

# The Role of Women Lawyers in American Legal History

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## INTRODUCTION

In her history, *Women and the American Experience*, Nancy Woloch quotes playwright Lillian Hellman's autobiography.<sup>1</sup> Ms. Hellman is quoted as saying: "My generation didn't think much about the place or the problem of women," and that women of her generation "were not conscious that the designs we saw around us had so recently been formed that we were still part of the formation." Dr. Woloch sees Ms. Hellman as representative of younger women's attitudes in the 1920s toward the suffrage movement, its leaders, and the rights they had won in 1920, when the nineteenth amendment was ratified and guaranteed women the right to vote. For example, founded in 1920, the League of Women Voters represented the mainstream of post-suffrage feminism; yet, one League member wrote in 1928 that women of the new generation took feminist gains for granted.<sup>2</sup>

Dr. Woloch concludes that "[e]conomic independence was in fact the new frontier of feminism in the 1920s. A change of direction from the service-oriented, progressive goals of the presuffrage era, it was also a shift of emphasis from public cause to private career, from society to self."<sup>3</sup>

*(Edited from Remarks Delivered to the Harvard-Radcliffe Club, on September 30, 1989 in Albuquerque, New Mexico)*

I believe I have something in common with those young women of the 1920s. When I graduated from law school in 1968, in fact when I entered law school in 1965, I took my opportunities, to be a law student, to become a lawyer, and to practice law, for granted. And I think I may be representative of my generation.

I remember attending a monthly luncheon of the Massachusetts Association of Women Lawyers and realizing that some of the older women present believed that those of us who had been recently admitted could have no appreciation for how difficult it had been to become a woman lawyer. I remember being surprised to discover that women lawyers had been excluded for some number of years from the Boston Bar Association and to realize that the Massachusetts Association of Women Lawyers (1901), and the National Association (1911) of which it was a part, were organized at a time when the regular bar association either did not admit women or was inhospitable. Nevertheless, I also remember feeling somewhat resentful and a little surprised that to other, older women lawyers my group of young lawyers seemed to have acquired their licenses too cheaply to appreciate their value.

Twenty-one years later I think I understand a little better what those women lawyers may have been trying to tell us. In fact, my roommate in law school recently gave a commencement address in Colorado. Her title was "We've Come a Long Way, Baby, But We're Not There Yet." I think my friend was trying to tell the young lawyers at



*Chief Justice Pamela B. Minzner is the first woman to lead New Mexico's highest court.*

the University of Denver something similar to what those Massachusetts women lawyers were trying to tell me in 1968.

I now think that what they were trying to tell us was that women lawyers had been around a long time and that the opportunities open to us were at least in part not due solely to our own will or to our families' patience. Rather, we were part of a very long tradition. I believe they were in fact sharing an oral tradition with us, a record that until recently seems to have been ignored by historians. I think they were trying to say that times were changing, that we were part of that change, and that they had looked forward to the changes they were seeing. I think they were also saying or at least should have said that they and others before them had made it possible. That is the

heart of what I want to open up for you: the emerging story of the first women lawyers. My hope is that that story will be increasingly better understood and that it will lead to a greater interest in the subsequent generations, including the generation of lawyers who welcomed me into practice.

It is only recently that legal historians and historians of women's history have begun to take a close look at the first women lawyers. You might, for purposes of telling a story, think of the first women lawyers as a pioneer generation of about 200. These women started the process of eliminating the many legal and institutional barriers for women who wanted to practice law. They built a network of female friendships as a result of which we know something about their experiences, not only as professionals but also as women. They made the idea of women in the law a reality and a palatable one, and others followed. Yet, for a long time, the available scholarly literature supported an inference that the history of women lawyers only began in the most recent past.<sup>4</sup> That is changing. I think one of the reasons it is changing is that the number of women lawyers has grown so that one part of the story as we know it is told in numbers.

It is true that as I finished law school women were beginning to enter law schools in far greater numbers than ever before. That is a part of the pattern in which I participated. The numbers are interesting.

At the national level, the figures we have suggest that the number of women attorneys rose from five in 1870, to fifteen in 1880, and reached about 200 by 1890. By 1920, the number of women lawyers had

reached 1738. That figure almost doubled by 1930, and then the pace started to slow. In 1940, there were almost 4500. In 1950, the Bureau of the Census reported about 6500 women lawyers; in 1960, the Bureau of the Census reported 7500 women lawyers.<sup>5</sup>

If you look at changes in the percentage of lawyers who are women, the small rate of progress is even more striking.<sup>6</sup> From 1951 to 1963, the percentage of women lawyers moved from 2.5 to 2.7 percent.

The late 1960s and early 1970s, however, were the beginning of dramatic movement. In 1970, the Bureau of the Census reported 13,000 women lawyers; 38,000 women lawyers in 1976; and 62,000 women lawyers in 1980. In 1980, 12 percent of the lawyers in this country were women; today the figure is 20 percent.

The same pattern is repeated in New Mexico. Today there are 870 women lawyers on active, dues-paying status with the New Mexico Bar. That represents 24.5 percent of the active, dues-paying population. Based on the admissions represented in the roll of attorneys, it looks to me as though the growth spurt begins in the late 1960s: six were admitted in 1969, four in 1970, five in 1971, and seven in 1972. After 1972, the number steadily increases, reaching seventy-one last year. By contrast, I had to go to the end of 1972 in the roll of attorneys to reach seventy-four women admitted since 1908.

The way you know you have really arrived, however, is when you are too numerous to count, when the news is no longer about a "first woman" to achieve a particular goal or honor, and when there is enough to interest historians in writing about the design the individuals have been forming.

And that is precisely what is happening. Professor Virginia Drachman at Tufts is working on a history of women lawyers in the United States. Professor Matsuda at Stanford is editing a book of essays about early women lawyers in Hawaii. Professor Babcock of Stanford has finished and published in the *Arizona Law Review* a wonderful account of Clara Shortridge Foltz, "first woman" in California legal history.

In California, Foltz was the first woman notary public, first woman counsel to a legislative committee, and first woman deputy district attorney, as well as the first woman to be admitted to practice in California. She played a large part in the passage of the first American state constitutional provisions guaranteeing women access to education and employment. An early feminist, Foltz lectured on suffrage, was President of the California Women's Suffrage Association, and founded suffrage and women's improvement organizations. In addition to women's rights, Foltz pursued other social and political causes, including penal and educational reform, and campaigned for candidates who espoused them.

She was the first person to conceive the idea of a public defender for indigents accused of crime, and she worked for public defender legislation in thirty states. She practiced law continuously for fifty years. In 1930 she ran for Governor of California. She was also candid. When asked to describe her thoughts about practicing law, she said she had found it hard, unpoetic, and relentless.<sup>7</sup>

Yet there were many other women who followed Foltz and there were a number of women who

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preceded her. She is part of a generation of women who pursued legal careers at a time when the conventional wisdom suggested men and women should occupy separate spheres, men working outside the home and women taking care of the home.<sup>8</sup> She is also part of an old tradition of women lawyers in this country. In overcoming the obstacles in their way, they began to change the conventional wisdom. I am happy to see the new legal historians at work on integrating the history of women lawyers into the history of the legal profession.

But there's something else that moves me in this story. And that is the fact of the numbers of women who followed the first few, and the fact that although many have disappeared from sight, their presence in the profession that early and that continuously in itself must have affected the conventional wisdom. By 1920, a woman had been admitted to practice in all but two states. And as you will see, that meant that in each of those states, someone, often a number of people, had been imaginative enough and brave enough and stubborn enough to make change possible.

In 1986, a lawyer journalist named Karen Berger Morello published a book entitled, *The Woman Lawyer in America: 1638 to the Present: The Invisible Bar*.<sup>9</sup> In that book, Ms. Morello tells in a lively fashion the stories of many of the early successes and defeats, as well as much about the present reception women encounter. For those of you who find yourself interested in this subject, the book is an interesting, highly readable account of many of the major

players so far as we now know them.

Ms. Morello credits Margaret Brent of Maryland as the first woman lawyer in America. Brent arrived in the colonies in 1638, became the administrator of Governor Calvert's estate when he died, and finally served as counsel for the absentee Proprietor of Maryland, Lord Baltimore.<sup>10</sup> Mistress Brent, or "Gentleman Margaret Brent," as she was frequently addressed, is representative of women attorneys in colonial times. In the period when few men and no women prepared themselves professionally for the practice of law, people frequently brought their own cases to court or appointed someone without specialized legal training to act for them.<sup>11</sup> Such a deputy or agent was called an attorney-in-fact, rather than an attorney-at-law; the latter term signifies one who has been formally admitted to engage generally in practice.<sup>12</sup> While seventeenth and eighteenth century women could not enter the legal profession as attorneys-at-law, they could and often were attorneys-in-fact.<sup>13</sup>

As law became a paid profession that men entered as a means of earning money, women disappeared from the court scene until the late nineteenth century.<sup>14</sup> We can't be sure when the first woman attorney-at-law appeared on the American scene. There is evidence that lawyers practiced at the local level without ever having been admitted to practice before the supreme court of the state or territory in which they lived.

There is a report in a legal newspaper of a woman named Mary E. Magoon practicing law in North English, Iowa County, in February 1869.<sup>15</sup> 1869 was in fact an important year in the history of women lawyers. In that year, two women entered St. Louis Law

School, now the School of Law of Washington University, which is often given credit as the first law school to admit women.

But, in June 1869, in Mt. Pleasant, Iowa, perhaps the most significant event occurred. Mrs. Belle A. Mansfield, or Arabella A. Mansfield, was admitted to the bar in Iowa. At that time, the Iowa Code of 1851 limited admission to any white male person.

Mansfield was permitted to take the examination despite the gender-specific language. The attorney who conducted the examination recommended her for admission, and the matter came before Iowa Supreme Court Justice Francis Springer.

Justice Springer ruled that another statute was also applicable, one that provided that "words importing the masculine gender only may be extended to females." He then held that when a statute contained an affirmative declaration of gender, as did the Iowa statute governing admission to the bar, it would not be construed as a denial of admission to females.

At the same time that Mansfield was being admitted in Iowa, Mrs. Myra Colby Bradwell was preparing to take the Illinois bar exam. Bradwell was the publisher of the *Chicago Legal News*, the first law journal printed in the West. She served as editor and business manager, and the paper was a critical and financial success.<sup>16</sup> It was her paper that recorded the presence of Mary Magoon in Iowa County.

In August 1869, Bradwell was examined by a judge and the state's attorney. They certified that they found her qualified and recommended that a license issue. She filed her certificate with the Illinois Supreme Court and petitioned for a license.

Bradwell made the same argument that had been successful in Iowa. She relied on an Illinois statute that provided, "when any party or person is described or referred to by words importing the female gender, females as well as males shall be deemed to be included." Bradwell argued that therefore the Illinois statute governing admission to the bar encompassed female as well as male applicants, and she cited a number of statutes that pertained to individual rights but referred to an individual of masculine gender, such as the right to trial by jury.

The Illinois Supreme Court denied Bradwell's application, on the ground she was a married woman and that, like a minor child, she was disabled from entering into a valid contract. Bradwell printed the decision on the front page of the *Chicago Legal News* and submitted a supplemental brief, asking for a new hearing.

The supreme court again denied her application, but this time it ruled on custom and natural law. Its opinion, in 1870, described what had been "the universal belief" at the time the statute governing admission to the bar was passed: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth." Thus, the court concluded, the legislature could not have intended the result for which Bradwell had argued.

Meanwhile, Mrs. Ada H. Kepley graduated from the Union College of Law in Chicago, now Northwestern, in June 1870. She thus became the first woman to graduate from law school in this country. She also was denied admission to the bar.

Bradwell then appealed to the United States Supreme Court. There, her lawyer argued that under the fourteenth amendment and Article IV of the federal Constitution, Bradwell was entitled to the same privileges and immunities as citizens of all other states and Illinois could not limit bar admission on the basis of either race or sex.

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The United States Supreme Court waited nearly two years to issue its decision. When it ruled, seven of its eight members ruled against Bradwell's claim. The sole dissenter did not explain his disagreement, but it has been noted that he had a daughter who was active as a clubwoman and speaker.<sup>17</sup>

Justice Miller's opinion for the majority was placed on two grounds: (1) since petitioner was a citizen of Illinois, the privileges and immunities clause was not applicable to her claim, and (2) since admission to the bar of a state is not one of the privileges and immunities of United States citizenship, the fourteenth amendment did not secure the right Bradwell sought.

Justice Bradley wrote a concurrence that attempted to explain things in a different way. He wrote:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .

... The paramount destiny and mission of woman are to fulfil 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.

Ironically, by the time the United States Supreme Court rendered the opinion in 1873, it had little or no effect in Illinois. The previous year, Alta M. Hulett, an eighteen-year-old studying law with a Rockford attorney, had applied for admission to the Illinois bar. Despite the fact Hulett was single, she also was denied a license to practice law. But she took her case to the legislature; she drafted a bill providing that no person could be precluded from any occupation, profession, or employment, except the military, on account of sex. With the help of Ada H. Kepley, Myra Bradwell, and the many readers of the *Chicago Legal News*, Hulett's bill passed. Hulett then became the first woman admitted in Illinois, in 1873. Also, the Iowa Legislature in 1873 deleted the words "white male" from the statute governing admission to the bar.

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But women hadn't been waiting for the United States Supreme Court or for the Iowa and Illinois legislatures. One of the two women who had entered St. Louis Law School in 1869 was Miss Lemma Barkaloo. She was admitted to the bar of the Supreme Court of Missouri in March 1870, and she became the second woman to be admitted to the bar of a supreme court. In addition to Mansfield and Barkaloo, Sarah Kilgore was admitted in Michigan.

About the same time, Charlotte E. Ray gained admission to Howard University by sending her application in as C. E. Ray. Ray, who was an instructor in the Normal and Preparatory Department of Howard University, registered for evening classes at the law school. She was admitted to practice in April 1872 to the District of Columbia bar. Ray was the first woman lawyer in the District of Columbia; she seems to have been the first African American woman lawyer in the United States. In 1872, Clara H. Nash also was admitted to practice in Maine, as was Phoebe W. Couzens in Utah. In 1873, Alta Hulett was admitted in Illinois, as was Nettie C. Lutes in Ohio. In 1875, Elizabeth Eaglesfield was admitted in Indiana, as was Elsie B. Botensek in Wisconsin. Martha Dorsett was admitted in Minnesota in 1877. In 1878, Clara Folz was admitted in California, as was Tabitha A. Helton in North Carolina.

The pattern of court resistance and legislative reform was common. Lavinia Goodell was refused admission to the Wisconsin bar in 1875. The tone of the court's decision in *In re Goodell* is even more jarring to a modern ear than the

tone of *State v. Bradwell*. Yet, Judge Ryan's decision had the unintended effect of helping his opponents gather the support they needed to change the restrictions of the Wisconsin statute governing admission to the bar. Through Goodell's efforts and testimony, in 1877 the legislature revised the Wisconsin statute by adding, "No person shall be denied admission or license to practice as an attorney in any court of this state on account of sex." The same thing happened in Massachusetts. In California, Clara Folz, a single mother of five, drafted and lobbied the Women's Lawyer Bill before she applied for admission, and she was the first to apply and be admitted under it.<sup>18</sup>

Belva Lockwood, who was admitted to practice in the District of Columbia the year after Ray, in 1873 was denied admission to practice before the United States Supreme Court. The federal statute providing for admission to the United States Supreme Court was gender-neutral. In 1876, the requisite three years having passed, Lockwood arranged for a member of the Supreme Court bar to move her admission. Chief Justice Morrison R. Waite announced that the matter would be taken under advisement. A week later, the Chief Justice delivered the opinion of the court denying Lockwood's application, on the ground that, as a matter of custom, the rule granted "none but men" the privilege of practice.

Bradwell was the first to criticize the Supreme Court in the *Chicago Legal News*. Lockwood drafted a bill providing for the admission of women to the federal courts and persuaded Congressman Butler to submit it to the House Judiciary. Neither the first bill she drafted nor the second reached the floor of the House. But, at last, in 1878, the

House passed a bill that gave women attorneys access to the federal courts. In 1879 the bill passed, and President Rutherford B. Hayes signed it. It was known as the "Lockwood bill." Lockwood seems to have been the first to be admitted under it.

These women illustrate the kind of resistance women who aspired to become lawyers met in this first decade of women attorneys-at-law. Yet by 1880, women had been admitted to practice in nine states and the District of Columbia and had gained access to the federal courts.<sup>19</sup> By 1917, when Lockwood died, women were admitted to practice in all but four states.<sup>20</sup> Mansfield, Bradwell, and Kepley are representative of many of the women lawyers in this period and later; they practiced with family, brothers, fathers, husbands, or sought admission to the bar in order to do so.<sup>21</sup> Lockwood, Goodell, and Folz demonstrate that women lawyers were able to build practices, but they seemed to have built solo practices or built a practice in partnership with another woman.

Single women, too, benefitted from influential male lawyer relatives. Many came from families with notable members in the legal profession. The first woman admitted to the bar in Utah, in 1871, was the daughter of the territorial Attorney General.<sup>22</sup>

The nature of practice for these women was often office work, in which they took what appears to be a staff position for the male lawyers with whom they worked; but not always. A handful of women did trial work, particularly criminal defense.<sup>23</sup> About one-fifth of the group that can be identified between 1870 and 1890 never practiced.<sup>24</sup> Some women used their law degree in other ways. For example,

Mansfield occupied a chair in history at DePauw University. Many were active in the temperance movement or in politics. Only a few seem to have been ardent suffragists.<sup>25</sup>

## CONCLUSION

Professor Drachman's work suggests that the studies to date have shared an emphasis on discrimination.<sup>26</sup> As she points out, the "discrimination model" of the history of women lawyers is important. It uncovers the obstacles—legal, institutional, and cultural—that women encountered as they pursued a legal career. It provides examples of women who successfully negotiated the obstacles. Women were not just victims of discrimination or the conventional wisdom; rather, in the decade of the 1870's, more often than not they proved to be survivors, victors, who gained the prize they sought. But, she notes, the model has limits. "First, it portrays women as being at odds with men, masks the important support women lawyers received from many men, and blurs the differences that divided women lawyers among themselves. Second, the discrimination model focuses almost exclusively on women's attempts to enter the public arena and ignores women's private lives."<sup>27</sup> The newer research is likely to be more focused on other models.

Today, one of the major problems that confronts women lawyers, as it confronts many women and men, is the need to balance home and work, family responsibilities and professional responsibilities. It is an old dilemma, as the letters among the first women lawyers show. Perhaps, as we learn more about the private lives of the first women lawyers, new light will shine on that old dilemma.

However, in the meantime, while I recognize that the tradition of women lawyers in this country will mean different things to different people, I find myself most interested in the women of the 1930s, 1940s, and 1950s, when a woman could cross the threshold but there was often no room in a firm. Yet several thousand women practiced. I credit them with helping the door open, their presence in itself belying the conventional wisdom.

In 1957, Dorothy Thomas compiled a directory of women lawyers. In that directory, she listed all the women lawyers of whom she had any record. It is some measure of how slow growth was that in New Mexico she lists eighteen. Yet, by my count in the roll of attorneys for New Mexico, thirty-three women had been admitted here prior to 1957. Some women, I know from other sources, had moved out of state, but still the number listed for 1957 seems low in comparison to the number who had been admitted. It suggests that women left practice, or at least left New Mexico, perhaps for lack of work.

I hope that the new legal historians will find time to write about these women also. Their presence shows me that it is not necessary to be first, or even to be newsworthy, or even to be in the public eye, to make a contribution to history. Rather, one can be part of an important design, of a significant historical movement, in a private, individual career choice. The pioneer women of the 1870s and 1880s and those who followed them made it possible for it to be said in the 1970s and 1980s that law school was a normal postgraduate choice and that women who practiced law in a variety of ways were a significant percentage of the legal profession.<sup>28</sup> The challenges for women in the

1990s, I think, include making that tradition better known, as well as continuing to help our profession move closer to true equal opportunity. Perhaps, if we keep our eyes fixed well on the prize rather than the remaining obstacles and hurdles, we can cross the distance that history has assigned to us. ■

## FOOTNOTES

1. (New York: Alfred A. Knopf, 1984), p. 387.
2. *Ibid.*
3. *Ibid.*, p. 388.
4. V. Drachman, "My 'Partner' in Law and Life:" *Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America*, 14 *Law & Social Inquiry* 221, 224 (1989).
5. Epstein, *Women in Law* (New York: Basic Books, 1981), p. 4, Table 1.1.
6. *Ibid.*
7. K. Morello, *The Woman Lawyer in America: 1638 to the Present: The Invisible Bar* (Boston: Beacon Press, 1986), p. 65.
8. Drachman, "My 'Partner' in Law and Life", p. 227.
9. *Supra*, n. 4.
10. Drinker, "Women Attorneys of Colonial Times," 56 *Md.Hist. Magazine* (Dec. 1961), p. 351.
11. *Ibid.*, p. 335.
12. *Ibid.*, p. 335.
13. *Ibid.*, p. 335.
14. *Ibid.*, p. 351.
15. Morello, *The Invisible Bar*, p. 11.
16. *Ibid.*, p. 14.
17. Dorothy Thomas, *Women Lawyers in the United States* (New York: The Scarecrow Press, 1957), p. .
18. B. Babcock, *Clara Shortridge Folz: "First Woman"*, 30 *Ariz.L.Rev.* (1988), p. 673, 685.
19. Morello, *The Invisible Bar*, pp. 37-38.
20. *Ibid.*, p. 36.
21. D. Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 *J. Leg. Ed.* (1977) 485, pp. 494-95.
22. *Ibid.*, p. 495.
23. *Ibid.*, p. 496.
24. *Ibid.*, p. 498.
25. *Ibid.*, p. 501.
26. Drachman, "My 'Partner' in Law and Life", p. 226.
27. *Ibid.*
28. Epstein, *Women in Law*, p. 44.