.* at 16 (referring to a letter to Mrs. Bradwell from the court clerk's office). See also *In re Bradwell*, 55 Ill. 535 (1870), *aff'd sub nom.* *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873).

26. MORELLO, *supra* note 1, at 16.

27. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873).

28. *Id.*

29. *Id.* at 141 (Bradley, J., concurring).

To be sure no benefit enured to women for being in the unmarried state, the Court went on to hold:

It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman [sic] are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases.<sup>30</sup>

Perhaps it was because of the law's apparent reluctance to allow women to practice that the women entering the field early on saw it as a vehicle for social change. As Katherine Robinson Everett said in 1983 at age ninety, some sixty-five years after she had tried her first case: "[Women attorneys] always have been more interested in helping people and fighting for causes than in simply making money."<sup>31</sup> Speaking of the women lawyers she saw marching for women's suffrage, she said:

[They were] what made me want to study law. . . . They were so eloquent, so impressive, and they talked about using the law to deal with human rights and human problems. They made it clear that being a lawyer wasn't just a job, it was a way of bringing about important changes in society.<sup>32</sup>

And women lawyers did just that. For example, Belva Lockwood, who after being prohibited from practicing or even speaking in federal court,<sup>33</sup> fought successfully in 1879 for legislation allowing women to join the federal bar.<sup>34</sup> She later formed the Equal Rights Party and ran for President, gaining 4149 votes at a time when women were not permitted to vote.<sup>35</sup> Throughout her life, she worked for women's rights and prison reform.<sup>36</sup> Phoebe Couzins, who was Washington

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30. *Id.* at 141-42. One year before the Supreme Court rendered its decision, another Illinois woman, Alta Hulett, who was single, applied for admission to the Illinois bar and was also rejected. MORELLO, *supra* note 1, at 21. However, Hulett drafted a bill that provided that no person could be precluded from any profession on account of gender. *Id.* The bill was passed by the Illinois legislature and women were allowed to practice. *Id.*

31. MORELLO, *supra* note 1, at 117.

32. *Id.*

33. *Id.* at 31-33.

34. *Id.* at 34-36. After being denied admission to practice before the United States Supreme Court in October, 1876, Lockwood drafted a bill allowing women to practice in the federal courts. After several bills and a hard fought battle, the "Lockwood" bill passed on February 7, 1879. *Id.* at 35.

35. *Id.* at 35-36.

36. *Id.* at 31-36.

University's first woman law school graduate, was a passionate and outspoken advocate of equal rights for both women and African-Americans.<sup>37</sup> Constance Baker Motley, who was the second African-American woman to graduate from Columbia Law School, went on to become the principal trial attorney for the NAACP Legal Defense Fund<sup>38</sup> and in 1966 was appointed to the United States District Court for the Southern District of New York.<sup>39</sup>

According to Lillian Rinenberg, an attorney who worked for the Queens, New York Women's Bar Association Legal Aid Bureau in the 1940's:

[R]epresenting the indigent, we saw so much misery—children who were abused and later became criminals, people who were desperate in one way or another. On the one hand, men would be protective of us and say these kinds of cases were too rough for women to handle, but we were really the only ones who were willing to take on free cases. So we were the ones who visited prisoners in jail and went out and talked to gang members and did the work we believed lawyers had a responsibility to do.<sup>40</sup>

This source of women's greater willingness to provide free legal services was explored as early as the mid-1960's in a study in which several thousand attorneys were sent questionnaires regarding attitudes toward law and career goals.<sup>41</sup> The results revealed pronounced differences in attitudes between women and men attorneys. The study concluded that women's lower salaries were the result not only of prejudice and discrimination, but also of women entering the legal profession with less financial orientation and greater determination to do unselfish work—to help the poor and oppressed.<sup>42</sup> Not until the late 1960's and early 1970's did defending the poor begin to have equal appeal to both genders.<sup>43</sup>

It is not surprising that women should see the rights of the poor and the rights of women as connected. Seventy-five percent of Americans living in poverty are women and children,<sup>44</sup> and it is predicted that "[a]ll things being equal . . . the poverty population [will] be

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37. *Id.* at 46-49.

38. *Id.* at 156-62.

39. *Id.* at 162.

40. *Id.* at 138-39.

41. *Id.* at 139. The study was performed by James J. White, a professor at the University of Michigan Law School. *Id.*

42. *Id.*

43. *Id.*

44. Janet McMillan, *PA Asked to Spend \$94 Million More on Women's Issues*, PHILA. INQUIRER, Mar. 9, 1985, at B3.

composed solely of women and their children by about the year 2000.'<sup>45</sup>

Not all of you will feel the same call to work for social change—nor need you. Not all of you will be content to work for the public interest. Some may enter the public sector for the security it may offer rather than for the public service orientation. Some may choose teaching. Some may decide to enter areas of the law that seem far from the public interest—representing corporations in large firms or predominantly affluent clients. A law degree offers wide latitude for career choices. All areas are honorable as long as you retain your personal ethics and values in the work you do.

I believe that you can retain the values embodied in many of the early practitioners by maintaining a commitment to making law inclusionary rather than exclusionary. Be determined to expand access to law's application and the enforcement of rights rather than progressively limiting access to the legal process, whether you do so by definition in your job through insistence upon being able to devote a portion of your time to pro bono legal representation, or even through supporting organizations with your efforts or contributions.

Women and minorities can bring a unique perspective to law—the outsider's eye to what has historically been a closed institution. This perspective can improve our legal system because, with an outsider's eye, one is likely to question basic premises and see the flaws that fade with familiarity. We can see the ways in which an institution operates to keep power in the hands of the powerful, falsely reassures itself of its own integrity, and reinforces outmoded and faulty systems of belief. Outsiders can bring with them fresh perspective and enthusiasm for change.

If history has taught us anything, it is the importance of change. And if law is anything, it is the structure within which useful change can occur. I believe that women have already brought that fresh perspective and willingness for innovation necessary to improve the ability of the legal process to achieve its end—the meting out of justice. I believe that we have demonstrated our ability to contribute uniquely throughout the time that women, even to a marginal extent, have been members of the profession. I also believe that the profession has changed and improved because of our increased presence.

Carol Gilligan, a researcher at Harvard, posits in her work on

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45. U.S. COMMISSION ON CIVIL RIGHTS, *A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN* 66 (1983) (citing NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, *CRITICAL CHOICES FOR THE 80S* 19 (1980)).

moral development the notion that women's moral orientation differs from men's.<sup>46</sup> According to Gilligan, men's values exalt adherence to rights and obligations, rules and principles and questions of justice and fairness, whereas women's values center on a "morality of care"—where the centrality of relationships is perceived as crucial to social well-being.<sup>47</sup> This "morality of care" values the recognition and preservation of relationships and avoidance of harm as the moral imperative, rather than emphasizing rules and relying on abstract principles to provide guidance in matters of ethics.<sup>48</sup>

In their book, *Moral Vision and Professional Decisions*,<sup>49</sup> authors Rand Jack and Dana Crowley Jack examine the effect of these two paradigms on the way women and men lawyers face their professional obligations. Their research suggests that women attorneys do experience their ethical obligations differently than men, and tend to view the broader implications of their professional acts.<sup>50</sup>

An historical examination of women lawyers' accomplishments and areas of interest supports the view that women, while being able to conform to the expectations of attorneys in general, also bring, in greater proportion, a social consciousness regarding the law and its impact. This is an important contribution to make to an evolving field that is increasingly being called upon to make ethical and moral choices.

I believe our unique perspective is needed in all areas of the law—especially now. As society becomes increasingly complex and technology expands the bounds of possibility, questions of law will involve newly evolving areas of moral judgments. As medical science becomes increasingly sophisticated and more possibilities for life and the prolongation of life exist, we must make new, and difficult, moral and ethical decisions about life and death.

In the panel earlier today, you heard debate over women's rights versus fetal rights. When does life begin? How do we protect the rights of those who can carry another's life while trying to determine what rights the fetus has?

When does life end? Should we allow medical science to sustain life of questionable quality simply because it is able to do so? Or

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46. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

47. *Id.* at 17.

48. *Id.* at 73-100.

49. RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS* (1989).

50. *Id.* at 151-58.

should we make subjective evaluations as to when life should be ended? Who should make these determinations?

With the structure of the family changing dramatically in recent years, how do we arrive at a legal definition of family? Can we find one that encompasses the reality of what the American family is now?

How do we balance the rights of those involved in nontraditional births? Do surrogate mothers retain rights to the child, or must they be bound to the contracts they make? How do we weigh the interests of each party?

How are we to weigh the right of privacy against the interest of sexual partners to know of life-threatening diseases? Can we force people who do not want to be tested to be tested for the benefit of others?

In considering the areas facing the law in the next decade, there are two notions that recur. An increasing number of legal controversies involve moral and ethical implications and an increasing number require the courts to become involved in relationships between human beings. The majority of topics that will come to the fore in the coming years fall into one or both of these areas. Ironically, the issues that have been viewed as falling in women's province—that is, morality and relationships—are dominating law at the time women are joining the ranks of lawyers in unprecedented numbers.

Out of the past 200-plus years that the legal system has existed on this continent, women have been involved in the law in significant numbers for less than the past twenty years. But look at the contributions we have already made in that short time. It is clear to me that women's involvement in the law over the past twenty years can be credited with the change in perspective we have seen in many areas within the legal system.

In the criminal justice system, the number of child abuse and rape prosecutions has risen exponentially over the past ten-plus years.<sup>51</sup> This rise in prosecution cannot be accounted for by the increase in incidents.<sup>52</sup> These cases are being vigorously prosecuted in ways they have not been before. Law has been modified to recognize the rights of victims as well as those of the accused.

The beginning of the victim rights movement can be marked by the emergence of Mothers Against Drunk Driving—M.A.D.D.—a predominantly women-created and sustained group. From my work

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51. Jeffery Fagan, *Contributions of Research to Criminal Justice Policy on Wife Assault*, in *FAMILY VIOLENCE* 53, 65 (Douglas J. Besharov ed., 1990).

52. *Id.* at 65-67.

in the District Attorney's office, it was apparent to me that the presence of victim advocates and an increased consciousness about victims' concerns resulted in more accountability in prosecution than had previously existed. The notion that victims of battering need and have a right to court orders for protection has evolved mostly from the battered women's movement. These laws, first introduced about twelve years ago, have been strengthened and expanded to provide protection in a variety of situations involving abuse. In short, women have begun to change the face of the legal profession in a short time and have a greater opportunity than ever to bring their perspective to the profession and to justice.

It truly would be a tragedy, if after nearly 300 years of struggling to have a voice—as Margaret Brent demanded of the Maryland Court in 1648<sup>53</sup>—we were to finally have that voice, only to have it blend indistinguishably leaving a unique perspective and different experience unrecognized.

So, my message to you today is to make your voice heard, to make your mark. Consider what you would like to accomplish in your lifetime. Ask yourselves what unique contributions you can make. I ask you, as an exercise after we are finished here today, to take ten minutes to consider what you would like to have remembered about you and your work. What would you like to have said about the contribution you made? Then work toward making that contribution.

The women who came before us in law made an impact disproportionate to their numbers. It is a proud, if not always successful, legacy they have left us. At the close of the twentieth century, we can look back over the past 300 years and see what the courage and determination of a few women has accomplished. Well into the twenty-first century, I hope that each of you is able to look back upon your own legal career with satisfaction and pride, and that we collectively can take pride in our accomplishments and contributions.

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53. See *supra* notes 2-9 and accompanying text.