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Women and the Law. By Leo Kanowitz.

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WOMEN AND THE LAW. By Leo Kanowitz. Albuquerque, New Mexico: University of New Mexico Press. 1969. 312 pages.

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A perspicacious observer of the contemporary scene has said that a high-brow is a man who has found something more interesting than women.¹ Thus, by definition, it would seem to follow that a preoccupation with civil rights and economic exploitation evinces lowbrow interests. However, women are people, albeit of a very special kind, and a discussion of the legal status of women should qualify as a middlebrow commitment. In *Women and The Law*, Professor Leo Kanowitz has chosen to retain a scholarly interest in women and to develop a passionate concern about how that jealous mistress, the law, discriminates against them.

The dimension of women *qua* women Professor Kanowitz leaves to the tender mercies of Simone de Beauvoir,² Betty Friedan,³ and Phyllis McGinley,⁴ who may be better equipped to discuss female frustrations and the identity crisis. His concern is characterized by his subtitle, "The Unfinished Revolution," and although the author does not incite to riot, he does offer sufficient data and analysis to shame a male dominated legal order. In Chapter 2 he deals with "Law and the Single Girl," and in Chapter 3 with "Law and the Married Woman." Thereafter he gives a detailed critique of Title VII of the 1964 Civil Rights Act⁵ and the Equal Pay Act of 1963⁶ and their inter-relationship. This is followed by a thorough analysis of the "Constitutional Aspects of Sex-Based Discrimination in American Law" and the author's summary and conclusions. There also are appendices of relevant statutes and recent court decisions. The book and its organization is suitable for use as a text in a seminar on women and the law.

Although Professor Kanowitz makes it clear that "you've come a long way baby to get where you got today," he jolts us out of complacency by noting many current instances of discrimination based on sex. The nineteenth amendment, Title VII of the 1964 Civil Rights Act, and the 1963 Equal Pay Amendment, as well as supplementary state legislation,⁷ have but limited

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1. The remark is attributed to Edgar Wallace.

2. *THE SECOND SEX* (1961).

3. *THE FEMININE MYSTIQUE* (1963).

4. *SIXPENCE IN HER SHOE* (1964).

5. 42 U.S.C. § 2000e *et. seq.* (1964). It is ironic that Congressman Howard Smith appended Title VII to the 1964 Civil Rights Act in the hopes of killing the legislation and that otherwise it probably would have taken several more years before federal legislation outlawed discrimination based upon sex in industries subject to the federal commerce power. *See* chap. 4.

6. 29 U.S.C. § 206(d) (1) (1964), *amending* section 6 of the Fair Labor Standards Act of 1938.

7. Prior to the 1964 Civil Rights Act, only two states, Hawaii and Wisconsin, had prohibited sex discrimination in employment but by the beginning of 1968, 11 other jurisdictions had joined the ranks, including New York in 1965. *See* p. 107.

coverage and are subject to evasion. In the early stages of its operation, over one-third of the discrimination cases heard by the Equal Employment Opportunity Commission were claims of discrimination in employment because of sex. Despite the substantial body of administrative decisions that is being developed under these statutes and the 1965 Presidential Executive Order 11,246 which forbids discrimination in government employment, there remain many areas where women are singled out for unfair differentiation. For example, section 703(e) of Title VII excepts "bona fide occupational qualification" related to sex, and thus opens the door to invidious distinctions.

On the whole, Professor Kanowitz's book is comprehensive, readable, and provocative. Especially valuable is his reasoning by analogy to equal protection decisions involving racial discrimination. One finishes his book with the conviction that social and legal discrimination against women is no more tolerable in a civilized society than is racial discrimination. Furthermore, it is somewhat shocking to realize that discrimination based on sex is taken for granted by and continues to persist in our society. Lesser pay for the same work remains the plight of a large percentage of the twenty-seven million women in our labor market. We need only look at the legal profession to appreciate the fact that a Portia rarely gets the emoluments and pay that are provided for young Wall Street lawyers of the male gender.

If one is looking for something about the book to criticize, the most obvious complaint is that Professor Kanowitz, in his enthusiasm to prove discrimination *de facto* and *de jure*, makes a "federal case" out of statutes and laws which are essentially protective rather than discriminatory. Thus, discounting differences in maturation and slighting the special problems presented by a Lolita, he questions state statutes providing for a lower female age of consent or age for marriage. Such differences in age of consent based on sex, as well as the law pertaining to seduction and statutory rape, are not calculated to penalize the female but to accord her special protection. In this age of open sexual aggression, perhaps males should receive comparable solicitude, but there is no lobby to promote seduction and statutory rape laws to protect teen-age boys and recent graduates from a Mrs. Robinson. In that situation the venerable adage of *volenti non fit injuria* applies.

In addition to the more obvious examples of protective statutes, there are other areas where the purpose is ostensibly protective, but due to the total situation, one may suspect ulterior motives. Statutes limiting the hours of work for women,⁸ or the weights they may lift,⁹ may perpetuate a male monopoly of certain occupations. Similarly, statutes barring women from professional wrestling¹⁰ and bartending¹¹ may have a public morals and health

8. See p. 117 *et. seq.*

9. P. 114.

10. P. 129. See also *Calzadilla v. Dooley*, 29 A.D.2d 152, 286 N.Y.S.2d 510 (4th Dep't 1968).

11. *Id.* See also *Goesaert v. Cleary*, 335 U.S. 464 (1948). It should be noted that a

rationale but discriminatory consequences. Prostitution laws, where male customers commit no offense or escape prosecution, may occasion a practical injustice although there may be no denial of equal protection where the classification is based on the difference between a professional and an amateur.

One also may regret that *Women and The Law* is rather skimpy on historical, sociological, and psychological materials and explanations. Its focus is economic and legal, and there may be an excessive concern with equal protection problems at the expense of the insights and theories provided by the social and behavioral sciences. It is a one dimensional rather than an eclectic approach to a complex problem.

For example, another author might have preferred to note the thesis of Sir Henry Maine that historically there is a movement from status to contract, with the individual being substituted for the family as the unit with which the law reckons,¹² and the theory of James Bryce that patriarchal societies evolve so that principles of female subordination are replaced by principles of equality.¹³ Usually the break comes when women acquire the capacity to inherit and hold property on a par with men. Thereafter other rights and powers follow as a matter of course. Against the backdrop of such historical generalizations, the legal status of wives from the Norman Conquest until the Married Women's Property Acts of the nineteenth century could be measured. The combination of feudalism and the church not only instigated and perpetuated a policy of discrimination which lasted seven hundred years but also contaminated judicial thinking about women and the law up to the present time. In the middle ages, learned theologians for years debated whether or not women had souls, and the deification of Mary, which Henry Adams has described so effectively,¹⁴ made mere mortal women ignominious by comparison—in much the same way that the knight's lady of romance made her sister ugly by comparison. In short, placing women on a pedestal exposes feet of clay.

The sociologists have also provided interesting insights into family relationships, role status, and social change. The anthropologists have disclosed the infinite variety of customs and laws pertaining to women. Although Freud's clinical observations regarding women may be passé, Erik Erikson has much to say that is timely and significant.¹⁵ Therefore, in order to adequately document the "Unfinished Revolution," it is necessary to consult the social and behavioral sciences. Although he does summarize the legal status of women at common law, Professor Kanowitz, unfortunately, leaves the impression that like topsy, the law surrounding women just grew.

few states, such as Arizona, Colorado, and Utah, bar women from the hazardous occupation of mining.

12. H. MAINE, *ANCIENT LAW* 163 (4th Am. ed. 1906).

13. J. BRYCE, *Marriage and Divorce under Roman and English Law*, in *HISTORY AND JURISPRUDENCE* 842 (1901).

14. H. ADAMS, *THE EDUCATION OF HENRY ADAMS* (1918).

15. See ERIK H. ERIKSON, *INSIGHT AND RESPONSIBILITY* (1964).

The practitioner may find that the most valuable part of *Women and The Law* is the legal analysis of federal legislation and constitutional issues. Most of the relevant statutes and court decisions are treated in depth but one must caution against the automatic transfer of principles evolved from cases of racial discrimination to those where the discrimination is based on sex. To some extent, sex is *sui generis*, the law of obscenity to the contrary notwithstanding. Perhaps it is becoming modesty for the author to devote more space to law than to women, and certainly the former may be more knowable. There also is the male concern that females may abuse their independence and equality so that others than Portnoy will complain, and there remains the suspicion that regardless of law, custom, or religion, many, if not most, females always have been able to achieve their will or whim if they cared to make the effort. Finally, it is noteworthy that Professor Kanowitz ignores the current discrimination against men and in favor of women in many areas of family law, such as that pertaining to custody and alimony, where only self-help by the man evens things up so as to avert total subjugation. If one places *Women and The Law* on the shelf next to *A Generation of Vipers*, perhaps a fair balance is struck.