

Heather Roberts review of Hilary Heilbron, *Rose Heilbron*; Evan Thomas, *First*; Pamela Burton, *From Moree to Mabo*; and Constance Backhouse, *Claire L'Heureux-Dubé*

Hilary Heilbron, *Rose Heilbron: Legal Pioneer of the 20th Century, Inspiring Advocate Who Became England's First Woman Judge* (Oxford, UK: Hart Publishing, 2012), 382 pp., HB \$50, ISBN 9781849464017

Evan Thomas, *First: Sandra Day O'Connor* (New York: Random House, 2019), 512 pp., HB \$52.99, ISBN 9780399589287

Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (Crawley, WA: UWA Publishing, 2010), 512 pp., PB \$49.95, ISBN 9781742580982

Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: UBC Press for the Osgoode Society for Canadian Legal History, 2017), 768 pp., HB CA\$49.95, ISBN 9780774836326

On 24 September 2019 Baroness Brenda Hale delivered the judgment on the question of whether the prime minister had lawfully suspended parliament. The decision was eagerly anticipated worldwide, in some quarters with a near prurient interest into the democratic misadventures, and constitutional conundrums, facing the United Kingdom in its advance towards Brexit. A topic of equal interest, it seemed, was the dramatic spider brooch Baroness Hale was wearing when she delivered the judgment in a television broadcast. Internet memes, and searches for arachnid-related products skyrocketed. As did Google searches for 'Baroness Hale'. Who was this 'power dressing' judge—the first woman to be appointed President of the Supreme Court—whose court was holding Prime Minister Boris Johnson to account?

The stories of the 'FW2' (First Woman To), the female pioneers into an industry or profession, have always attracted media and public attention, including interest in their sartorial choices, appearance, and marital and parenting credentials. For biographers and historians, their stories allow an insight into how women have negotiated the pressures of being 'first' and of entering the distinctive cultures of male-dominated professions, and the broader backdrop of systemic socioeconomic pressures uniquely faced by women of their eras. Four biographies of women judges published in the last decade illustrate the shared pressures they faced, across 4 nations, distinct time periods and waves of feminist activism. Each biography also demonstrates the different choices made by the women, and their biographers, in telling the stories of women navigating a successful life in law.

Rose Heilbron: Legal Pioneer of the 20th Century, Inspiring Advocate Who Became England's First Woman Judge is an affectionate biographical memoir written by Hilary Heilbron, Rose Heilbron's daughter. The book's subtitle leaves little doubt as to the historic significance of Rose Heilbron's contribution to the British legal landscape. Informed in part by a private diary, personal recollections and court records, Hilary Heilbron is able to take the reader into glimpses of how Rose Heilbron prepared for cases, and her often self-critical inner thoughts about her career and relationships. The biography also offers some insights into how Rose 'made it work' being wife/mother and successful lawyer in the 1950s, at a time when those roles were usually filled by two separate people in a marriage. A poignant anecdote in the book speaks to both the highly unusual phenomenon of the 'working mother' of Rose Heilbron's era, and the power of the cultural norms Rose was attempting to challenge. When Rose's sister-in-law visited for the first time to meet her niece, Hilary, then 11 months, she went with Rose to the nursery:

[Hilary] rose on her chubby little legs gurgling with delight at recognising her mother, to which her sister-in-law commented in surprise and amazement 'Gosh, she knows you!' (p. 100)

According to Hilary Heilbron, Rose would frequently recount the anecdote 'with some wry amusement' (p. 99). The assumptions underpinning the story go a long way to explaining the emphasis in the biography on the positive *presence* of her mother in Hilary's life, both physical and emotional. Contemporary working parents will also find much that continues to resonate in these stories, in the challenges of attempting to forge 'work/life balance' in a marriage with two busy professionals.

First is the latest biography of Sandra Day O'Connor, the first female Justice of the Supreme Court of the United States (US), appointed in 1981. Evan Thomas's biography has the advantage of access to the previously private diaries of both Sandra Day and John O'Connor, as well as interviews of friends, family and clerks of the Justice. This allows Thomas to weave a rich tapestry of the journey of this US legal pioneer to the bench, and reveal previously unconfirmed incidents in her personal story. For example, Thomas can confirm that Sandra Day O'Connor had received, and declined, an offer of marriage—written by hand—from her later fellow Justice, and Chief Justice, on the US Supreme Court, William Rehnquist. When discussing the leading, and highly controversial, cases that marked out O'Connor's tenure on the bench, Thomas's access also allows a 'behind the scenes' glance at how decision-making occurs, including the personal tensions that can play a significant part in how judgment emerges from the US Supreme Court. As a journalist, Thomas's discussion of the legal cases is more light-touch than that of the practising barrister Hilary Heilbron, while still ensuring that the reader is left in no doubt of the pragmatic, highly intelligent judge's contribution to the court, and her capacity to carve out her own distinctive judicial philosophy. Contemporary readers will engage particularly with Chapter 6, which explores the infamous confirmation

process for US Supreme Court Justices undertaken by the United States Senate Judiciary Committee. Thomas refers explicitly and at length to the 'balancing act' required of O'Connor as part of this process, and throughout her career: the 'FW2' inevitably negotiating the double-bind faced by women of not being masculinist, and thereby conforming to gender-norms of the supportive spouse and homemaker, while simultaneously not being too feminine to hold positions of public power. O'Connor emerged unscathed by the confirmation process with a unanimous 99-0 vote in her favour.

Former lawyer Pamela Burton, in contrast to Heilbron, Thomas and Backhouse (the author of the fourth biography in this review), attempted to tell her story of Mary Gaudron without any support or assistance of her subject. As Burton explains, the biography was 'not in any sense authorised' (p. xv); Australia's first woman High Court Justice refused to be interviewed or allow Burton access to her personal papers. Unsurprisingly, unaided by these sources Burton pays more limited attention to Gaudron's interior mind, although what emerges clearly from the biography is Gaudron's motivation (shared also by O'Connor) not simply to inhabit the judicial office, but to prove that she was more than equal to the task:

I do not want to be the first and last. People might say 'we tried a woman once and it did not work'. (Gaudron quoted at p. 269)

That level of determination was required of Gaudron to succeed in law. Appointed to the High Court of Australia as its first woman judge in 1987, Gaudron had forged her career in an era in Australia when married women could not work for the Commonwealth Public Service; when it was questioned whether the top student in a law class should be awarded a University Medal, as a man was 'more likely to obtain benefit' from the award (p. 62); and when women were refused rooms in barristers chambers because 'it was felt that the company of a woman on the floor would be either disruptive or, at the least, uncongenial' (p. 78). While Burton devotes less attention to Gaudron's personal life than do Heilbron and Thomas, the careful navigation needed to 'balance' personal and private lives, and the impact of gendered expectations regarding childcare in particular, remains apparent throughout the biography. 'Problems with teenage children do not evaporate when their mother becomes a High Court Judge', Gaudron is reputed to have observed, and judges remain the children's 'taxi service' (p. 266). However, the biography is prominently focused on Gaudron's legal legacy, with detailed discussions of her key contribution to many of the High Court decisions that have shaped modern Australian legal and political life. This includes the eponymous *Mabo v Queensland (No 2)* (1992) 175 CLR 1, which historically recognised Indigenous Australian native title interests. As such, it is an important aid in understanding a key period in the Australian legal landscape, and the journey and legacy of an important legal icon.

Like Mary Gaudron, Claire L'Heureux-Dubé was appointed to her nation's highest court, the Supreme Court of Canada, in 1987. However unlike Gaudron, and O'Connor, L'Heureux-Dubé was the *second* woman to join the Supreme Court of Canada. Iconic and controversial, L'Heureux-Dubé was the first francophone woman to join that court, having originated from Quebec where she had been the first woman to sit in Quebec City on the Quebec Superior Court (in 1973), and the first woman appointed to the Quebec City Court of Appeal (in 1979). Like Heilbron, O'Connor and Gaudron, L'Heureux-Dubé faced 'brutal' gender discrimination, 'marked irrefutably as an outsider by gender, captured in group portraits as the lone female in the crowd' (p. 5). A renowned feminist legal scholar herself, Constance Backhouse explores the legacy and impact of the court's 'great dissenter', and deftly interrogates the impact of her many identities on her experience as 'First/Second' on the court. Backhouse's work is rigorously researched, with its final 200 pages devoted to extensive referencing, bibliography and index. As a legal academic, I find comfort in such referencing, as it opens the source material to reader engagement, critique and further exploration, and matches the critical evaluation offered by Backhouse of L'Heureux-Dubé's contradiction, complexities and legacy. This does not mean that Backhouse's work is turgid legalese. The biography is impeccably written, engaging, insightful and an important treatment of its subject matter. It also stands as an exemplar of best scholarly practice in the under-represented genre of judicial biography.

Backhouse's approach to the structure of her narrative illustrates the self-consciously critical nature of her account of her subject. In contrast to works that adopt a cradle to end of career approach, Backhouse commences with a discussion of L'Heureux-Dubé's most controversial decision, that of *R v Ewanchuk* [1999] 1 SCR 330. As Backhouse's detailed yet accessible prose indicates, this was a pivotal case both in the trajectory of Canadian jurisprudence on gender and the law, and in the framing of L'Heureux-Dubé as a feminist icon and divisive figure in Canadian legal and political imagination. Recounting her multifaceted reputation at the outset reinforces that for Backhouse complexity is a feature of both her biography and L'Heureux-Dubé that can be embraced and not sidelined in the telling of this story. In this regard the contrast to Thomas's discussion of O'Connor's record on abortion is striking. O'Connor was regarded by many in the United States, as Thomas reflects, as a controversial figure—for both her incrementalism and pragmatic decision-making, and her capacity to be the 'middle' voice for her era on the court. In some respects Backhouse's task was simpler in framing a gripping biography: known as the fiery 'tiger' on the court, L'Heureux-Dubé was regarded by some as a figure courting controversy, and was also renowned for her dramatic language and decision-making style. *Ewanchuk*, for example, saw judicial complaints made against L'Heureux-Dubé for her calling out of what she perceived to be gender discrimination by a lower court

judge. The recurring complaint against O'Connor was instead that one could not be sure where she stood on an issue and, particularly, that her views on abortion were 'opaque', and her judgments rarely 'memorable'. And yet, for a time, O'Connor was reputedly the most powerful woman in America.

What Backhouse's 768 pages (including 200 pages of notes and index) also deftly accomplishes is an exploration of the *intersectionality* of discrimination. L'Heureux-Dubé was the first francophone woman on the court, and Backhouse's decision to use French and English throughout the text ensures that L'Heureux-Dubé's inhabiting of both worlds is always front in the reader's mind. This also reinforces the tensions in L'Heureux-Dubé jurisprudence, discussed by Backhouse, that is that the judge was cognisant to discrimination faced by some groups (such as women and children) but not to the prejudice encountered by others. According to Backhouse, the fact that the judge had had a privileged education by nuns lead to a strong sense of self-confidence, which meant that L'Heureux-Dubé held a difficult relationship with feminism and the feminist movement. While Backhouse brings these complexities into full view in her biography, the question of race is left relatively unexplored by Hilary Heilbron. Rose, in addition to being the first woman judge in the United Kingdom, was also its first Jewish judge. The fact that Rose forged her career during the rise of Nazism is underdeveloped by Heilbron. It is unclear, at least to an Australian reader, the extent to which Rose benefited from patronage of Jewish solicitors in forging her career. As Backhouse noted, '[g]etting started in law was a difficult proposition for anyone, male or female, who did not have an elite family background or legal connections' (p. 135). Increased attention in Heilbron's account to how the combination of gender and race impacted in Rose Heilbron's early career would have provided the reader with greater contextual understanding of Heilbron's 'outsider' status, and in turn enriched the generational, class and cultural portrait that could have emerged of this remarkable woman.

A subject that Heilbron, Thomas, Burton and Backhouse each explore, in different ways is the question of their subject's status as 'mother judge'. Is it possible to be a judge and a mother? The social expectations surrounding the 'good' mother (and how the absence of children can itself be a black-mark against professional women) are topics of continuing resonance. As is the question why men are rarely asked whether they can be *good father* judges, a topic Annabel Crabb recently queried in her *Quarterly Essay*.¹ For each pioneer woman Justice, it is clear that the struggle of 'balance' was one that touched their lives and their management of their careers. For each, accepting help was essential, as was functioning on minimal sleep. With varying levels of critical engagement, and aided by differentiated access to their subjects, what emerges from these books is that each woman dealt with the 'ordinary' challenge of parenting in different ways, just as their approach to judging

1 Annabel Crabb, 'Men at Work', *Quarterly Essay* (September 2019).

demonstrated that there is no one way to inhabit the role of ‘woman judge’. With each book underpinned by these questions, alongside the essential question of the attributes of a good judge, both collectively, and individually, Heilbron, Thomas, Burton and Backhouse provide the reader with much to explore.

This text is taken from *Australian Journal of Biography and History*:
No. 4, 2020, published 2020 by ANU Press, The Australian National
University, Canberra, Australia.