

"Liberty, Equality And ?"

Endowing Fraternity With Voice[†]

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Fraternity comes into being after the sons are expelled from the family; when they form their own club, in the wilderness, away from home, away from women. The brotherhood is a substitute family, a substitute woman — alma mater.¹

1. *Introduction: Feminism and Fraternity*

Feminist legal scholarship, a phenomenon of the last two decades, has destabilised conventional understandings of law, legality and the constitution of the legal subject. Its most significant contribution has been its sustained critique of law's claim to neutrality. However, feminist legal scholarship has focused primarily on the formal knowledge produced by legislators and judges, a phenomenon that can only help to uphold the dominant paradigm of legal positivism. Remarkably little critical attention has been paid to the informal roles played by the legal dramatis personae. Perhaps this is unsurprising, since a lack of reflexivity is a notable characteristic of the legal culture, bolstered by the enduring social myth that lawyers erase their own subjectivity in the service of others.²

Legal positivism, by its nature, affirms the idea of lawyer as conduit, for it privileges technocratic knowledge over contextualised knowledge, particularly that involving the subjective, the corporeal, and the affective.³ Despite instability at the methodological margins of adjudication, the "neutral" judge who interprets legal texts, continues to be the paradigmatic agent of legality, although the recently discovered phenomenon of "gender bias in the judiciary" has invited scrutiny of the adjudicative process and challenged the positivistic assumptions of neutrality and objectivity. The term "bias" is somewhat misleading,

† This paper represents an elaboration of some ideas I began to canvass in Thornton, M, *Dissonance and Distrust: Women in the Legal Profession* (1996). I am indebted to Krysti Guest for conducting interviews with women in the legal profession and to Jean Crowther for transcribing tapes. I also acknowledge financial assistance received from the Australian Research Council and the former School of Social Sciences, La Trobe University. Earlier versions of the paper were presented at the Annual Meeting of the Research Committee on Sociology of Law, International Sociological Association, University of Tokyo, August 1995, and the Australian Law & Society Conference, Southern Cross University, Ballina, December 1995.

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1 Brown, N O, *Love's Body* (1966) at 32.

2 This is not to deny the significance of work such as that of Abel, R L, *American Lawyers* (1989); Abel, R L and Lewis, P S C (eds), *Lawyers in Society* (1988-89); Cain, M and Harrington, C B (eds), *Lawyers in a Postmodern World: Translation and Transgression* (1994); Weisbrot, D, *Australian Lawyers* (1990).

3 Hart, in summarising the elements of legal positivism in a footnote, stresses the idea of law as a "closed social system", that is, distinct from other sources of inquiry. See Hart, H L A, *The Concept of Law* (1961) at 253, n181.

for it suggests an individualised pathology that renders the condition amenable to remediation by means of a specified course of treatment, such as the administration of a re-education and rehabilitation program. The "gender bias" thesis supports the popular view that there are a few elderly male judges replicating anachronistic views about women. Once they retire or are "rehabilitated", it is believed, juridical order will be restored. The individualised pathology deflects attention from the ways in which the legal culture itself is suffused with masculinist values, a culture that is also Anglocentric, heterosexist, able-bodied and middle class.

Practising lawyers as a class have not been problematised in the same way as judges within the contemporary debate. While judges are deemed to require remedial attention, practitioners (understood as barristers and solicitors) are not. Not only are judges conventionally selected from the ranks of practitioners, but the latter are constantly engaged in producing legal knowledge; this is not the prerogative of judges. Nevertheless, the privileged and authoritative status of judges occludes an understanding of the ways in which practitioners produce legal knowledge. The juricentric focus is underpinned by legal education's fixation with the stories of law that emanate from appellate judges, which are deemed to be the only worthwhile accounts with which students should acquaint themselves.

Women now constitute approximately 50 per cent of law students and almost 30 per cent of legal practitioners in Australia, a scenario replicated elsewhere in the Western world. The liberal progressivist thesis avers that these demographic changes will miraculously transform the gendered character of the legal profession. It is assumed that an environment of receptivity will be automatically effected through contiguity with women in law. It is apparent, however, that the legal culture is deeply resistant to alterity, but the positivistic veneer of technocentrism successfully obscures the significance of the social, including the role of individual agency.

In this paper, I propose to fracture the technocentric veneer in order to examine the social phenomenon of fraternity that undergirds the legal culture. While the concept of "the club" is well known in popular parlance, it is rarely taken seriously by legal scholars.⁴ The positivistic message that the subjective and the affective are irrelevant to the rule of law continues to exert considerable sway, despite incursions by postmodernism with its suspicion of abstract universals. I consider the ways in which the concept of fraternity insidiously informs a masculinist consciousness within the legal profession, particularly through clubs, sport, and eating and drinking rituals. At the broader social level, fraternity has significant ramifications for the constitution of civil society in its attempts to retain traditionally gendered, raced, ethnicised and heterosexed values. While I acknowledge that masculinity is constituted in multifarious ways, including through literature for boys⁵ and manual labour,⁶ I confine

4 Feminist writers have, nevertheless, presented a devastating critique of fraternity in the professions, including law, from time to time. See, for example, Woolf, V, *Three Guineas* (1947).

5 Kanitkar, H, "Real True Boys': Moulding the Cadets of Imperialism" in Cornwall, A and Lindisfarne, N (eds), *Dislocating Masculinity: Comparative Ethnographies* (1994) at 184. See also the other essays in this collection.

6 See, eg, Cockburn, C, *Brothers: Male Dominance and Technological Change* (1983).

myself to a narrower canvas in order to focus attention on the embodied and relational character of fraternity. My analysis is illuminated by the insights of women in law.

2. *The Aphonicity of Fraternity*

Although the concept of fraternity is central to the constitution of masculine identity, comparatively little is heard of it, compared with its triadic partners, liberty and equality.⁷ Fraternity's literal meaning of "brotherhood" tends to get in the way of its metaphorical meaning of communal bonding, even when accompanied by the universalised and disembodied abstractions of liberty and equality in the revolutionary shibboleth "*liberté, égalité, fraternité*". The historical and contingent linkage of the concepts in Norman Brown's epigrammatic "Liberty means equality among the brothers"⁸ underscores the symbiosis between liberty and equality, which is apparent in the first social contract.⁹ In the primeval story, recounted by Freud, the brothers, having been expelled by the father, band together and kill and devour him.

The sexed specificity of the contract story is not easily sloughed off within the social script, despite contemporary discourses of egalitarianism. Thus, when we turn to liberty and equality, we find that women and "others" are marginalised within political theory, despite the earnest attempts of feminist legal reformers to revitalise and rethink these concepts.¹⁰ Fraternity has constituted an even more testing exercise. Community, which might be conceptualised as a revisionist version of fraternity, continues to be tarnished by the white, masculinised, heterosexed nature of brotherhood. Furthermore, the more attractive features of community, including an ability to take up the point of view of the "other", remain flawed, as community depends upon members of the "in-group" being able to perceive themselves as fundamentally similar.¹¹ "Community" may therefore disguise the way it legitimises a form of "othering".

The primary meaning of fraternity as brotherhood also challenges the enduring fiction of the degendered, autonomous self of liberalism. The autonomous self tacitly denies that relationality — between men, rather than between men and women, and men and children — is central to the constitution of masculine identity,¹² the acknowledgment of which is a provocative idea within a homophobic society. Given the corporeal reality of fraternity in public life, how has the fiction of the degendered, autonomous self been maintained? It would seem that the symbiosis between public and private life is the clue, whereby the caring work that women continue to do in the home for their families creates the material conditions whereby the preponderance

7 See Pateman, C, *The Sexual Contract* (1988) at 77 et passim.

8 Above n1 at 4.

9 Freud, S, *Moses and Monotheism: Three Essays* (2nd edn, 1940) at 30–6.

10 See, eg, Australian Law Reform Commission, *Equality before the Law: Women's Equality* (1994) No 69 Part II, ALRC, Sydney.

11 Gaus, G F, *The Modern Liberal Theory of Man* (1983) at 93.

12 See Cornell, D, *Transformations: Recollective Imagination and Sexual Difference* (1993) at 78.

of men are able to build upon their power capital, both in employment and in the polity. The fiction of the autonomous self denies the significance of this gendered symbiosis. This is not to negate the reality of relational ties between men and their families, but men are able to leave their families behind in a way that has generally not been possible for women, whether in paid work or not. The point is illustrated by a woman legal academic with a young baby:

Even though [my partner] is so supportive and so good around the house, I still ultimately feel like it is the mother's responsibility ... and I really feel that it is an impediment to my career in that he can go to work and, once he's at work, that's it; he doesn't have to worry about her until 5 o'clock when he comes home. But I come to work [and] I'm waiting here all the time in case they ring me up: "She's upset; come down here". They don't ring him up ... I've got her feed time between 11 and 12 and I have to wait here in case they ring up and say, "Come straightaway — she's crying; she's hungry". So I go down there.

Women in heterosexual relationships with school-age children also point out that it is invariably they, not their partners, who take time off work to attend school functions or accompany children to the dentist. The social responsibility of mothering is then used to deny women authority in senior positions in the legal profession and in civil society generally. More is at stake than a question of possible time away from work, for it is inferred that women's love for their children prevents them from developing a sense of justice.¹³ That is, this dimension of feminised partiality averredly impedes the exercise of dispassionate judgment. The myth of the autonomous self is therefore a crucial ideological device in maintaining the masculinist character of the legal profession. The love and commitment that many men have for their families is indisputable, but the social script allows them to slough off the responsibility once they leave home in the morning. Their resumption of responsibility is contingent upon the extent of their work/leisure "commitments", including drinking in the "after hours bar".

While liberty and equality are indelibly associated with the Enlightenment, modernity and reasoned speech, and have generated vast literatures, fraternity has remained largely aphonic, apart from vestigial and effete pockets of acknowledged brotherly activity involving elaborate rites of initiation, as exemplified by Masonic lodges. Carole Pateman, in writing on the origins of civil society within classical contract theory, has observed that "[p]erhaps the most striking feature of accounts of the contract story is the lack of attention paid to fraternity".¹⁴

Discomfort with the phonicity of fraternity may arise not only from the sex specificity of the contract story and the love between brothers, but also from its more gruesome elements of fratricide and cannibalism. This story dramatically disrupts the masculinist claim to reason in the Cartesian mind/body dualism, to which the Western intellectual tradition, including law, continues to cleave.¹⁵ Indeed, fraternity is qualitatively different from liberty and equality in the way that it retains a pre-modern, non-rational flavour, because it is derived from kinship rather than from intellectual commitment. In lieu of reliance

13 Pateman, C, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989).

14 *Id* at 34.

15 Lloyd, G, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (1984).

upon the long and impressive philosophical tradition to which liberty and equality belong, the existence of fraternity depends upon shared feelings: "it pushes to the absolute the dialectic of approval and condemnation".¹⁶ The mysterious and affective nature of fraternity within ostensibly gender-neutral, egalitarian and universal public spaces today may suggest why positivistic knowledges ignore it, while tacitly endorsing it. Fraternity is able to remain aphonic within contemporary political theory because, as Tacussel observes, "mystery needs no words".¹⁷

Nevertheless, colloquial speech still refers to the legal profession, or a component of it, as a "legal fraternity" and residual acknowledgment of the existence of fraternity is found in linguistic archaisms, such as "my brother judge". Presbyopia may enable fraternity to be discerned by the historian where it is invisible to the contemporary theorist.¹⁸ It is also notable that while studies of women in the legal profession of a decade or so ago acknowledged the significance of fraternity,¹⁹ more recent studies tend not to do so.²⁰ The increase in the number of women entering the profession and the demise of clubs, with their curious practices, such as the specification of side-door entrances for women, may have induced many to believe that fraternity in the legal profession was now effete. The allure of liberal progressivism is difficult to resist in the face of numerosity.

Despite its aphonic character, fraternity is indubitably associated with dominant incarnations of masculinity, which connote physical prowess, competitiveness and rugged individualism. These values are the antitheses of those conventionally associated with the social construction of the feminine, which include dependence, affectivity and care. I am not wishing to dispute the social construction of fraternity, nor do I wish to suggest that its meaning is fixed, but I suggest that its connotations of male embodiment are undeniable. Women's bodies are both resisted and resistant to being subsumed within a notion of fraternity.

Conventionally, men have possessed the social power to enable them to claim normativity for themselves within the jurisprudential script by means of a perennially positive evaluation of those characteristics associated with masculinity, or what might be termed "the imagined masculine". Its counterpart, the "fictive feminine", has been perennially constituted or reconstituted as "the other" to the masculinised norm, and it is sufficiently permeable to include "transgressive" sexualities, as well as Aboriginal and non-Western manifestations of race and other non-normative characteristics. Similarly, I also acknowledge the cultural

16 Tacussel, P, "The Laws of the Unspoken: Silence and Secrecy" (1988) 144 *Diogenésis* 16 at 18.

17 *Ibid.*

18 See, eg, Prest, W, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (1986) at 74 when describing the "order of the coil" in his study of the rise of the legal profession.

19 For example, Epstein, C F, *Women in Law* (1981) at 283-6; Sachs, A and Wilson, J H, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (1978) at 170-95. See also Burns, M M, "The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality" (1983) 18 *Harv C R-C L LR* 321.

20 For example, Hagan, J and Kay, F, *Gender in Practice: A Study of Lawyers' Lives* (1995); Harrington, M, *Women Lawyers: Rewriting the Rules* (1994); Lentz, B F and Laband, D N, *Sex Discrimination in the Legal Profession* (1995).

and temporal diversity inherent within the concept of masculinity or, more properly, masculinities.²¹ While the masculinised norm is usually conceived in terms of benchmark man, that is, one who is Anglo-Celtic, heterosexual, able-bodied and middle class, this norm is sufficiently permeable to include subordinated masculinities, particularly homosexuality, as well as class, raced and ethnicised manifestations, such as Orientalism, which may be selectively counterpoised against the feminine from time to time:

The largest percentage of law school women would go into Public Service-type jobs and there was a large number floating upwards towards the top. It was thought that in due course, there would be a lot of women at the top, or near the top, or in middle management in law. But that's not how it's going to be ... because of the old boy network. Without being racist, or sexist, or prejudiced, the gay community had got there first, but women didn't seem to be following them up ... I could just never quite understand how come this could be. It maybe had something to do with coming out of the closet, them being socially acceptable now, or better connected ... If you go into some firms in Sydney, you'll see they've got a lot of people of the "other" sexual persuasion who are men on the letterhead, but not women ... they're closer to the old boy network or have broken the barriers or whatever, but women haven't [Public Servant].

Although fluid, the imagined masculine and the fictive feminine are not entirely unbounded. All too often, a conflation occurs in the social script between men, male and masculinity, on the one hand, and women, female and femininity, on the other.²² However, the conjunction of men and femininity, or women and masculinity, may also occur, which is why I favour the terms the "imagined masculine" and the "fictive feminine", thereby emphasising their social construction. Women in law, like "successful" women in the public sphere generally, are renowned for a propensity to position themselves close to the imagined masculine, for many women have thoroughly absorbed the social message that masculinity and neutrality are congruent. There may also be an additional conscious element of self-interest in favouring masculinised subject positions, in that women and "others" may thereby hope to secure the approbation of influential gatekeepers, such as senior partners, within the jurisprudential community. When women choose to be "one of the blokes", the normativity of the imagined masculine is revived.

Despite the attempts at conservation, the indubitably gendered nature of fraternity serves to corrode the attempts of liberal legalism to appropriate neutrality as the prerogative of the imagined masculine at the same time as it affirms the liaison, which may be another reason why fraternity is encased in silence. Nevertheless, the sporadic dissonance between fraternity and the imagined masculine may be viewed as productive in terms of social change. Like the fictive feminine, the imagined masculine represents a site of contestation, where masculinity and femininity are simultaneously "produced and destabilised in the course of [their] reiteration".²³

21 See Connell, R W, *Masculinities* (1995); Cornwall and Lindisfarne, above n5.

22 Cornwall and Lindisfarne, above n5 at 10.

23 Butler, J, *Bodies that Matter: On the Discursive Limits of 'Sex'* (1993) at 10. Although Butler is expanding upon the fluid and multidimensional construction of sexuality in this quotation, the constructivist point is appropriate in relation to gender.

Thus, I do not wish to present a totalising picture of masculinity, but to suggest, through a brief contextualised exploration of fraternity in practice that fraternity prevents the realisation of both liberty and equality for women in the public sphere. Without the process of naming and identification, fraternity is likely to retain its aphonic character, cloaked by a technocratic carapace of rules declaiming procedural fairness. Although touted as a "public ideal",²⁴ fraternity's signification of masculine embodiment clearly accords women less status and less freedom to act within the jurisprudential community. Accordingly, fraternity also has ramifications for the meaning of active citizenship.²⁵ Feminised acts, such as championing issues pertaining to child care or sexual harassment, may disturb the conventional understanding of active citizenship, but the social script, with its masculinist bias, tends to be dismissive, if not scathing, of such acts.²⁶ Furthermore, like Anne Phillips, I am not suggesting that the addition or substitution of a concept of sorority would address the issue.²⁷ Women's bodies, and relationships between women, carry quite different messages in the social script.

Hegemonic masculinity is never uncompromisingly totalising, however. There are always windows of opportunity because hegemony necessarily entails the consent and approbation of the "other", as Gramsci so clearly recognised.²⁸ Not only is the recourse to fraternity likely to be occasional and ad hoc but, to add a Foucauldian gloss, the power that the *hegemon* exercises is also likely to invite "a multiplicity of points of resistance,"²⁹ as my examples suggest.

3. Corporeality, Camaraderie and Competition

Men's clubs — both physical and metaphysical — are the paradigmatic sites in which fraternal values are fostered, in what may represent a subliminal attempt to retain a separation between the imagined masculine and the fictive feminine. If the separation were not to be safeguarded, the feminine could no longer be designated as the "other", and the masculine claim to normativity would be jeopardised. In the past, segregated spaces, as exemplified by military life, served to reinforce a relatively stable line of demarcation between men and women in public life. Today, the line is blurred and uncertain, for the boundaries are constantly being contested and renegotiated. However, the vestigial segregated spaces that underpin the historic notion of a masculinised public are still jealously guarded.

24 Esheté, A, "Fraternity" (1981) 35 *R Metaphysics* 27.

25 I have considered the difference between passive and active citizenship in "Embodying the Citizen" in Thornton, M (ed), *Public and Private: Feminist Legal Debates* (1995) at 198.

26 See, eg, Garner, H, *The First Stone: Some Questions about Sex and Power* (1995), together with the substantial public commentary generated by this book, which deals with sexual harassment in a university college. For a useful review of the book and the public controversy, see Cossins, A, "Stone Throwing from the Feminist Sidelines" (1995) 20 *MULR* 528.

27 Phillips, A, *Democracy and Difference* (1993) at 32.

28 Hoare, Q and Smith, G N (ed and trans), *Selections from the Prison Notebooks of Antonio Gramsci* (1971) at 161 et passim.

29 Foucault, M, *The History of Sexuality — Volume I: An Introduction*, trans Hurley, R (1981) at 95.

All Australian capital cities still contain a few prestigious city clubs that formally exclude women. The seeds of invidiousness continue to attach to the feminine in its Eurocentric, as well as its raced and ethnicised forms, and are not necessarily dissipated by judicial authority, even in the 1990s. Thus, a woman who was automatically granted honorary membership of a city club upon appointment to the judiciary received a letter of revocation as soon as the club realised that she was a woman.³⁰ Fraternity acquired voice as a result of the ensuing correspondence, but the club refused to change its policy. The acquisition of voice facilitated a dialogue enabling resistance, for dialogue cannot be conducted with that which is aphonic. Thus, when the same judge was expected to attend a dinner at another men-only club to welcome her to the Bench, as well as to welcome and farewell several male judges, she declined to attend. Her resistance led to a boycott by some members of the Bar, men as well as women.³¹ On this occasion, fraternity received a discursive jolt from the adverse publicity, and the venue was changed. Although the incidents prompted the questioning of a non-rational practice, that is, the exclusion of a judge, the quintessential rational knower, the boldness of the exclusion highlights the desperation of the attempt to retain a line of demarcation between the imagined masculine and the fictive feminine. The exclusion carries with it more than a hint of the fear of contamination associated with female corporeality, or what Julia Kristeva calls abjection.³²

More pervasive than the exclusive practices of elite "gentlemen's" clubs are the informal practices of fraternity associated with legion sporting and community organisations from which women are conventionally excluded, other than in peripheral sexual or fundraising roles. Ken Dempsey has shown compellingly how women play an essential ancillary role in supporting men's sporting and club life in rural settings and country towns, in fundraising and preparing endless suppers.³³ The significance of club life not only serves to reproduce concepts of masculinity and femininity in particular heterosexed ways, but it also provides the informal infrastructure to legal life. In professional, sporting, and service clubs throughout the country, legal and commercial business is transacted and the bonds of masculinist homosociability, which constitute the backbone of the private practising profession, are forged.

Many women lawyers whom I interviewed adverted to the significance of the "old boy network" in the legal profession.³⁴ This network was likely to be more conservative, more tightly meshed and consequently more resistant to women in small or isolated legal communities, although each branch of the profession, including the judiciary and the Bar, maintains its own distinctive ethos. The intersection of heterosex, class, race and religion has been conventionally institutionalised through these networks, the groundwork for which is

30 O'Sullivan, H, DCJ, *Speech to Women in Insurance*, Brisbane, 23 July 1993 at 8-9.

31 Ibid.

32 Kristeva, J, *Powers of Horror: An Essay on Abjection*, trans Rondiez, L S (1982).

33 Dempsey, K, *A Man's Town: Inequality between Women and Men in Rural Australia* (1992).

34 This is a familiar scenario elsewhere in regard to the legal profession and the Bar in particular. For example, in Morison and Leith's study of the Belfast Bar, interviewees referred to the "Crumlin Road Mafia" and our "happy little cartel here". See Morison, J and Leith, P, *The Barrister's World and the Nature of Law* (1992) at 40.

laid in boys' schools, particularly prestigious private schools. The networks are then invoked periodically for the material benefit of their members in professional life. Women colleagues, as non-traditional claimants to partnerships, may find that they have been assigned outsider status; commercial rivals are by no means the only competitors.

Given the relentless pressure on associates to acquire corporate clients as generators of income over "bread and butter" clients, such as those involving family law matters, the significance of fraternity in the construction of the authoritative agent of legality cannot be gainsaid. The ability to generate income is a key criterion in considering the "promotion" of associate solicitors to partnership. No amount of regression analysis based on formal qualifications and experience can establish *why* benchmark men are consistently more likely to be made partner or to be appointed to other authoritative positions in preference to women when their respective merits are predicated on the aphonicity of fraternal ties:³⁵

There were specific instances of lawyers walking with male colleagues to court and male colleagues saying to one another, "I'll see you at the curry club" and the females saying, "What's that?" "Oh, you wouldn't be interested in that; we just tell dirty stories". But the hard fact is that it's in those social male environments that a lot of business and contacts are done [Academic and Former Practitioner].

As I have pointed out, ostensibly comporting with the imagined masculine may not be beyond the reach of women lawyers and "others", but there is a reductive corporeal element associated with fraternity that eludes women. It is apparent that being male is a prerequisite to being invited to the "curry club", and it may also be desirable, if not essential, to be Anglo-Australian and heterosexual. The point is not that women and "others" necessarily wish to be invited, but that their bodily exclusion has significant ramifications for the constitution of both legitimate agents of legality and fully fledged citizens, thereby begging the question: "But how can the feminine body become part of a (liberal or socialist) fraternal body politic?"³⁶

The liberal progressivist thesis, which avers that the "letting in" of women in equal numbers will automatically create the conditions for substantive equality, chooses to ignore the informal mechanisms by which cultural capital is acquired. Only by scrutinising these phenomena can it be understood why women are invariably pronounced less worthy of appointment, particularly in the case of authoritative positions. Only then can it be seen how the construction of the "best person" is insidiously shaped by the experience of fraternity, which, in turn, tends to confine "others" to the periphery of the polis.

Men's sport plays a particularly significant role in Australia in fostering fraternity. Furthermore, legal discourse itself is saturated with sporting allusions.³⁷ Sport can therefore be understood as an additional mechanism for

35 See Lentz and Laband, above n20, as an example of a study based on the regression analysis of extensive empirical data.

36 Pateman, above n13 at 50.

37 Jack, R and Jack, D C, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989).

maintaining the line of demarcation between the imagined masculine and the fictive feminine:

The whole culture militates against women getting ahead ... Firm teams are everywhere I've ever worked — football teams or basketball teams and they're all men; squash teams — sometimes, there are several in the firm. I mean, "You're most welcome to go along and why don't you get up a cheer leading squad?" But there's nothing you can play, and they don't want to play with you [Academic and Former Practitioner].

If all the male lawyers in a firm ride bikes to work together and then shower together, as well as play basketball and football together, there is little space in such a firm for women lawyers, as one articulated clerk found.³⁸ Of the eight articulated clerks appointed by the firm in one year, four played in the same football team as the department head. Female corporeality permanently confined the articulated clerk to the status of "other" within the firm. It is apparent that a particular kind of embodied fraternity is produced through sporting rituals. This inescapable sexed and essentialising dimension cannot be gainsaid.

Fraternity also facilitates the maintenance of gendered hierarchies within organisational structures. Not only do the exclusionary activities of men, in scenarios such as I have mentioned, ensure that women lawyers remain marginalised, but they also ensure that women secretarial and support staff continue to occupy the pyramidal base of the organisational hierarchy. In addition to perennial surveillance, these women, particularly if young and good looking, are expected to occupy a conventionally eroticised, as well as subordinate, subject position in relation to the male lawyers.

Women lawyers do not easily "fit in" to conventional heterosexed organisational structures. If they accept the eroticised subject positions that are always available to attractive, young women, that acceptance indubitably detracts from their authority as lawyers; their eroticised bodies deem them even less able to be impartial administrators of justice than women who choose to occupy masculinised positions and who may seek to "neutralise" and contain their bodies by wearing variations of the male suit.³⁹ The woman articulated clerk, to whom I referred, declined to occupy an eroticised position. Had she agreed to compromise and engage in badinage about the men's sport, since she could hardly play football and shower with her male colleagues, she might have been tolerated at the periphery of organisational life. If not, there was no space for her, so she chose to leave.

Law firms themselves may sponsor a range of sporting activities from which women are usually excluded, including fishing trips, squash, and tennis. If they wish to be included, women are expected to accept the conventional, eroticised subject positions:

[The tennis] was for men in both work groups ... I objected explicitly about this on the basis that it was ridiculously discriminatory ... [The game] was to be held at a partner's house who had a lawn court and a pool, and we were told that we were welcome to come as long as we put our bathing suits on and did a synchronised swimming display. That was put in the memo and

38 Material tabled at the meeting of Feminist Lawyers, Melbourne, March 1993.

39 I have elaborated on the role of dress codes in Thornton, above n† at 222–30.

they all thought that was bloody hilarious ... That sort of thing happens all the time [Academic and Former Practitioner].

As the subject of organisational memoranda, it may be seen that the fraternal and heterosexed nature of the homosocial bonds was endowed with voice by the firm. However, such practices are so overt that they may be considered to have transcended the bounds of propriety, even within a masculinist culture, so they invite resistance. A similar example employing litigation as a tool of resistance, involved an American law firm, which attracted notoriety for running a bathing suit competition among its summer associates.⁴⁰ Rather than excising the impugned conduct, however, such actions may serve to drive fraternity back to the realm of the aphonic and subliminal, where it is beyond formal challenge.⁴¹

Fraternal bonds are also reinforced through time-honoured drinking and lunching rituals which, like sport, are marked by gendered practices of exclusion. These rituals are important transmitters of masculinist values. The "after-hours bar", for example, represents a significant manifestation of the metaphysical club. Like the "gentlemen's" clubs, it serves both a functional and an ideological purpose, as well as representing a source of pleasure and relaxation. While the days of sex-segregated drinking in hotels have largely disappeared, many women feel uncomfortable with the macho atmosphere of the "after-hours bar" and decline to participate, even though they know their absence might affect them deleteriously in appointments, promotions, and access to work in the private sector:

Well, actually, I don't really like drinking. I would rather spend the time with my spouse or my children or with a good book. I mean, I've done my day's work. I really don't feel like being in another smoky, unpleasant, noisy environment for another three or four hours. I don't find that relaxing or fun or even communicative because you can't hear people speaking [Public Servant].

As well as being professionally desirable, luncheon codes operate as a subtle means of maintaining the heterosexual regime, as women are expected to defer to men and wait to be invited. It is much harder for women to initiate the arrangement without such an action being eroticised:

The odd popping around the corner to the coffee shop to have a sandwich and a cup of coffee at lunch-time and discuss the morning's proceedings is enough to raise eyebrows ... You can't market in a way that a male practitioner is perceived to be able to market. And marketing is becoming the be-all and end-all of legal practice. Because if you take a liquidator out to dinner then the assumption he makes is that you want to go to bed with him. And the assumption that everybody who sees you or knows about the event is the same. Whereas at the end of a case, a male barrister has no problems just popping out to dinner or even lunch. I've had eyebrows raised when I've been out to lunch with a client in the middle of a case [Academic and Former Practitioner].

40 *Hishon v King & Spaulding* 467 US 69 (1984).

41 I have made this point in regard to the systemic nature of discrimination, regardless of whether one is addressing sexism, racism, homophobia or other proscribed grounds in Thornton, M, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

Gendered practices regarding the serving of drinks and refreshments may be institutionalised at the articles or junior appointment level:

I've seen younger female practitioners asked for the champagne. You know, "Could you just run over and grab a tray full of champagnes, Jenny?" And Jenny, of course, being beautifully brought up, has taken three steps towards the counter before she thinks, "What am I doing?" These are issues that a man will never confront [Academic and Former Practitioner].

The socially inscribed images of women as handmaidens who assume responsibility for the comfort of others and the well-being of an environment populated by important men, are sustained by norms of homosociability. Sex specific and exclusionary practices assist in constructing women as "other" within the organisation. Those whose perceived role is to serve can never be admitted to the "community of equals". When a choice has to be made as to who is to be promoted to partner, outsiders are invariably deemed unworthy, although the basis for the rejection may not be readily apparent:

They will take you as far as senior associateship and, suddenly, you're sitting there looking at people who don't have clients and who don't have the same sorts of billable hours and earning capacity that you have being promoted. And when you ask them for a reason, you get a sort of mumbled response or a response that's quite bizarre [Partner in Large Firm].

The homosociability of the metaphysical "club" also shapes the "private" social life of lawyers in a way that contributes to the power capital of its members. Women lawyers whose partners are male lawyers may be included in social gatherings by virtue of their relationship, but women lawyers, who are not obviously "manned", may not. Women lawyers who have attended such social gatherings have found themselves confined to the periphery. One judge recounted how, when she went to dinner parties, the men would talk law, but not talk to her. Women are expected to occupy the eroticised, maternal or wifely subject positions at such gatherings, not that of "the professional", "the lawyer", or "the intellectual".

Fraternal bonds are additionally secured by a panoply of gendered social practices and linguistic interactions. Making jokes *about* women, particularly about women's bodies, is a familiar manner of endeavouring to safeguard the line of demarcation between the masculinist self and the feminised "other":

It's kind of the way males feel with things — pretend it's not there, or make jokes, jokes with sexual innuendos to kind of put women back in their place or to make them feel inferior [Community Centre Lawyer].

We probably behave somewhat more like one of the boys than we would otherwise be inclined to do, simply to stop areas of friction, but it facilitates things and it's probably part of our conditioning that we don't want to make problems. By the way, I don't think the boys accommodate for us at all. I mean they will continue to tell offensive jokes; they will continue to use inappropriate language and make inappropriate comments about other women, without it even occurring to them that we might find it offensive [Barrister].

Male judges may even violate court convention by bonding with a male witness against, rather than with, counsel if that person is a woman:

[The witness] had got into a bit of trouble with his evidence. He contradicted himself a few times and eventually he said, "It's all very well for you, my dear, with your fancy education and your fancy use of words, but I'd like to see you on the back of a back-hoe" ... What he was saying was that I'm in

your environment and you're getting the better of me, but I'd get the better of you in my environment, which is certainly something that he would never have said to a man ... He had an initial level of frustration about even being questioned by a woman. I don't think it had ever happened in his life before ... The reaction of the judge, though, was instead of saying that it was inappropriate to talk back to counsel like that, as I've heard judges do when people get cheeky with male barristers, was this judge nearly fell off his chair. Obviously, the mental picture of me on the back of a back-hoe was too funny for words [Barrister].

In this scenario, involving a transitory interaction, fraternal bonding took precedence over class, and possibly ethnic differences. The situation is somewhat different when it is a question of professional solidarity. The close-knit bonding between members of the judiciary and other senior men of the legal profession signifies a reluctance to admit anyone from outside the circle. The frequent conjunction of sex with class reveals how fraternity within the legal profession has been constructed to reflect the values of benchmark men:

I am very kind of conscious of my working class background and almost sort of apologetic for it, you know. I actually tend to expose it before someone exposes me. "Why don't you speak properly? Why don't you know who all these famous people are in the legal profession in Melbourne?" I say that I had a really working class upbringing and I don't really know anything about it ... They all come from a certain part of Melbourne, certain schools, and they are all men, all the judges that is. It's been, I think, a kind of two-way education. I've kind of learnt lots about the legal profession and how incredibly sleazy it is and male-biased, but I think some of the judges have never encountered someone from a working-class background before in real life and they had never encountered until this year or last year a woman who wasn't a secretary ... so they really don't know how to deal with women lawyers [Judge's Associate].

A desire for homogeneity continues to be an animating force underlying the contemporary legal cultures. When we scrutinise law firms, it may be seen that the homogenising imperative is intended to bind the members of firms together against competitors. Sex, class, religious and ethnic ties are thereby affirmed and alterity is contained in the belief that it is likely to detract from the profit-making enterprise. Thus, the assumed functionalism of fraternity operates to bolster it at the very moment that it is subject to attack.

4. Conclusion: Fraternity and Phonicity

I have argued that there is an homologous relationship between male embodiment, male bonding, and "successful" participation in professional life. Fraternity facilitates the reproduction of masculinity and femininity in conventional ways so that masculinity continues to be associated with success, and femininity with "non-success" in professional life. The presence of women lawyers does disturb the conventional bipolarised and heterosexed paradigm within the public sphere. Nevertheless, the evaluation of the bodies of those women on an eroticism and caring scale, determined by a heterosexual male gaze, also helps to sustain a conventional construction of the feminine. As I have suggested, some women are prepared to accept masculinised positions; others are not. Legal practice has therefore become a prime site of contestation in the production of masculinity and femininity.

Success for women is not necessarily synonymous with the idea of success for men.⁴² Many women reject the aggressive, adversarial legal culture that is reminiscent of sporting contests. This style of practice is thought, by some, to be incompatible both with raising children and with personal satisfaction:

The way we play law at the moment is a boy's game without any regard for quality of life or family commitments. So, it's not only women who are missing out by not playing the game; men are missing out too [Public Servant].

I wouldn't want to risk anything where I think I might not be successful or where I might not be good, or where I might have to work really hard and make cut-throat decisions and be awful to people. I would just rather be happy and ... I've got a great husband; I've got a wonderful baby; I've got a beautiful home; I've got a lovely motor car to drive; I've got a wonderful mother who loves me and I've got a fairly good salary. When it's all said and done, why on earth should I risk any of that by becoming so hungry and ambitious that I don't talk to my husband or my baby and I stay up 'till midnight writing books and articles and churning them out, or I go and get into the legal profession and bring home everybody else's problems in family law and can't sleep at night because Mr X wants to shoot Mrs X and take the children. My life is just so content at the moment. Why should I look at changing it? [Junior Academic]

Other women who seek partnerships and promotions encounter resistance because they may be unable to comport with the prevailing masculinist definitions of merit.⁴³ Women are tolerated in legal practice at the lower echelons, where they can be disciplined and controlled, and where employed solicitors are disparagingly known as "grinders" or "drones". They tend to be resisted in other than tokenistic numbers in authoritative positions. Being a "rainmaker" is a necessary prerequisite for promotion to partner, but the threshold may be such that a woman is precluded from complying. In order to allay the suspicions attaching to her as "other", she may have to be *twice as good* as her male peers:

I went to the managing partner and said, "What do you think my chances are this July?" And he said, "Well, I don't think they're good; we've got four candidates, and I think the other three are likely to succeed ..." I was the eldest in the line and one of the highest billers, so there's an objective standard there. And I said to him quite directly, "Well, I don't understand that because here's the objective evidence that I'm paying my way. I get along well with everybody. Can you tell me what the problem is?" And he said, "Well, I'll be quite straight with you. You're better than most of the boys but, as a woman, you've got to be twice as good, and you're not quite twice as good yet" ... Of course, being twice as good in a firm like that means billing 600,000 instead of 300,000 a year which is almost impossible to do ... I have no doubt I would have been made a partner this year but I think I would have to continue being twice as good for the rest of my life. I couldn't

42 Markus, M, "Women, Success and Civil Society: Submission to, or Subversion of, the Achievement Principle" in Benhabib, S and Cornell, D (eds), *Feminism as Critique: On the Politics of Gender* (1987) at 96.

43 I have sought to deconstruct this term and expose its contingent meaning elsewhere. See Thornton, M, "Affirmative Action, Merit and the Liberal State" (1985) 2 *Aust J L Soc* 28. See also, Burton, C, *Redefining Merit* (1988) Affirmative Action Agency Monograph no. 2, AGPS, Canberra; Martin, B, "Merit and Power" (1987) 22 *Aust J Soc Issues* 436.

see any reason why I should have to work much harder than anyone else to get the same rewards [Academic and Former Solicitor].

The rewarding of the male associates in this story reveals how homogeneity has been factored in as a constituent element in the construction of merit. The positive representations of the "imagined masculine", fostered within the metaphysical club, facilitate the interests of benchmark men, that is, those who are, generally speaking, Anglo-Australian, heterosexual and able-bodied.

Furthermore, as a woman solicitor from a legal centre said of the benchmark men of law: "They can be very, very mediocre and get away with it." Mediocrity is likely to be disabling for a woman, but so is super-competence, for it may be a source of discomfort to senior men:

If you're different, you stand out, so it draws much more attention to that person and they either get labelled as being very, very good or very, very bad, but never quite anywhere in between ... you have to be extraordinarily good to be noticed in the first place. Then the other partners will find that threatening, so you go round and round in circles [Partner in Large Firm].

Women in public life may therefore find themselves in an invidious position. Although they may be attracted to masculinised positions, as I have pointed out, and they may be tolerated at the periphery, their insecurity facilitates the reproduction of women as "other":

It is no accident that fraternal relationships rest and feed upon a hatred or disdain for those not within the fraternal circle.⁴⁴

Legal discourse mirrors the homology between benchmark men and authority, which is a characteristic of both civil society and the polity. Fraternity facilitates the realisation of liberty and equality for benchmark men in the public sphere, while inhibiting the realisation of these values for women. This is apparent in the case of lawyering, when women were encouraged to enter the legal profession during the 1970s and 1980s, as the economy prospered, but have not been accepted to a commensurate degree, particularly in authoritative positions.⁴⁵

Scrutiny of the concept of fraternity reveals that the numerical equivalence of men and women in the legal profession is not synonymous with substantive equality for women.⁴⁶ The aphonic nature of fraternity has permitted it to operate insidiously through multiple sites to ensure the production of conventionally dichotomous notions of the imagined masculine and the fictive feminine. I have suggested that a focus on fraternity, not just masculinity, is salutary as it reminds us of the significance of embodiment and relationality. Embodiment and relationality both serve to deny the claim of the imagined masculine to the neutral subject position. Endowing fraternity with voice is therefore a discursive act with considerable productive potential.

44 Abbott, P, "The Tyranny of Fraternity in McWilliams' America" (1974) 2 *Political Theory* 304 at 307.

45 The scenario is replicated in other prestigious areas of employment, such as the Senior Executive Service of the Australian Public Service. See Pusey, M, *Economic Rationalism in Canberra: A Nation Building State changes its Mind* (1991). Pusey also links race and class background, school attended and university degree in his analysis of power in the SES.

46 See Thornton, above n41.