12

Ensnared by Custom

Mary Astell and the American Bar Association on Female Autonomy

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12.1 INTRODUCTION

Is it possible for women to thrive in a man's world? Do we even want women to thrive in a man's world? If we think that women should be able to thrive in a man's world, and if they aren't doing so, what should be done about it?

These are the questions addressed by two very different authors separated by almost four centuries. And although the two authors agree that women should be able to thrive in a man's world but aren't doing so, they use very different rhetorical strategies to reach very different conclusions about what should be done to remedy the problem. Ironically, the early feminist who wrote during the seventeenth century – when women could not vote, hold public office, or practice any of the learned professions – writes with greater confidence and authority than the twenty-first-century women who have risen to the top echelon of the legal profession. And the solution proposed by the early feminist relies on the empowerment of women, while the modern women lawyers appeal solely to the good graces of men to solve the problem of women's failure to thrive as large-firm lawyers.

Mary Astell, one of the earliest English feminists, examined the issue of women's intellectual and educational subordination in 1694 in *A Serious Proposal to the Ladies* (1970). She believed that women were not living up to their intellectual potential and were relegated to the realm of trivia and frivolity by the social norms of the period. In 2019, the American Bar Association (ABA) published a report entitled *Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice* (the ABA Report) (Liebenberg & Scharf, 2019). Focusing on America's 500 largest law firms,[1] the report found that women with

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[1] Elsewhere in the report, the number of firms surveyed is given as 350 (Liebenberg & Scharf, 2019, p. iii).

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more than fifteen years' experience are leaving law firms in droves. Like Astell, the report attributed this failure to thrive to male-created cultural norms.

As Christine Mason Sutherland (2005) points out in *The Eloquence of Mary Astell*, one of Astell's signal accomplishments was her move from *sermo*, private conversational discourse, to *contentio*, the discourse of public debate. This move marked a significant moment in the history of feminist discourse, since women lacked the traditional platforms of public debate: politics, the church, and the academy. Astell's confidence in making the move from sermo to contentio resulted from a number of factors, including her own education, her successful dialogue with John Norris, and the Cartesian philosophy that liberated women's intellect from the perceived weaknesses of their bodies. Astell's transition from sermo to contentio can be seen in her sure-footed identification of her audience, her deft employment of metaphor and rhetorical questions, and her direct address to her critics. Unfortunately, these same characteristics are missing from the ABA Report. In addition to the report's challenges with ethos, it vacillates uneasily between sermo and contentio. By using Astell's rhetorical sophistication as a lens, we can view the rhetoric of the report more clearly, assessing its success or failure as a rhetorical document.

12.2 BACKGROUND: A SEVENTEENTH-CENTURY FEMINIST AND TWENTY-FIRST-CENTURY LAWYERS

Mary Astell (1666–1731) was a British philosopher, author, and early feminist whose influential[2] works challenged prevailing notions of a woman's intellectual ability while promoting her conservative Anglican values (Sutherland, 2005). Born in Newcastle upon Tyne, she moved to London in 1684, where she gained the patronage and companionship of several aristocratic women, including Lady Catherine Jones, Lady Mary Chudleigh, Lady Elizabeth Hastings, and Lady Ann Coventry (Perry, 1986, pp. 39–40, 68; Sowaal, 2023). Her first major work, and her most influential, *A Serious Proposal to the Ladies*, was published in 1694, with a second part published in 1697. In *A Serious Proposal*, Astell argues that women are the intellectual equals of men but have been debarred from exercising their intellects by social custom, which denied women an education equal to men's. This lack of education initiated a vicious circle, argues Astell: Because they are uneducated, they appear to be shallow and frivolous, lending support to the argument that they lacked the intellect necessary for a rigorous education. Because of the rhetorical sophistication of her works and her explicit attention to rhetoric, Astell has been recovered by contemporary scholars as an important rhetorical theorist.

[2] Astell's ideas in *A Serious Proposal to the Ladies* (1970) were so influential in their time that writers Daniel Defoe and George Berkeley are known to have plagiarized Astell's proposals and language (Sutherland, 2005, pp. 159–160).

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To remedy this lack of education, Astell proposed the establishment of an "academical monastery," the equivalent of an all-female college, a plan which she elaborated in the second part of *A Serious Proposal*. These works went through several editions into the early eighteenth century and, together with her second major work, *Some Reflections upon Marriage* (1700), influenced later feminists such as Lady Mary Wortley Montagu (Perry, 1986, pp. 108–109). Astell was a devout Anglican, and her works reflect her conventionally Christian worldview, but she drew upon medieval spiritual concepts that extol the equality of the soul despite the inequality of the sexes and the Cartesian idea that a formal education is not necessary to engage in philosophy (Sutherland, 2005, pp. 11, 27–28). *A Serious Proposal* reflected a commitment to the conversational theory of rhetoric (Sutherland, 2005, p. 53), and among the subjects to be taught at the academy was rhetoric.

The American Bar Association is a voluntary association of attorneys founded in 1878 in Saratoga Springs, New York. Consistent with the composition of the legal profession at the time of its founding, the ABA was originally made up exclusively of white men. Only in 1950 did the ABA gain its first African American member. The first woman became an ABA member in 1918. Despite its deeply conservative roots, the ABA sponsors some progressive initiatives, such as the Special Committee on Legal Aid Work, founded in 1920. A half-century later, in 1974, the ABA supported legislation creating the federal Legal Services Corporation, designed to provide legal services to indigent clients in civil cases. According to the ABA, in 2022, there were 1,327,010 lawyers in the United States; of this number, 242,500, or approximately 18 percent, were members of the ABA (D. Lopez, personal communication, January 20, 2022)

Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice is the first report published as part of the Achieving Long-Term Careers for Women in Law initiative from the American Bar Association. This initiative is designed to study and understand the high attrition rate of female lawyers from large law firms. Former ABA president Hilarie Bass described this project as her greatest priority as president and commissioned this four-pronged research initiative to identify issues and provide solutions for firms (Liebenberg & Scharf, 2019, p. iii). The ABA used data collected by ALM Media regarding female attorneys' partnership status and longevity in the nation's 500 largest law firms as its metrics for success (p. iii). As of 2022, the ABA had published three reports (American Bar Association, n.d.-a). Following the first report, which discusses female representation and attrition broadly, the second report focuses on the experiences of women of color as represented by focus groups sponsored by the ABA. The third report reflects qualitative research, collecting the results of 12 focus groups and 12 individual interviews with 116 experienced female lawyers of all races practicing in a variety of settings in six large cities. The ABA made a concerted effort to market these reports on the internet with content branded with the tag

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"#WhyWomenLeave" and videos expressing concern that women are "leaving the profession" (American Bar Association, n.d.-b).

The solution, according to the ABA Report, is for the predominantly male power structure at firms to, first, use gendered data collection to measure key factors relating to promotion and, then, overhaul the training and best practices of the firm to make them more conducive to retaining female attorneys (Liebenberg & Scharf, 2019). The ABA Report appeals to the existing hierarchy and provides recommendations for working within it to advocate for cultural change in the individual firms.

12.3 RHETORICAL SITUATION

12.3.1 *The Paradox of Ethos*

Both Mary Astell and the authors of the ABA Report[3] are engaged in a persuasive endeavor. They both describe a problem, diagnose the problem, and offer a solution to the problem. Astell wanted to persuade her audience that women are intellectually equal to men and that they should be afforded an equal education. She also wanted to persuade her readers that the best way of providing that education was through a female-only institution where women could separate themselves from the world and concentrate on reading and study. The ABA Report wants to persuade those with power in large American law firms that women are failing to become equity partners in those firms because of gender-based issues. The report also wants to persuade its readers to implement gender-conscious policies and practices in order to retain the women lawyers they hire.

Any author engaged in persuasion must rely on ethos, that is, "[t]he speaker or writer must be seen to have authority to speak upon this particular subject to this particular audience" (Sutherland, 2005, p. 4). The author's authority can derive from the power of the text itself – "intrinsic ethos" – or it can derive from the author's "already-established reputation" – "extrinsic ethos" (p. 4). The author's ethos engenders trust in their audience. A persuasive endeavor may founder if the author's ethos is insufficient to gain and maintain the reader's trust. Thus, it is imperative for an author to establish a stable ethos; a reader's uncertainty about the author's ethos raises doubts about the strength of the author's argument. Ironically, because Astell explicitly theorizes and deploys ethos in *A Serious Proposal*, it is the seventeenth-century feminist, not the twenty-first century authors of the ABA Report, who gains and keeps the reader's trust.

At first blush, it would seem that the ABA Report, backed by the authority of the nation's largest voluntary bar association and its immediate past president, Hilarie

[3] Because, as will be shown below, it is difficult to assign authorship of the ABA Report to individuals, the term "report" and "authors" will be used interchangeably when discussing the ABA Report.

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Bass,[4] would have no trouble establishing and maintaining extrinsic ethos. However, the report displays anxiety about its authority. First, its title page credits two individual authors, Roberta D. Liebenberg and Stephanie A. Scharf. But the title page also bears the imprint of three organizations: ALM Intelligence Legal Compass,[5] ABA Presidential Initiative on Achieving Long-Term Careers for Women in Law,[6] and the American Bar Association. A disclaimer on the title page warns: "The views expressed herein represent the opinions of the authors. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities."[7] Similarly, on the copyright page, the reader is warned: "The materials contained herein represent the opinions of the authors and should not be construed to be the views or opinions of the law firms or companies whom such persons are in partnership with, associated with, or employed by, nor of the American Bar Association or the Commission on Women in the Profession unless adopted pursuant to the bylaws of the Association." Interestingly, a Google search for "Walking out the Door" brings up the text of the report as the fourth result, with the caption, "Walking out the Door – American Bar Association,"[8] and the text is on the ABA's website (American Bar Association, n. d.-a). The report is copyrighted by the American Bar Association.

This authorship and ownership issue is damaging for building extrinsic ethos for the report. In an attempt to invoke the credibility of the national organizations and initiatives that support the work, the report undermines its own ethos by mentioning that those same organizations do not unquestionably endorse their research and conclusions. The intrinsic ethos that the authors stood to gain from their research and reporting is blunted by the disclaimer that the organization publishing the

[4] Hilarie Bass is now the head of her own company, the Bass Institute for Diversity and Inclusion. According to its website, "The Bass Institute for Diversity & Inclusion was founded by Hilarie Bass, a leader in identifying why women leave companies before they reach senior management. An attorney and former American Bar Association president, Hilarie has more than 20 years in senior management, including six as co-president of 2,000-person law firm Greenberg Traurig and eight as head of the firm's 600-attorney litigation practice." https://bassinstitute.org/hilarie-bass.

[5] According to the ABA website, "ALM Intelligence, a division of ALM Media LLC, supports legal, consulting, and benefits decision-makers seeking guidance on critical business challenges. Our [sic] proprietary market reports and analysis, rating guides, prospecting tools, surveys, and rankings, inform and empower business leaders to meet business challenges with confidence."

[6] This program originated with Hilarie Bass, ABA President in 2017–18, and now operates under the aegis of the ABA Commission on Women in the Profession.

[7] This disclaimer appears to be typical of those used by the ABA in connection with reports it coauthors with other organizations. See, e.g., American Bar Association Center for Human Rights. Center for Civil Liberties (2022); Blanck et al. (2020). However, reports authored solely by the ABA carry no such disclaimer. See, e.g., American Bar Association Commission on Immigration (2021).

[8] Google search August 21, 2022.

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report and the firms with which the individual authors are affiliated disclaim approval of its findings.

The report next attempts to bolster its ethos with fulsome framing documents. Three preliminary texts follow the title and copyright pages. First is "A Note from the Authors," featuring photos of Stephanie A. Scharf and Roberta D. Liebenberg, who were appointed by Bass as Co-Chairs of the Presidential Initiative on Achieving Long-Term Careers for Women in Law (Liebenberg & Scharf, 2019, pp. i–ii). Next up is a foreword from Hilarie Bass, who by the time of publication was the past president of the ABA. According to Bass, *Walking out the Door* is the first of four research reports to be published as a result of the presidential initiative (Liebenberg & Scharf, 2019, p. iii). However, only two additional reports have been published: *Left Out and Left Behind*, published in 2020, examining the "experiences women lawyers of color have in the profession," and *In Their Own Words*, published in 2021, subtitled "Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession" (American Bar Association, n.d.-a; Liebenberg & Scharf, 2019, p. 25).[9] Finally, a foreword from Patrick Fuller, Vice President of ALM Intelligence, notes that the report is the result of a "joint study" conducted by ALM and the ABA. Fuller explains his credentials: "I gave my first speech on diversity in 2002 for the Minority Corporate Counsel Association. . . . As the only son of a single mother, I witnessed first-hand the struggles that women faced in professional environments, from behavioral double-standards to the lack of advancement and recognition for achievements" (Liebenberg & Scharf, 2019, p. iv). As a male writing about the oppression of women, Fuller is at pains to bolster his ethos (and that of the report as a whole) by proving that he is an ally to women.

Like Astell, whose wealthy patrons supported her work, the ABA Report has its sponsors. The final page lists Platinum, Gold, and Silver Sponsors, along with Patrons. The Platinum Sponsors are the ABA Commission on Women, the Center for Women in Law, Teachers Insurance and Annuity Association of America, and Sheppard Mullin, described on its X.com (formerly Twitter) site as a "[f]ull-service AmLaw 50 firm with more than 1000 attorneys in 16 offices in the United States, Europe & Asia." Of the additional fifty-plus sponsors and patrons, all are large national law firms, with the exception of the ABA Section of Litigation, John Hancock Financial, the Ark Group, Charles River Associates, VISA, Wal-Mart Stores, Inc., Hilarie Bass, and Roberta (Bobbi) Liebenberg.

Clearly, these adjuncts to the text are intended to provide extrinsic ethos for the report: The two identified female authors do not stand alone; they are supported by a former ABA president, a prominent national research firm, a male ally, and a plethora of the very organizations the report critiques. But, paradoxically, the effect

[9] The acknowledgments page at the end of the report lists a fourth project, "a representative survey of law school alumni," which "[has] been completed" and is in the course of publication. As of 2024, however, this fourth report has not appeared.

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of all this hedging is to incite skepticism. The disclaimers, which try to distance the text from the very organizations that appear to sponsor it, create tension. Is the text so dangerous or controversial that these groups cannot appear to approve of it? Yet the nature of the sponsoring organizations – the most powerful lawyers' group in America, large corporations, and large multinational law firms – creates a halo of conservatism and convention around the text. Can a work supported by such groups say anything radical or revolutionary? The overall effect of these elaborate efforts to bolster the text's extrinsic ethos is to destabilize the text, to raise questions in the reader's mind at the outset, and to undermine the authors' extrinsic and intrinsic ethos.

In contrast to the energetic ethos-building of the report's authors, Astell does not see the need to bolster her authority in *A Serious Proposal*. The first edition was published anonymously by "A Lover of Her Sex," clearly indicating that the author is a woman. The work "burst upon London in 1694 and was read and talked of from Pall Mall to Grub Street" (Perry, 1986, p. 99). Despite the anonymous publication, Astell's authorship seems to have been an open secret, due perhaps to her network of aristocratic friends or the support of her publisher, well-known bookseller Rich Wilkin (Perry, 1986, pp. 68–69). Thus, while the author's anonymity would seem to defeat any extrinsic ethos, her readers' knowledge of her authorship would engender some extrinsic ethos. Of course, this knowledge was a two-edged sword: Respectable women of the period were relegated to the private sphere, meaning that only private genres, such as letters and diaries, were deemed appropriate. In seventeenth-century England, women were viewed as naturally deficient in intelligence, morality, and goodwill, the three elements of classical ethos (Sutherland, 2005, pp. 6–8). Once a woman entered the realm of commercial publication, her ethos was brought into question because she was engaged in an activity deemed inappropriate for women (Sutherland, 2005, p. 8). By publishing her theories publicly, Astell broke contemporary rules of decorum (Sutherland, 2005, p. 23). Perhaps recognizing that her authorship challenged contemporary norms, Astell attempts to identify her work as an acceptable genre: the letter. Without a dedication, foreword, or introduction, Astell begins her project with a straightforward salutation: "Ladies." She embarks upon her discourse with confidence, taking advantage of the intrinsic ethos of her work – its logic and clear style – to gain the trust of her readers.

While *A Serious Proposal* was widely admired, in the second part of the *Serious Proposal*, published three years later, in 1697, Astell supplements her reliance on intrinsic ethos with some extrinsic ethos building. In the period between 1694 and 1697, Astell published her second work, her correspondence with John Norris, a well-known philosopher, entitled *Letters Concerning the Love of God*. This work, published in 1695, came in for harsh criticism. Indeed, another well-known woman intellectual, Damaris Masham, John Locke's patron, published a pamphlet critical of Astell, *Discourse Concerning the Love of God* in 1696 (Perry, 1986, p. 87).

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These intervening events may explain why the second part of *A Serious Proposal*, published anonymously, again by Wilkin, opens with a dedication to "Her Royal Highness, the Princess Ann of Denmark," signed only "Your Royal Highnesses Most Humble and most Obedient Servant." By 1697, this anonymity was certainly unnecessary, since Astell was openly credited as the author. Indeed, *A Serious Proposal* was so popular that it went through five editions by 1701 (Perry, 1986, p. 103). However, the first part of *A Serious Proposal* had been criticized for offering no practical scheme for bringing its vision of a Protestant nunnery to fruition. In the second part, Astell offers a program of education for the women who undertake to educate themselves, and she believes that Princess Ann can further this project:

> What was at first address'd to the Ladies in General, as seeming not considerable enough to appear in your Royal Highnesses Presence, not being ill receiv'd by them, and having got the Addition of a Second Part, now presumes on a more Particular Application to Her who is the Principal of them, and whose Countenance and Example may reduce to Practice, what it can only Advise and Wish. (Astell, 1970, p. 47)

Thus, it seems that the dedication to Princess Ann was not intended to bolster Astell's credibility as a form of extrinsic ethos so much as it served a more practical purpose: flattering a potential donor.

Following the dedication is a nine-page introduction, "containing a farther Perswasive to the Ladies to endeavor the Improvement of their Minds." Here Astell is more self-conscious, noting that she is taking a risk in publishing the second part, since she could more safely "content her self with the favourable reception which the good natur'd part of the World were pleased to afford to her first Essay" (Astell, 1970, p. 51). She declares that she is "very indifferent what the Critics say, if the Ladies receive any Advantage by her attempts to serve them," and asserts, "It were more to her Satisfaction to find her Project condemn'd as foolish and impertinent, than to find it receiv'd with some Approbation, and yet no body endeavoring to put it in Practice" (p. 51). The second part is neither a retraction, nor an explanation, nor an apology for the original. Instead, it is a further step along the path she marked out in the first part, which merely laid out her plan "in general," with "the particular method of effecting it left to the Discretion of those who shou'd Govern and Manage the Seminary" (p. 59). In the second part, she hopes "to lay down in this second part some more minute Directions" for achieving her vision (p. 59).

While the addition of a dedication and introduction could be interpreted as props to her credibility by invoking aristocratic authority and addressing criticism of the original, Astell, far from backing down from the original, sees these additions as aids to achievement of her original vision. Rather than simply restate her suggestion for a protestant monastery for female education, she includes philosophical theory that her stated audience of upper-class and middle-class literate women would have little experience with (Astell, 1970, pp. 65, 66). Astell increases her intrinsic ethos by

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demonstrating her ability to engage in rhetorical logos, propounding philosophy and educational theory at the same level as influential thinkers of her time (pp. 66, 80). The confidence she exhibited in the first part of *A Serious Proposal* seems undiminished in the second part, in which she broadens her audience to include not just other women but also other philosophers. Astell's refutation of her critics, including John Locke, signals a crucial step from the traditionally female and passive rhetorical style of sermo into the more confrontational and masculine contentio, which will be on display in her later works (Sutherland, 2005, p. 80).

12.3.2 *Argument: Who Caused the Problem and Who Should Solve It?*

12.3.2.1 Audience

Both Astell and the ABA Report address elite, conservative audiences. Astell expected her proposal to reach literate women, and literacy was far from universal among women in the seventeenth century. Certainly, her audience was limited to upper- and middle-class women. Similarly, the ABA Report is not directed to the general public, but to legal professionals. In fact, it is aimed at a particular set of lawyers – those in the 500 largest American firms. Even more particularly, it is aimed at the partners, especially the managing partners, of those law firms.

Thus, the two works have very different audiences: Astell addresses women, while the report addresses men. In fact, these differing audiences reflect the basic dichotomy that subsists throughout the two works. The most fundamental similarity between the two authors is their use of the dichotomy between men and women to describe the human experience. Omitted from this universe are nonbinary or gender-nonconforming individuals. However valid the dichotomy may have been in 1694, by 2019, when the ABA Report was published, the dichotomy certainly was not an accurate description of the universe of lawyers (National Association for Law Placement, 2010). Moreover, Astell theorizes her audience, while the ABA Report does not. Throughout *A Serious Proposal*, Astell is conscious of her audience. She addresses women using the second person. She describes them, analyzes them, and exhorts them. In contrast, the ABA Report does not directly address its audience, nor does it explicitly theorize those at whom the report is aimed.

Accepting the dichotomy between men and women, the two authors are surprisingly congruent in the assumptions they make about both groups. For Astell, men are in charge politically, socially, and personally. They have excluded women from positions of power within society. Even within the family, men (with the complicity of women) have created a culture that has unfitted women for serious thought or discourse. Indeed, they are not even fit to educate their own children. Astell takes a Christian view of women, seeing them as created by God and – radically for her time – equal to men in intellect. However, women have been acculturated to value

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only the most superficial things – dress, flirtation, accomplishments such as needlework. Women are enthralled to "Tyrant Custom."

Similarly, the ABA Report sees men as the source of power within large law firms. They are the ones who can make the changes advocated by the report. Emphasizing the number of managing partners who responded to their survey – only 28, a miniscule number given the number of law firms included in the survey (500) – the report speaks primarily to these few individuals. Although women make up a certain percentage of equity partners in large law firms, and may also serve as managing partners, the report does not explicitly recognize this fact. Congruent with its identification of its primary audience, the rhetoric of the report is male-centered. With the exception of a few passages, its discourse views women as victims of big firm culture and the sole caregivers within the family. Most importantly, however, the report depicts women as financial assets whose earning power can be exploited.

12.3.2.2 The Problem and Its Cause

Both Astell and the ABA Report maintain awareness of their respective audiences throughout their arguments, using rhetorical strategies, including figures of speech, that reflect their audiences' viewpoints. In diagnosing the reasons why women have not prospered in their respective cultures – seventeenth-century England and twenty-first century American large law firms – both authors assign the blame to men. In proposing a solution, however, the two authors diverge. Astell sees women as the agents of their own improvement, while the ABA Report believes that men hold the key to improving women's status. Consistent with her confidence in her own intellectual prowess, Astell moves eloquently from sermo to contentio in framing her argument. In contrast, the ABA lurches uncomfortably at times between sermo and contentio. At all times during her argument, Astell speaks to her audience as one of them, while the ABA Report mostly identifies with its male audience, but – perhaps reflecting the fact that its two named authors are female – at times takes a more adversarial stance.

Despite her assumption that men wield primary power within her society, Astell correctly assesses the needs of her audience by engaging in woman-centered discourse. Although her audience are women, Astell does not soft-pedal her views about her contemporaries. She begins her analysis by identifying the problem: the current state of Women, who are "cheap and contemptible" (Astell, 1970, p. 1). She deploys a variety of metaphors, many based upon natural phenomena, to describe her contemporaries. They are "useless and impertinent Animals" (p. 1). They are "Cyphers in the World, useless at the best, and in a little time a burden and nuisance to all about them" (p. 1). When women speak without education or understanding, "[p]rating like Parrots," their words are meaningless (p. 101). And in Astell's most famous simile, she asks her contemporaries, "How can you be content to be in the

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World like Tulips in a Garden, to make a fine shew and be good for nothing; have all your Glories set in the Grave, or perhaps much sooner?" (p. 3).

Set against this pessimistic vision of women's current status is Astell's assessment of women's potential. Astell undertakes to "enquire what it is that . . . keeps you groveling here below, like Domitian catching Flies, when you should be busied in obtaining Empires" (Astell, 1970, p. 5). Thus, her argument begins in the sermo rhetorical style, using a conversational tone to instruct the reader that the current state of affairs for women is deleterious to women and the social order through its waste of God's natural gift of reason to women (Sutherland, 2005, pp. 53–54). Astell appeals to the readers through *pathos* in these descriptions, using pessimism and pity to motivate her reader to seek the solution that she intends for women of her standing. She also appeals to her audience by using the very style she advocates for the pupils in her academy: a "plain and explicit" style which persuades "by putting every thing in its proper place with due Order and Connexion" (Astell, 1970, p. 118).

If women are to obtain empires, they must first overcome the causes of their current debased state. Here, Astell employs a series of dichotomies to explain why women have not obtained empires and to describe what must happen for women to becomes empresses. The most important dichotomies are Body versus Mind, Vice versus Virtue, Ignorance versus Knowledge, and Custom versus Reason, but these align with subsidiary dichotomies of Appearance versus Reality, Affections versus Judgment, Chat versus Conversation, and Wit versus Wisdom, among others (Astell, 1970, pp. 1, 9, 10–11, 13, 15, 16, 73, 129). Although the overuse of dichotomies can feel simplistic and lack texture, Astell's copious use of more granular dichotomies largely avoids this danger. These dichotomies, in turn, align with Women as They Are and Women as They Might Be. Despite the scathing words Astell uses to describe her contemporaries, the overall effect of this constant dualism is optimistic: The present can be reformed; the future can be different from the past. Astell's use of metaphor and dichotomy signals her foray into contentio style of rhetoric that was typically reserved for men in her time (Sutherland, 2005, p. 65).

With respect to the cause of the problem, Astell has no doubt:

> [I]f our Nature is spoil'd, instead of being improv'd, at first; if from our infancy we are nursed up in Ignorance and Vanity; are taught to be Proud and Petulant, Delicate and Fantastick, Humorous and Inconstant, 'tis not strange that the ill effects of this Conduct appear in all the future Actions of our Lives. (Astell, 1970, p. 7)

Although Astell elsewhere identifies women as the primary caretakers of children (p. 129), she lays the blame for women's defective upbringing squarely at the door of men. It is clear to Astell that men are in charge. Metaphorically, men raise women as a crop or build women as a house:

> The Soil is rich and would if well cultivated produce a noble Harvest, if then the Unskilful Managers, not only permit, but incourage noxious Weeds, tho'

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> we shall suffer by the Neglect, yet they ought not in justice to blame any but themselves, if they reap the Fruit of this their foolish Conduct. Women are from their very Infancy debar'd those Advantages, with the want of which they are afterwards reproached, and nursed up in those Vices which will hereafter be upbraided to them. So partial are Men as to expect Brick where they afford no Straw. (Astell, 1970, p. 6)

According to Astell, men cannot see any problem with keeping women in ignorance because they believe that women "were made for nothing else but to Admire and do them Service, and to make provision for the low concerns of an Animal Life" (p. 158).

Although she identifies men as the cause of women's current status, Astell broadens the circle of blame by personifying Custom as the ultimate force behind women's subordination. While men may have been "Unskilful Managers" who neglect women's education, Astell assigns a more active role to Custom: "Thus Ignorance and a narrow Education lay the Foundation of Vice, and Imitation and Custom rear it up" (Astell, 1970, p. 10). The nurturing role that should be played by virtuous women rearing virtuous children has been usurped by "Tyrant Custom," as she calls it (p. 11). The dichotomy between Custom and Reason explains what Astell means by "Custom." For her, it is received wisdom, the voice of authority, the socially accepted way of doing things (Broad, 2007, p. 168). Custom opposes Reason because it is collective rather than individual. Reason operates in the individual; placed within each individual soul by God, it empowers the individual to judge accurately between right and wrong. In contrast, Custom "reverses the proper relation between the understanding and the will" (Astell, 1970, p. 11). While the individual's understanding, operating on the basis of Reason, makes an accurate judgment about right and wrong, the will conforms to Custom, "becom[ing] a 'head-strong and Rebellious Subject'" (p. 84). Because, in Astell's view, the will develops before the understanding, humans are not initially governed by Reason but by "Education, Example, or Custom" (p. 63). Thus the need for a proper childhood education becomes paramount.

For Astell, Custom is what anthropologists today might call "culture"; it pervades society, dictating gender roles and valuing vice over virtue. It is a "merciless torrent that carries all before it" (Astell, 1970, p. 63). Of course, a culture is not created by one sex alone, and Astell clearly sees that women have contributed to the authority of Custom. However, she argues, they are not to blame for following its dictates. Although she urges her readers to "dare to break the enchanted Circle that custom has plac'd us in" (p. 3), she also realizes the cost to women of trying to swim upstream against the torrent: "For Custom has usurpt such an unaccountable Authority, that she [who] would endeavor to put a stop to its Arbitrary Sway and reduce it to Reason, is in a fair way to render herself the Butt for all the Fops in Town to shoot their impertinent Censures at" (p. 29).

Like Astell, the authors of the ABA Report identify the problem as the current status of women. Specifically, women are not becoming equity partners at large law

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firms in the numbers that would be expected based upon their representation in law schools. Although women now account for more than 50 percent of law school graduates, and although almost 45 percent of new associates at large law firms are women, only 20 percent of equity partners in large law firms are women (Liebenberg & Scharf, 2019, pp. iv, i). Data from the National Association for Law Placement show that the gender representation gap increases relative to seniority in law firms (p. 2). Thus, the ABA Report clarifies that the problem is not the failure to hire women into entry-level associate positions. Instead, the problem is the failure to promote women into the powerful, profit-sharing upper echelon of large law firms.

As for the cause of this disproportionate attrition of women, the ABA Report blames men, or, more generally, the workplace culture cultivated by the majority-male power structure in the firms. Of course, the few women who are equity partners contribute to the firm culture, but the report does not explicitly remind the reader of this fact. Consistent with its identification of its audience as men, the report conceptualizes firm leadership as male. However, to the extent that culture is the culprit, women are complicit in both the seventeenth-century culture described by Astell and the law firm workplace culture identified in the ABA Report. But Astell seems to be more aware of this complicity than are the authors of the report. Astell's reprimands to women show her awareness that the frivolity and triviality she abhors are partly created and maintained by women. On the other hand, the ABA Report does not exhibit any awareness that women contribute to the toxic culture in large law firms. Women are partners; they serve on compensation committees; they serve as managing partners. The conditions in large law firms that drive women away before they make partner are partly created and maintained by women who have achieved that status. Astell's clarity about her audience – literate, largely upper-class women – enables her to take better account of their role in maintaining the dominant culture. While Astell accurately recognizes that men operate the power structures in seventeenth-century Britain (government, judicial system, church, and most of the wealth), the ABA Report glosses over the fact that senior women lawyers are just as responsible as senior male lawyers for creating law firm culture.

Using survey results from 1,262 men and women lawyers with more than 15 years' experience in the nation's 500 largest law firms,[10] the ABA Report focuses on two categories of information: the everyday experiences that contribute to the success of both men and women, and, specifically, what causes women in particular to stay or leave their firms (Liebenberg & Scharf, 2019, pp. 3, 9). Ironically, the report highlights that when firm leadership genuinely believes that their practices infallibly create a meritocracy, they are less likely to be aware of the various biases that inhibit female attorneys from achieving partnership status (p. 4). This lack of awareness

[10] Women constituted 70 percent of respondents, while men constituted 30 percent of respondents (Liebenberg & Scharf, 2019, p. 3).

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manifests itself in everyday practices that contribute to the dissatisfaction of women with the firm's status quo.

According to the survey results catalogued in the ABA Report, the cause of women's attrition from large firms is not one definite issue; rather, it is "a death by a thousand cuts," ranging from routine disrespect from all levels within the firm to overt violence in the forms of sexual misconduct and fear tactics (Liebenberg & Scharf, 2019, p. 4). Female attorneys are far more likely than their male counterparts to have negative workplace experiences, including being mistaken for a lower-level employee, being overlooked for advancement or salary increases, and missing out on desirable assignments (pp. 7–8). Additionally, the existing informal structure for compensation and recognition and the lack of female representation on compensation committees create a system that does not provide equitable treatment for female attorneys (p. 8).

Specifically, the survey presented women respondents with several reasons why they may choose to leave large private firms and asked women to report whether the reason was "a very or somewhat important reason for leaving." Fifty-eight percent of women said that caretaking commitments fell into this category and 50 and 51 percent said that the number of billable hours and the emphasis on marketing or originating business were important reasons for leaving (Liebenberg & Scharf, 2019, p. 16). In another study by the ABA related to female attrition, the focus groups reiterated the claims in *Walking Out the Door*, citing undercompensation and unreasonable time demands as their least liked aspects of practicing law in large private firms (Sterling & Chanow, 2021). In addition to caretaking demands, overwork, and undercompensation, the survey reported that 50 percent of women were sexually harassed at work and that 25 percent of women decided not to report their sexual harassment out of fear of retaliation (Liebenberg & Scharf, 2019, p. 8). The report describes these conditions of sexual misconduct as "pervasive" in large firms (p. 9).

Thus, while the underlying cause of women's failure to achieve and maintain equity partner status is big-firm culture, women's attrition also results from their own decisions to leave, to "walk out the door" – their refusal to continue to endure the conditions outlined in the report. Women lawyers are not interested in being the Stepford wives of the legal profession, being passed over for tangible and intangible forms of recognition and yet expected to continue in the industry that does not respect them and actually harasses them. Although the report at several point equates leaving Big Law with leaving the profession, it is likely that many, if not most, women who depart large law firms find more attractive practice environments elsewhere, recognizing that their efforts will be better compensated, or they will find more professional satisfaction, in government work or as in-house counsel (Liebenberg & Scharf, 2019, p. 2).

Both Astell and the ABA Report see women as the problem. For Astell, women are poorly educated, resulting in a shallow and frivolous life, devoid of the

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intellectual and spiritual rewards that would result if their minds were nurtured. But women are not the cause of their own intellectual failings. They are poorly educated, shallow, and frivolous because men have engineered the social structure to exclude them from the benefits of education. Tyrant Custom has imprisoned women. For the ABA, women have come a long way: They are educated, professionally equal to men, and capable of achieving the greatest heights in the legal profession (large-firm partnerships). But they are stymied by large-firm culture, a culture created by existing firm leadership, which is overwhelmingly male. Like the Custom of Astell's day, big-firm culture of twenty-first-century America creates an environment in which women cannot thrive. Treated with disrespect or active hostility, women lawyers exercise their power of choice by leaving large law firms behind.

12.3.3 *Argument: The Appeal and the Solution*

With the problem and its cause identified, both Astell and the ABA Report undertake to propose a solution. Here, perhaps, is their greatest challenge: They must ask their audiences to take action. While indicting those responsible for the problem, both authors must also appeal to the self-interest of their readers in order to motivate change. In meeting this challenge, Astell proves much more effective than the ABA Report. Her rhetoric skillfully appeals to her audience's self-interest while admitting the difficulty of implementing her proposed solution. In doing so, she moves appropriately from sermo to contentio. The ABA Report, on the other hand, remains embedded in male-dominated large-firm culture, even while trying to ameliorate it. Unlike Astell, who proposed a radical solution that women themselves should enact, the ABA Report proposes conservative steps that reflect the view of women as victims and as primary caretakers. In doing so, the report appeals primarily to the financial interests of law firm leadership, depicting women as assets to be exploited.

The difficulty of breaking free of the culture in which one is immersed motivates Astell to propose her "Academical Institution" for women (1970, p. 157). For Astell, the first advantage of "Retirement" is that "it helps us to [check]mate Custom and delivers us from its Tyranny, which is the most considerable thing we have to do, it being nothing else but the habituating our selves to Folly that can reconcile us to it" (p. 157). Separated from the social whirl, women will be able to achieve what Astell terms "the one great end of this Institution": "To expel that cloud of Ignorance which Custom has involv'd us in, to furnish our minds with a stock of solid and useful Knowledge, that the Souls of Women may no longer be the only unadorn'd and neglected things" (p. 17). Astell believes that women have the power to save themselves, to gain education and to put it to work once they return to the world. Her vision requires liberating women from the fetters of Custom by removing them to a safe haven where they can improve themselves through self-reflection. Although Astell envisions the women reading works of philosophy such as the works of

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Descartes and Malebranche, she also prescribes self-knowledge, reflecting her belief in the power of women's minds (p. 20).

First, however, the process of gaining self-knowledge begins by stripping away the worldly trappings that distract women from their nobler quest. When the mind is constantly taken up with the sensations deriving from worldly trifles, it is impossible to focus the mind on itself.[11] Consistent with Astell's (1970) high-church Anglican loyalties, in the secular monastery women will regularly take communion, will hear preaching, and will observe all the holy days of the Church (Astell, 1970, p. 21). Their food and clothing will be "plain and decent," with no "superfluities" (p. 22). Their conversation will consist of "Friendly Admonitions," as opposed to the "Scoffing and offensive Railleries" of the world (p. 22). In the monastery, there will be "no impertinent Visits, no foolish Amours, no idle Amusements," and there will be very little time "spent in Dressing" (p. 25). Indeed, Astell's austere vision of her monastery also paints a vivid picture of its opposite, the social world, which is peopled by flighty but conniving women and arrogant, lustful men. Astell herself recognizes the self-perpetuating nature of that world. Women who feast on "Plays and Romances" see themselves reflected there, and this in turn confirms them in their "greatest Follies" (p. 19). Thus, in the Academical Institution, it is vital to eliminate these useless, and indeed vicious, works because "[a] rational mind *will* be employ'd, and it will never be satisfy'd in doing nothing, and if you neglect to furnish it with good materials, 'tis like to take up with such as come to hand" (pp. 19–20).

Unlike Astell's proposal of an entirely new institution with which to address the issue of women's education, the ABA's solution to the problem of female attrition in law firms is firmly grounded in existing Big Law structure. That structure is thoroughly capitalist, based on profits earned by equity partners by charging clients more than it costs the firm to pay associates and non-equity partners to staff the clients' cases. The pool of clients is generated by the lawyers' "rain-making" abilities, and it is primarily the firm's senior lawyers who attract wealthy clients. Thus, the report appeals primarily to its audience's self-interest in retaining senior female attorneys. Law firm managers are urged to "own the business case for diversity" (Liebenberg & Scharf, 2019, p. 19). Women's departure from Big Law constitutes, not a loss of intellectual energy or human potential, but rather a loss of clients – the lawyers' "books of business" – and a lost return on the firm's investment in those lawyers (p. 1). The report points out that "[l]aw firms devote substantial resources to hiring and training their lawyers, and the attrition of senior women lawyers causes substantial losses, both tangible and intangible" (p. 2). Even more bluntly, the internet marketing materials for the report include the following observations on the loss of female partners by Guy N. Halgren, chairman of the Executive Committee at Sheppard Mullin: "[I]f you're losing men or women during that time period, it's just very tough on your business . . . [I]t's not just that you're going to miss

[11] For a discussion of Astell's epistemology, see Goldie (2007).

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out on business by not having folks around, but also that you've spent so much money getting them to that point" (American Bar Association, n.d.-b, 1:38, 1:38–2:07). Thus the ABA Report appeals to the self-interest of large firms by correlating attrition of female attorneys with financial loss and wasted investment:

> When senior women lawyers leave firms, the firm's relationship with those lawyers' clients suffer, there is a reduced range of legal talent to offer clients, a narrower base for firms and businesses to develop robust client relationships, a diminished ability to recruit and retain skilled women lawyers at all levels, and, ultimately, serious challenges to the firm's future growth and revenue. (Liebenberg & Scharf, 2019, p. 2)

The authors of the report expect firm management to be galvanized into action to change their culture and practices to ameliorate the issue of the gender gap because it affects the firms' ability to make a profit on their investment in hiring female attorneys.

Conversely, the ABA Report repeatedly notes that managers of large law firms often fail to properly recognize and compensate women for their success in rainmaking, bringing new clients into the firm (Liebenberg & Scharf, 2019, p. 7). The report is not the first to recognize this disparity. The legal research firm Major, Lindsey & Africa has been tracking the gendered difference between compensation and client origination credit for years. From 2010 to 2018 male partners made between 32 and 53 percent more than female partners, and 48 percent of that difference is related to differences in origination credit (Lowe, 2018, p. 53). To address this issue, the report suggests that law firms develop a written policy for origination credit and a system to settle disputes of origination credit (Liebenberg & Scharf, 2019, p. 19). While mistrust of law firms' management echoes throughout the other solutions provided by the ABA Report, the suggested solution to this important problem is entrusted to the same managers who, according to the report, create the problem in the first place (p. 18).

Another of the primary causes of female attrition mentioned by women lawyers was the lack of time to fulfill their caretaking commitments (Liebenberg & Scharf, 2019, p. 12). The ABA Report recognizes that male attorneys in families that have children or elders requiring care do not carry the same burdens as female attorneys in similar family structures (p. 12). Firms often boast that female attorneys can still stay on the partner track while working part-time; however, even though nearly all large firms have this option, only 6–7 percent of attorneys make use of these policies (p. 13). The female attorneys realize that although this opportunity is afforded to them, actually using the part-time structure would likely ruin their timeline and goals of becoming partner (p. 13). The ABA Report notes with approval that some firms are implementing so-called concierge services to attract and keep female lawyers by hiring people to do the homemaking tasks that female attorneys typically would be forced to do on top of their work at the firm. Rather than encouraging men

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to do their fair share so that women don't have to work the "second shift," the ABA's suggested solution is to hire people to do those tasks, which reinforces the gender hierarchy by shielding men from their caretaking duties. This solution, reiterated in the section describing what firms should do to decrease attrition, negates a worldview where people have valuable and meaningful work outside of the firm in favor of facilitating the same high working hours that the report identified, just a few pages earlier, as a cause of female attrition (p. 11).

Most seriously, the ABA Report notes that 50 percent of women reported receiving "unwanted sexual conduct at work" and 16 percent of women "have lost work opportunities as a result of rebuffing sexual advances" (Liebenberg & Scharf, 2019, p. 8). Weirdly, in light of this revelation of the pervasiveness of conduct that, in some cases, could be criminal, the ABA Report recommends merely the implementation of "sensible and enforceable policies that incentivize women to report sexual harassment, protect them from retaliation, and punish those who engage in such conduct" (p. 9). This is the only use of the word "sensible" in the entire report. While insisting that "[l]aw firms must send a strong message that sexual harassment simply will not be tolerated," the policy that the ABA Report ultimately recommends as the remedy for sexual harassment at firms is to have more sexual harassment training (p. 19). The report fails to recommend firing lawyers who are guilty of sexual harassment, although such an example is provided in a footnote (p. 23 n.45).

This approach of identifying a serious and pervasive problem facing women in Big Law and then giving general advice in corporate-speak, touting strategy, targets, and metrics, is repeated throughout the solutions section of the report (Liebenberg & Scharf, 2019, p. 18). The logos of the report is sound, providing clear and specific evidence that points to a logical conclusion: The workplace culture and practices of large firms push women out before they are able to climb the hierarchy and become top billers for their firms. However, the lack of practical responses that firms or individuals can take harms the rhetorical strength of the authors' argument that firm behavior is both the cause of and the solution to this problem.

In sum, the attrition of female attorneys from large law firms is the result of toxic firm culture, but rather than advocate changing the culture to be more amenable to female lawyers, the ABA Report provides solutions that attempt to allow women to exist in the culture as it presently exists. Hiring concierge services, hosting more awareness campaigns, and adopting "sensible" policies on sexual harassment do not strike at the problem of female dissatisfaction with the current law firm culture. Consistent with the ABA's conservative history, and its donors' mainstream presence, the report seeks to solve the problem of female attrition by encouraging just enough change to quiet the complaints of female attorneys while maintaining the firms' basic capitalist structure. The report's tacit acceptance of this structure weakens the rhetorical logos that it crafted by using empirical evidence of the problem and its causes. The fate of women lawyers in large firms is in the hands

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of the same actors – primarily men – who have created and maintained the system that generates the problem. There is nothing radical to see here.

Similarly, despite the radical nature of Astell's proposal – creation of an entirely new institution for women's education – her assumptions and goals are deeply conservative, befitting a devout middle-class Anglican woman writing in the 1690s. What is the ultimate goal of Astell's proposal? She does not promote only one goal; instead, she elucidates a series of intermediate goals that will lead to what she sees as the ultimate good, expressed in a rhetorical question: "What End can Creatures have but their Creators Glory?" (Astell, 1970, p. 75). And along the way to this ultimate goal, women will achieve a number of concomitant goals that will benefit their families and society in general. Astell catalogues a number of ways in which the women's sojourn in the Academical Institution will benefit others. Aiming her argument toward men, she points out that a good education will make a woman a "better Wife" who will reclaim the brutish instincts of men and will make his life so "comfortable" that he will remain faithful (pp. 36, 38). Astell also argues that an educated woman will be a better mother by exerting a good influence on the impressionable child (pp. 38, 129). Surprisingly, perhaps, Astell urges her readers – primarily literate middle- to upper-class women – to nurse their children: "And if Mothers had due regard to their Posterity, how Great soever they are, they would not think themselves too Good to perform what Nature requires, nor through Pride and Delicacy remit the poor little one to the care of a Foster Parent" (p. 7). On the other hand, her position is consistent with her conservative Anglican values, which consign women to the private sphere. Astell disclaims any argument for a public role for women: "Women have no business with the Pulpit, the Bar or St. Stephens Chapel [i.e., Parliament]" (p. 123). However, Astell does envision a role for women as teachers. Disclosing her view of her audience, Astell notes that women educated in the seminary can "give the best Education to the Children of Persons of Quality, who shall be attended and instructed in lesser Matters by meaner Persons deputed to that Office" (p. 35).

But in Astell's view, the influence of educated women will extend beyond the family to a larger social circle. Women will not only educate children; they will educate one another. Although women have no place in the public pulpit, Astell insists that there can be no objection to women's educating one another, presenting a biblical example of a female teacher:

> I cannot imagine wherein the hurt lies, if … Women be enabled to inform and instruct those of their own Sex at least; the Holy Ghost having left it on record, that Priscilla as well as her Husband, catechiz'd the eloquent Apollos and the great Apostle found no fault with her. (Astell, 1970, p. 20)

Thus the education provided in the seminary will "fit us to propagate Religion when we return into the World" and to "make[] Proselytes to heaven" (pp. 33, 34). An educated woman can "improve her Sex in Knowledge and true Religion"; she can "revive the ancient Spirit of Piety in the World" (p. 14).

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However, more important than the benefit that women will bestow on others is the benefit women themselves will accrue. One of Astell's most consequential positions is that women's "Soul," like men's, is created in the image of God (Astell, 1970, p. 78). Likewise, women, like men, are endowed with Reason and are equally capable of using it to develop their understanding (p. 18). Astell asserts that using the power of Reason to develop the understanding will enable women to choose right actions and to appreciate divine revelation, but Astell also conceives women's mental powers as being intrinsically valuable, not just instrumentally valuable (pp. 62, 98). She adopts, for women, the Cartesian model of man as a self-reflecting, self-knowing being. Astell explains to her readers that the retirement provided by the seminary will enable its residents to "know and reflect on our own minds" (p. 29). If women have done the difficult mental work necessary to clear their minds of prejudices, Astell assures her readers that Truth is easily accessible: "we have no more to do but to look attentively into our Minds" (p. 97). Education in the monastery will be valuable because it will enable her readers to "live up to the dignity of your Nature" (p. 4). Indeed, having chided her readers early on that they should be chasing empires instead of flies, Astell explains near the end of the Proposal what kind of dominions she hopes her readers will rule over. She hopes that by being "intimately acquainted with our own Hearts," women will become "Monarchs in our own Bosoms" (p. 159).

12.3.4 *Sermo and Contentio*

While Astell clearly moves from sermo to contentio – from her salutation to her audience as "Ladies," to her exposition of a full-fledged theory of rhetoric – the report mixes elements of sermo and contentio (Liebenberg & Scharf, 2019, p. 1; see Sutherland, 2005, chs. 9–10). The framing materials establish a familiar tone, complete with smiling photographs and use of the first person to address the reader, redolent of sermo (Liebenberg & Scharf, 2019, pp. i–v). Yet the report begins with reference to "facts" and "figures," invoking surveys and percentages and using distancing constructions such as "It is clear that" and "It is evident that" (p. 2). Instead of first-person pronouns, subjects of sentences become abstract nouns – for example, "implication," "problems," "satisfaction" (p. 7). This rhetoric of contentio comprises the majority of the twenty pages of the report. However, unlike Astell, who keeps her eye steadily on her female audience throughout the first part of the *Serious Proposal*, the authors of the report interrupt with first-person statements more suitable to sermo. In fact, these first-person statements, and the instability they inject into the discourse, reflect a bit of frustration with their audience. Although the report is clearly aimed at those in charge of Big Law firm culture, of the 1,292 respondents to their survey, only 28 were managing partners (p. 3). When the authors declare, "We also emphasize that there is no 'one size fits all' set of policies that suits all firms. We urge firms to tap into the creativity of their own lawyers"

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(p. 13), they are pleading with the minority of their respondents, the ones whom they are depending on to make the changes necessary to improve women's positions in law firms.

This personal tone is more consistent with sermo than contentio, creating an uneasy slippage between the two discourses. Similarly, the contrast between Astell's and the report's style, especially their use of metaphor, shows the same slippage between sermo and contentio in the report. Astell's metaphors refer almost exclusively to nature – women are tulips in a garden, they are soil to be cultivated, they are straw to be used as bricks. In contrast, the report's metaphors are either competitive or mechanistic. According to the report, the goal of Big Law should be to "level the playing field" (Liebenberg & Scharf, 2019, p. ii). Currently, the report concludes, law firms are forcing women to "sidelin[e]" their careers by continuing to "move the goal posts" of equity partnership (pp. 1, 13). If equity partnership is a game to be won, it is also a vantage point to be achieved through utilizing "building blocks" and "climb[ing] up the ladder" (pp. 4, 7, 17). Thus, to Astell, the progress of women is a natural process; attention and conscious effort will yield fruit. True, women's minds have to be tended, and the people best able to do that are men, given the social arrangements of seventeenth-century Britain, but in Astell's Academical Retreat, women will be able to nurture themselves. In contrast, to the authors of the report, women in big law firms are competitors in a contest where those in charge of the game are men, who can move the goal posts and sideline women players at will. In the report, equity partnership is a prize to be won through competition or a position to be attained through the use of man-made (literally) tools such as building blocks and ladders. Metaphorically, big law firms must stop giving "lip service" to gender equality; instead, they must "give teeth" to the effort to promote women (pp. ii, 20).

But these metaphors, which support the contentio of the report, are belied by many of the emotion-laden adjectives deployed in the report, which are more appropriate to sermo and seem to deploy pathos in support of the report's argument. For example, women's lack of access to equity partnership is "undeniable and unfortunate" (Liebenberg & Scharf, 2019, p. 17). The gender differences revealed by the survey are "striking and alarming"; the results of the survey are "distressing" (pp. 8, 9). These overwrought adjectives might be appropriate in sermo – indeed, in his Foreword, Patrick Fuller of ALM calls the numbers "stunning" (p. iv) – but they create tension with the report's overall sense of contentio. Just after the survey results have been called striking, alarming, and distressing, the authors speak from a position of undoubted authority in diagnosing the shortcomings in Big Law and prescribing a solution:

> What is holding senior women lawyers back is not a lack of drive or commitment, a failure to promote themselves, or an unwillingness to work hard or to make substantial sacrifices. Simply put, women lawyers don't need to "lean in" any more than they have already done. What needs fixing is the structure and culture of law

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> firms, so firms can better address the needs of the many women they recruit and seek to retain. (Liebenberg & Scharf, 2019, p. 17)

In their passion, sincerity, and declaratory power, these sentences echo Astell. But they stand out in their context because of the uneasy mix of sermo and contentio that exists throughout the report. In fact, while the report uses emotional adjectives to label the results of the survey, its treatment of sexual harassment demonstrates this instability. The report reveals the truly shocking statistic that "one of every two women [respondents] said they had experienced sexual harassment" (p. 8). But in suggesting a solution to this sorry state of affairs, the authors use the most neutral of adjectives and even resort to bureaucratese: "[F]irm leadership and management [should] implement sensible and enforceable policies that incentivize women to report sexual harassment, protect them from retaliation, and punish those who engage in such conduct" (p. 9). It would seem that if there ever was a time for strong adjectives, the description of a solution to sexual harassment suffered by 50 percent of experienced women lawyers would be it.

Ultimately, the refusal of the ABA Report to suggest radical solutions and to maintain its rhetorical tone may result from its origin. The two named authors of the report, Roberta D. Liebenberg and Stephanie A. Scharf, were assigned the project conceived by former ABA President Hilarie Bass. They were provided a private sector partner, ALM Intelligence, to carry out the mandated survey. They were limited to examining the status of women in a specialized sector of the legal profession. Although the website hosting the ABA Report declares that "'Walking Out the Door' is making headlines with its shocking statistics and valuable recommendations" (American Bar Association, n.d.-a), it's easy to imagine the authors' belief that their report will merely take its place in a long succession of diversity, equity, and inclusion initiatives resulting in little change. As the authors declare in their introductory note, "We are way past the point where mere lip service to the goal of gender equality in the profession will suffice." Instead, they argue, the "market" for legal services is "increasingly demanding not only a professed commitment to diversity and inclusion, but actual proof of success in achieving that objective" (Liebenberg & Scharf, 2019, p. ii). Perhaps due to the conservative nature of the proposed solution, the women authors of the report occasionally lurch from sermo into contentio, revealing a certain level of frustration with attempting to motivate real change in large-firm culture.

In contrast, Astell chose her audience and her subject matter. Although she was constrained by the social mores of the time, her education and her network of friends and patrons gave her the confidence to advance her own views in her own voice. Her strong ethos, her explicit acknowledgement and direct address of her audience, and her plain, cogent style contrast with the insecure ethos, blindness to audience, and unstable style of the ABA Report.

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12.4 CONCLUSION

Although Astell's *A Serious Proposal* and the ABA report *Walking Out the Door* have many similarities, ultimately they are very different. Both works divide the world into two genders, men and women. Both perceive a problem with women's status in the world – the social world, for Astell; the professional world, for the ABA Report. Both assign a gendered cause for the problem – Astell sees men as the culprit, although she acknowledges that men and women both create a culture that buttresses the problem; the ABA Report less perceptively blames (male) law-firm managers for creating a toxic work environment for women, while failing to explicitly recognize the role that women play in maintaining that environment.

Both works are deeply conservative. Astell writes from the perspective of a devout, middle-class Anglican. The ABA Report originates from the perspective of entrenched, well-established, moneyed law firms having traditional hierarchies of status and compensation. Both works are classist and elitist. Not only does Astell aim her proposal at literate, middle-class women, but she also asserts that human reasoning power is distributed on the basis of class. She asserts that some minds have a "larger Capacity" than others, and that "every one is placed in such a Station as they are fitted for" (Astell, 1970, pp. 90, 128). Because God has ordained every person's social class, each person's intellectual aspirations should align with their class; the "Plow-man" cannot be blamed for seeking less knowledge than the "Doctor" (p. 84).

Similarly, the thrust of the ABA Report is that equity partnership at a large law firm is the ultimate achievement for a woman lawyer. The report equates leaving large law firms with leaving the practice of law as a whole. The report seems blind to the fact that women who have spent the time and energy to go to law school, to get jobs at competitive firms, and to invest the time and energy to be successful at these firms might choose to work in a different legal setting. It is well documented that the onerous working conditions at large law firms have led women to disproportionately choose work in more hospitable settings such as in-house corporate counsel, government legal departments, or academia. Yet the ABA Report fails to acknowledge that these other roles might be as rewarding, or more rewarding, than equity partnership at Big Law. By walking out the door and voting with their feet, women lawyers might be sending a message to large law firms that exceeds a message about individual preferences.

Both works make conservative assumptions about their readers' worldviews. For Astell, the Christian religion is the commonly held orthodoxy; she expects her readers to understand and accept her assertions about the role of divinity in human life and the value of established religion in her culture. Therefore, Astell can pepper her work with rhetorical questions. Sharing a common cultural foundation with her readers, she can expect them to approve Astell's implicit or explicit answers. For example, when she asks the big question, "What did we come into the World for?,"

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she does not expect her reader to argue with her answer: "to Prepare our selves and be Candidates for Eternal Happiness in a better [world]" (Astell, 1970, p. 67). Likewise, the ABA Report assumes that its readers share the large firms' capitalist worldview. Its readers are assumed to view law firms as businesses and women lawyers primarily as economic assets generating wealth for the members of the firms.

However, despite these many similarities between the two works, one overriding distinction separates the two. Astell empowers women to solve their own problem, to improve themselves and their lives. Even when she is scolding them, the women addressed by Astell always maintain their dignity. The ABA Report rejects a role for women lawyers in solving the problem of toxic big-firm culture, insisting that it is up to men to change the culture of Big Law. While this approach may seem salutary because it relieves oppressed women from responsibility and places blame on the true wrongdoers, in reality this approach patronizes women. When viewed through the lens of Astell's rhetorical practice, the myopia of the ABA Report becomes more understandable. Unlike Astell, who theorizes her audience, the ABA Report fails to acknowledge its audience. Although the report is designed to further the interests of women, its rhetoric moves them from the center of the discourse. The ABA Report exhibits a strong distrust of Big Law, blaming the problem of attrition on firms' work culture. In another report from this series, the ABA recognizes that the gender and diversity initiatives at most large firms do not effectively advocate for the needs of female lawyers of color (Peery et al., 2020, p. 24). However, in determining a solution for the problem, the ABA Report focuses only on solutions that are decided on by that same firm management. For example, the report urges law firms to redouble the efforts they have already undertaken: "The data lead us to conclude that firms need to look anew, from broader perspectives, at setting targets and implementing policies and practices that actually achieve meaningful progress and results" (Liebenberg & Scharf, 2019, p. 16). Yet the report's only specific suggestion is adoption of the so-called Mansfield Rule, an aspirational goal of 30 percent representation of women or ethnic minorities on firm committees (p. 19), which only 42 percent of experienced lawyers said was very or somewhat effective (p. 16). As envisioned by the ABA Report, large law firms thus play a double role of the oppressor and the savior whereby they are called on to rescue female attorneys from the very culture that the law firms have created.

Just as Mary Astell urged seventeenth-century women to "break the enchanted Circle that custom has plac'd us in" (Astell, 1970, p. 3), so large law firms should break out of the vicious circle of data, goals, targets, and policies. Unlike Astell, who argues for "a new vision of who and what women truly are and what they should see as their destiny" (Sutherland, 2005, p. 162), the ABA Report argues for maintaining the status quo. Ironically, now that women have become educated and have entered the public sphere, with few formal barriers to achieving the same professional goals as men, the ABA Report seeks to keep women in their place as traditional equity partners in traditional large law firms. But women lawyers who are walking out the

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door have an important message for Big Law that will be heard only if the focus shifts back to the women themselves. Their message cannot be heard if no one is listening.

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