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## Life, work and capital in legal practice

Dermot Feenan, James Hand and Barry Hough

### ABSTRACT

Career opportunities in legal practice remain significantly gendered, raced and classed in many countries. In particular, features of the organisation and culture of law firms in an era of neoliberalism exemplify how patterns of disadvantage for women and minority ethnic lawyers are sustained. This paper introduces a special issue of papers on the ongoing challenges faced by women and minorities, particularly in the large law firm, – an increasingly important sector of the legal profession. Both the special issue and this paper focus on three initiatives – diversity, work–life balance and wellbeing – purportedly designed to alleviate such disadvantage. The paper argues that distinctive features of capital in the large law firm, while ignoring the structural and underlying conditions for creation and maintenance of such disadvantage, limit the potential of such initiatives at the same time as renewing disadvantage.

### Introduction

Decades after the introduction of sex discrimination legislation, career opportunities within the legal profession, certainly within the common law jurisdictions, remain significantly classed, raced and gendered, especially within the large law firm. Features of the large law firm continue to create obstacles for entry and progression of minorities and women, often rendering the environment alienating, inhospitable or unsupportive to them. Initiatives intended to address these phenomena, such as diversity, work–life balance and wellbeing programmes, have been criticised where they fail to address the structural and deeply embedded cultural conditions that sustain the problems that they were ostensibly intended to redress. This special issue draws together work following the symposium 'Innovations: Legal Practice – Work–Life Balance: Challenges, Differences and Diversities', and this paper draws on recent pioneering studies on legal practice to argue that a number of features of the organisation and culture of the large law firm within neoliberal economies exemplify (and, indeed, exacerbate) problems of access, fit and retention for minorities, notwithstanding such initiatives. While the papers in this issue explore aspects of diversity, work–life balance and wellbeing – drawing on primary research in Australia, the US, Canada and the UK – this paper seeks to situate interconnecting themes in those subsequent papers within a broad examination of the salient literature. We begin first by sketching the development of the approach to diversity, wellbeing and work–life balance in legal practice in the context of these disadvantages. We then examine the context and features of the

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large law firm in neoliberal economies that perpetuate the disadvantages for women and minority ethnic practitioners, before arguing that the trend in those firms towards capitalising on identity exacerbates those disadvantages.

## Diversity, work–life balance and wellbeing

Policies aimed at increasing diversity continue to be the ostensible remedy to the low representation of minorities in the legal profession, even while its meaning and salience remain contested. In the UK, for instance, representative bodies of the legal profession have published their commitments to diversity (Law Society of England and Wales, 2009; CILEx, 2012; Bar Council, 2014). Similar commitments exist among professional bodies in Australia (New South Wales Bar Association, 2013), Canada (Kay et al., 2004) and the US (Chambliss, 2005).

A number of these bodies have, across various jurisdictions, identified common problems and patterns. Ongoing discrimination affecting entry and progression reveals how the profession is structured according to gender, race and class. This problem is explored by Ronit Dinovitzer and Meghan Dawe in their paper in this issue, 'Early legal careers in comparative context: evidence from Canada and the United States'. But this is not all because harassment and inflexible working practices disadvantage women, certainly as preponderant carers for dependents. These problems lead to lower pay, higher levels of exit and thwarted promotion – including access to partnership (Kay & Hagan, 1998; Bolton & Muzio, 2007). Much of the available research focuses on the position of women and minority ethnic groups (Gorman & Kay, 2010), and this research is referred to here as indicative – though increasing attention is paid to other personal characteristics such as disability (Brockman, 2006; Lyon & Sossin, 2014) and sexual orientation (Brockman, 2006). The research tends to show that notwithstanding diversity initiatives, minorities continue to experience disadvantage (Sommerlad, 2012; Kumra, 2015; Rhode, 2015).

Thus, while women have for decades been entering the legal profession in numbers equal to or in excess of men they continue to experience disadvantage (cf. Epstein, 1995; Schultz & Shaw, 2003). As Sommerlad argues in her paper in this issue, "A pit to women in": professionalism, work intensification, sexualisation and work–life balance in the legal profession in England and Wales', it is now evident that a rhetorical commitment to equal opportunities policies and other forms of diversity and inclusion initiatives is unable to disguise the resilience of the 'male breadwinner culture'. Neoliberalism has inflicted damage on women. As Sommerlad has identified, a particular concern has been the commodification of female sexuality.

Moreover, women's pay remains consistently below that of men (Dinovitzer et al., 2009) and women predominate in the less prestigious specialisms. In addition,

women tend to occupy public sector legal practice, which generally is less prestigious (as well as being less well paid) than private practice (Dinovitzer & Hagan, 2014). Within private practice, they tend to be admitted to small firms rather than the large (more prestigious) firms (Hagan & Kay, 1995; Sullivan, 2010). Neither are women in in-house practice immune from a range of familiar disadvantages (Wald, 2011). Rates of attrition are higher, in general, for women lawyers in the UK (Sommerlad et al., 2010; Sommerlad, 2016),<sup>1</sup> US (Liebenberg, 2011; Pecenco & Blair-Joy, 2013), Canada (Kay et al., 2004; Brockman, 2006) and Australia (Law Council of Australia, 2015). Discrimination continues to be reported across a range of activities. In a survey of women solicitors in England and Wales reported in 2011, for example, 34% of women said they had experienced discrimination – rising to 43% for women partners and 42% for female associates and assistants – compared to 17% of men (Rothwell, 2011). In the most recent survey in Australia of lawyers, close to one in two women reported that they had experienced discrimination due to their gender compared to just over one in ten men (Law Council of Australia, 2015). Of course, the forms that discrimination take will vary considerably, and can be categorised variously but also predominate at different stages of career compared to different cohorts of women. While it is well-known, for instance, that women lawyers tend to leave legal practice at higher rates than men (Kay, 1997), Law Council of Australia (2015) research reports that younger women are more likely to have felt discriminated against due to their age at work than their older counterparts; that women in their middle years were more likely to experience discrimination due to their family responsibilities; and that mature aged women, particularly those joining the profession later in their careers, felt bias against their age.

These problems are exacerbated for women of colour or minority ethnic women (Payne-Pickus et al., 2010) compared to white women, though lawyers from minority ethnic populations generally remain underrepresented. In the UK, 38.4% of white Europeans in private practice are at partnership level: the corresponding proportion from ethnic groups is significantly lower, 25.9% (Sullivan, 2010). In the US in 2001, for instance, almost all women of colour leave private practice by their eighth year (ABA, 2001). A follow-up study published in 2014 of lawyers who passed the bar in 2000, found that women of colour were especially least likely to have made partner in private law firms. Women overall were more likely to be unemployed or working part-time, and the pay of full-time women attorneys was 80% of male attorneys (Dinovitzer et al., 2014).

The 'business case' model that underpins the diversity initiatives – that equal opportunities makes business sense as it can lead to improved morale and thence productivity, it does not waste human capital and it obviates expensive discrimination claims (McGlynn, 2000, pp. 447–448) – can be seen to compound the underlying problems. For example, the business case model tends to focus on numerical equivalence, and is ultimately based on the 'bottom line'. Considerations of equity, equality and social justice are therefore residual matters at

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<sup>1</sup> The attrition rate for female solicitors in the UK is 42% within 10 years of qualification (AWS, 2012).

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best and, as noted by Sommerlad later in this issue, once the cost of training has been recouped the business argument may fall away. The business case model fails to address both the traditional law firm culture that excludes and alienates many women and minorities, and the competitive ('tournament of lawyers') ethos of the large firm (Wilkins, 2007). Similar critiques are made against other initiatives, such as work–life balance and wellbeing.

One response to a number of challenges faced particularly by women lawyers has been to propose better 'work–life balance' (Law Council of Australia, 2015), and, for lawyers more generally, 'wellbeing'/'wellness' initiatives designed to address high rates of ill-health, including stress (Chan, 2014). In the face of intensifying global competition, there is an increasing need for the legal profession to confront the problem of what is meant by wellbeing and how wellbeing is connected in complex and often contradictory ways to contemporary debates about gender equality and diversity. In his paper in this issue, 'Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)', Richard Collier explores how the lack of workplace autonomy (in particular for law firm associates), and the way legal workplaces can be marked by endemic cultures of 'presenteeism', frequent job insecurity and high levels of career dissatisfaction raise questions about the organisation and culture of law firms (albeit that there are complexities in assuming that these explain the anxiety disorders) insomnia and other depressive-associated symptoms suffered by an increasing number of practitioners. Collier argues that gender equity and inclusion in the legal profession continues to be constructed as a 'women problem' obscuring the interconnections of parenting and the gendering of ideas of 'commitment' to a legal career, not least in relation to normative understandings of fatherhood in the law firm. Neoliberalism has demanded the services of what Collier describes as the 'bleached out', 'ideal' and 'committed legal worker' which leads us to question, in particular, how the firm has historically positioned women lawyers.

Most of the 'wellbeing' interventions involve counselling/training designed to develop greater individual resilience (Chan, 2014). But increasing concern is being paid to the failure of these initiatives to address fundamental structural and cultural features of the legal profession – and especially the large law firm within neoliberal economies – which have particular adverse implications for minorities. This is related to the ineffectiveness of diversity initiatives to effect significant change in their underrepresentation and relative disadvantage. The large law firm has become, in the wake of the fragmentation of the legal profession, the main source of socialisation and control, with profound implications for the opportunities of women lawyers (Sommerlad, 2016) and minority lawyers. It is necessary therefore to sketch out the significance and relevant characteristics of the large law firm in neoliberal economies.

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## The context of the large law firm in neoliberal economies

First, it is helpful to recall the key features that may be said to characterise neoliberalism. It is ostensibly anti-statist, favouring de-regulation, open markets, competition and privatisation (Stone, 2004). The economic rationalism of neoliberalism contrasts with the focus in social welfare states on individual rights and social justice. If law firms and policy makers are to pursue successfully the achievement of diversity within the legal profession when women practitioners predominantly assume caring responsibilities, they must engage with the particular forms of organisational practice that are developing in many law firms in neoliberal economies. Just as demands for flexible working were becoming more urgent and compelling, the intensification of competition has tended to privilege what commentators such as Thornton have described as the characteristics of hypermasculinity – featuring the willingness to work long and unsociable hours as well as a readiness unfailingly to prioritise work over family life. Thornton's paper, 'Work/life or work/work? Corporate legal practice in the twenty-first century', explores the consequences of neoliberalism for those who work in law firms where the ideal worker is constructed in the image of the unencumbered individual who can pursue an unbroken career path and work excessively long hours – ideally a male with an economically inactive wife. The unhealthy self-sacrifice demanded of lawyers in the modern neoliberal law firm, especially the large corporate firm, often makes the workplace unappealing and even inhospitable to women.

In the common law countries mentioned in this paper and accompanying papers, neoliberalism has profoundly shaped how new legal services have developed, are organised and regulated (Abel, 2003; Flood, 2011). For instance, in England and Wales the former powers of self-regulation of the solicitors' profession have been eroded and the Legal Services Act 2007 has enabled the creation of alternative business structures. This has most recently led to three of the 'Big Four' global accountancy practices launching as law firms (Ames, 2015).

In this context, there has been a significant increase in both the number of large law firms and the proportion of lawyers who now enter practice in those firms. In the US, for instance, in 2005, 13% of lawyers worked in firms of over 100 lawyers (Carson & Park, 2012). Now, 31.6% of new entrants to the bar join such firms (NALP, 2014).

Similar growth is reported in numbers of solicitors in England and Wales (Pleasence et al., 2012). Such firms have shifted the professional orientation of legal practice away from notions of public interest through asymmetrical commercial relationships consistent with the logic of the market (Hanlon, 1999; Flood, 2011). According to Thornton and Bagust (2007), the "privileging of the business of legal practice has caused the significance of legal professionalism to wane" (p. 804) – compromising lawyers' moral integrity with a form of pragmatism (Kirkland, 2005).

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Globalisation has enabled many large law firms' exponential growth and international reach (Pinnington & Gray, 2007; Sechooler, 2008). Such growth tends to emanate from the most advanced neoliberal economies. So, in "virtually every major capital of countries tied into global markets, local lawyers – typically trained in the United States – have more or less imported the US model of law firm practice" (Dinovitzer & Garth, 2015, p. 9) which is in acute tension with what Collier identifies in his contribution to this special issue as the heightened political and cultural resonance of wellbeing.

In the process of aggrandising power, the globalising large firm is enabled in the undermining, modifying, escaping and reconstructing of professional regulation regimes (Flood, 2011). For instance, The City of London Law Society, the main lobbying and negotiating group for large law firms in the City, changed its formal status in 2007, which enabled it to become involved in debates around the Legal Services Act and subsequent reviews of the legal profession. In its evidence to the Committee on the Draft Legal Services Bill, and in setting itself apart from the Law Society (the traditional professional body for solicitors) it challenged whether the basis of a number of regulatory objectives of the Bill – including protecting and promoting the interests of consumers and increasing public understanding of the citizen's rights and duties – should extend to large law firms.

The 'commercialised professionalism' described by Hanlon in the 1990s (Hanlon, 1999) has contributed to increasing corporatism of the modern law firm (Gabarro, 2007), leading in turn to financialisation. The latter entails "the ascendancy of new financialized discourses and practices [ . . . ] through the proxy indicator of PEP [profits per equity partner], somewhat unexpectedly reproduc[ing] the logics of finance capitalism in the domain of law" (Faulconbridge & Muzio, 2009, p. 658). In June 2015 Gateley was the first UK-based law firm to float on the London Stock Exchange's Alternative Investment Market. Slater and Gordon, another Londonbased law firm, had already floated on the Sydney exchange in 2007.

The logic of capitalism requires extracting surplus value from the worker (Marx, 1867/1930). This is achieved most particularly within the large law firm through longer hours that are not billed and the associated competition among workers in order to try to secure the relatively fewer lucrative rewards of senior positions. This is gained, in part, through presentee-ism and a traditional 'tournament' of lawyers (Galanter & Palay, 1988) that characterises this 'survival of the fittest' competitive ethos. The intensification of work that results could be seen to extract surplus value through what Sommerlad (2016) calls "boundary spanning" – involving the exploitation of skills not covered by the formal contractual relationship. These skills comprise understanding, empathising and mediating – which tend to be allocated to women. This extra (surplus) work was, in the words of one of the female respondents in Sommerlad's research, "high-volume, low-value work which no one else could be bothered to do" (2016, p. 70). Women lawyers are often pushed into lower status work, with "[k]nowledge management [emerging] as a new feminized underclass of lawyering" (Thornton & Bagust, 2007, p. 787).

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Connectivity through the internet 24/7 potentially further dissolves the border between office work and home life. Indeed, Thornton (2016) argues that the idea of work–life balance is largely elusive, with the boundary between life and work effectively extinguished by the neoliberal firm.

The long-hours culture associated with the modern law firm undermines those policies that purport to achieve flexible working, and work–life balance, though this phenomenon is shared among other professional service firms (Muzio & Tomlinson, 2012). The rules of the large corporate firm serve to “disadvantage women by refusing to recognize other family-based and gendered role demands” (Dinovitzer & Hagan, 2014, p. 933). Moreover, as Thornton and Bagust (2007) note, there is no “serious talk about flexible work practices for men to enable them to share in childcare” (p. 780), which reinforces assumptions concerning gendered roles in the legal workplace (e.g. Collier, 2016). This is particularly problematic for women in the US, where few firms guarantee any form of paternity leave.

Part-time workers are often treated as less committed than full-time workers, adversely affecting promotion prospects. Thornton and Bagust (2007) found that while some large firms have reluctantly accepted the idea of a part-time equity partnership sought by a person who is already a partner, even this is regarded with some suspicion (p. 796). Part-timers/flexible workers generally risk being perceived as “time deviants” (Stone & Hernandez, 2013). Such attitudes and behaviour disproportionately discourage women in their full participation and commitment (Epstein, 1995).

But there are other less direct ways in which the ethos of the large law firm disadvantages women. The ideal worker tends to be seen in heroic masculine terms, whose capacity to undertake long hours (typically favouring single individuals, unencumbered with dependents) privileges and reifies the young man. There exists an associated perception that women are not a good investment for the firm given that they may take maternity leave and be less committed upon return. And yet, there is mounting empirical evidence that in fact female employees report slightly less family–work conflict than their male counterparts (Hoobler et al., 2009). Given that women lawyers will often postpone any family until into their thirties, the combination of the effect of taking maternity leave at a key point in the ‘tournament of lawyers’ is potent, particularly when one considers the age at which lawyers reach senior positions, which has dropped in the modern law firm. Galanter and Roberts (2008) report that in 2000 32% of partners in the US firm Rogers & Wells were over 51 years of age, including 15% who were more than 56; but only 14% of partners in the London-based firm Clifford Chance were over 51 and only 2.7% were over 56. Where the age of reaching partnership is no longer in later life, but closer to mid-life, it tends, especially with the younger threshold in England, to advantage the unencumbered male ‘ideal worker’, and correspondingly risks disadvantaging the female lawyer who takes maternity leave.

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There remain instances of overt discrimination that affect women (Wilder, 2007; Rothwell, 2011), though minorities generally continue to experience high levels of discrimination (Brockman, 2006). The Law Council of Australia survey found that discriminatory behaviour was more commonly identified in large and medium-sized firms. Sommerlad (2016) reports from her survey of women lawyers in the UK that discrimination in the era of neoliberalism entails a re-sexualisation of women. Indeed, Brockman's (2006) survey of women lawyers in Alberta, Canada found that women's perceptions about discrimination against women lawyers in the form of unwanted sexual advances increased from 37% in 1991 to 50% in 2003. And yet, the language of discrimination has largely disappeared from those initiatives that seek to redress structural and cultural disadvantage against women and minorities. Thornton (2006) argues that this, too, is a function of neoliberalism. The substitution of economic rationality, 'the business case', for social justice and equality effaces the liberal conceptual framework by which such re-sexualisation may be understood. Indeed, the commodification of identity, including dress, renders the body, and particularly the body more vulnerable to commodification – the female body – to precisely that process of economic rationality.

## Identity and capital

If the traditional law firm relied more on social and cultural capital in recruitment, the modern firm might be said to rely on a form of cultural capital as commodity that is more intimately linked to economic capital. Traditionally, entry to the profession was heavily dependent on social privilege (Abel, 1988). In 1995 in the UK, those who had been to independent fee-paying schools were five times more likely than those in the general school population to enter law schools, three times more likely to study law at Oxbridge, and 40% less likely to attend a new university (Shiner & Newburn, 1995). That generation now occupies the stratum within firms within which recruitment practices operate. Social and cultural capital remains important in securing entry (see e.g. Francis and Sommerlad (2009), and in this issue Dinovitzer and Dawe (2016) and Wald (2016)), but features of the neoliberal firm demonstrate how an exchange value is easily attributable to identity that might previously have been regarded only in Bourdiesian terms as a "structural correspondence between social class of lawyers and their clients – where the position of lawyers in their professional hierarchy corresponds to the position their clients occupy in the social hierarchy" (Swartz, 1997, p. 130). Thus, Sommerlad's (2007) research among City law firms revealed an employee at one of the top City firms in London stating: "We could take a woman who wore the hijab . . . we do lots of public sector work and our public sector clients are very pc and would see it as a plus point – also we have a diversity policy." (Emphasis added) (p. 206) Here, the potential commercial value of a (female) employee's dress to clients is foregrounded before the firm's adherence to its diversity policy. Likewise, a later study noted that:

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The Head of Chambers said: "I want him, he comes hunting and shooting with us and . . . my clients like him, my Greek shipping clients like him because he has everything that they are looking for, he's been to a certain public school and then to Oxbridge and he presents the right image".

These were the criteria. He hadn't actually, at that point, passed his Bar exam. So it was not the quality of his work that was important, it was the fact that he fitted. (Sommerlad et al., 2010, p. 43) Here, identity becomes 'image' – a marketable commodity. It is perhaps no surprise therefore that Ashley and Empson (2013) found most leading law firms in London recruit lawyers with specific forms of institutional and embodied capital in order to present an 'upmarket' image as part of their attempt to carve out a share of the market. Moreover, the concept of identity capital is exploited by clients as well as law firms. This phenomenon is explored by Eli Wald in his paper in this issue, 'Lawyers' identity capital'. He explores how, as the use of gender and racial identity and capital grows increasingly more explicit it brings to the fore complex questions about the interplay of merit and personal identity. Using the case of the basketballer Kobe Bryant, his alleged victim and his lawyer, Wald examines the commodification of lawyers' personal identity by clients, firms and themselves and whether it is desirable or even inevitable.

## Conclusion

In light of the foregoing, where diversity and work–life initiatives fail to redress persistent disadvantage against women and minority ethnic individuals, we may rightly be critical of wellbeing initiatives that ignore similar structural and cultural conditions. Collier (2016) helpfully questions the normative underpinnings of 'wellbeing' in the context particularly of these gendered conditions. Wellbeing discourses can risk responsabilisation and pathologising of the individual for her work-related ill-health or simply not fitting into, pace Foucault (1975/1977), disciplinary regimes of performance required by the corporate firm. There remains a risk that initiatives, such as wellbeing, diversity and work–life balance, purport to improve working life while ignoring or concealing the conditions that have always threatened its flourishing.

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*symposium, and the panellists and those who attended.*

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