

WOMEN AND THE BAR EXAM: THINKING LIKE A WOMAN LAWYER

COMMENTS ON THE LEGAL PROFESSION

*Arthur E. Ryman, Jr.**

Among the important functions of American law schools is critique of the courts and the legal profession. Members of the bar sometimes object to ivory-tower-academic-jurisprudence in legal education—indeed, a popular article in the *New York Times Magazine*¹ said law students aren't taught to think like lawyers, but like law professors. If that is so, it is to be hoped that the law professors are questioning the doings of lawyers and judges. You may want to comment on or object to what you see here. Socratic questioning flourishes on interchange, and I will respond here or by mail.

I. PREJUDICE?

I cringe inside when I say this—we are talking about the bar exam and only passing the bar exam—I would stick to the male third person in your answers. But if anyone feels uncomfortable with this, use he/she, but you are probably jeopardizing your chances.²

II. IOWA FACTS

The pass rate for men on the Iowa bar examination for June, 1987, was 77%; for women it was 66%.³

The academic records of the Drake women who failed were better, on average, than the academic records of the men who failed.

The failure rate for women had increased from 23% in June of 1986 to 26% in January, 1987, to 33% in June of 1987 when the author called these statistics to the attention of Chief Justice Reynoldson of the Iowa Supreme court.⁴ The Chief Justice sent a copy of the letter to the Iowa Board of Law Examiners. Chairman Bristol replied: "The members of the Board of Law

* Professor of Law, Drake University Law School; J.D., Denver University Law School, 1955; LL.M., Yale University, 1959.

1. Turow, *Law School v. Reality*, N.Y. TIMES MAG., Sept. 18, 1988.

2. S. Chess, videotaped BAR/BRI lecture, *quoted in A.B.A.J.*, Oct. 1988, at 34.

3. Data reported in Harpster, *Iowa Bar: Men Do Better Than Women?*, The Gavel (Drake University Law School student newspaper), Apr. 6, 1988.

4. Letter from Arthur Ryman to Chief Justice Ward Reynoldson, Iowa Supreme Court (July 22, 1987).

Examiners would have no way of explaining this. We examine test papers by number and not by name or gender. We do not know whether the applicant is a man or a woman when we grade the papers."⁵

Not only do many women use the female third-person singular pronoun, but some people believe that feminine handwriting often is identifiable.⁶

All the Drake women graduates who completed the December, 1987, Iowa bar exam passed, including those who were retaking the examination after failing in June. However, the overall statistics reflected no improvement. Men taking the bar had a pass rate of 81% while women passed only at a 67% rate. The differential *increased* from ten percentage points to fourteen.⁷

Taking the two examinations together, 154 of 196 men passed, a 78.5% pass rate; 77 of 115 women passed, a 67% pass rate.⁸

Responding to these statistics for a Board of Law Examiners now constituted of four men and three women,⁹ John M. Wharton said: "We do not believe the Iowa Bar Examination is biased in either its content or the manner in which it is graded [W]e are always open to constructive comments by members of the profession on how we might improve upon our efforts."

No review of the statistics on the June, 1988, bar is included here.¹⁰

III. GENDER DIFFERENCE

Women's question-posing, when faced with moral conflict, indicates a sensitivity to situation and context. Constructionist women resist premature generalization about what they could do or what should be done, particularly about matters of right and wrong. They insist on respectful consideration of the particulars of everyone's needs and frailties They do not want to neglect "the practicalities of everyday life" for the sake of abstract justice.¹¹

5. Letter from Chairman Bristol to Arthur Ryman (Aug. 5, 1987). Board of Law Examiners stationery reflected a board of seven including two women.

6. Monroe Freedman, Professor and former Dean at Hofstra University expressed the opinion in a telephone call to the author that identification of gender by handwriting on law school "anonymous" exams is reflected in grading patterns. The call expressed his interest in and concern about the issue of bar examination gender bias.

7. Letter from Arthur Ryman to Chief Justice Arthur McGiverin, Iowa Supreme Court (Feb. 8, 1988).

8. Data are based on information previously routinely provided by the Clerk's Office of the Iowa Supreme Court through the Dean's Office of Drake University Law School.

9. An increased sensitivity was also reflected in new stationery designating Mr. Bristol as the *Chairperson* (rather than the previous *Chairman*) of the Board of Law Examiners.

10. Data were not supplied to the faculty through the Dean's Office in the usual way. The author encountered difficulty in obtaining data from the Clerk of the Iowa Supreme Court.

11. M. BELENSKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAYS OF KNOWING* 149 (1986).

The quoted work is not the first or only book or published study by scholars with substantial credentials¹² suggesting that women think differently than men do. Nor is it necessary to dredge up put-downs about women's intuition to know that much comment on the difference in the way women think has stated or implied that the difference was the product of inferiority. *Women's Ways of Knowing*¹³ includes review of some male-oriented research studying the way men learn and reason which is then treated as the standard or correct way. Of course, compared to a male-oriented norm, women's rational processes may be found to be different. If it is assumed that the male norm is "best" or "correct," different female reasoning may be judged deficient.

Masculine thinking often is couched in visual terms—men use "seeing" to mean "understanding" and "shedding light" to mean "explaining." Women often use aural analogy—"to listen" may mean "to understand," "to hear" may mean "to comprehend." That difference may not be so significant for traditional "legal reasoning" as is the masculine idea of "blind"—meaning "objective" or "unbiased." Men may think of blind justice as fair, because prejudicial matter is excluded. Women, it has been suggested, may prefer to hear all the data to attain objectivity by total inclusion.¹⁴

Not only to treat women in the legal profession fairly, but also to embrace the unique contribution to the wisdom of the law offered by feminine insight and perception, serious inquiry into how men and women think about matters of fairness and justice should be made. If there really is, as the evidence now suggests, a material difference in male and female thought processes, then let us not offend it by trying to recondition women to think in imitation of men (or male lawyers or male judges or even male law professors), but instead celebrate the opportunity for an infusion of new insight.

Vive la difference!

IV. NEW CHALLENGE

In many ways it might be easier if the problems which women are having with bar examinations were purely and simply prejudice. The fact may be that the law is at the beginning of a revolution. Surely it won't do simply to continue to try to teach law students how to think like a (male) lawyer (or law professor as the case may be). It won't do for bar examiners simply to review their questions for obvious anti-feminist bias when the problem may be that the inner hearing of a female lawyer produces an approach to problem-solving which differs from the traditional insight of her male prede-

12. See e.g., C. GILLIGAN, IN A DIFFERENT VOICE (1982).

13. See *supra* note 11.

14. *Id.* See also C. GILLIGAN, IN A DIFFERENT VOICE (1982).

cessor.¹⁵ We know that law students who think in verbal or conceptual terms have different problems than students who think by visualizing. Now a large minority (which may become a majority) of our students and young lawyers may be responding mentally to a slightly different, perhaps more expressive, sound of reality. It is past time to start finding out.

What is needed is a funded research effort which has the cooperation and support of the law schools, the law examiners, and the courts. Needed are experts in psychology and semantics and law and education working toward understanding and appreciation of female legal thought with a view to designing new teaching and evaluation tools.

What is likely to happen is that women will struggle their way into the profession and bring their insight (or inner voice) to it without much help. "We know so little about legal education. We continue to do what we've done for the last 80 years without really knowing whether what we do is sensible or effective."¹⁶

At least we can indulge a presumption that law students and law graduates of either gender are bright and able people who have a strong drive to be learned in the law. We should read their examinations with that idea in mind, keep a wary ear out for minds responding to a different drummer, and try not to be a biased curmudgeon.

15. The Iowa Board of Law Examiners sent a copy of the June, 1988, bar examination questions (without model answers) to the Drake University Law School for circulation to the faculty in case anyone wanted to read and comment on it. While increased sensitivity is clearly important, casual requests for volunteered comment are not a substitute for disciplined and funded inquiry by experts.

16. Comments of David Vernon, Professor and former Dean, University of Iowa Law School, when presenting to the Test and Development Research Committee of the Law School Admissions Council a proposal for funding research programs in law schools focusing on academic programs. The proposal was rejected. Law School Admission Council/Law School Admission Services, NEWSL., Mar. 1988.