

GENDER IN THE LEGAL PROFESSION: FITTING OR BREAKING THE MOULD by Joan Brockman, UBC Press, Vancouver, 2001, xii + 259 pp, ISBN 0-7748-0834-9

GENDER, CHOICE AND COMMITMENT: WOMEN SOLICITORS IN ENGLAND AND WALES AND THE STRUGGLE FOR EQUAL STATUS by Hilary Sommerlad and Peter Sanderson, Aldershot UK and Brookfield USA, Ashgate/Dartmouth, 1998, xii + 348 pp, ISBN 1-84014-454-8

Law is resistant to looking at itself. It prefers to direct its gaze elsewhere but, even then, it is selective about its choice of lens. Legal positivism, which attempts to draw a line of demarcation between law and morality, law and history, law and sociology, and law and other sites of intellectual inquiry, encourages a technocratic approach. The myths of objectivity and neutrality that underpin this approach to legal interpretation have deluded the profession into believing that the same descriptors apply to its own practices. A major focus of feminist legal scholarship has involved the deconstruction of law's claims to objectivity in respect of all aspects of legal culture, including professional practices. The dramatic increase in women law students and practitioners over the last two decades has compelled scrutiny of the profession's partiality for 'Benchmark Man', the normative lawyer, who is white, heterosexual, able-bodied, middle class and, of course, male.

When I began my study of women and the legal profession in Australia¹ there was a dearth of scholarship on the topic, not only in Australia, but also in the United Kingdom and Canada, although some notable work had been done in the United States.² A number of studies have since emerged from both the UK and Canada³ in addition to the books under review.

Strictly speaking, both 'the UK' and 'Canada' are geographical overstatements, as Sommerlad and Sanderson's study focuses on one region in the North of England, while Brockman's study is confined to British Columbia. The 'legal profession' must also be qualified. Sommerlad and Sanderson deal with solicitors generally, whereas Brockman restricts herself to a population of 50 men and 50 women lawyers who were called to the Bar between 1986 and 1990, and who were still members in 1993. The rationale for Brockman's selective focus is that decisions regarding career advancement, child bearing and raising all occur in the early years when attrition rates are at their highest.

1 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996).

2 For example, Cynthia F Epstein, *Women in Law* (1983).

3 Clare McGlynn, *The Woman Lawyer: Making the Difference* (1998); John Hagan & Fiona Kay, *Gender in Practice: A Study of Lawyers' Lives* (1995).

While both books feature 'gender' in their titles, their respective 'blurbs' make it clear that they are about the practices of exclusion experienced by women. The transition from 'women' to 'gender' in feminist discourse reflects the discomfort associated with the category 'women', which has been attacked as an essentialist version of 'Benchmark Men' because it fails to take cognisance of differences *between* women, including race, class, sexual preference, disability, and age. On its face, 'gender' has little to say about dimensions of identity either, but it does signal the inclusion of men. For this reason, 'gender' is perceived to be less partial as a category of analysis. In both studies, the male interviewees represent a control group against which the experiences of women are tested. Brockman is sensitive to questions of race, ethnicity, sexual orientation, and disability, but indicates that her sample was not sufficiently large to address these characteristics properly, although a number of her respondents did comment within the general rubric of discrimination (p16). While Sommerlad and Sanderson acknowledge the importance of race and class, they are of the opinion that gender overwhelmingly remains the principal factor in the career trajectories of women lawyers (p4).

Both Brockman and Sanderson have been trained in sociological methods and are conscious of the epistemological significance of standpoint, perception and interpretation; in other words, they recognise that 'facts' are always constructed and therefore contestable. Nevertheless, they are assiduous in ensuring a sound empirical basis for their findings through questionnaires and other data, as well as through interviews. The critical and theoretical orientation of both books is signalled by the series in which they appear: *Gender, Choice and Commitment* was published in the Socio-Legal Studies Series, edited by Philip Thomas in the UK, whereas *Gender in the Legal Profession* inaugurates a new Canadian Law and Society Series, edited by Wesley Pue.

Gender, Choice and Commitment pays particular attention to a range of labour market theories to problematise the issue of gender in relation to the legal profession, which considers the historical struggle of women to be 'let in' and their subsequent alienation. Sommerlad and Sanderson invoke Bourdieu's concept of *habitus* in order to capture the distinctive milieu of the legal profession. *Habitus* refers to the absorption of values, which occurs in the process of acculturation into a particular field so as to enable the perpetuation of that culture.⁴ Sommerlad and Sanderson argue that a legal *habitus* 'involving depoliticisation and the marginalisation of women's perspective, begins in the law schools' (p103). In support, they cite the concept of 'technocentrism': 'the centripetal pull of rules rationality and the way it disqualifies other forms of knowledge' (p98)⁵ as an example of the way in which the law student is acculturated into the legal profession and permanently immunised against questioning the gender of law.

On its face, the 'letting in' story is one of success, as women now constitute half of those admitted. Despite performing at least as well as men at law school and

4 For example, Pierre Bourdieu & Jean-Claude Passeron, *Reproduction in Education, Society and Culture* (1990 at 31 *et passim*).

5 Above n1 at 76-77.

in practice, they are nevertheless paid less than their male counterparts and find public sector employment more congenial than private firms, where they are less likely to be promoted to partnerships, certainly equity partnerships. (According to one respondent in *Gender, Choice and Commitment*, salary partnerships ‘had virtually been “invented” to accommodate women’ (p112)). The explanation for the failure to reward women practitioners in the light of demonstrated achievement is the conundrum with which the authors of these studies, like others before them, seek to wrestle.

Paralleling *Dissonance and Distrust*,⁶ Sommerlad and Sanderson show how cultural capital is constructed through family relationships, sport, coarse humour, drinking and other ritualistic practices, which are designed to facilitate camaraderie and generate business, but to exclude women. Within the *habitus* of the professional legal culture, membership in the ‘boys club’, or what Sommerlad and Sanderson term ‘laddishness’, seems to be generally more important than competence. Far from ‘feminisation’ of the legal profession, a prospect widely feared once the tipping point is imminent, Sommerlad and Sanderson query whether it is not the ‘masculinisation’ of the profession that we are witnessing instead (p149). Thus, far from being a thing of the past, new incarnations of the boys’ club are being created. Some of Brockman’s respondents even referred to young male lawyers as ‘baby dinosaurs’ (p200). Like *Dissonance and Distrust*,⁷ these studies show that numerosity is not in itself transformative.

Women are tolerated if they are prepared to put up with the prevailing masculinist norms and accept secondary positions, despite the expectation that they should also be super-competent. Qualified assimilation comes at a high price, for it necessitates acceptance of the status quo, including sexually discriminatory practices, such as having to accept eroticisation to please clients. Both books show that sexual disparagement, as well as high rates of harassment, operate to diminish the authority of women as legal knowers. Thirty-six per cent of Brockman’s women interviewees reported having experienced sexual harassment since entering the workforce (pp114–15).

The other dimension of the gendered *habitus* that continues to be perennially intractable is child bearing and raising. Far from being perceived as social goods that ought to be accommodated, these activities are deemed to be antipathetic to legal practice where the professional ‘has to be 100% on call’ (Sommerlad and Sanderson, p241). However, it is only women with families, not men, who are constructed as evincing a personal choice to have children. This ‘choice’ averredly demonstrates women’s lack of commitment to the workforce, which is then used to justify less favourable treatment. Sommerlad and Sanderson argue that it is the ascription of women as unreliable and uncommitted, rather than classical human capital theory, which explains women’s distinct career trajectories. These gendered constructions of choice and commitment are underpinned by the separation between public and private spheres, which law itself sustains. This leaves intact a

6 Above n1.

7 Ibid.

gendered dichotomy in which women are assumed to be available for domestic responsibilities, thereby enabling men to monopolise the 'ideal worker' role.⁸

The caring explanation for women's fringe dweller status is nevertheless not a complete answer, as women lawyers are still less likely to have children than male lawyers, although this is changing for younger women. Regardless as to whether women lawyers are mothers or not, the most authoritative positions remain elusive. As Brockman notes: 'What is surprising is the clear interaction between gender and seniority, in a group that differs so little in seniority' (p60). The ubiquitous 'glass ceiling' is not a phenomenon encountered only at the pinnacle of women lawyers' careers, for it seems to hover over them from the moment they enter the profession. While it might be thought that the mega-firms would encourage the development of formal non-discriminatory practices, bureaucratisation and hierarchisation would seem to be antipathetic towards the feminine.⁹ Indeed, Sommerlad and Sanderson found that 'the most supportive and least discriminatory employers in [their] sample were represented by some of the smallest firms' (p277). In light of the pressure within corporate firms to maximise profits by billing more and more hours, Brockman asks provocatively, 'Are hours of work increasing as women enter the workforce, in order to exclude them from full participation' (p206)? Her solution to this phenomenon is also provocative, for she suggests, perhaps facetiously, the creation of incentives to *discourage* overwork, such as medicare premiums.

By and large, both studies perceive the construction of the private sphere to be the nub of the problem. In other words, the work/family conflict needs to be reconceptualised as a public sphere responsibility, rather than relegated to the realm of private choice. Brockman argues that we cannot consider equality in the paid workforce without equality in the unpaid workforce (p213). Rather than compel women to conform to an unreal model of unencumbered masculinity at work, she suggests that the site of equality has to shift so that men also have to 'fit the mould' at home. Out of a similarly reconceptualised world, Sommerlad and Sanderson hope that 'a new type of humanised civil society' would emerge 'in which the current apartheid between the private and public spheres is destroyed and, consequently, caring and homemaking work ceases to be privatised and devalued' (p287).

In terms of strategies, Sommerlad and Sanderson acknowledge that there can be no single solution, particularly one that can be delivered by the state in light of the profession's hostility towards state intervention. They suggest a multi-pronged approach, including childcare measures, appointing women to the judiciary, and codes of practice with procedures for monitoring and enforcement. Given the intractability of the *habitus* they describe, these suggestions appear to be a trifle tepid. While changing the discourse at least exposes the private sphere to public scrutiny, we know that changing the *habitus* would virtually require a revolution,

8 Compare Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000).

9 Compare Thornton, above n1 at 171–72.

particularly in a neoliberal climate that favours individual choice and profit maximisation at the expense of social justice and common good.

Changing the discourse as to what constitutes good lawyering is also problematic. The hope that the presence of women lawyers would make a difference to the aggressive practices of corporate law through the affective values of the private sphere has not come to pass. Indeed, Brockman puts paid to the theory that there might be an homology between women lawyers and a more caring, softer style of practice: 'Only 38% of the women, and a mere 6% of the men, thought that women lawyers were more conciliatory than men lawyers' (pp154–55). Twenty-six per cent (of both men and women) thought that women were more adversarial than men (p157). What is more, the majority of Brockman's respondents, men as well as women, identified themselves as cooperative and conciliatory, rather than adversarial, believing that the interests of clients were best served by avoiding an adversarial approach altogether. Evidence of this kind is invaluable because it confounds the familiar essentialist assumptions about male and female behaviour.

The two books reviewed present insightful accounts of the careers of men and women lawyers, and the obstacles encountered by them, supported by sound scholarship and percipient analyses. Both studies nevertheless present compelling evidence that women remain fringe dwellers of the jurisprudential community. In this respect, they endorse the findings of *Dissonance and Distrust*.¹⁰ Indeed, there is a remarkable congruence between the various studies on women in the legal profession in different parts of the world.

Both books are very accessible, with the authors relying extensively on quotations from their interviewees to enliven the texts and highlight the subjective experiences of individual men and women. These stories will resonate with lawyers in Australia, thereby strengthening the case for persevering with endeavours to change the skewed gendered practices of the legal workplace.

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¹⁰ Above n1.

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