



Memorandum

To: [REDACTED]

CC: Elizabeth Brundige, Executive Director, Avon Global Center for Women and Justice and Visiting Assistant Clinical Professor of Law

From: Maithili Pradhan, Women & Justice Fellow, Avon Global Center for Women and Justice

Date: November 25, 2012

Re: **Exclusion of women from the legal profession in the United States of America, the United Kingdom, and South Africa**

This memorandum responds to your request for information regarding the exclusion of women from the legal profession in the United States of America, the United Kingdom, and South Africa. It provides a brief overview of the key statutes, cases, and legal arguments that sanctioned the exclusion of women from the bar and, by extension, the bench, in each of these countries.

Exclusion of women from the legal profession in the United States of America

In the United States, women began gaining admission to state bars in the 1860s and 1870s.¹ The first women to attempt to gain admission to the bar met with various obstacles, including legal provisions that limited admission to the bar to male applicants. One of the most difficult obstacles was the gender-biased attitude of the judiciary, which excluded women from the bar even where there was no specific legal provision requiring such exclusion. Nonetheless, prior to widespread acceptance of women as applicants to the bar, some women did indeed engage in the practice of law despite not gaining admission to the bar.²

We did not come across any statutes or case law that specifically prohibited women from becoming judges. However, “by the early decades of the 1900s, nearly every state required

¹ KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 17 (1986); Maria Pabon Lopez, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN’S LAW JOURNAL 55 (2008).

² MORELLO, *supra* note 1, at 17, 24-26. Margaret Brent, the first woman to practice law during colonial times, practiced in Maryland in the mid-1600s. Lopez, *supra* note 1, at 56. Mary Magoon is often recognized as the first woman lawyer in the United States, practicing in Iowa in the late 19th Century. *Id.*

formal law training for all but municipal court judges and justices of the peace;”³ thus it is likely that women were effectively prohibited from becoming judges by state requirements that judges have legal training (which was not widely available to women until long after the first women were admitted to the bar).⁴ Furthermore, the broader common law prohibition on women holding public office,⁵ which stayed in effect until 1920 (when the 19th Amendment to the Constitution, giving women the right to vote, effectively allowed them the right to hold public office), provided another ground for excluding women from the judiciary. Additionally, gender biases held by judicial gatekeepers who could influence judicial appointments and women’s lack of political influence due to their disenfranchisement also likely played a role in keeping women from the bench.⁶ The first woman judge in the United States was Esther Morris, appointed Justice of the Peace in Wyoming in 1870 one year after the Wyoming legislature adopted the first state law granting women equal suffrage.⁷ However, in the following decades, women were appointed only infrequently to the judiciary,⁸ and in several states, the first woman joined the bench only in the 1970s.⁹

Where women were excluded from the bar by statute, this was typically found in state requirements for admission to the bar. For example, the Iowa Code of 1851, §1610, limited admission to the bar to “any white male person, twenty one years of age, who is a resident of [Iowa]” and who possessed “requisite learning.”¹⁰ Arabella (Belle) Mansfield, who became the first woman officially licensed to practice law and to be admitted to a state bar in the United States in 1869,¹¹ was admitted to the Iowa state bar despite this legal provision because of a judge’s progressive interpretation of the law. Judge Francis Springer relied on another Iowa statute stating, “words importing the masculine gender only may be extended to females” and declared that a statute containing an affirmative declaration of gender could not be construed as an implied denial of the enumerated right to women.¹² At the other end of the spectrum lies *In re Maddox*, which addressed the claims of Etta Haynie Maddox that she should be allowed to sit for

³ Deborah Thaw, *The Feminization of the Office of the Notary Public: From Femme Covert to Notaire Covert*, 31 J. Marshall L. Rev. 703, 708 (1998); Larry Berkson, *Women on the Bench: A Brief History*, 65 *Judicature* 286, 287 (1982).

⁴ Indeed, where legal training was not required, there are instances of women having held judicial positions. For example, Esther Morris was appointed Justice of the Peace in Wyoming in 1870. Berkson, *supra* note 3, at 287.

⁵ Thaw, *supra* note 3, at 708.

⁶ Berkson, *supra* note 3; Beverly B. Cook, *Women Judges: A Preface to Their History*, 14 *Golden Gate U. L. Rev.* 573, 574-75, 586-87 (1984), available at

<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1332&context=ggulrev>; MORELLO *supra* note 1, at 223-224. Gatekeepers can include law school administrators who decide whether to accept a female law student, law faculty who recommend individuals for law clerk positions (which can then lead to positions in the judiciary), those making the appointments (such as the President of the United States), and the trusted advisors, including lawyers and other judges, to those making the judicial appointments. Cook, *supra*, at 574-75, 586-87.

⁷ Cook, *supra* note 6, at 573.

⁸ MORELLO, *supra* note 1, at 222-224; Beckson, *supra* note 3, at 287. The first woman to serve on the federal U.S. Court of Appeals, Florence Allen, was appointed to that position in 1934. It was not until 1949 that Burnita Shelton Matthews became the first woman to serve on a U.S. District Court. Hon. Betty Barteau, *Thirty Years of the Journey of Indiana’s Women Judges 1964-1994*, 30 *Indiana L. Rev.* 43, 63 (1997).

⁹ Berkson, *supra* note 3, at 290.

¹⁰ MORELLO, *supra* note 1, at 12.

¹¹ MARY JANE MOSSMAN, *THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW, AND THE LEGAL PROFESSIONS* 11 (2006); MORELLO *supra* note 1, at 26.

¹² MORELLO, *supra* note 1, at 12.

the bar examination and receive admission to the bar despite a Maryland state statute limiting bar admission to “male citizens of Maryland.”¹³ The judge hearing *In re Maddox* stated that although the court was

not to be understood as disparaging the laudable ambition of females to become lawyers[, i]t is for the General Assembly to declare what class of persons shall be admitted to the bar. We have no power to enact legislation. The courts can only interpret what the Legislature adopts...If the General Assembly thinks, at its approaching session, that females ought to be admitted to the bar it can so declare. Until then we have no power to admit the applicant and her request to be allowed to stand for examination must be denied.¹⁴

In other U.S. states too, judges interpreted statutes – even those that did not expressly restrict admission to members of the male sex – to exclude women. In two important cases, *In re Goodell*¹⁵ and *Bradwell v. The State*,¹⁶ state court judges refused to allow the women petitioners admission to the bar. They explained that that the rule of statutory construction stated above, that words importing the masculine may be extended to females, should be applied “unless...such construction would be inconsistent with the manifest intention of the legislature.”¹⁷ They concluded that in these cases the legislature clearly did not intend to allow women admission to the bar.¹⁸

Although the petitioner in *Bradwell v. The State*, Myra Bradwell, cited precedent from the Mansfield case to argue that women can indeed be granted admission to the bar, the Supreme Court of Illinois and the United States Supreme Court did not uphold this argument.¹⁹ In *Goodell*, the Supreme Court of Wisconsin refused to include women within the construction of the word “person.”²⁰ Judge Ryan noted that that extending the meaning of “person” to include females as well could result in perverse interpretations of the law, and provided examples of the ridiculous results he foresaw, including the “prosecution [of a woman] for the paternity of a bastard...”²¹ In support of his conclusion that a gender-neutral statute did not mean that women

¹³ Hollis Atkinson, *Etta Haynie Maddox: Maryland's First Woman Lawyer*, Women's Bar Association of Baltimore City (February 19, 1950), at 6, available at <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/012400/012464/pdf/atkinson.pdf>

¹⁴ *In re Maddox*, 93 Md. 727, 735 (1901).

¹⁵ *In re Goodell*, 39 Wis. 232 (1875).

¹⁶ *Bradwell v. The State*, 55 Ill. 535 (1869).

¹⁷ D. K. Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485, 487 (1977) citing *In re Goodell*, at 241.

¹⁸ *Id.* at 487.

¹⁹ See *Bradwell v. The State*, 55 Ill. 535; *Bradwell v. State of Illinois*, 83 US 130 (1872), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=83&invol=130>. See also MOSSMAN *supra* note 11, at 42; Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287 (1994), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1918&context=vulr>. In 1890, the Supreme Court of Illinois granted Myra Bradwell a license as an attorney and counselor at law on its own motion. Friedman, *supra*, at 1303. In 1892, the United States Supreme Court admitted Mrs. Bradwell to practice on the motion of William Henry Harrison Miller, Attorney General of the United States. *Id.*

²⁰ See *In re Goodell*, 39 Wis. 232 (1875), available at <http://www.uiowa.edu/~prslaw/courses/gender/goodell.pdf>.

²¹ *Id.* at 246.

could be admitted to the bar, Judge Ryan also maintained that the admission of women to the bar was not something contemplated by the state legislators who enacted of the legislation in question;²² thus he found “no statutory authority for the admission of females to the bar of any court of [Wisconsin].”²³

The two state court decisions *In re Goodell* and *Bradwell v. The State* reflected the prevailing negative attitude toward expanding women’s entry into the legal profession. They indicate a “slippery slope” concern, wherein admitting a woman to the bar based on the use of the word “person” in the statute governing admission to the bar or a liberal interpretation of the masculine gender used in the statute could lead to women being eligible for even “the constitutional right of male suffrage”²⁴ or that women might then become “governors, judges, and sheriffs,”²⁵ an undesirable consequence that might call into question the legitimacy of denying women the right to vote.²⁶

The Supreme Court decision *Bradwell v. State of Illinois*²⁷ was especially important in the subsequent state court cases that excluded women from the bar. This decision by the highest court in the land held that a woman’s freedom to pursue the occupation of a lawyer was not a “privilege and immunity” of United States citizenship that was protected from state restriction by the 14th amendment to the United States Constitution.²⁸ The Supreme Court thus assured judges hearing subsequent cases in lower courts that excluding women from the bar did not violate the U.S. Constitution.

The judiciary also excluded women from admission to the bar because of marriage. For example, in *Bradwell v. The State* and *In re Lockwood*,²⁹ the judges stated that a woman could not be admitted to the bar because she did not have the right to enter into contracts with third persons without the permission of her husband.³⁰ In addition, a married woman could not be granted entry into the legal profession because this would create a conflict with her role as a wife and mother.³¹ In *Goodell*, Judge Ryan declared:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it...³²

²² *Id.* at 242. See also Weisberg, *supra* note 17, at 488.

²³ Weisberg, *supra* note 17, at 488.

²⁴ *In re Goodell*, at 243.

²⁵ *Bradwell v. The State*, 55 Ill. 535, 543 (1869).

²⁶ See Weisberg, *supra* note 17, at 488.

²⁷ *Bradwell v. State of Illinois*, 83 US 130 (1872).

²⁸ *Id.* at 139. See also MOSSMAN *supra* note 11, at 45.

²⁹ *In re Lockwood*, 154 U.S. 116 (1893), available at <http://supreme.justia.com/cases/federal/us/154/116/case.html> ; Weisberg, *supra* note 17, at 489.

³⁰ See *Bradwell v. The State*, 55 Ill. 535; *In re Lockwood*, 154 U.S. 116.

³¹ Weisberg, *supra* note 17, at 492.

³² *In re Goodell*, 39 Wis. 232, 245 (1875).

Furthermore, in his concurring opinion in *Bradwell v. State of Illinois*, Justice Bradley of the United States Supreme Court articulated a similar view of the role of women, stating:

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 constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.³³

Indeed, these cases underscore the view that “it was the law of nature that women both lived in separate spheres from men and that the practice of law was closed to women.”³⁴

Informed by 19th-century gender norms that posited that the key role of a woman was to be a wife and mother, the arguments against married women being admitted to the bar were also used to exclude unmarried women who wanted to gain admission. Judge Ryan explained, “[I]t is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of law is surely not one of these.”³⁵

Another argument often espoused in judicial decisions that excluded women from the bar was that women were mentally and physically incapable of sustaining the rigors of the legal profession. For example, in *Goodell*, Judge Ryan declared that the legal profession was not fit for the female character, stating that “the peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room as for the physical conflicts of the battlefield.”³⁶

Overall, the gender biases of the time strongly colored the judicial decision-making behind cases that excluded women from the bar. The practice of law seemed to be inherently in conflict with the “destined” role of a woman as a wife and mother, and therefore women were to be excluded from the legal profession. The liberalization of judicial views (and therefore judicial interpretation of bar admission statutes), paired with the increased civil rights granted to women, the growing number of women law students, and the increased normalization of the woman lawyer led to a gradual inclusion of women in the legal profession, but only after pioneers like Mansfield, Bradwell, and Goodell had tested the courts and started demanding they be allowed to practice without regard to their gender.

³³ *Bradwell v. State of Illinois*, 83 US 130, 141 (1872).

³⁴ VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY*, 18 (1998).

³⁵ *In re Goodell*, 39 Wis. at 245.

³⁶ *Id.*

Exclusion of women from the legal profession in the United Kingdom

Women in the United Kingdom continued to be excluded from the legal profession long after their American counterparts. Indeed, until the Sex Disqualification (Removal) Act of 1919 prohibited the exclusion of women on the basis of sex or marriage from “being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation,”³⁷ gaining admission to the bar continued to be a struggle for women in the United Kingdom.³⁸ As in the United States, although women were excluded from the legal profession by statutes and by case law, a few British women did practice law without being admitted to the bar.³⁹ Furthermore, women were not specifically prohibited by statutes or case law from becoming judges but were *de facto* prevented from holding these positions because of a common law prohibition on women holding public office.⁴⁰

A number of key cases reflect the reluctance of judges to admit women into the legal profession, based on the historical fact that women never previously had been admitted. In *Hall v. Society of Law Agents* in 1901, Margaret Hall appealed to the Court of Sessions regarding the decision of the Society of Law Agents in Scotland to deny her permission to take the preliminary examination for the Society.⁴¹ Hall argued that she should be given permission because the statute permitted “persons” to become law agents and so, by its terms, did not exclude women.⁴² The Society had found that women did not have a legal right to practice law given that “[a]ccording to inveterate usage and custom in Scotland, that practice has in all departments of the law been hitherto confined exclusively to men.”⁴³ Upon Hall’s appeal, the Court of Sessions also refused to grant her permission because the statute did not explicitly *include* women, even though it did not explicitly *exclude* them either. In support of its decision, the court stated that the word “persons” had to be interpreted according to its customary usage; because women had been ineligible to become law agents when the statute was enacted in 1873, the court found the customary usage of “persons” to mean “male persons” and accordingly refused Hall’s appeal.⁴⁴

Perhaps the most famous case, brought before the Court of Appeal by Gwyneth Bebb in 1913, *Bebb v. Law Society*,⁴⁵ was decided on similar grounds. Bebb, upon being denied admission to the Law Society to take the preliminary examination to become a solicitor, took the matter to court. In *Bebb v. Law Society*, the Court of Appeal stated that the question of whether the gender-

³⁷ Sex Disqualification (Removal) Act 9 & 10 Geo. 5, ch. 71 §1.

³⁸ MOSSMAN, *supra* note 11, at 116.

³⁹ *Id.* at 116. Ms. Elizabeth Orme opened the first woman lawyer’s office in London in 1875 despite not being admitted to the bar. *See id.* She successfully practiced in estate work, conveyancing, and patents for several decades. Mary Jane Mossman, *The First Women Lawyers: “Piecemeal Progress and Circumscribed Success,”* 45 *Osgoode Hall Law Journal* 379, 386 (2007).

⁴⁰ Thaw, *supra* note 3, at 708; Berkson, *supra* note 3, at 287.

⁴¹ *Hall v. Incorporated Society of Law Agents* (1901) 3 F 1059; MOSSMAN *supra* note 11, at 113. *See also* Hector L. MacQueen, *Scotland’s First Women Law Graduates*, W A Wilson Memorial Lecture, School of Law, University of Edinburgh (2 June 2009), available at <http://womeninlaw.law.ed.ac.uk/documents/WilsonLecture.pdf>.

⁴² *Hall v. Incorporated Society of Law Agents*, 3 F at 1060; MOSSMAN *supra* note 11, at 113.

⁴³ *Hall v. Incorporated Society of Law Agents*, 3 F at 1060.

⁴⁴ *See id.* at 1064-65; MOSSMAN *supra* note 11, at 114.

⁴⁵ *Bebb v. Law Society*, (1914) 1 Ch. 286, CA. For an in-depth discussion of this case, see Christine Alice Corcos, *Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession*, 75 *Denv. U. L. Rev.* 361, 362-79 (1998).

neutral language of the statutes meant that women could gain admission to the bar was settled through “long usage” in the common law and found that women were not included under “persons” in the Solicitor’s Act of 1843.⁴⁶ Master of the Rolls Cozens-Hardy concluded:

In the first place, no woman has ever been an attorney-at-law. No woman has ever applied to be, or attempted to be, an attorney-at-law. There has been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law of this country, and which we ought, beyond all doubt, to be very loth to depart from...[The court’s] duty is to consider, and so far as we can, to ascertain what the law is. And I disclaim absolutely any right to legislate in a matter of this kind. That is for Parliament and not for this court.⁴⁷

In a concurring opinion, Lord Justice Philmore added that women have an additional disability at common law, namely that after marriage they are not able to enter into contracts with third parties.⁴⁸ He also noted that although this disability did not apply to single women, “every woman can be married at some time in her life, and it would be a serious inconvenience if, in the middle of her articles, or in the middle of conducting a piece of litigation, a woman was suddenly to be disqualified from contracting by reason of her marriage.”⁴⁹ Thus the common law disability applicable to married women was also a reason to exclude unmarried women from the legal profession.

In 1903, Bertha Cave applied to the Benchers of Gray’s Inn for permission to qualify as a barrister, and her application was denied.⁵⁰ She appealed to a committee of seven justices sitting in the House of Lords under the chairmanship of the Lord Chancellor.⁵¹ After a private proceeding lasting only five minutes, the committee confirmed the Benchers’ decision and denied Cave’s application for permission to qualify as a barrister “by adopting the principle that ‘there was no precedent for ladies being called to the English Bar, and the tribunal were unwilling to create such a precedent.’”⁵² Also in 1903, Christabel Pankhurst was denied admission as a student at Lincoln’s Inn on the ground that it would be useless to admit her because women were not then allowed to practice at the Bar.⁵³ Thus the fact that women had never been attorneys meant that they could never become attorneys absent legislation expressly granting them admission.

⁴⁶ *Bebb v. Law Society*, at 286, 299. *See also* MOSSMAN, *supra* note 11, at 115.

⁴⁷ *Bebb v. Law Society*, at 294.

⁴⁸ *Id.* at 299.

⁴⁹ *Id.*

⁵⁰ *Cave v. Benchers of Gray’s Inn*, *The Times*, 3 December, 1903; MOSSMAN *supra* note 10, at 114; *see also* Sophonisba P. Breckinridge, *A Recent English Case on Women and the Legal Profession*, 23 *J. Political Economy* 64, 69 (1915), *available at* <http://www.jstor.org/stable/1819534>.

⁵¹ MOSSMAN, *supra* note 11, at 114; Breckinridge *supra* note 49, at 69.

⁵² MOSSMAN, *supra* note 11, at 114, *citing* *Cave v. Benchers of Gray’s Inn*, *The Times*, 3 December 1903.

⁵³ *Id.* at 115.

Exclusion of women from the legal profession in South Africa

In South Africa, the two key cases relating to the exclusion of women from the legal profession relied on arguments similar to those employed by the judges in the United Kingdom and in the United States in deciding that despite gender-neutral statutes, until such time as legislatures explicitly permitted women to practice law, women were not permitted to gain admission to the bar because historically “the legislature had not intended to include women within the class of persons who could be admitted to the profession.”⁵⁴

As in the United States and the United Kingdom, we did not find any provisions in statutory law in South Africa prohibiting women from becoming judges. The dearth of women judges seems to be attributable to other causes, including a smaller pool of qualified women who had legal training, biases of judicial gatekeepers, including the Judicial Service Commission and the Judge Presidents, who can influence judicial appointments, and gender bias in the legal system (often shown through the use of generic “he” in statutory language).⁵⁵

In 1909, Judge Bristowe of the Transvaal Supreme Court presided over *Schlesin v. Incorporated Law Society*,⁵⁶ the first case to consider whether women had a right to enter the legal profession.⁵⁷ The Transvaal Supreme Court held that women were barred from admission to legal practice based on historical practice in South Africa, Holland, and England.⁵⁸ Judge Bristowe explained that the Interpretation of Laws Proclamation 15 of 1902 provided that “words of the masculine gender shall include females...unless contrary intention appears”⁵⁹ and found that given long historical practice, it was evident that contrary intention did indeed appear in the legislation governing admission to the bar. Judge Bristowe stated:

The mere use of the word “attorney” indicates that the intention was that the persons should be admitted as attorneys in accordance with what has been the universal practice, if not the law, for so long as the law on the subject has existed. The use of the word “attorney” in my opinion indicates that the persons who are to be attorneys are to be of that class who have always been capable of being attorneys, and not of that class who, so far at all events as practice is concerned, have never been capable of being attorneys.⁶⁰

As such, the court “would not feel itself justified in departing from that practice [of not admitting women as attorneys] unless the legislature had indicated an intention that it should be departed

⁵⁴ Kate O’Regan, *Transforming the Judiciary: Notes from a continuing South African journey*, Ethel Benjamin Lecture, 16th Annual New Zealand Law Foundation, Dunedin, 3 (April 23, 2012). See also Mia Swart, *The Carfinian Curse: The Attitudes of South African Judges Towards Women Between 1900 and 1920*, 120 S. African L.J. 536, 548-51 (2003).

⁵⁵ See Ruth B. Cowan, *Women’s Representation on the Courts in the Republic of South Africa*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 291, 305-15 (2006). In 1994 only two of the 166 judges in South Africa were (white) women, including one appointed by the departing apartheid government. *Id.* at 298.

⁵⁶ *Schlesin v. Incorporated Law Society*, 1909 TSC 363.

⁵⁷ Swart, *supra* note 54, at 548.

⁵⁸ *Schlesin v. Incorporated Law Society*, 363. See also Swart, *supra* note 54, at 548.

⁵⁹ *Schlesin v. Incorporated Law Society*, at 364, *citing* Interpretation of Laws Proclamation 15 §10 (1902). See also Swart *supra* note 54, at 548-549.

⁶⁰ *Schlesin v. Incorporated Law Society*, at 365.

from,” and based on this historical precedent, denied Schleisin’s application for the registration of her articles.⁶¹

In the 1912 case, *Incorporated Law Society v. Wookey*, the Appellate Division was called upon to decide whether the term “persons” used in the statute governing admission of attorneys to the bar included only “male persons” or also included women.⁶² They determined that “persons” included only male persons, thus excluding women from the legal profession.⁶³

In this case, a firm of attorneys was willing to enroll Madeline Wookey as an articled clerk, but Wookey met with opposition from the Cape Law Society, which refused to register her articles.⁶⁴ Wookey submitted an application to the Cape Supreme Court, which ordered the Society to register her.⁶⁵ The Law Society appealed this decision to the Appellate Division, arguing that Wookey could not be admitted as an attorney because she was a woman.⁶⁶

After an examination of the historical background of persons admitted to the legal profession, Acting Chief Justice Innes concluded that “by the word “persons” only male persons were denoted.”⁶⁷ He stated:

The question is not whether this lady is likely, adequately, and satisfactorily to discharge the duties of a legal practitioner...The inquiry is simply whether she belongs to the class to which the terms of the section in question refer...if she does not, she has no such right, and the Court can give her none. And that being so, assistance must be sought elsewhere. The Legislature of the country is the only source from which relief in a case of this kind can be obtained...⁶⁸

Concurring with ACJ Innes, Judge Solomon noted that “from time immemorial men only had been admitted and enrolled as attorneys of the Court...in view of the central fact that at [the time the laws were made] the invariable practice for centuries had been to admit men only to the profession,” he felt “not the least doubt that the Legislature was contemplating men only, was legislating for men only, and had not thought of introducing any change into the well-established practice of the Courts.”⁶⁹ Thus, considering what the word “persons” meant to the original legislators, Judge Solomon agreed that women were not included within the gender-neutral term used in the statute governing admission to the legal profession.

⁶¹ *Schlesin v. Incorporated Law Society*, at 365. See also Swart, *supra* note 54, at 549.

⁶² *Incorporated Law Society v. Wookey*, 1912 AD 623. For an in-depth discussion of this case, see Swart, *supra* note 54, at 549-551.

⁶³ Swart, *supra* note 54, at 549-50; O’Regan, *supra* note 54, at 3. See also M. Slabbert, *The Requirement of Being a “Fit and Proper” Person for the Legal Profession*, 14 (4) Potchefstroom Electronic Law Journal 209, 213 (2011), available at http://www.nwu.ac.za/webfm_send/4723.

⁶⁴ Swart *supra* note 54, at 549.

⁶⁵ *Id.* at 549.

⁶⁶ O’Regan *supra* note 54, at 3; Lilla Crouse, *A Bar for Women?*, 15 Advocate 30, 30 (2002), available at <http://www.sabar.co.za/law-journals/2002/december/2002-december-vol015-no3-pp30-31.pdf>.

⁶⁷ *Incorporated Law Society v. Wookey*, at 567.

⁶⁸ *Id.* at 568.

⁶⁹ *Id.* at 569-70.

In agreement with ACJ Innes and Judge Solomon, JP De Villiers stated that although “[n]o doubt many of the disabilities under which women have laboured in the past have been abolished...we cannot ignore the fact that from the time that Carfinia vexed the soul of some too nervous praetor with her pleading down to our own day, the profession of an attorney has been exercised exclusively by men...it is not unreasonable to expect that if the Legislature had meant women as well as men in future to be admitted as attorneys and notaries, it would have said so in plain language.”⁷⁰

Thus the historical basis of this decision ensured that the legal profession would continue to be exercised exclusively by men until 1923, when the legislature allowed women to practice the law through the Women’s Legal Practitioner’s Act.⁷¹

Conclusion

In the United States, the United Kingdom, and South Africa, the legal arguments that have been used to exclude women from the legal profession are remarkably similar and reflect the views of the era during which the first cases of women demanding admission to the profession were heard. These cases focus on the “essential nature” of women as nurturing, caring, weak, and unsuitable for the masculine legal profession, as well as on the common law disabilities with which women were burdened, namely the inability of a married woman to enter into contracts with third parties and the long history of women being excluded from the legal profession. As political and legal developments granted women the recognition of their rights, including the right to vote and the right to be free from discrimination, the official barriers to entering the legal profession receded, although unofficial barriers, such as gender biases within the judiciary and the male-dominated legal profession remained.

⁷⁰ O’Regan, *supra* note 54, at 4, *citing* Incorporated Law Society v. Wookey at 641. Swart explains that “[a]ccording to Roman law authorities, women could not practise as attorneys. Two women, Carfinia and Calphurnia, offended the sensibilities of the courts. Carfinia ‘vexed the soul of some too nervous praetor with her pleading’ and Calphurnia, pleading before the Senate, lost her case and in an act of extreme contempt of court, turned her back to the judges, lifted her robes and displayed her derriere. Women were therefore excluded entirely from rendering any court or public service on account of their temperament. It seems as if, by their actions, these two women (like Eve) tainted all their sisters.” Swart, *supra* note 54, n. 1 at 540.

⁷¹ CHRISTOPHER ROEDERER AND DARRELL MOELLENDORF, JURISPRUDENCE, 297 (2004).