Santa Clara University
School of Law

Santa Clara Law Review

Volume 38 | Number 1 Article 7

1-1-1997

Books Received

Santa Clara Law Review

BOOKS RECEIVED

Becoming Gentlemen: Women, Law School, and Institutional Change. By Lani Guinier, Michelle Fine, and Jane Balin. Boston, Massachusetts: Beacon Press. 1997. Pp. 175. Hardcover.

As women increasingly make up almost half of all entering first-year students at law schools nationwide, the authors of *Becoming Gentlemen* suggest that this has not resulted in a corresponding change in the institutions in which men and women receive their legal training. For example, while men and women enter law school with essentially equivalent entry profiles, men receive, on average, significantly better grades by the end of year one. Furthermore, the study conducted by the authors reveals that more men than women rank in the top ten percent of their class. This leads the authors to probe questions such as: what does it mean to be qualified as a law student or legal practitioner?; how do we assess such qualifications?; and, ultimately, how does this affect the practice of law after men and women graduate?

Becoming Gentlemen attempts to answer these questions and to address how the "one-size-fits-all" approach to diversity at law schools serves only to reinforce and legitimize social stratifications. Lani Guinier, Michelle Fine, and Jane Balin endeavor to determine, through a study of law students at the University of Pennsylvania from 1987 through 1992, the answers to some of the questions raised above. What makes this study refreshing is the honesty in which these authors' approach the subject matter. While the authors recognize that not all women share the viewpoints expressed within the study, they focus upon the differences that exists in the levels of success between men and women in law school. Moreover, the authors stress the need for law schools to address this difference in order to bring about institutional change in a manner that benefits both men and women. *Becoming Gentlemen* does not censure the system of legal education for preventing women from achieving success in the same manner as men. Instead, the book attempts to encour-

age both men and women to rethink the meaning of "equal access." In the modern, gender-charged society in which we live, the authors' advocate the need for more thought in solving the question of diversity.

Both women and men will nod their heads in agreement when they see the results of this study. The authors found it alarming that in the attempt to place men and women on an even playing ground, women feel impelled to conform their attitudes to a traditionally male-constructed belief system. The authors suggest that this only establishes, legitimizes, and subtly internalizes this traditional system. The data demonstrates that while law schools may be treating all students equally, it may not be treating all students equitably. Bringing together men and women of diverse ethnic backgrounds will inevitably call forth different perspectives about the role of lawyering. In acknowledging the extant differences, the authors urge legal institutions to support alternative perspectives and approaches. Otherwise, they "may be denying the legal profession and its clients the advantages of creative tension, of solving problems by synthesizing information from diverse sources."

Guinier appropriately titles her introduction, "Why Isn't *She* President?" She summarizes the conclusions drawn from the University of Pennsylvania study and discusses the limitations of "one-size-fits-all" thinking. Essentially, the authors used this study as a vehicle to address three sets of questions. The first set of questions centers upon what it means to be qualified as a law student or legal practitioner. The authors question the methods in measuring and assessing such qualifications, and whether a single standard is adequate in predicting the success of law students in their future performance as lawyers. The second set of questions concerns fairness in reference to the uniform treatment of men and women towards legal education in law schools. The authors ask whether the real goal of legal education is to treat men and women the same? The third set of questions pertains to what we learn from diversity. The authors query the approach to and meaning of the issue of diversity. The conclusions the authors reach to each set of questions impart a greater understanding of what is necessary in securing a broad, diverse legal education in the quest to obtain better lawyers.

In her introduction, Guinier emphasizes that what the authors attempt to demonstrate is not about "lowering standards." The prevalent fear among opponents of diversity is that the recognition of difference will result in changes that affect society in a detrimental manner. Guinier stresses that "we are not advocating lower standards. Nor are we talking about shrinking from a commitment to excellence. This is about adapting standards to fit a changing and changed environment." Guinier demonstrated the tendency to prefer single rules that rank or sort people through the example of the height requirements used in the selection of police officers. This type of arbitrary standard resulted in discrimination against women, Asian men, some Latino men, and short white men, and reinforced the stereotype that only tough, big men were capable of being police officers. When standards were adjusted, and women became police officers, it was discovered that women were often better suited to "keep the peace" due to their better interpersonal skills, sensitivity, politeness, and abilities to communicate. Thus, the lesson learned is that a single standard of "ranking" can "unwittingly institutionalize value preferences" in favor of a particular group and deny everyone else the benefit of "adaptive work," which Guinier defines as "new forms and innovative ways of doing old jobs."

The self-titled second part, "Becoming Gentlemen," begins with an explanation of how the authors conducted their study at the University of Pennsylvania Law School. The authors relied upon academic performance data on 981 students, self-reported survey data from 366 students, written narratives from 104 students, and group-level interview data from approximately 80 male and female law students. The authors' source notes contain a disclaimer acknowledging that the results obtained at the University of Pennsylvania may not apply to other institutions of legal education. However, the notes provide how this same phenomena has been identified and is in evidence at most American law schools.

From their research, the authors draw three notable conclusions. First, there are strong academic differences between graduating men and women. Second, strong attitudinal differences exist between women and men in year one, with a striking homogenization by year three. Third, the Socratic method used in legal instruction serves to alienate

women. The culmination of the above results in women experiencing a "crisis of identity" which corresponds to less competitive academic credentials, less representation within law school's academic and social hierarchies, and less frequent attainment of prestigious and/or desirable jobs after graduation in comparison to their male counterparts.

The authors use extracts from narrative surveys throughout the book to support the explanations for the data gathered. For example, one female student commented, "I came in here a very bright person, we all came in here very bright people, but what I lost while I was here, I lost the ability and the interest to really think about things, to think critically, to explore all avenues that were around." Furthermore, the quantitative data collected revealed that while men and women enter with essentially the same impressive and comparable academic records, the men, on average, receive significantly better grades by the end of the first year of law school. This advantage is maintained throughout the three years of law school. Hence, men are consistently better represented in the top percentiles of their law school class.

The authors also looked at the relationship between LSAT scores law school GPA's and discovered a very weak correlation. According to their research, LSAT scores were not reliable indicators of predicting law school performance for either men and women. This variance in GPA results in fewer women obtaining positions on the Law Review, Order of the Coif, as well as participating in moot court competitions—all activities that use grades as a barrier to entry.

More disturbing than the "hard" data uncovered by the authors is the change in women's attitudes towards the field of law they intend to enter upon graduation. Whereas first- and third-year men consistently expressed minimal interest in public interest work, first-year women were at least three times more likely than men to express interest in public interest law. However, by their third year, women's level of interest in public interest law was nearly as low as the men's. This suggests to the authors that women students come to sound more like their male classmates and less like their first-year "selves." The authors conclude that while "[a]ttitudinally [women] become closer to men; academically they move apart."

The authors draw three hypothesis to explain the em-

pirical evidence. "[First,] many women *feel* excluded from the formal educational structure of law school. [Second,] many women *are* excluded from the informal educational environment; . . . [Third,] some women are individually affected by the gender stratification within the school, in terms of potentially adverse psychological consequences and more limited employment opportunities." Rather than leave readers with only a conclusion, the authors provide a section on recommendations as to how law schools can reform their structure to better accommodate students' needs. The authors recommend the abolishment of the Socratic classroom, the rethinking of the litigation-as-combat model of problem solving, and the use of more cooperative approaches to negotiation. The authors clearly state that their intention is not to simply clean up the legal hierarchy to make it appear more "diverse," but to create "an intellectual environment in which the theoretical, practical, and ethical notions of justice and injustice are discussed, critiqued, and imagined anew in order to meet the changing needs of many women students, and men, and of contemporary society in general."

The last part of *Becoming Gentlemen* includes an essay by Lani Guinier titled "Models and Mentors." In her essay, Guinier reflects upon her path in becoming a Black law professor at a prestigious Ivy League university and she looks back at her own experience as a law student at Yale. She describes her mixed emotions upon returning to Yale Law School to participate in a panel of mainly Black alumni to reminisce about the years following the Supreme Court decision in *Brown v. Board of Education*. While the men on the panel exchanged fond stories of their years in law school, Guinier struggled to remember a single moment where she felt a part of the school, and could not. Only afterwards, in talking with other Black women on their experiences in law school, was she able to share similar stories about her three years and how much it differed from the memories of the men on the panel. Guinier discusses the importance of mentors and role models, and her own place as a role model. A discourse on what a "role model" encompasses places an emphasis on sharing the richness of one's experiences to empower others through feedback and guidance rather than simply being looked up to. Rather than being a "role model," Guinier prefers to be seen as a "mentor" or teacher. In contrast to

cultural icons, mentors are "continuously legitimized and reinforced by a process of dialogue that monitors student performance and holds those who follow to high expectations."

Becoming Gentlemen is an insightful evaluation into the process of law school. Unlike books that focus upon the rigors of legal education itself, this book provides valuable statistics regarding the success of male and female students, and attempts to provide an understanding for the differences found. Regardless of one's view regarding the divergent success between men and women in law school, readers will come away with an enlightened perspective regarding this issue. The authors use the interpretation of their data as a means to improve the institutions of formal legal education. Whereas many books simply provide readers with an overview and criticism for a particular legal issue without any salient solutions, these authors manage to account for the problem of "becoming gentlemen" in an objective manner with an intent to improve the system for all involved. This book is highly recommended for those interested in a deeper comprehension into the different experiences of male and female law students.

The Excuse Factory: How Employment Law is Paralyzing the American Workplace. By Walter K. Olson. New York, New York: The Free Press. 1997. Pp. 378. Hardcover

Litigation in America is a booming business. An individual's right to sue is well established in American jurisprudence and there is no shortage of people taking their grievances to court. In the *Excuse Factory*, author Walter K. Olson brings to the forefront the staggering amount of litigation arising from workplace disputes. Featured prominently among the issues allegedly plaguing America's workplace is the rise in employment discrimination suits. Olson examines issues such as the expansion of discrimination laws to include not only religion, sex and national origin, but also age, disability, pregnancy, and veteran status, to name a few.

Olson's book identifies how each of these new categories of plaintiffs has perpetuated the dramatic rise in litigation brought about from the workplace. The *Excuse Factory* discusses the author's perceived crisis in employment discrimination law. Originally, employment discrimination law fo-

cused on the plight of Blacks in the Jim Crow South. According to the author, employment discrimination law now symbolizes a new generation of litigants, including: the elderly, the mentally ill, the paralyzed, working mothers, legal aliens, gays. Olson examines each of these new groups seeking rights in the workplace and how their battles have affected the working environment.

Arguably, many will claim that Olson's perspective is that of a corporate employer angry at a system that makes it harder to achieve the bottom line, while ignoring the greater social issues behind the movement for greater discrimination protection in the workplace. However, the viewpoint Olson presents is actually a portrayal of how the expansion in employment discrimination law is plaguing the workplace and creating a legal quagmire. Whereas many advocate the need for greater protection against discrimination in the workplace from a theoretical legal standpoint, the *Excuse Factory* emphasizes the results of such protection. While Olson never argues that such protection is unnecessary, his main point stresses the pitfalls enacting such policies may have. The drawback to this analysis, however, is Olson's failure to address other perspectives concerning employment discrimination law.

The *Excuse Factory* is arranged into five parts. Each part addresses a distinct aspect of the state of American employment discrimination law. The chapters within each part show, by example, the types of suits being brought, and the responses of the courts and legislative bodies. Olson opens with an overview of the developments in employment discrimination law that have employers scurrying to rewrite company policies for fear of being slapped with a discrimination suit. Beginning with issues such as the new "fear of flirting," Olson then moves into the newly revised definition of disability, complicated by the enactment of the Americans with Disabilities Act ("ADA") in 1990. Throughout this process, Olson identifies the discrepancies and contradictions that arise when good intentions get bungled by inadequate legislation. Olson provides powerful vignettes of the consequences of employers' accommodations in their frenzy to abide by the ever-changing standards courts identify in employment law. Finally, Olson examines the current state of employment discrimination law and the confusion of employ-

ers in their attempt to abide by the law.

The author directs his harshest criticism at how the accommodation of "disabilities," pursuant to the ADA has resulted in a general loosening of standards in many major industries. According to Olson, the proponents for the ADA focused upon how to overcome the combination of discrimination and lack of accessibility for the handicapped at all levels of society. Beyond addressing the intrinsic limitations of being disabled, the ADA was geared at aiding the disabled to contribute to society through participation in the workplace. Despite the optimism attached at the passing of the ADA, the author describes the surprise of ADA proponents when the numbers that emerged a couple of years after the statute's enactment showed that the number of disabled individuals participating in the workplace had actually fallen. Meanwhile, towns and businesses had spent tens of billions of dollars in making facilities accessible and legislators had imposed tougher penalties for job bias. Olson smugly critiques the ADA by reflecting on how, in light of the history of other discrimination laws and of the past course of disabled employment, none should have been surprised by the failure to move the disabled to jobs from idleness.

Chapter Seven is aptly entitled, "Accommodating Demons," from the author's perspective. Olson begins by describing the plight of Northwest Airlines in its quest to accommodate new workplace disabilities. Olson shares the story of Norman Lyle Prouse, a former captain who had completed an alcohol rehabilitation program. The airline company announced that it would rehire Prouse in October 1993 to the praise of those in the press who claimed this reflected a modern trend of encouraging recovering alcoholics to pick up their careers where they left off. However, Olson addresses the possible bitter feelings harbored by other employees given the nature of Prouse's original removal. In March 1990, Prouse along with two other members of the crew showed up drunk at 6:30 a.m. for their flight from Fargo, North Dakota to Minneapolis. Northwest had a strict rule that pilots could not drink in the twelve hours prior to a takeoff. While a Federal Aviation Administration ("FAA") inspector in North Dakota could not confirm his suspicions, the flight landed in Minneapolis where FAA officials greeted the crew with bloods tests and launched an investigation into the

possibility that the crew flew while under the influence of alcohol. These suspicions proved correct and all three men were placed under arrest for flying under the influence. Ultimately, all three were sent to prison. Ironically, Prouse argued in trial that he was a seasoned alcoholic who had built up a tolerance, thus enabling him to handle a high blood level.

Using this example, Olson launches into a strong lamentation of how the "new" employment law allows for the protection of previously excluded behavior. This new category of protection extends beyond the problems of simple incompetence or bad character to include such problems as alcohol misconduct and serious mental disturbances. In this section, the author discusses how administrators and courts have interpreted existing legislation to encompass such newly defined disabilities. Olson bitterly describes the outcome of the 1984 case of *Whitlock v. Donovan*, where a federal court judge held that employees must be given more than one chance at rehabilitation because of the predictability of relapses in the treatment of alcohol. The examples Olson uses border on the absurd in that they do not seem to be actual cases. But, unfortunately, the cases represent the consequences that result from such broad interpretation of employment discrimination law. Perhaps the cases seem absurd because Olson convincingly persuades the reader that current courts' treatment of employment law is absurd.

Despite the use of "horror" stories depicting the outcome of expanding the protection of employment discrimination law, Olson's perspective is shockingly one-sided. The arguments he uses to accompany his vignettes are plausible. Yet, if one gets too caught up in the anger Olson obviously harbors towards the current state of employment discrimination law, then one would fail to realize that there is an alter reality dictating the need for such laws. In Chapter Four, entitled, "Fear of Flirting," Olson discusses how sexual harassment suits have paralyzed the workplace and describes leading feminist legal scholar, Catharine MacKinnon, as the "Savonarola of Ann Arbor," who has "virtually invent[ed] sexual harassment doctrine in the form that judges were to accept and install as federal law . . . ." This slur at MacKinnon really serves to undermine Olson's credibility and relegates him to the category of naysayers that do not under-

stand the very real and continual problem of sexual harassment in the workplace. With women making up almost half of the American workforce, Olson cannot simply relegate the problem of sexual harassment as a legal doctrine invented to cause employers grief. In his over-simplification of these important issues, Olson's failure to be objective undermines his arguments.

By the time Olson reaches his main premise that those who scramble to accommodate the new employment law embody "the excuse factory," readers will already be shaking their heads at his one-sided perspective. In Chapter Nine, "The Excuse Factory," Olson examines the state of businesses, public institutions and federal administrations that have had to compromise established standards of testing in order to "accommodate" the new categories of discrimination identified within employment law. The chapter begins with a vignette about a fourth-grade teacher who wrote the answers to a standardized test on the board for students to copy. Much to the shock of the community and local officials, the teacher was suspended for only thirty days after an arbitrator concluded that despite her "unethical and dishonest" behavior, her actions were not so bad given the "violent world of the 1990's," including crime in the streets, child abuse, etc. Using this example, Olson then chastises law-school theorists who came up with the idea of achieving tenure for teachers through litigation. He discusses how basing such a process upon union grievance arbitration and the civil service has proved a "curious choice of model for the future." Olson then lists a string of cases, with absurd results, to support his point. Yet once again, Olson never examines the legislative process which brought about such effects. Instead, he launches into a resounding critique of why arbitration is ineffective because it does not allow employers to fire "problem" employees.

Moreover, Olson analogizes the process of arbitration as one based upon America's criminal justice system. He argues that the "terminology of labor relations" is based upon principles found in criminal law. While noting that commentators "are at pains to deny that arbitration rules consciously imitate the rules for criminal prosecution," Olson proceeds to use three cases to exemplify this alleged parallel to criminal law. He writes that criminal prosecution is "expected to follow a

rule that offenses be preannounced with specificity, and ambiguities construed in favor of legality." Olson maintains that arbitration is similar since, in one example, an aviation company worker won full back pay and reinstatement because, despite a 0.14% alcohol reading on his breath (the state drunk driving limit was 0.10%) the company had not spelled out how much intoxication was acceptable. Another example cites the case of an employee who won in arbitration because the company rules only provided that one "may" be fired due to misbehavior, not "will." Lastly, an employee prevailed because the union contract gave only management a right to fire on a first offense of insubordination; however, this was the employee's second offense.

The *Excuse Factory* is a blanket condemnation of the treatment by legislators and the courts of employment discrimination law. While many will nod their heads at the woes resulting from the current interpretation of employment discrimination law, this is a perspective from employers and businesses that have had to accommodate the rising number of definable disabilities. Olson's meager attempts to address the other viewpoints usually serve as vehicles upon which he heaps more criticism. This shortsightedness might not seem obvious at first, because most would agree with Olson's initial points. However, it will become clear that Olson makes the same point throughout the book without offering any salient solutions. The *Excuse Factory* is merely a pointed criticism at the current state of employment discrimination law and not much else. Olson fails to conclude with any suggestion as to a better approach.

A frustrating aspect of the *Excuse Factory* stems from the author's scattered witticisms meant to further provoke the reader at the sad state of employment discrimination law. In commenting upon one example of an employee who triumphed over the employer, Olson wrote that this case was "a triumph worthy of a Gilbert and Sullivan hero." Commentary such as this, dispersed throughout this book, distracts the reader from the author's only point—that the current state of employment discrimination law needs re-evaluation. Further, Olson diminishes his credibility by his failure to provide source notes throughout his book. Without footnotes referencing his more provocative points, readers do not know which of Olson's statements can be supported and which

cannot. This weakness contributes to the sense that this book merely permits the author to vent his frustration.

Olson concludes the *Excuse Factory* with more concise reasons why the progress of employment discrimination law is heading for further disaster. He writes that the current presumptions underlying the "new" employment law—that certain types of jobs and workplaces are unacceptable, and can be ordered to change or be dismissed—will lead to two long-term effects. For one, many such jobs and workplaces identified as "extreme or unusual" will be cut off. Secondly, the remaining jobs will result in a general deterrence of people moving from position to position in pursuit of a job for which they are best suited. Once more, Olson makes these points with no solution in sight or even examples as to how this would occur. He then embarks upon a broad critique of every public office and official contributing to this legal quagmire: Congress, federal judges, the American Civil Liberties Union, and, ultimately, Ralph Nader (described as "Mr. Litigation himself").

While the *Excuse Factory* seeks to make a valid point in reflecting upon the often absurd consequences of employment discrimination law, it cannot overcome the author's obvious bias regarding this topic. Olson is unable to portray a semblance of neutrality in making his points. What this reader finds distressing is that many might agree with the author without realizing the existence of other viewpoints. One can easily get caught up in the author's sweeping censure of employment discrimination laws without stopping to dwell upon the many other forces at work in shaping the future of employment law. This book is recommended only as a lesson in the consequences of hasty judgments. While the author's final words beseech a plea for a return to a time where free association was "considered the crowning glory of a liberal and civilized society," he fails to overcome the overall negativity that his book emits.

Lucy Wang