

# UNDERSTANDING DISADVANTAGE PARTLY THROUGH AN EPISTEMOLOGY OF IGNORANCE

DERMOT FEENAN  
*University of Ulster, UK*

## ABSTRACT

This article is concerned with the way in which ignorance is actively constituted or reproduced as an aspect of power. The significance of ignorance as an important site of study is suggested in this article through an examination of the results of a survey of applications by women for Silk, in recognition of senior status as an advocate, and judicial office in Northern Ireland. The survey found that in the male-dominated profession of law more women than men were unsure of criteria for appointment. The survey revealed also a different perceptual world between male and female lawyers and judges in terms of identifying disadvantage on the basis of gender. Male barristers were twice as likely as female barristers to state that female barristers were not under-represented in applications for Silk. None of the male judges acknowledged that the culture of the bench was male, while most women said it was. This survey is supported by analogous illustrations from other fields. The article concludes that the study of ignorance should be added to the field of vision of those working on the intersection of power/knowledge, and that identification of ignorance may require distinctive responses. The general observations in this article may be of relevance in other areas of anti-discrimination and equality law, policy and praxis.

## KEY WORDS

disadvantage; discrimination; ignorance; judges; legal profession; women

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INTRODUCTION

**R**ELATIVELY LITTLE has been written about the way that ignorance is used as a technique to actively constitute or reproduce gendered power relations and the significance that this may have for law. Foucault is often cited in support of the proposition that knowledge is power (Foucault, 1972, 1977; Gordon, 1980). The study of knowledge – epistemology – tends to focus on how we come to know and what we can know. A critical epistemology reveals connections between knowledge, authority and power. It asks: for whom does the dominant epistemology exist, whose interests are served, and who are suppressed or neglected in the process (Code, 1993)? A number of legal academics have shown how law constructs knowledge along gender lines (Smart, 1990; Graycar, 1995; Graycar and Morgan, 2002). Moreover, as a result of those aspects of law which render women's accounts unintelligible (Smart, 1989), male-stream ignorance is preserved.<sup>1</sup> It should seem obvious that the constitution of knowledge is intimately bound to ignorance (Hobart, 1993). Proctor (1995), in his study of the politics of cancer research, argues for the need to 'study the social construction of ignorance' (p. 8). And, Eve Kosofsky Sedgwick (1990) notes in her study of homosexuality that 'ignorance effects can be harnessed, licensed, and regulated on a mass scale for striking enforcements' (p. 5).

The aim in this present article is principally with making intelligible certain material differences in the relationship between ignorance/knowledge that are related to issues of power and law. The article draws, albeit eclectically, from a range of illustrations of how 'ignorance' is related to power and disadvantage. It seeks to contribute to the literature by arguing that ignorance should be added to the field of vision of those working on the intersection of power/knowledge, and that the identification of ignorance may require distinctive responses. For instance, remedying ignorance may be important for praxis, as ignorance does not allow informed, targeted and effective responses. Given these aims, the article does not seek to engage in further theoretical development of the relationship between ignorance and power, though separate work on this elsewhere may be productive.

Proceeding with the frame of an epistemology of ignorance<sup>2</sup> reveals how ignorance is actively constituted or re-produced to sustain power relations (Freire, 1970). It is not only a passive state. Those in power may construct and perpetuate the ignorance of the less powerful. Two key techniques are, first, 'to impede or distort the acquisition of knowledge' (Rouse, 1987: 13), and second, to ascribe ignorance to a person or group to ignore or silence on the basis that he/she/they know nothing – are ignorant – what Freire calls the 'absolutizing of ignorance' (Freire, 1970). Power may be preserved also by inattention to a subject or by rendering a subject invisible, effectively maintaining ignorance of the subject. As Minow (1989) noted, the 'largely silent response' to feminist scholarship 'may represent a form of significant criticism. Inattention itself does communicate a message of relative disinterest or complacent disregard' (p. 117).

The maintenance of ignorance can be instrumentally perpetuated through regimes of truth and states of denial (Cohen, 2001). It explains the widespread ignorance among post-war generations of Japanese about the atrocities of its country's campaigns in Manchuria and Korea. It is connected to what Stanner (1968) terms Australia's 'cult of forgetfulness' over its treatment of its first peoples, and white people's ignorance generally about their racial privilege (hooks, 1982).

The impeding of information, when revealed, may uncover systemic biases – as was the case with the withholding of prosecution evidence that would have led to the acquittal of the Irish Catholic 'Birmingham Six' for the alleged bombing of pubs frequented by British soldiers. This context of history may be necessary to pierce the veil of ignorance, for, as Toni Morrison observes, in 'any kind of illumination the focus must be on the history routinely ignored or played down or unknown' (Morrison, 1992). An epistemology of ignorance also examines what knowledge is valued, and, in turn, what is regarded as unworthy of knowing – that of which one is expected to remain ignorant. The conferment of knowledge, or lifting of the label of ignorance, will distinguish those who have 'understood' or not, and how, in turn, they/she will be expected or enabled to perform to roles and expectations (Halford and Leonard, 2001).

To disrupt such norms of ignorance would be to challenge the power system. As the African American freed slave Frederick Douglass recorded in his autobiography; his white 'master' warned that 'learning will spoil the best nigger in the world'. The ignorance of the slave is thereby revealed as a necessity of oppression (Douglass, 1962: 79). The oppressed can then so internalize the demand not to acquire knowledge that it no longer becomes necessary for the oppressor to physically prevent access. Moreover, myths can be circulated to diminish or obscure ways of seeing. As Davis (1981) points out, the myth of the Black rapist instrumentally obscured the unlawful and tortuous lynching of many African Americans in early 19th century America.

That ignorance is important as a site of study is illustrated in this article through an examination of the results of a survey of applications by women for Silk<sup>3</sup> and judicial office in Northern Ireland, where women have historically been under-represented. While that under-representation is partly attributable to frank discrimination, findings from recent research suggest how 'ignorance' also militates against women's progress. The nature and extent of this ignorance is grouped in this article under different headings: the 'unknown' woman lawyer; denial of discrimination; mythologies; male-streams of knowledge; and undermining credibility. These categories are supported by analogous illustrations from other jurisdictions. A combination of phenomena appears to explain both women's ignorance of opportunities, men's ignorance of women's experience, and the profession's management of ignorance. One might then ask whether 'ignorance' serves a function? This is a more difficult stage of analysis. Nonetheless, the context of domination in which this ignorance operates in the legal profession, and its corollaries with other fields, suggests that an 'epistemology of ignorance' can be explained

in terms of a dominant group's systemic control of knowledge or reliance on such control to the detriment of others. Not all the phenomena presented represent the same form of ignorance. Nor do I intend to suggest that ignorance is a catch-all concept for any form of unknowing. There are significant differences, for instance, between 'not knowing', deliberately turning away, and denial. Still, there is some value in seeing how they each affect ignorance.

#### LAW'S IGNORANCE

The study of ignorance is also important because the focus in much anti-discrimination law and equality law on isolated instances of discrimination fails to take account of broader systemic issues about mentalities – domains of knowledge that operate at deeper structural levels, and therefore require different responses. For instance, the gender bias taskforces in the USA which examined gender bias in American courtrooms were important in identifying the 'nature', scale and incidence of gender bias, but failed to explain the reasons for this. In part, this was due to the terms of reference of the task forces (Resnik, 1991, 1996). Their work was summarized as being to:

... verify the legitimacy of the complaints and to take seriously the effects of discrimination as experienced by the victims. This legitimization must be brought into our legal institutions through formal mechanisms and to educate members of the profession as to what is, and is not, appropriate behaviour and to sanction that which is not. (Gellis, 1991: 972)

The approach that treats discrimination as aberrance, warranting topical intervention, distracts from structural explanations (Fredman, 1997) and an appreciation of the intersectionality of disadvantage (*European Journal of Women's Studies*, 2006). This may lead to surface, primarily procedural, changes. For example, the problems faced by women in achieving judicial office are often couched in terms of changes only to the appointments process.

None of this is to say that discrimination and disadvantage cannot be explained in other or additional ways. There is, for instance, a long history of frank exclusion of women from the legal profession, well documented in the United Kingdom (McGlynn, 1998, 2003) and Ireland (Bacik et al., 2003). In the context of judicial appointments, broader economic and cultural factors also affect women's differential access to judicial office trans-nationally (Schultz and Shaw, 2003). As Boigeol points out, women's entry into the judiciary in France has coincided with a diminishing status in the judiciary, reflected in poor pay, lack of up-to-date facilities, and unattractive office environment (Boigeol, 2003).

RESEARCH ON APPLICATIONS BY WOMEN TO SILK AND JUDICIAL  
OFFICE

Much academic literature has been produced on the subordinate status of women in the legal profession in the United Kingdom (Sanderson and Sommerlad, 2000; McGlynn, 2003; MacMillan et al., 2005), and worldwide (Schultz and Shaw, 2003). Reports on women's under-representation in the judiciary emanate from a wide variety of regions (Formisano and Moghadam, 2005) and jurisdictions, including England and Wales (Department for Constitutional Affairs, 2004), Northern Ireland (Feenan, 2005), the USA (Palmer, 2001), Canada (Backhouse, 2003), Australia (Davis and Williams, 2003), Brazil (Junqueira, 2003), Egypt (Khalil, 2003), France (Boigeol, 2003), Ireland (Bacik *et al.*, 2003), and The Netherlands (de Groot-Van Leeuwen, 2003). This present research was conducted during a time of considerable discussion about diversity in the judiciary in England and Wales (Department for Constitutional Affairs, 2004). It was commissioned in April 2004 by the Commissioner for Judicial Appointments for Northern Ireland, and co-funded between the Commissioner and the Northern Ireland Court Service.

The research was conducted between 23 September 2004 and 28 February 2005. Questionnaires and optional follow-up semi-structured interviews were used with a sample of barristers and solicitors eligible for judicial office or Silk (as appropriate) and with a sample of female holders of judicial posts.<sup>4</sup> Questionnaires were based on those used by Dr Kate Malleson and Fareda Banda as part of their research on ethnicity and gender in applications to judicial office for the Lord Chancellor's Department in England and Wales (Malleson and Banda, 2000). The questionnaires were adapted to reflect material differences in legal practice and judicial posts between Northern Ireland and England and Wales.

The questionnaires to barristers and solicitors asked a series of closed questions to obtain statistical data and, then, open questions in order to determine respondents' views on representation of women in applications for judicial office and Silk. The response rate was 27 per cent. Interviews were conducted in total with 23 lawyers: 14 solicitors (two of which were male) and nine barristers (two of which were male). The response rate from a similar questionnaire-survey of women judicials was 44 per cent. Eighteen female members of judicial office were interviewed.

A letter requesting a personal interview was sent to each of the existing nineteen automatic consultees in the process of appointment to Silk in Northern Ireland. Seven male judges, including the Lord Chief Justice of Northern Ireland, and the Chair of the Bar Council and the President of the Law Society, accompanied by their respective Chief Executives, made themselves available for interview.

Quantitative data from questionnaires were analysed using the computer software package SPSS. Qualitative data from questionnaires were processed using the computer software package Access.

### FINDINGS IN BRIEF

The study revealed a series of experiences and patterns pertaining to ignorance and knowledge that had significant gender implications for applications to, and probably appointment to, judicial office. For example, 25 per cent of women compared with 18.1 per cent of men reported not applying because of being unsure of the criteria for appointment to judicial office. Equivalent findings for Silk were: 16 per cent female versus 11.1 per cent male. More female than male respondents in the general survey reported that women were 'not visible' or were 'unknown' to consultees. Male barristers were twice as likely as female barristers to state that female barristers were *not* under-represented in applications for Silk. No male judges said that the process, including criteria or procedure, for appointment to judicial office had any gender implications. The majority of male judges offered no proposals for improvement in the process for appointments. Just over half the lawyers and female holders of judicial knowledge knew women who had left private practice for reasons associated with their gender, while none of the male judges knew any. None of the male judges acknowledged that the culture of the bench was male, while most women said that it was. Most female lawyers and female holders of judicial office believed that networking/socializing had adverse gender implications for women in applications. Yet, none of the male judges said so. The findings in Northern Ireland also reinforce data from other studies suggesting that there is a differently gendered perceptual world. One of the key findings of the 31 state and five federal task forces that reported on gender bias in the US court system was that male judges and lawyers of all ages were largely unaware of the experiences and perceptions of their female colleagues (Gellis, 1991). Three-quarters of female attorneys reported experiencing gender bias, while just over one-third of men reported observing it (Rhode, 1997). In the Ninth circuit in the USA three times as many female lawyers and judges (69 per cent) as male judges and lawyers (22.5 per cent) perceived networking to be a factor affecting selection of judges.<sup>5</sup> Conversely, white-Anglo men were most likely to believe that men and women were treated equally in those decisions.

### EXCAVATING IGNORANCE

#### *UNKNOWN WOMEN*

One of the ways by which law maintained ignorance of women was through exclusion or marginalization. Historically, women were literally unknown to law – not recognized as having any legal standing. Women's subordinate status was reflected in the fact that they were not admitted to the legal profession. This was enforced partly through gender norms, which dictated that women were ill-fitted for the masculine requirements of law. In the USA this was illustrated in Justice Bradley's telling words in *Bradwell v Illinois*

(1872): '[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits her for many of the occupations of civil life' (p. 139). Even when women did gain access to the profession the legacy of these norms tended to marginalize women by admitting them to certain fields only and by excluding them from positions of authority. Gender stereotypes tended to work against women displaying any attribute that did not fit within male norms. This remained a persistent problem in many other countries such as Australia (Thornton, 1996) and Canada (Canadian Bar Association Task Force, 1993). The association of gender norms with lawyering may become internalized so that women lawyers construct themselves as non-female subjects. Characteristics associated with female behaviour such as femininity become devalued (Hunter, 2002). Thus, aspects of women (and similar characteristics in men) may also remain invisible, unknown. The denial that women may offer anything distinctive to judicial office, whether in terms of equal representation, diversity in judicial office or even, arguably, a 'different voice' (Wilson, 1990), may reflect a conscious attempt to remain ignorant of gender. In the present research, for instance, the Chairman of the Bar Council of Northern Ireland said that having more women in judicial office and Silk would make no difference. The significance of gender is negated. While masculine norms remain dominant, the profession denies their significance. To do otherwise would be to reveal the historical and systemic gender bias of the profession. Thus, the trope of gender-neutrality or equality blocks attempts at gender scrutiny. This, in turn, can be used to undermine women lawyers who attempt a feminist analysis (Canadian Bar Association Task Force, 1993).

The historical exclusion of women from the profession which was followed later by gendered constructions of those who were admitted so that aspects of women remained invisible, is compounded more recently by their invisibility before the judges who appoint. The reliance on visibility before judges meant that women who did not appear in higher courts or in certain high profile areas, for example crime, were not known. In the present research the main area of work for female applicants to judicial office was family law, whereas none of the male applicants cited this as a main area of work. One respondent noted in relation to Silk, echoing comments of other respondents regarding judicial office:

Women are not getting anywhere near as much criminal work/civil litigation/commercial work . . . as men are, which gives men more court experience and exposure that puts them more in the frame (by a superior margin) to get Silk. (Questionnaire Respondent 86, 12 December 2004)

These findings are consistent with results in the USA (Coontz, 1995), Australia (Hunter, 2005), and England and Wales. Malleson and Banda in their research on factors affecting the decisions of women to apply for Silk and judicial office in England and Wales found that a recurrent theme was the need to be 'known' by the right people in order to be successful in the consultation process (Malleson and Banda, 2000). The former system was criticized for

being dependent on 'being noticed and being known' (TMS Management Consultants, 1992).

The Commissioner for Judicial Appointments for Northern Ireland observed that some candidates for Silk appeared mostly in criminal cases in the Crown Court before County Court judges (Commissioner for Judicial Appointments for Northern Ireland, 2003). Yet, women tend to work in areas other than criminal law. Reliance on references from County Court judges could, therefore, have disadvantaged women candidates. The Commissioner recommended, therefore, that the risk would be 'reduced if candidates were permitted to nominate additional consultees who were able to assess their professional work if they had a concern that the existing automatic consultees would not have had adequate, direct and recent experience of their work' (Commissioner for Judicial Appointments for Northern Ireland, 2003: para. 9.5.6). As suggested earlier, the dominant group may preserve power through inattention or by rendering a subject invisible.

Moreover, if women generally are 'unknown', there are also women whose disadvantage is compounded by the intersection of other oppressions, for example on the grounds of race or disability. In the recent history of Northern Ireland, actual or perceived religious and political affiliation has been perceived to affect appointment, at least, to judicial office. This was the main reason for recommendations for an independent appointments process for judges, as part of the recent constitutional changes in the jurisdiction (Criminal Justice Review Group, 2000). While a number of respondents in this research speculated about possible networking advantages for members of religious organizations such as Opus Dei, only one (female judicial) respondent acknowledged that women may be differentially positioned according to other factors. She said:

I could never imagine . . . a member of the gay or lesbian community ever being considered suitable for judicial office . . . what chance would they have? And, I think that permeates every aspect [of appointments], whether it's working class background, whether it's socio-economic . . . background . . . I don't think it's gender on its own, I think it's combined with other things. (Interview, 7 December 2004)

The silence among other respondents about the intersection of potential disadvantages may reflect the compartmentalizing view of discrimination that afflicts law (Hannett, 2003). Its effect, however, masks further the particular disadvantages that differently situated women face (Crenshaw, 1989; Grillo, 1995).

#### DENIAL

If the response to a problem is that there is 'no problem', denial precludes any remedial action. In fact, denial may be the most effective form of resistance to change. This has been common in relation to appointment of women

to judicial office and senior legal positions in the USA (Rhode, 1997, 2003) and Canada (Canadian Bar Association Task Force Report, 1993). The technique of denial was evident also in the present research across a range of matters which suggest that denial is systemic. Both professional bodies denied responsibility or knowledge of any problem. The Chairman of the Bar Council of Northern Ireland stated that the Bar Council had no views on whether the process of appointment to Silk or judicial office had any gender implications. He added that nothing needed to be done to improve the process of appointment to Silk or judicial office with reference to gender. The Law Society of Northern Ireland proffered no view that the process of appointment to Silk had any gender implications. The President, herself a woman, said, '[b]ecause that is something that is exclusively for the Bar, it's not something I've given a lot of thought to. It's an issue that could be directed to the Bar' (Interview, 10 February 2005). Yet, the office of President of the Law Society had for some considerable time been one of the consultees in the process of appointment to Silk, and the Law Society was at the time of interview discussing a document about reform of the process of appointment to Silk for Northern Ireland which had been initiated almost a year-and-a-half before the interview. The denial of a problem at such a high level effectively maintains institutional ignorance of the problem, resonating with Cohen's observation about states of denial – though in a somewhat different context (Cohen, 2001). As observed earlier, failure to address disadvantage in accessing information, consolidates power over knowledge. That this may amount to systemic neglect, at least in relation to the solicitors' profession, appears to be corroborated by the failure of the Law Society to address recommendations by the Equal Opportunities Commission for Northern Ireland in 1999 regarding under-representation of women in the profession. It is also noteworthy that the Law Society did not report the findings of the research on applications by women for Silk and judicial office in its magazine, though it did manage in the period of time in which it might have done so to devote a one-page report on the Belfast Solicitor's Association summer golf outing, accompanied by four photos of (male) golfers.

#### *GENDERED PERCEPTION OF GENDER PROBLEMS*

The research suggested that the experience and perception of any adverse gender implications within the process for appointment to judicial office or Silk split along gender lines: male versus female. This split suggests that men, particularly barristers, largely remain ignorant of women's experiences of problems, while women, on the whole, acknowledge those problems. As already noted, male barristers were twice as likely as females barristers to state that female barristers were *not* under-represented in applications for Silk (50 per cent men compared to 23 per cent women). Additionally, the ratio was almost the same in terms of perception of under-representation of females in applications for judicial office. Fifty per cent of male barristers denied

under-representation, compared to 26.7 per cent of female barristers. While raw data show a gender difference in the perceptions of male and female barristers, the qualitative responses on the subject of under-representation reinforce this division. There were three separate types of responses given by male barristers. The first illustrates the division between perceiving ability versus the perception of opportunity. One male barrister explained the under-representation of women in judicial office as follows, 'not enough of sufficient skill and competence apply' (Questionnaire Respondent 4, 10 November 2004). The typical contrasting response from women is illustrated in the view of one female barrister who said that women 'do not have the same opportunities presented to them in criminal and civil fields to develop practices which lend readily to successful [judicial or] Silk careers' (Questionnaire Respondent 9, 12 November 2004). A second type of response revealed differential knowledge of obstacles facing women. A typical male barrister response was encapsulated in the following statement: 'I do not know of female barristers who would feel held back or restricted because of their [gender]' (Questionnaire Respondent 14, 12 November 2004). Yet, female barristers' responses were much more varied. One identified a number of obstacles: 'because they lack the confidence and perhaps the respect of their colleagues; because the ethos of the Bar requires women to keep their head down and not to promote themselves; because they lack the experience of civil or criminal litigation, which makes up most of the work of judges' (Questionnaire Respondent 46, 14 November 2004). Finally, a difference in the willingness of men and women to ascertain facts is linked to the gendered differential in terms of remaining ignorant or not. Two male barristers offered similar reasons in relation to judicial office. One stated: '[n]ot aware of the breakdown of figures in applications' (Questionnaire Respondent 70, 23 November 2004). The other said that '... information as to applicants is generally unknown' (Questionnaire Respondent 85, 29 November 2004). Yet, one female barrister explains: 'I do not have access to the information I would need to answer this question ... with precision' (Questionnaire Respondent 7, 10 November 2004). This response suggests that it is ability and willingness to access the information that is necessary to answer the question accurately. Neither male barrister indicated such willingness to address their ignorance.

This gender differential, and others reported earlier in this article, in knowledge/ignorance is not unique to Northern Ireland. The Canadian Bar Association Task Force Report on Gender Equality in the Legal Profession (Canadian Bar Association Task Force Report, 1993) reported that one of 'the significant observations found in the Task Force reports and research is the existence of two, almost separate, perceptual or cultural worlds. Women in the legal system continue to report discrimination and the perception of being treated differently from men while men report either a lack of awareness of discriminatory practices or a belief that the system operates fairly or neutrally' (p. 270). For example, in Ontario men were almost three times less likely than women to perceive gender bias against women (75 per cent v.

29 per cent) (Canadian Bar Association Task Force, 1993). The Indiana Bar Association report on gender bias in the courts found that almost three-quarters of women (72.5 per cent) compared to a minority of men (43.6 per cent) agreed that female lawyers encounter discrimination (Gellis, 1991). Similar results were found in the gender bias task force report for the Ninth Circuit.<sup>6</sup> Coontz (1995) also found that men lawyers were significantly less likely to score observed bias across several obvious measures of gender-bias than women lawyers. This is associated with traditional stereotypical attitudes that men lawyers had to woman lawyers, explaining why women 'see' bias and men don't. A survey in Ontario in 1992 found that three-quarters of women reported *perceiving* discrimination against others while less than a third of men had this observation. In Saskatchewan the differentials were 82 per cent (women)/63 per cent (men) (Canadian Bar Association Task Force Report, 1993).

#### EXPERIENCE OF GENDER DISCRIMINATION

The differential in *experiencing* discrimination is even greater. In Ontario and Saskatchewan the experience of discrimination by gender was 70 per cent (women)/6 per cent (men) and 92 per cent (women)/12 per cent (men) respectively. While this present study found that the majority of women had no *direct experience* of gender discrimination in applications for Silk or judicial office, seven women – compared to no men – did state that they believed or suspected gender discrimination either in four cases where they had been denied appointment or by virtue of the fact that there were so few women in judicial posts generally. However, many women identified practices which they believed may have had adverse consequences for positioning them for judicial office or Silk. Just over half of lawyers and female holders of judicial office, but none of the male judges, who were interviewed knew women who had left private practice for reasons associated with their gender. Most lawyers and female holders of judicial office cited discriminatory briefing practices and 'passing-on' of briefs between barristers as adversely affecting women's opportunities for achieving judicial office. In contrast, one male judge stated: 'In the early days . . . the 1970s . . . women said they were disappointed that they weren't instructed. [Interviewer: What of the position today?] I haven't heard that said' (Interview, 13 February 2005).

#### KNOWING/IGNORING DISCRIMINATION

The apparent anomaly between no reports of 'direct experience' of discrimination in applications and pervasive discriminatory practices that could adversely affect women's positioning in applications for judicial office or Silk, may reflect respondents' reliance on the conventional requirement in anti-discrimination law for identifying direct or indirect discrimination, which

require, in the case of direct discrimination, proof that one person treats another less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances) or, in the case of indirect discrimination, by imposing a requirement which disproportionately and adversely affects women, causes detriment to a complainant, and cannot be justified irrespective of gender (Fredman, 2002). However, it may also suggest that lawyers are less able to identify systemic as opposed to individual discrimination. This should not be surprising given that the typical liberal legal education offered in most law schools focuses on formal notions of equality and discrimination, rather than also examining structure or context (Lacey, 1998). Professions, too, create their own ways of seeing, or not, that preserve ignorance. Hunter's study of women barristers at one of the independent Bars in Australia showed how women barristers tended to deny sex discrimination (Hunter, 2002). This may be explained as part of the well-recognized strategy to assimilate to the dominant gender norms of the profession (Kennedy, 1992; Canadian Bar Association Task Force Report, 19937). Freire (1970) noted that while the ignorance of the oppressed is partly explained by their 'adhesion' to the oppressor, so that they cannot consider him clearly to discover him outside themselves, it also involves 'prescription' by the oppressor. The oppressor imposes his choice upon another, transforming the consciousness of the other so that it conforms with the prescriber's behaviour. Freire argued that liberation entailed unveiling the world of oppression and transforming that world. This, in turn, required a transformation in the consciousness of the oppressed.

The requirement to self-discipline may, therefore, be the most effective exercise of power. As Lukes contests, 'is it not the supreme exercise of power to get another to or others to have the desires you want them to have?' (Lukes, 1974: 23). Rackley (2002) points out that the woman lawyer who does so, like the mermaid in Andersen's fairy tale, trades her self and her 'voice' to fit the expectations of her object of desire, but in the end she loses both (Rackley, 2002). Male judges' 'shock' at discrimination that might be expressed towards/done to women is indicative of this historically constructed ignorance. Madam Justice Bertha Wilson, formerly of the Supreme Court of Canada, recalled how Chief Justice Lamer expressed shock that judges would discriminate against other judges (Anderson, 2001). Similarly, Coontz reports the view of a woman in her study of lawyers in Pennsylvania:

With my first employer, a law firm representing unions, I was denied assignment to one of the unions that was represented because the union representative did not believe that women should be attorneys. I learned this only after I asked why I was not being assigned to this union's cause. My male colleagues could not understand why I found this objectionable. (p. 12)

An associated technique to preserve ignorance of women's disadvantage is to belittle a concern. The gender bias task force report on Massachusetts, for instance, found that 'during the course of our research we sometimes encountered perceptions that biased treatment of women in the courts is a trivial

matter or that reports of this treatment are exaggerated' but concluded that actual bias did affect women's ability to function in the system and was linked to unjust outcomes (Report of the Gender Bias Study of the Supreme Judicial Court, 1989–1990: 758). In the Indiana Bar survey, 30 per cent of men lawyer respondents thought 'women make too much of an issue of sex discrimination' (Gellis, 1991). Reducing the extent or seriousness of a problem also protects a degree of ignorance about its effect.

#### LAW'S MYTHOLOGIES

In addition, law creates its own mythologies (Fitzpatrick, 1992), aspects of which, too, sustain ignorance about the problems women face generally, or within the professions and on the bench in particular. The most persistent myths include the notions of ungendered merit and the ungendered judge.

(A) *UNGENDERED MERIT* Williams (1992–93) observes that the 'traditional epistemological view that animates our legal system . . . requires that knowledge be a neutral, universally valid, objective description of an independent reality' (p. 1572). She cautions that a 'neutrality that attempts to ignore differences in a world characterized by hierarchy will generate social inequality. And a neutrality that ignores inequality is not neutral' (p. 1572). The first part of Williams' caution may be seen in the present research through the failure of the Bar Council to acknowledge that having more women in judicial office will make any difference. That view may have been predicated on the view that all judges are to act impartially, and that women will therefore be in no different position to men. But the Bar Council's position ignores the significance of women's increased representation in judicial office in terms of equality of representation, diversity of representation and public confidence in representation. It also does not allow that women may bring a different approach to judging (Wilson, 1990; Hale, 2005). The differences between women and men judges posited by some authors would confirm Rackley's thesis that 'the pursuit of difference reveals the contingency of traditional accounts of legal reasoning and the possibility of alternative and diverse adjudicative voices which are not necessarily feminine or *feminist* in intonation' (Rackley, 2006: 165). Indeed, some women judges elsewhere have argued for attaining a judiciary that broadly reflects a spectrum of experience and awareness: a 'multiplicity of voices' (Werdegar, 2001: 40) or 'multiple consciousness' (L'Heureux-Dubé, 1997). This approach is consistent with a number of justifications for more women, and other under-represented minorities on the bench, which are: trust, public confidence in the judiciary, and diversity. In this way, women judges reconstitute notions of judicial authority. This need not necessarily be seen as confirming the hypothesis that all women judges speak in a different voice', especially in view of the theoretical, empirical and strategic dangers of basing judicial diversity on the 'different voice' thesis that have been noted (Malleon, 2003). Nonetheless, the fact that male judges have

traditionally opposed anything other than 'neutrality' or appointment on 'merit' as touchstones of judicial office, might support the thesis that they feared changes to the male-constituted domain of knowledge.

This idea of gender neutrality is often associated with the view that merit alone is a sufficient basis for appointment to judicial office or Silk. Indeed, the Chair of the Bar Council reiterated that appointment should be based only on merit. This is related to the idea that nothing further than simply allowing merit to surface will do. Thus, the Lord Chancellor Lord Laing of Irvine in a speech in 1998 to the Association of Women Barristers, though acknowledging that many judges were white, Oxbridge-educated men, added: 'This does not mean that the social composition of the judiciary is immutably fixed. For too long barristers were drawn from a narrow social background. As this changes over time, I would expect the composition of the Bench to change too. That is inherent in the merit principle' (Lord Chancellor, 1998). This, too, is part of law's mythology – the 'progress is being made' myth, a half truth that mutes precise assessment of the ongoing status of women relative to men (Canadian Bar Association Task Force, 1993).

Thornton (1985) points out also that the concept of merit has, historically, allowed for 'idiosyncratic and arbitrary' assessment. It functioned to work against women (Hamilton, 1999) by replicating previous characteristics of male judges (Commissioner for Judicial Appointments, 2005) and through what has been termed 'cloning' (Kennedy, 1992). An acknowledgment of this danger lies behind the shift in the appointments processes in England and Wales from the singular criterion of merit to the adoption of a list of specific competencies and, more recently, to different modes of testing a range of competencies. Historically, therefore, the concept of merit served as a technique to ignore the gender biases latent in the male-dominated profession. Its practitioners remained ignorant not only about those biases, but by corollary remained unwilling to confront their ignorance of the attributes that could, but need not necessarily, be associated with women.

*(B) THE UNGENDERED JUDGE* The inability of male judges in this research to acknowledge that there was a 'culture' which might not include women reflects the historical tendency to treat the judge as ungendered. In part, this is a function of law's ignorance, its inability to understand experience unless understandable in legal terms, which has historically been framed through male eyes (Smart, 1989). The gender bias taskforces in the USA found that the majority of male judges in the US studies were unaware of discrimination against women, and some could not recall a single example of discrimination (Rhode, 1997).

The image of the judge or QC as objective has, historically, buttressed the notion of neutrality. The ideological image of the judge is, as Rackley (2002) observes, 'necessarily male' and, as she points out, 'the internalisation and collective denial of this gender dimension effects the exclusion and/or silencing of the woman judge' (p. 605). Indeed, historically the image of the male judge as objective was literally figured in the notion of law itself when Lord

Radcliffe stated that ‘the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself’ (*Davis Contractors Ltd v. Fareham Urban District Council*, 1956: 728). Such a conception of justice, associated with the stereotypes faced by women, discussed earlier, impeded female lawyers and judges in being treated as authoritative knowers (Thornton, 1996; Rackley, 2006). Many women have, perhaps understandably, cooperated with the myth of universality and objectivity that underpins traditional concepts of law and legal practice to protect against the precariousness of particularity. But doing so, effectively preserves the masculinity and claimed objectivity of law.

Moreover, until recently the criteria for appointment to Silk in Northern Ireland included a requirement of demonstrated capacity for ‘leadership’ which may have served to exclude women. This was likely to be compounded by the Lord Chancellor’s reliance on the criterion: ‘marks them out as a leader of the profession, that is to a standard comparable with those already appointed Queen’s Counsel in the same or analogous practice type’ (Lord Chancellor, 2003). If it were the case that ‘leadership’ includes also the occupation of senior positions in the Bar Council, it may also be the case that this requirement indirectly discriminated against women. In 2005, women held only four out of 19 positions on the Executive Committee (i.e. 21 per cent), and two positions as Chair out of the 12 committees of the Bar Council of Northern Ireland that contain this position (i.e. 16.7 per cent). Women made up a majority on only six of the Bar’s 39 committees/groups/authorities of more than two members.

#### MALE STREAMS OF KNOWLEDGE

Another way that groups are subordinated is through control of flow of information to them, for example non-disclosure or limited disclosure. In the case of the traditionally male-dominated legal profession it may be said that this controlled flow of information represents a male-stream of knowledge. The flow may be so controlled that it amounts to secrecy. Or it may otherwise privilege men, effectively keeping women ignorant. The male-stream of knowledge may explain why two separate studies in different jurisdictions found that women were less certain of the criteria for application to judicial office as men. Similar findings were made in England and Wales (Malleon and Banda, 2000). In the present study in Northern Ireland, 25 per cent of women compared with 18.1 per cent of men were unsure of the criteria for appointment to judicial office (Feenan, 2005).

The process of appointment to judicial office has, until recently, largely been unknown to women. Historically, barristers were invited to apply. The informal system meant that judges tended to appoint in their own image, with some anecdotal evidence that judges did not appoint those ‘not like us’<sup>8</sup> – presumably white, Oxbridge-educated men. In acknowledgement of a problem, the Lord Chancellor’s Department published in 1986 *Judicial*

*Appointments: The Lord Chancellor's Policies and Procedures* to 'dispel any lingering sense of mystery or obscurity' (p. iii).

In addition to the 'formal' process of application, the informal flows of information tended to privilege men at the expense of women. In the present research, just over 40 per cent of interviewees perceived that informal networks or socializing which had gender implications for women were important in applications for judicial office. Three types of comments predominated: there were groups which admitted only male members which could adversely affect women's appointments; there were associations or societies which had the effect of excluding women, whether intended or not, and; general socializing which tended to be more accessible to men than women, due to the tendency of the latter to be main carers, adversely affected women. One female judge stated: 'golf clubs – membership of which is seen as prestigious in some way – almost exclusively male-oriented, affording opportunities to interact usefully within the profession . . . secret societies also play a part here . . .' The difficulty for most women in combining socializing with childcare precludes them from the male-stream, which may count for much when it comes to being known by consultees in the appointments process. One barrister remarked, 'if you socialise and you're in a social setting with judges and they get to know you and you get to know them, you are more inclined to be freer to approach them for references and the like' (Interview, 3 December 2004).

The responses are broadly consistent with findings elsewhere. In Ireland more women than men tend to feel excluded from social networks (Bacik et al., 2003). In England and Wales, some lawyers believed that appointment to judicial office depended on the extent to which they were prepared or able to network and socialize in the 'right' circles to get known (Malleon and Banda, 2000). In Australia, Justice Catherine Branson noted that 'a significant problem does arise because, as women in our profession, we are made to feel that we are outsiders – not of the mainstream' (Branson, 1997). This reflects what Thornton (1996) neatly terms the 'homosocial' norms that perpetuate male dominance over women.

#### UNDERMINING CREDIBILITY

If denial is one of the most effective ways to preserve ignorance, obstruction may be the most effective. Here, I take obstruction to include a range of techniques to prevent the seeker of information accessing that information or being able to believe its veracity. If overt obstruction is the most effective technique for preserving ignorance, undermining the veracity of relevant information or undermining the credibility of the messenger are related to this technique. Code (1993) points out that 'the epistemologies of the analytic mainstream are constructed, to produce uneven, and often unjust, multiple standards of credibility, authority, responsibility and trust: standards that perpetuate white affluent male epistemic privilege while discrediting and

discounting the knowledge and wisdom made in places and by knowers other than those legitimated by the current, authoritative knowledge-makers' (p. 174). This tends to target women who challenge the malestream (Report of the Gender Bias Study of the Supreme Judicial Court, 1989–1990) and to posit feminism as incompatible with judicial office (Backhouse, 2003). It is evident in the denigration of Anita Hill following her complaint against US Supreme Court nominee Judge Clarence Thomas (Higginbotham, 1995), but equally targets the messenger. In the present research this was attempted by the Chair of the Bar Council by communicating through the Chief Executive that he had 'grave reservations about the objectivity of the research' (E-mail, 24 January 2005). As Lennon and Whitford observe: 'legitimation of knowledge-claims is intimately tied to networks of domination and exclusion' (Lennon and Whitford, 1994: 1). Following publication of the report, the Bar Council's only acknowledgement of any need for reform is mentioned as follows: 'at least some of the points made in the report have been taken on board by the Bar's Equal Opportunities Committee since they could be identified within the personal experiences of female barristers' (Letter to Commissioner for Judicial Appointments for Northern Ireland, 15 November 2005, on file with author). The response by the Chair of the Bar Council to knowledge-claims about women's disadvantage in Northern Ireland echoes that of one male respondent to the then-forthcoming research on gender-bias in courts in the USA (which subsequently confirmed extensive bias): 'In my opinion this so-called "gender bias" is purely fiction – an invention brought about by a small faction of women lawyers who are emotionally and intellectually immature [. . .] negative treatment at times is part and parcel of practicing [sic] law – it has absolutely nothing to do with this mythical "gender bias" which to me simply does not exist' (Coontz, 1995: 16). If women remain less knowledgeable about opportunities for appointment to judicial office, and men remain as ignorant about women's disadvantage in, say, five years, we may usefully note Proctor's words that 'ignorance is not just a natural consequence of the ever shifting boundary between the known and the unknown but a political consequence of decisions concerning how to approach (or neglect) what could and should be done . . .' (Proctor, 1995: 13).

#### CONCLUSION

The disadvantage experienced by women in the legal profession and in applications to judicial office may be explained generally in terms of direct and indirect discrimination by men. These can be addressed, and were addressed in the research presented here, through conventional anti-discrimination responses. However, the techniques of power that effect that discrimination occur in myriad ways. Historically, women were simply excluded from the profession. When they were admitted they struggled against the legacy of stereotypes. They encountered dismissive or, occasionally, hostile, attitudes

(Backhouse, 2003). Sanderson and Sommerlad (2000) note also that male domination within the profession is reflected in gendered modes of professionalism, historically embedded male-centred working practices, and formal processes for appointment that favoured men. This was echoed in the present research on applications by women for judicial office and Silk in Northern Ireland. But what this research also suggests is that women's ignorance about opportunities and men's ignorance about women's problems augments the axiom that knowledge is power. The research revealed striking gender differentials along the ignorance/knowledge axis, which would tend to favour men. Given that men controlled the means of information flow, and continue to have responsibility for these flows, the lack of effective response by the professional bodies and others responsible may be seen to consolidate male power within law. Thus, this research confirms the view that law is a deeply gendered domain. The research suggests a need to move from a liberal concept of discrimination to an appreciation of the complex interrelated relations of power that serve to preserve privilege and advantage at a systemic level. Much anti-discrimination and equality law focuses on individual instances of discrimination, which entail singular remedies, rather than finding connections that would require broader and perhaps continuous interventions. The focus on ignorance indicates different strategies which target particular sources of disadvantage for women such as poor information flow, processes of appointment that privilege being 'known', gendered mythologies of law, and the stereotypes and biases of male lawyers and judges. It also calls for sensitivity that women may 'know' in a different way to men (Alcoff and Potter, 1993). It should be self-evident that attempts to homogenize women will fail as abysmally to respect difference as the concept of the 'neutral' lawyer ignored women. Therefore, strategies to address ignorance must account for the differently constituted relations of power, disadvantage and ignorance which affect different women. These observations may resonate in other areas where individuals or groups are subordinated, including but not limited to race, disability and sexual orientation. However, if knowledge is changed by the transformations in its context (Lyotard, 1984), so, too, is ignorance. This call for a critical archaeology of ignorance reflects the view that knowledge and ignorance are persistent artefacts of power relations and thus requires constant vigilance.

#### NOTES

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1. I borrow, here, from the term 'male-stream' used by Mary O'Brien (1981) to refer, in a slightly different context, to the ideology that supports male supremacy.
2. While I believe I came up with this term independently, a literature review reveals that it has been used (apparently also independently) by Tuana (2004) in relation to women's knowledge of orgasm; and by Mills (1997) in relation to white peoples' systemic lack of knowledge about black people.
3. The term 'Silk' refers to the material in the black robe of senior counsel, which is different from the material in the robe of junior counsel. Silk is also referred to at the Bars of England and Wales, Northern Ireland, and some Commonwealth jurisdictions, as Queen's Counsel. While the basis for the award of Silk has, on occasion, been disputed, it nominally recognizes excellence as an advocate.
4. Forty-five female holders of judicial office were selected, drawn from those who held judicial office as defined by the Department for Constitutional Affairs (DCA) plus a random selection of female tribunal members. The DCA definition as applied to Northern Ireland comprised County Court Judges, District Judges, Resident Magistrates and their associated deputies, plus the Official Solicitor.
5. See Coughenour et al. (1994).
6. See note 5.
7. '[M]any women who have "made it" in the legal profession have done so by conforming to the male model, by not reacting to sexist comments and attitudes, by not reporting sexually harassing behaviour, and by forcing themselves to develop interests that match those of their male colleagues' (p. 268).
8. Interview with Janet Tweedale, Department for Constitutional Affairs, London, 1 February 2005.

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