

“Women’s Voices in Ancient and Modern Times”
Speech delivered at the ANU Law Students’ Society Women in Law Breakfast
22 March 2021

I acknowledge the traditional custodians of this land and pay my respects to their elders—past, present, and emerging. I acknowledge that sovereignty over this land was never ceded.

I extend my respects to all First Nations people who may be present today.

I acknowledge that, in Australia over the last 30 years, at least 442 Aboriginal and Torres Strait Islander people have died in custody.

It is a pleasure to be speaking to a room of young women who will be part of the next generation of Australian and international lawyers.

I hope that we will also see you in politics. In my youth, a very long time ago, the aspirational statement was “a woman’s place is in the House—and in the Senate”. As recent events show, that sentiment remains aspirational today.

Women’s voices are still being devalued.

Today, I will speak about the voices of women in ancient and modern democracies.

Women in Ancient Greece

Since ancient times, women’s voices have been silenced. While we could all name outstanding male Ancient Greek philosophers, poets, politicians, and physicians, how many of us know of eminent women from that time?

The few women’s voices of which we do know are those of mythical figures. In Ancient Greece, the gods and goddesses walked among the populace, and people were ever mindful of their presence. They exerted a powerful influence.

Who were the goddesses?

Athena was a warrior, a judge, and a giver of wisdom, but she was born full-grown from her father (she had no mother) and she remained virginal. Artemis was a huntress and warrior, but also a virgin. Hestia was respected, but as an old maid. Aphrodite was a sex object who acted irresponsibly. Hera was a wife, mother, and queen who remained faithful despite her husband’s promiscuity.¹

The Amazons, a people of female warriors equalling men in bravery and strength, were probably invented as a myth that was useful to illustrate that men must save civilisation from the obvious risks posed by powerful women.²

In mythology, men often used and then abandoned the goddesses and minor female deities. Ariadne had betrayed her family for Theseus—he used her golden thread to find his way out of the labyrinth and then abandoned her on a beach. Penelope was faithful to Odysseus during his absence; meanwhile, he enjoyed relationships with Circe and Calypso.

¹ Sarah B Pomeroy, *Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity* (Schocken Books, 1975) at 8.

² Mary Beard, *Women and Power: A Manifesto* (Profile Books, 2018) at 62.

Other women were portrayed as “troublemakers” who received their just desserts. Take Pandora. Or, like Helen of Troy, they were passive, just a pretty face.

In tragedies such as Medea and Antigone, women were “represented as skilful at manipulating and even subverting the dominant discourse of husbands and masters”.³

The first record in Western literature of a man telling a woman to “shut up” was in *The Odyssey*. Penelope’s son told her:

Mother, go back into your quarters, and take up your own work, the loom and the distaff. ...
[S]peech will be the business of men, all men, and of me most of all; for mine is the power in
this household.⁴

Real women could express themselves only through “lyric expressions of fear and grief”, prayer, domestic life and family, and, of course, silence.⁵

The lack of women’s voices from Ancient Greece reflects their disempowerment in the classical world. They were confined to the home; their worth determined by what they could do for men. Even their children were not their own—the Ancient Greeks believed that children retained none of their mother’s genetic material and all their father’s. In the fourth century BC, Demosthenes explained:

We have mistresses for our enjoyment, concubines to serve our person, and wives for the bearing of legitimate offspring.⁶

Ancient women were actively excluded from public speech. Beard argues that “public speaking and oratory were not merely things that ancient women *didn’t do*, they were exclusive practices and skills that defined masculinity as a gender. ... Public speech was a—if not *the*—defining attribute of maleness”.⁷

The laws of Ancient Greece reinforced the silencing of women. Their consent was not necessary for marriage. A woman could not vote, make a will, or represent herself in court. Throughout her life, she was under the care of a male guardian (a husband or her closest male relative) who handled all legal transactions. If a man had daughters but no sons, upon his death, his daughters were by law given in marriage to the nearest male relative, along with the deceased’s other property.⁸

So much for the first great Western democracy!

Throughout Western history, women’s achievements have been undervalued. Generally, women have been lauded not for their own achievements, but for enabling the achievements of their husbands, fathers, or brothers (“*behind every great man is a great woman*”).

Myra Bradwell

Only recently have women have acquired any voice in the law.

In 1855, in Illinois, Myra Bradwell started her legal training. She undertook a legal apprenticeship in her husband’s law office.

³ A P M H Lardinois and Laura McClure, *Making Silence Speak: Women’s Voices in Greek Literature and Society* (Princeton University Press, 2001) at 5-6

⁴ Beard (n 2) 4, quoting *The Odyssey*.

⁵ Lardinois and McClure (n 3) at 123-124.

⁶ Victoria Griffin, *the Mistress: Histories, Myths and Interpretations of the “Other Woman”* (Bloomsbury, 1999) at 1.

⁷ Beard (n 2) at 17 (emphasis original).

⁸ Raphael Sealey, *Women and Law in Classical Greece* (University of North Carolina Press, 1990) at 202.

In 1868, she founded the Chicago Legal News. It published information about judgments and laws. It criticised corruption within the local bar and judiciary. It included a column entitled "Law Relating to Women". In one issue, Bradwell argued that the earnings of a married woman should be retained by the wife free and clear of her husband's death. She then drafted a law to this effect and successfully lobbied it through the Illinois legislature.⁹

In 1869, a judge of the Seventh Circuit Court of Appeals and the state's attorney examined Mrs Bradwell's legal ability, pronounced her qualified, and suggested that the Illinois Supreme Court license her to practice law.

The Illinois Supreme Court refused the application.

Bradwell took the case to the United States Supreme Court. In the Court's judgment of 1 December 1872, Justice Bradley (with whom Justices Swayne and Field agreed) stated:¹⁰

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.

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 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.

Seemingly, there had been little change in the attitude to women since Ancient Greek times.

In Australia, the position was similar. In 1902, Ada Evans was the first Australian woman to graduate in law. She was denied admission to the New South Wales Bar as the Bar rules of practice did not comprehend the existence of women lawyers.¹¹

After a campaign to change the rules, a year later, Flos Grieg became Australia's first woman lawyer.¹²

Mary Gaudron

Almost a century later, in 1987, Mary Gaudron became the first woman on the High Court of Australia.

Her Honour refused to be silenced by expectations about women in the law.

Unlike many of her High Court colleagues who had experienced a privileged upbringing, Justice Gaudron was born in Moree to working-class parents. In her final year of high school,

⁹ George W Gale, 'Myra Bradwell: The First Woman Lawyer' 39(12) *American Bar Association Journal* 1080, 1081.

¹⁰ *Bradwell v State of Illinois*, 83 US 130 (United States Supreme Court, 1872).

¹¹ Joan M O'Brien, 'Evans, Ada Emily (1872–1947)', *Australian Dictionary of Biography* (online) <<https://adb.anu.edu.au/biography/evans-ada-emily-6118>>

¹² Renee Knake Jefferson, 'Hidden Women of History: Flos Grieg, Australia's First Female Lawyer and Early Innovator' *The Conversation* (online, 24 July 2019) <<https://theconversation.com/hidden-women-of-history-flos-grieg-australias-first-female-lawyer-and-early-innovator-119990>>.

she asked a local solicitor to accept her as an articled clerk. She was told that “girls don’t do law”; instead, she should pursue secretarial work.¹³

Justice Gaudron was not discouraged. In 1961, she was accepted to the University of Sydney Law School on a Commonwealth Scholarship. She said:

So, as a brand spanking new law student who hadn’t opened a single book, I knew that the laws of this country discriminated against its women and its Aboriginal people, against more than half the population.¹⁴

Although she married and had a baby while studying, Justice Gaudron excelled at university. In her final year, she received six prizes, as well as the University Medal.

In 1968, her Honour was called to the New South Wales Bar. Her application to purchase well-established chambers was refused because the male barristers on the floor would not accept a woman barrister (incidentally, I had the same experience in 1982). Unable to find any suitable chambers of her own, she accepted the offer of Janet Coombs (another female barrister) to share her chambers.

Despite her refusal to exhibit “lady-like” behaviour and a reputation for strong language, Gaudron soon gained respect as a capable advocate. After two years at the Bar and at the age of 27 she appeared unled in the High Court in *O’Shaughnessy v Mirror Newspapers Ltd*.¹⁵

At the age of 31, she was appointed Deputy President of the Commonwealth Conciliation and Arbitration Commission.

In 1980, she was appointed Solicitor-General of New South Wales, becoming the first female Solicitor-General in any Australian jurisdiction.

At 44 years of age, she was appointed a judge of the High Court. At her swearing-in ceremony, she paid tribute to the women lawyers who had gone before her, stating:

My appointment is the result of the courage, determination and professionalism of women who made their mark in the profession in days when the value of women’s contribution had to be established.¹⁶

Until her appointment, courts across Australia used the title “Mr Justice” when referring to judges. After considering whether female judges should be “Madam” or “Mrs Justice”, the High Court settled on the term “Justice” for all judges, and other courts began to follow suit. The practice of judges referring to other judges as “brother judges” remained until 2009, by which stage three of the seven High Court justices were women; the Court then decided that judges should refer to other judges as “colleagues”.

During her years on the bench, Justice Gaudron reflected on important principles relating to equality, due process, and procedural fairness. For example, in *Leeth v Commonwealth*, she described the principle of equal justice as “a concept which requires the like treatment of

¹³ Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (University of Western Australia Publishing, 2010) at 38.

¹⁴ Mary Gaudron, ‘Speech to the Adelaide UNIFEM Breakfast’ (Adelaide Convention Centre, 8 March 2005) <<https://web.archive.org/web/20070929022937/http://www.womenlawyerssa.org.au/publicationsandspeeches/hon-mary-gaudron-qc-at-the-unifem-international-womens-day-breakfast>>.

¹⁵ (1970) 125 CLR 166.

¹⁶ Burton (n 13) at 258, citing *Swearing-in Ceremony*, Mason CJ, Toohey and Gaudron JJ (High Court of Australia, 6 February 1987).

like persons in like circumstances, but also requires that genuine differences be treated as such".¹⁷

It was expected that, when Justice Gaudron retired in 2002, she would be replaced by another woman. Susan Kiefel was a front runner.¹⁸ However, Justice Gaudron was succeeded by Justice Dyson Heydon. With the benefit of hindsight, this decision was perhaps unfortunate.

So much for women's voices in law. It has been just as difficult for women to achieve a voice in the House—or in the Senate. That is especially so for women of diverse backgrounds.

Kamala Harris

In January 2021, Kamala Harris was sworn in as the United States' first female vice president and as the first African-American and Asian-American to be appointed to that office.

Kamala Harris is the daughter of two immigrants, an Indian biologist and a Jamaican professor of economics, who met as activists during the civil rights movement in California.

When Harris was in high school, her best friend disclosed to her that she had been molested by her father. Kamala and her mother insisted that the young woman live with them for the remainder of high school. This experience influenced Harris to form a commitment to using the law to protect women and children.¹⁹

After graduating in law, Harris joined the district attorney's office in California. As a prosecutor, she gained a reputation as a "tough fighter",²⁰ prosecuting charges of gang violence, drug trafficking, and sexual abuse.

From 2004 to 2010, Harris served as the first female District Attorney of San Francisco. She was the first person of colour to hold that office. As District Attorney, she established the Hate Crimes Unit, which focused on hate crimes against LGBTIQ+ children and teens. She partnered with civil rights activist Lateefah Simon to establish the Back on Track recidivism and re-entry program, whereby offenders could have their case dismissed and record expunged if they "graduated" from the program. The program required activities such as community service, obtaining a high school diploma, maintaining steady employment, taking parenting classes, and passing drug tests.²¹ Harris never sought the death penalty, despite political pressure to do so.²²

In 2011, Harris became the first female and first African-American Attorney-General for California. In 2013, she launched the California Division of Recidivism Reduction and Re-Entry, with programs like those of "Back on Track". She refused to defend Proposition 8, which banned same-sex marriage in California. In 2014, she co-sponsored legislation to ban

¹⁷ *Leeth v Commonwealth* (1992) 174 CLR 455, 502.

¹⁸ 'Second Woman Appointed to High Court', *The Age* (online, 21 September 2005)

<<https://www.theage.com.au/national/second-woman-appointed-to-high-court-20050921-ge0wlg.html>>.

¹⁹ A Conversation with Kamala Harris' Childhood Friend Wanda Kagan (Breakfast Television Toronto, 9 November 2020) <<https://www.bttoronto.ca/videos/a-conversation-with-kamala-harris-childhood-friend-wanda-kagan/>>.

²⁰ Kate Zernike, 'She Just Might Be President Someday', *New York Times* (online, 18 May 2008) <<https://www.nytimes.com/2008/05/18/weekinreview/18zernike.html>>.

²¹ 'Let's Talk About Kamala Harris', *Code Switch* (National Public Radio, 2020) <<https://www.npr.org/2020/10/13/923369723/lets-talk-about-kamala-harris>>.

²² Phillip Matier and Andrew Ross, 'Senator Boxer Joins Throng Calling for Death in Killing of Cop' *SFGate* (online, 5 May 2004) <<https://www.sfgate.com/bayarea/matier-ross/article/Sen-Boxer-joins-throng-calling-for-death-in-3324378.php>>.

the gay and trans panic defence, and California became the first state to implement such legislation.

When Harris accepted the nomination for vice president, she thanked the women who had campaigned for the right to vote, and the many women (particularly black women) who had “worked to make democracy and opportunity real in the lives of all of us who followed”.²³

Continuing to amplify women’s voices

In the wake of such achievements, is there much more to do? Your university classes are dominated by women. You study in the ACT, where the High Court is presided over by a woman, and the heads of jurisdiction of both the Supreme Court and the Magistrates Court are women. The ACT Supreme Court was the first superior court in Australia to achieve gender parity among the judiciary. At one point last year, 12 of the 13 associates working at the Supreme Court were women.

But there is still a way to go. Witness events outside Parliament House only a week ago.

We are yet to comprehensively address sexual harassment in the workplace, flexibility for people (usually women) with carer responsibilities, and the disappointingly low numbers of senior women barristers. According to the NSW Bar Association, women make up 24 per cent of all practising barristers, and only 12.5 per cent of all senior counsel.²⁴

A recent article examining interruptions of judges during oral argument before the Full Bench of the High Court found that, in 2015 - 2016, women judges received 52 per cent of the total interruptions.²⁵ After Kiefel CJ’s appointment in 2017, the rate of interruptions of the three women judges increased to 69 per cent of the total interruptions.²⁶

Why is our profession still troubled by these issues in 2021? The problem is not one of merit or of the quality of women lawyers. Justice Gaudron once stated:

It is often said that, for a woman to succeed in a traditional male area, she has to be better than her male counterparts. We know this is true. We also know that it is not very hard to be better than the average male.²⁷

Conversely, Justice Penfold of my Court has said:

We will not have achieved gender equality until there are just as many dopey women judges as there are dopey men judges.

Given the huge amount of female talent in the current and emerging profession, I am confident that equality need never be tested by that standard.

Attitudes to women will only change when women themselves speak out.

Like Bradwell, Gaudron and Harris, women should express themselves boldly. They should not question themselves but the attitudes and structures that impede them.

Like Bradwell, Gaudron and Harris, women should support and nurture other women across the generations; real change takes generations. When Myra Bradwell lost her application for a licence to practice law, she supported other women to study law and gain their licence. As

²³ Kamala Harris, ‘DNC Speech’ (Speech, Democratic National Convention, 20 August 2020).

²⁴ New South Wales Bar Association, ‘Statistics’ <<https://nswbar.asn.au/the-bar-association/statistics>>.

²⁵ Amelia Loughland, ‘Female Judges: Interrupted: A Study of Interruption Behaviour During Oral Argument in the High Court of Australia’ (2019) 43(2) *Melbourne University Law Review* at 1.

²⁶ *Ibid* at 5.

²⁷ Mary Gaudron, ‘Australian Women Lawyers’ (Grand Hyatt, Melbourne, 19 September 1997) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj_wlasp.htm>.

New South Wales Solicitor-General, Justice Gaudron advocated for governments to brief women. In my early years at the Bar, I was a beneficiary of her advocacy. She also influenced the Victorian Solicitor-General to brief women barristers—Susan Crennan (who was subsequently appointed as the second woman judge on the High Court) was a beneficiary.²⁸

You are the beneficiaries of the many women who have gone before you, and you have a responsibility to those who will come after you.

I know that your generation of women takes this responsibility very seriously. The Australian of the Year, Grace Tame, successfully spearheaded a movement for reform of the Tasmanian law that prevented sexual assault survivors from self-identifying in the media.²⁹ Many young women have bravely told their stories of sexual assault survival. At all levels, women are calling men to account for their conduct and that of their male colleagues.

But the task for the future is about more than gender equality. In striving for gender equality, please remember the plight of Indigenous women, migrant women, working-class women, women with disabilities, and LGBTIQ+ women, all of whom face much higher hurdles than many of you. Hold the door open for all your sisters, not just those who look and sound like you.

²⁸ Susan Crennan, 'Celebration of Women in the Law' (Foley's List Event, Melbourne, 16 April 2014) <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/crennan/Celebration_of_Women_in_the_Law_-_16-04-2014.pdf>.

²⁹ Lorna Knowles, 'Finally, She Can Speak' ABC News (online, 12 August 2019) <<https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044?nw=0>>.