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Chapter 19

Canadian Approaches to Equality Rights and Gender Equity in the Courts

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Introduction

[T]he history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an over-bearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in man's world, to develop a set of legislative reforms in order to place women in the same place as men. . . . It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights.[1]

Equality has always been a very difficult concept for judges, lawyers, law professors, and other students of the law to define or describe. The reason is, as Justice Rosalie Abella of the Ontario Court of Appeal puts it, that

Equality is evolutionary, in process as well as in substance, it is cumulative, it is contextual, and it is persistent. Equality is, at the very least freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight. What we tolerated as a society 100, 50 or even 10 years ago is no longer necessarily tolerable. Equality is thus a process, a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness. If in this on-going process we are not always sure what "equality" means, most of us have a good understanding of what is "fair."[2]

And the way women's rights are treated in all areas of the world, in many ways is not fair. It is now widely documented and accepted that

international norms and institutions were designed by men primarily to serve men's interests.[3] Women have barely been visible in systems that create, interpret, and apply laws.[4] If women are served by them, it is in a derivative way—when they suffer violations in the same way as men. This privileges the male world-view and supports male dominance in the international order. Issues of concern to men are seen as general human concerns, while those of women are relegated to a specialized limited category of women's rights that under analysis, do not amount to "human rights" as we know them.

The purpose of this paper is to first show how barriers to the achievement of gender equality for women are created by theories of equality that do not work and by gender bias in judicial decisions. Unless both these problems are dealt with, women will not achieve legal or social equality. The second purpose of the paper is to suggest some theoretical and practical strategies that may improve the status, recognition, and implementation of women's rights such that they are given the same weight and respect as men's rights.

The Problem

One of the primary emphases of the United Nations Charter as well as the Universal Declaration is equality.[5] The International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights both give legal force to the equality guarantees but do not define them. To fill the gaps, the United Nations Commission on the Status of Women labored for many years—more than thirty—to amplify the general discrimination prohibitions. It brought to light almost all the areas of life in which women are denied equality with men. As a result of these efforts, several declarations and conventions were drafted and subsequently ratified by many countries[6]—the central, most important, and comprehensive document being the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention).[7] It deals with civil rights and the legal status of women, reproduction, and the impact of cultural norms on gender relations. It emphasizes rights of political participation, nationality rights, nondiscrimination rights in education, employment, and economic and social activities. It asserts equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights, and command over property. It requires that rules intentional or unintentional treating women differently from men cannot be tolerated, particularly when they are based on prejudice and inaccurate generalizations about women. Although there are a number of provisions requiring women to be treated the same as hypothetical men in similar

situations, read as a whole, the concept of equality in the Women's Convention clearly extends beyond formal de jure equality to address unintentional, systemic forms of discrimination and equality of result.

In the area of reproduction, for example, it recognizes that equality requires legal norms to go beyond gender neutrality or treating women in the same way as men. It makes the connection between discrimination against women and women's unique reproductive role. By recognizing that women's equality requires states parties to guarantee women's rights to decide on the number and spacing of pregnancies and to have access to information and means to exercise these rights, the Women's Convention comes to grips with the realities of gender difference and the social and economic consequences of pregnancy. It acknowledges that gender discrimination is often caused by stereotyped sex roles when it demands fully shared responsibility for child-rearing by both sexes. Maternity protection and child care are proclaimed as essential positive rights saying that states have an obligation to provide services to enable individuals to combine family responsibilities with work and participation in public life.

Finally, the Women's Convention identifies the generic, structural sources of inequality. It identifies culture and the use of stereotypes, customs, and norms as potential barriers to women's enjoyment of equality. States are exhorted to modify such customs and practices when they encourage the domination of women by men. In other words, it obliges them to change not only negative laws but negative culture. In summary, it recognizes that, in order to achieve gender equality, a multifaceted approach is required. In some instances, equality requires that women cannot be denied opportunities and benefits enjoyed by men. In others, women must be empowered to determine their own destinies, defined by their own priorities and needs. Unlike the non-interference role required for the protection of civil liberties, states have a crucial, proactive role to play if gender equality is to be achieved. Unfortunately, very few states have either accepted or performed this role.

The Women's Convention was adopted by the UN General Assembly in 1979 and ratified or acceded to by 126 countries as of August, 1993, but the global status of women shows no significant improvement since the Convention was drafted. Many reasons have been suggested for the abysmal lack of progress[8] not the least of which are the large number of reservations to the Convention;[9] its much weaker implementation procedures compared to other antidiscrimination conventions; and a male-centered conceptualization of rights that determines the interpretation and application of modern human rights law.

Male-centered conceptualizations of rights have tended to ignore or

diminish women's experiences in the application and interpretation of human rights in the courts and other decision-making bodies.[10] Although judicial and quasi-judicial bodies are not entirely to blame for the low status of women, numerous studies show that one of the most formidable barriers to women's equality is gender bias in the courts.[11] The results of judicial decisions are often discriminatory and harmful to women. For example, the freedom of religion guarantee more often than not has been interpreted by the judiciary to operate to the detriment of women. When certain religious practices undermine women's bodily security, social position, and status[12] and women's rights are not considered, religion-related issues such as marriage, divorce, custody, property rights, and participation in public life allow men to exercise their freedoms at the expense of women.[13] Internationally recognized rights applicable to the family raise the same problems, couched in different terms.[14] If the perspective of women is not considered when family rights are challenged or interpreted, the unequal power division and stereotyped sex roles within families, which usually favor men, are institutionalized. This results in legalized male dominance and female subordination on such "family" matters as birth control, access to abortion, spousal violence, citizenship, and economic independence.

Women's gender equality rights and traditional values may also clash in the context of the right to development. When it is interpreted in a gender-blind way, traditional theories, strategies, and solutions to deal with development, growth, and under-development tend to ignore the role of women. In Africa, for example, where women produce 75 percent of the agricultural food products,[15] development policies and strategies that fail to take women's concerns and realities into account not only violate women's human rights to development but doom themselves to failure.[16] Furthermore, when the "neutral" language of development and economics fails to challenge the sexist assumption that women's work is of a different or lesser order than that of men, the work women do is often rendered invisible. Universally, reproduction, child care, domestic work, and subsistence production have been excluded from the measurement of economic productivity and growth. This has been particularly detrimental to women in developing countries.[17]

Many other examples can be offered from areas such as refugee law, humanitarian law, children's rights, and environmental law. All demonstrate the same point. Where general "human" norms are equated with male norms, the interests, rights, and concerns of women tend to disappear. Feminist analyses of international law suggest that the problem is global. Men of all nations have used the statist system to establish economic and nationalist priorities to serve males while the

basic human, social, and economic needs of women are not met. In both developed and developing countries, the power structures and decision-making processes exclude women, who, in every society, are the poorest and least privileged.

It is clear that if women's rights are to be recognized and protected and if women are to achieve equality, existing models and values must be questioned and traditional theories, foundations, and boundaries challenged. More women must participate in male-dominated human rights institutions, in the courts and in other centers of legal decision making. Most important, the international human rights emphasis must shift from the discussion and setting of norms to implementation of rights. One of the challenges is to discover ways to use the Women's Convention effectively to deliver substantive gender equality in countries bound by its terms. One approach lies in an interpretation of the Women's Convention that invalidates narrow, male-centered conceptualizations of equality and other rights that disadvantage women. Strategies must be developed to ensure that women's voices are heard, that gender-biased myths that buttress the law are removed, that principles applied to the law involve and support women in the legal system, and that judges and other actors in the administration of justice respond to women's needs.

In the next section, a theory of equality is described which if applied in the Courts could achieve equality under the law for women and lead to social equality in real life. I explain that an understanding of equality in terms of socially created advantage and disadvantage instead of sameness and difference, applied to international human rights law including the Women's Convention, could profoundly influence domestic law. In the second section I describe a judicial education strategy designed to implement the theory at the grass-roots level of domestic law as well as at the international level. The suggestions are based on experiences in Canada where such strategies have achieved some notable results and have provided a focus for action and consciousness-raising.[18] It is my view that the Canadian model could be adapted to achieve a similar result at the international level.

Theories of Equality

In order for women to engage the law's transformative potential, there must be a legal framework with enough flexibility to permit the development of a theory of equality that will advance women's interests, identify and recognize violations of their rights, and lead to effective remedies. It is clear from the extraordinary number of reservations to the terms of the Women's Convention[19] that countries have widely dif-

ferent views on what constitutes discrimination against women. Drawing the line between "justified" and "unjustified" distinctions, determining whether or not intention is a requirement for discrimination, deciding on the relevance of purpose and effect—all these choices have led to different interpretations and different results in equality cases.[20] The reason is that the theories behind the choices lack a principled base, a clear, unequivocal purpose to eliminate disadvantage and reliance on unjustified stereotypes which relegate women to second class status from the outset.

In most countries of the world, if equality for women is legally acknowledged at all, it is understood in the Aristotelian sense.[21] Equality norms require that likes be treated alike and permit unalikes to be treated differently. Put another way, equality law is a law of sameness and difference. This is a problem for women because their social reality consists of systemic deprivation of power, resources, and respect. Men do not experience long-term, widespread social conditioning in systemic subordination as women do. Most often, the second class citizenship women endure ensures their difference from men, so it makes no sense to require them to be the "same" as socially advantaged men in order to be entitled to be treated equally. Moreover, the sameness/difference model does not allow for any questioning about the ways in which law has maintained and constructed the disadvantage of women, nor does it allow for an examination of the extent to which the law is male-defined and built on male conceptions of problems and of harms. Simply put, it does not permit effective implementation of equality rights when their infringement arises from female-specific circumstances.[22] For example, legal treatment of sexual harassment, prostitution, sexual assault, reproductive choice, and pornography cannot be characterized or questioned as sex equality issues because the male comparators have no comparable disadvantage or need. Women will always be "different." Even governmental action or inaction that furthers women's disadvantage in these sex-specific areas is not considered to be a violation of domestic sex equality guarantees or a violation of the Women's Convention.[23] The sameness/difference model is one of the reasons that rape of women in conditions of war has never been prosecuted as a war crime, yet torture, genocide, and other "gender-neutral" crimes have.

In addition to the male comparator problem, when equality is defined according to the sameness/difference model, the assumption is made that equality is the norm and that, from time to time, autonomous individuals are discriminated against. Systemic, persistent disadvantage is not contemplated. The Aristotelian model is incapable of proposing or restructuring or even identifying systematic discrimination in educational institutions, the workplace, the professions, the family, or the welfare system. It assumes these societal institutions should continue to exist as they are. To be equal, women just need the same chance as men to be able to participate in them.[24] This universalistic, gender-neutral approach does not recognize that institutional structures may impinge differently on men and women. Such an interpretation of discrimination cannot provide women with the systemic remedies they need such as employment equity, equal pay for equal work, adequate child care facilities, access to abortion and contraception, and literacy rights. Without systemic remedies, female occupational job ghettos will persist, women's lives will continue to be biologically determined and their low status will not improve.

Despite its superficial attractiveness and historical longevity, in practice the Aristotelian doctrine is more likely to perpetuate rather than eradicate inequality. When its use by legislators or the courts obstructs the achievement of equality for women, states should be challenged for violating the substance, intent, and spirit of the Committee for the Elimination of Discrimination Against Women as well as other international instruments that mandate gender equality.[25] This cannot be done however, until courts, human rights commissions, human rights committees, and other decision-making bodies reject the Aristotelian model and replace it with a more effective and principled approach.

The history of gender discrimination cases decided by the Canadian Supreme Court over the past ten years provides excellent illustration of the change in thinking that is required. Two earlier cases demonstrate how the Aristotelian theory was used to perpetuate gender inequality and why such use should be recognized as a violation of international law. More recent cases apply a different theory that is far more likely to achieve de facto equality.

The first case, *Bliss v. Attorney General of Canada*,[26] was decided in 1979. In the *Bliss* case, the Supreme Court of Canada was asked to consider whether an employment benefit provision was discriminatory when it required pregnant workers to meet more stringent requirements to access unemployment benefits than it required of men or non-pregnant workers. In deciding that there was no sex discrimination, the Court came to the bizarre conclusion that discrimination on the basis of pregnancy did not amount to discrimination on the basis of sex. The Court said if the government treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is because they are pregnant and not because they are women.

It is easy to see that interpretation of sex discrimination in this case was so narrow as to be perverse. Failure to acknowledge pregnancy as a

component of femaleness when interpreting discrimination not only exacerbates the social and economic disadvantage of women by forcing them to absorb all the costs of pregnancy, it distorts women's reality and perpetuates gender bias in the law. What is not so evident at first glance is the role played by the underlying theory of equality in driving the result.

The outcome of the *Bliss* case was effectively predetermined through the use of the male comparator or the sameness/difference approach. Compared to men, pregnant women will always be different and they will always be vulnerable to discriminatory treatment. One can readily see how women's opportunity to be treated equally is diminished. They can only demand equal treatment to the extent that they are the same as men. Compounding the difficulties was the further reasoning that even if the discrimination test was satisfied, it was not discriminatory to confer benefits in an unequal way, as the equality guarantees were interpreted as being applicable only to imposed burdens. This, of course, ignored the reality that for those who need them, discriminatory allocation of benefits can be just as damaging as or even more damaging than discriminatory burdens.

A second example of a perverse application of the theory was the case of *Attorney General of Canada v. Lavell; Issac v. Bedard.*[27] In this case, the sameness/difference definition of discrimination was used to perpetuate and condone flagrant discrimination against aboriginal women. The case arose when two native women challenged a section of the Federal Indian Act[28] that disqualified them from claiming their Indian status if they married outside their race. The challenge was made under the sex equality provision that guaranteed equality before the law and equal protection of the law,[29] because Indian males who married non-Indian women did not suffer the same disqualification. Upon marrying non-Indian women, males not only retained their Indian status, they automatically conferred Indian rights and status on their non-Indian wives and children. The effect of losing statutory Indian status meant that, on marriage to a non-Indian, women were required to leave their reserve. They could not own property on that reserve and were required to dispose of any property they might have held up to the time of marriage. They could be prevented from inheriting property and could take no further part in band business. Because their children were not recognized as Indian, they too were denied access to cultural and social amenities of the community. The women could also be prevented from returning to live with their families on the reserve notwithstanding dire need, illness, widowhood, divorce, or separation. The discrimination even reached beyond life—they could not be buried on the reserves with their ancestors.[30]

When this institutionalized gender inequality was put before the Supreme Court of Canada, it found that the legislation did not violate sex equality rights. Without providing any principled rationale, the Court merely said that Indian women were not the same as Indian men and could not be compared to them. As long as all Indian women were treated the same, no violation of "equality before the law" or "equal protection of the law" occurred. The Court interpreted the section to guarantee only procedural, not substantive equality. It refused to consider the inherent unfairness or adverse effect of the law on women.

It is difficult to see how either of the above decisions could amount to anything but violations of the Women's Convention and other gender equality provisions of international and regional human rights conventions. At the international level, a state is responsible for the conduct of its judiciary when the use of its legal doctrine violates human rights norms. This is especially true when, as in both *Bliss* and *Lavell*, the decisions came from the court of last resort.[31] Nevertheless, this situation in Canada persisted until 1989, when the Supreme Court, in the first case requiring an interpretation of the equality guarantee in Canada's newly entrenched Charter of Rights and Freedoms, threw out the Aristotelian similarly situated test in no uncertain terms saying it could justify even Hitler's Nuremberg Laws.[32] It was replaced with a new test that focuses on the impact of laws and on the context of the plaintiff. This test, I believe, corrects the gender bias problem, is fairer, has a much greater chance of achieving real equality, and is consistent with the norms set out in the Women's Convention.

The new Canadian test determines discrimination in terms of disadvantage. No comparator, male or otherwise, is required. If a person is a member of a persistently disadvantaged group and can show that a distinction based on personal characteristics of the individual or group not imposed on others continues or worsens that disadvantage, the distinction is discriminatory whether intentional or not. Disadvantage is determined contextually by examining the plaintiff's social, political, and legal reality. Unlike the test of "similarity and difference," the test of "disadvantage" requires judges to look at women or other claimants in their place in the real world and to confront the reality that the systemic abuse and deprivation of power women experience is because of their place in the sexual hierarchy. When a constitutional case is taken, women have the opportunity to challenge male-defined structures and institutions and demonstrate how it is only through norms based on their own needs and characteristics that equality will be achieved. This is not to rule out that in some cases appropriate remedies will require identical treatment with men. In others, however, the male comparator will be irrelevant. Only this type of result-oriented, contextual view of

equality, permitting both facially neutral and gender-specific laws or policies to be questioned for a disparate impact on individual women or women as a group, will deliver de facto equality.

In the remedial context, the effects-based approach opens the door for development and growth of positive rights. For example, a purposive response to under-inclusive benefits legislation would be to "read-in" the excluded group rather than to strike down the legislation[33] in order to alleviate the disadvantage it causes or exacerbates. While striking down under-inclusive legislation may meet technical constitutional requirements, in reality it increases disadvantage. It is a kind of "dog-in-the-manger" remedy that helps no one. An example would be striking down under-inclusive welfare legislation allowing only single mothers to apply for benefits. Reading in single fathers rather than striking down legislation solves the constitutional problem and keeps food on the table whether needy parents be female or male.

It is interesting to look at the difference the new equality theory made when it was applied to a pregnancy discrimination case decided ten years after *Bliss* in the same Supreme Court of Canada. In *Brooks v. Canada Safeway Ltd.*,[34] pregnant women workers had received disfavored treatment in comparison with males and non-pregnant women in terms of benefit provisions. This time, the Court not only found it unnecessary to find a male equivalent to the condition of pregnancy, it specifically held that the disadvantage the pregnant women suffer comes about because of their condition—because of their difference. In order to determine whether discrimination on the basis of sex occurred, the Chief Justice situated the pregnant women in reality, in their own context. Once this step was taken, it was impossible not to find that differential treatment on the basis of pregnancy was anything but discrimination on the basis of sex. The Court stated:

> Combining work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged, seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.[35]

In the same vein, a case dealing with sexual harassment and the issue of sex discrimination was resolved by situating sexually harassed women in the context of their own workplace reality of economic disadvantage and lack of access to power. The Supreme Court unanimously overturned a lower court's decision that had left the plaintiffs without a remedy by concluding that sexual harassment did not constitute sex discrimination.[36] In rejecting the lower court's decision, the Supreme Court explained the relationship between sexual harassment and gender, how sexual harassment has a differential, negative impact on women in terms of the gender hierarchy in the labor force and the inherent "abuse of both economic and sexual power."[37]

The Court understood that, in the context of a deeply sexist society that objectifies women's bodies and perpetuates a male-defined image of sexual attractiveness, the practice of sexual harassment cannot be separated from the unequal relations of sexual interaction that disadvantage women.[38] The Court noted with approval the view that a hostile or offensive working environment created by sexual harassment is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.[39] This contextual approach to women's sexuality if applied to other gender-specific laws would be of great assistance to women. Reproductive self determination and sexual assault are good examples. If laws limiting women's access to reproductive control were to be examined in terms of whether or not they increase the persistent disadvantaged status of women, I think they would be found to be discriminatory. Similarly, laws that require sexual assault survivors to be subjected to degrading forms of questioning; or to meet evidentiary requirements not demanded of other victims of violent crime (such as recent complaint or corroboration); or sentencing patterns that show batterers of women treated more leniently than other assaulters; or police practices showing slack enforcement of sexual assault or wife abuse laws—all of these matters could be framed as discrimination cases if discrimination were defined in terms of disadvantage to already disadvantaged claimants.[40]

The disadvantage test is also effective when used as a shield rather than as a sword. The Canadian Supreme Court's decision in *R. v. Keegstra*[41] illustrates the point in the context of race, ethnicity, and religion. This was a case involving a constitutional challenge to hate propaganda laws in the Criminal Code[42] as a violation of freedom of expression. The Court upheld the anti-hate law, advancing an equality harm-based rationale to support limitations on speech. It said that not only can the constitutional guarantee of equality be used to strike down laws that discriminate, it can also be used to constitutionally *support* laws that further equality. It held that the objective of promoting social equality that lies behind constitutional guarantees is relevant to the inquiry about justifiable limits on freedom of expression. Just as in the cases where the equality guarantee was directly engaged, the Court in *Keegstra* examined the larger social, political, and legal context of the

target groups protected by the hate propaganda provisions and balanced them against the free speech interests between equality and freedom of expression of hate mongers. In other words, the Court contemplated the social meaning of hate propaganda and uncovered its harmful effects. Once revealed, the balancing of interests favored equality. The decision demonstrates that equality is a positive right, that equality provisions have a large remedial component, and that legislatures should take positive measures to improve the status of disadvantaged groups. Most important, the *Keegstra* decision identifies the transformative potential of equality rights when they are properly interpreted.

The Court further clarified and strengthened this position in the first case to challenge obscenity laws as a violation of the freedom of expression guarantee under the Charter.[43] Once the Court examined the threat pornography posed to women's equality rights, it unanimously found that pornography presents an even stronger case for regulation than hate propaganda does. The Court adopted a contextualized approach which revealed that pornography is much more commonplace, socially accepted, and widely distributed across class, race, and geographical boundaries than hate propaganda, and that it exists in a context of social inequality. It said that the most serious risk of harm arises when the material in question presents sexual representations that degrade and dehumanize the participants, subjects them to violence, and reduces them to mere objects of sexual access. Women's disadvantage viewed in the larger context—including rape, battery, prostitution, incest, and sexual harassment, when placed beside the encouragement and promotion of women's subordination in pornography, demonstrated its undermining effects on women's legal and social equality as well as their bodily security rights.

The Court logically concluded that the deeper, wider, and more damaging harm to social life caused by pornography, as compared to hate propaganda, outweighs any free speech interest of pornographers or their consumers. In a society where gender inequality and sexual violence exist as entrenched and widespread social problems, it makes sense that criminal legislation with the objective of prohibiting material that attempts to make degradation, humiliation, victimization, and violence against women appear normal and acceptable is constitutionally valid.

The foregoing cases demonstrate a re-thinking of equality. They exemplify an analytical approach that favors context rather than detached objectivity—an approach that expands the perimeters of the discussion, exposing underlying facts and issues. The cases demonstrate that in order to redress past wrongs, equality must be taken

beyond formalistic, abstract principles. Where barriers impede fairness for some individuals, they must be removed. This mandates a theory that permits flexibility, understanding, and empathy in judicial response.

Judicial Gender Bias

The foregoing analysis underscores the crucial role that judges and other actors in the administration of justice play in the achievement of rights for women. In many ways, the judiciary in particular is the institution on which women's rights ultimately depend. Judges are responsible for deciding how and when international human rights law generally and the Women's Convention specifically will be applied at the local level and the degree to which legal systems can be made to conform to international standards.[44] An effective theory of equality is essential, but just as important is the use judges make of it. Experience has shown that even the most progressive legal reforms can be thwarted by a stroke of the judicial pen.[45] Extensive research over the past twenty years demonstrates that judicial decisions in many other areas of the law are influenced by biased attitudes, sex stereotypes, myths, and misconceptions about the relative worth of men and women, and the nature and roles of the sexes.[46] Consequently, women are often denied equal justice, equal treatment and equal opportunity by the courts as well as by governments. In addition to areas of law already discussed above, distortions of substantive law through gender bias occur in areas such as damage awards, treatment of wife abuse, criminal law, matrimonial law, and sentencing practices, to name a few. Brief descriptions of the effect of judicial gender bias in each of these areas follow.

Damages

In tort law one sees judicial gender bias at the theoretical level as well as in process and application of the common law including in the assessment of damages. Gender bias becomes embedded in the substantive law from actions such as the *actio per quod*, which recognizes a husband's claims when his wife is injured. The action treats the marital relation as one of master-servant. When a wife is injured, the husband is compensated for the loss of his wife's services including homemaking and sexual relations. At the same time, the action is not available to wives whose husbands are injured. This gender bias influences much of the present day tort law as it applies to homemakers. The concept of equal interdependency in marriage is not accepted by judges in their per-

sonal injury damage assessments. It is only very recently that judges in Canada have recognized that impairment of homemaking capacity can be a compensable loss to the homemaker rather than her spouse. But even where assessments have been granted, they have been pathetically meager, especially when compared to damages awarded for impairment of working capacity outside the home. On the other hand, where actions for compensation are based on wrongful death of wives the damages assessments are much higher.[47] This is because the husband's claim is on a basis similar to the old *actio per quod* and the cost of a market replacement for the wife must be calculated. Judges who are more used to being homemakees rather than homemakers,[48] recognize that husbands whose wives have been killed will have to hire child care workers, cooks, chauffeurs, and housekeepers and award damages accordingly.

Family Law

In family law, gender bias exists in underlying assumptions and stereotypes that affect division of property, alimony, child support, and custody awards. In the western world, researchers have traced the "feminization of poverty" directly to judicial misinformation and misunderstanding about the economic and social realities of women and men. They have concluded that inequitable apportionment of the economic burdens of divorce has created an entire underclass of women and children.[49] Some of the misinformation judges rely on include inaccurate economic assumptions about the costs of raising children and unrealistic expectations about women's ability, especially that of middle aged and older women, to earn future income. When the earning power of women who have been out of the job market for many years is overestimated, alimony awards are seriously deficient. The research data show that men experience a 42 percent improvement in their post-divorce standard of living, while women experience a 73 percent loss.[50] In addition, division of property decisions show that judges undervalue the contribution of the wife-homemaker to the marriage. Seldom do judges take a homemaker's foregone income-generation potential and retirement funds into account in any significant way in considering contributions the wife makes to the marriage and career of her husband.[51]

With respect to child support, researchers have discovered that judges, for the most part, have unrealistic ideas of the costs of running a family and raising children[52] and award inadequate amounts of support payments. Some posit that the awards are based on what the father can afford without suffering a decline in his standard of living rather than on the children's needs. When payments fall into arrears, they are frequently forgiven by judges without justification.[53]

On the custody issue, the case law indicates that judges are influenced by traditional stereotypes that disadvantage non-traditional women who work outside the home and men who are primary caregivers. They assume children raised in homes with full-time homemakers are better off. The limits this places on the aspirations and goals of women affects their independence, economic security, and equality in a way that does not affect most men. It also fails to recognize that more often than not, the mother is the primary parent notwithstanding the fact that she may have responsibilities outside the home,[54] and that removing children from her custody does them more long-term harm than the lack of an idealized, stereotypical home life. Women often find themselves in a double bind when they are awarded custody but insufficient support to remain homemakers. Once they leave their homemaking jobs for the marketplace, they then lose custody when the fathers remarry and tell the judge their new wives will stay at home and be "proper" mothers for the children. Similarly, women who are battered often lose custody to fathers because of the lifestyle they are forced to adopt to protect themselves. Frequent changes of address are viewed as evidence of instability and the new wife of the batterer, especially if she is a "traditional" mother, will be viewed as the better caretaker for the children.[55]

Criminal Law

In criminal law, gender bias is found in many areas, but probably most notoriously in the judicial treatment of sexual assault and wife abuse. In many jurisdictions, there is a sweeping uncritical acceptance of the view that rape complainants are inherently suspect and may well make false accusations against men.[56] This puts the woman victim on trial in an unsympathetic, insensitive courtroom environment. The nature of the crime of rape, long-term psychological injury to the victim and the prevalence of the crime, especially acquaintance-rape, are subjects that researchers have discovered judges know little about.[57] This is often reflected in judge-made rules that require corroboration (or at least a warning of the dangers of convicting on the uncorroborated evidence of a rape complainant), or evidence of a recent complaint to support the credibility of the victim, or which permit questions on the past sexual history of the victim to attack her credibility. This not only relies on the sexist assumption that women who are sexually active with more than one man are liars, it turns the trial into a pornographic spectacle. As a result, victims of rape are often reluctant

to report the crime and suffer unequal protection of the law.[58] In sentencing practices, gender-biased mitigation principles partially or sometimes totally excuse male sexual violence through a "blame the victim" ideology, which limits women's freedom to dress as they like, walk when and where they choose, and drink as much as they want—limitations that are not placed on males. Some more extreme examples of this problem include cases where judges have blamed female children as young as three years of age for their abuse because of "sexual provocation."[59]

Victims of wife abuse face serious gender bias due to widespread judicial misunderstanding of the dynamics and seriousness of a battering relationship. This often leads to unjust conclusions being drawn about victims who are reluctant to leave a battering relationship or who do not cooperate in testifying.[60] When a woman is burdened by multiple disadvantages because of her race, disability, or other immutable characteristic, the harmful effects are magnified. Victims who stay in battering relationships are often blamed in a gender-biased way by judges who assess their behavior from a dominant, male perspective which demonstrates a lack of understanding of the context of inequality within which women live. First-hand accounts by many battered women demonstrate that they are often trapped in their relationships. A decision to stay with an abusive husband is perfectly reasonable if, from the wife's point of view, there is no other place to go. Financial and emotional dependence on their husbands; concern for the welfare and their custody of the children; lack of emergency housing and day care; lack of support from law enforcement agencies; the fear of public exposure; inadequate social support networks; the fear of greater injury; and the tendency of society to blame women rather than their assailants are some of the reasons battered women cite for staying in violent relationships.[61] All are related to the unequal social position of women.

These are but a few examples of gender bias. Many more could be offered to illustrate its existence. What must be understood is that gender bias in the application and interpretation of laws is important not only for individual women before the courts. To the extent that the justice system suffers from gender bias, the system fails in its primary societal responsibility to deliver justice impartially. As a consequence, the administration of justice as a whole suffers. The legitimacy of the entire system is brought into question.

What is the most troublesome and insidious aspect of the problem of gender bias in the courts is the failure of the legal establishment to recognize its existence. It often exists without the cognizance of either the individuals or institutions where it is practiced, be they courtrooms,

law schools or law firms. Ironically, the judiciary—the very institution that determines the effectiveness of efforts to achieve equality and which can undermine even the most progressive legal reforms through the exercise of judicial discretion and through courtroom behavior—is not scrutinized by social reformers and analysts for discriminatory biases. Why? Probably the main reason lies in the unquestioned and commonly held belief that judges are completely objective, disinterested, and impartial in all their work. The pervasive hold of the appealing and powerful idea of judicial neutrality has affected even those whose job it is to criticize and evaluate the judiciary. Lawyers and law professors have historically limited their inquiry and critiques of judgments to the logic and sensibility of the legal analysis they contain and their relationship to precedent. Occasionally the social, economic, or policy implications of judgments are discussed or evaluated, but rarely, if ever, are questions asked about judicial use of societally induced assumptions and untested beliefs—about the use of stereotypes that judge individuals on their group membership rather than on their individual characteristics, abilities, and needs. Law review articles are rarely written about judges who view issues solely from the dominant perspective, who neglect to consider alternative views, who over-simplify or trivialize the problems of women, or who fail to treat children seriously. The importance of variability of cultural, racial, and gender perspectives; of context, contingency, and change are neither discussed in classrooms nor in courtrooms.[62]

Another reason is the courts themselves. Until recently, the judicial arm of government has been loath to accept any culpability with regard to the disadvantaged status of women or other minority groups. The idea that courts could be acting in a manner prejudicial to a specific group in society is generally rejected outright.[63] The failure to entertain this possibility precludes any attempt to begin to rectify or redress the situation. To further complicate matters, the issue of bias is often personalized and reduced to assertions of individual judges denying prejudice on their part or on the part of their associates. This reaction is inappropriate because it confuses the concepts of overt discrimination with systemic discrimination. While there may still be some incidents of overt prejudice, they are relatively easy to identify and rectify. Systemic discrimination, on the other hand, is far more insidious and much more difficult to eradicate; to do so requires knowledge of its existence, its pervasiveness, and its consequences and an unremitting commitment to ending it. In Canada this reality is now accepted and recognized at the highest levels of the judiciary, the government, the bar, and in the legal academy.[64] To remedy this the following reform efforts are underway.

Judicial Education Programs to Eliminate Gender Bias in the Courts

In order to remove gender bias from the judicial processes, judges must be able to understand the impact of sex-role stereotypes, myths, and biases on their thinking and decision making. Deeply held cultural attitudes and beliefs about the "proper" roles for women and men must be examined and challenged where they interfere with the fair and equitable administration of justice. This requires education programs that stimulate a sense of personal discovery and enable judges to identify and eliminate their own biases. Presentation of new facts and sensibilities assists this process as does the involvement and commitment of non-judges. The key element to sustainable and successful reform, however, is the realization that change must come from within the judiciary and that judges must lead the program. Not only does this give the program legitimacy and credibility in the eyes of the judges, it addresses the requirement of judicial independence.

Two of the most active participants in judicial reform in Canada are the Western Judicial Education Centre (WJEC), a cooperative project of the Canadian Association of Provincial Court Judges and the International Project to Promote Fairness in the Administration of Justice, which operates in and outside of Canada.[65] The WJEC organizes continuing education programs for Provincial and Territorial Court Judges from western and northwestern Canada and the International Group, often working with WJEC, promotes judicial education in other countries through the presentation of seminars, teaching demonstrations, consultations, and dissemination of materials. Since 1988, the members of this cooperative group, assisted and supported by legal academics, the bar, community groups, and representatives of minorities have focused on developing programs dealing with delivery of justice to Aboriginal people, gender equality in judicial decision making, and racial, ethnic, and cultural equity. A central objective of the WJEC is to show judges how their own beliefs and attitudes affect impartiality and fairness. In addition, a "participatory" model of program delivery has been adopted which is capable of implementation in any part of the country at any level of court. A close association has been developed with law schools and continuing legal education societies in western Canada as well as with non-legal professionals and private citizens. Advice and direct resource commitment of these organizations and individuals is obtained, often at no charge. As a result, a strong community support base as well as a high-quality product has been created.

One of the key elements of WJEC programs is peer leadership. Judges are trained by credible "outsiders" to instruct and lead other judges in training-the-trainer sessions. While initially there was some concern expressed about "imposed agendas of special interest groups," it soon became apparent to the judges that, on the contrary, such sessions provided new facts and more precise knowledge which only helped them maintain their genuine commitment to fairness and impartiality. This method of delivery also challenges judges to participate and to take responsibility for their own continuing education, while at the same time allowing members of the broader community concerned with improving the quality of justice delivery to participate in the workshops and other sessions. Women, Aboriginal people, racial, cultural, and ethnic minority group members—people very unlike most judges—supply knowledge judges require but seldom receive. They describe and discuss the problems they experience in their daily lives as well as in the courts. They lead discussions, present papers, participate in social events, and sometimes provide entertainment to educate judges about their cultural and social reality. Over time these programs have grown significantly in scope and quality.

In May 1993, the fourth annual WJEC workshop attracted 330 judges and more than 60 faculty and advisors to Victoria, British Columbia for what was probably the best example to date of "hands-on" judicial education using the best adult education techniques and high quality interdisciplinary resources. Notwithstanding the WJEC's considerable progress, much remains to be done. If gender, race, and other forms of bias are to be eradicated from judicial decision making, the education of judges on these issues must be comprehensive, consistent, systematic, and of high quality. At the present time, there is no comprehensive long-term pan-Canadian plan for judicial education, no clearinghouse for materials, no consistent evaluative process providing reliable, comparative results. In order to support and validate the programs in the future as well as to document specific problems and trends, empirical data must be collected as an ongoing part of judicial education.

There is a danger that as the programs grow and develop, organizers may lose sight of the original goals. As new people with different agendas enter the programs, there are tendencies to alter directions and perspectives. One increasingly discernible trend in Canada is the tendency to focus on courtroom interaction rather than on substantive law. The pressures to emphasize this aspect of bias are considerable and must be avoided if the integrity of the fundamental premises of judicial education is to remain intact. Gender, race, and ethnic biases in courtroom interaction are important for judges to address but they are only symptomatic of deeper, doctrinal problems. Learning about more sensitive courtroom behavior does not require judges to re-think

the fundamental premises of their decision making and the patterns they form. Substantive inequities must be explained, understood, and changed if real, lasting reform is to occur in the administration of justice as a whole.

Conclusion

Canada has progressed on two fronts in ensuring that women's rights will be recognized and protected and that women will achieve de facto equality. The first is at the theoretical level in the adoption of a theory of equality that allows Canadian women to address, in equality terms, the deepest roots of discrimination that occurs to them as women, not just as women compared to men. If courts in other jurisdictions were to similarly interpret equality requirements in domestic and international law, a major barrier to the achievement of gender equality would be removed. The second is at the practical level in identifying and attempting to correct gender and race bias in the courts through judicial education programs. This is based on the understanding that equality will never be achieved unless the administration of justice is free from gender bias.

The acknowledgment in Canada that unequal and unfair treatment of women and racial minorities occurs within the judicial system was the important and crucial first step toward equality. The second step was the recognition that in order to remove these biases judges need better to understand the impact of variables such as gender, poverty, race, illiteracy, disabilities, discrimination, alcohol and drug abuse, sexual and physical abuse on social behavior and on their own decisions. This led to the further recognition that legal principles must be linked to the social context in order to achieve complete justice and fairness within the legal system.

By virtue of the fact that judges have taken a leadership role in opening the channels of communication, they have not only removed artificial barriers to the acquisition of important knowledge required to address issues previously unaddressed, but have set an important example for other actors in the legal system about self-examination and improvement. What is innovative and exciting about the new judicial education initiatives in Canada is the idea that the community, as well as judges, has a direct connection to and investment in the work that judges do.

One can only hope that this development will continue and flourish within the Canadian judiciary and expand into other jurisdictions.[66] It may be that a solution to the implementation of women's human rights will be found in the direction and leadership the judiciary in all countries of the world can provide. While it is fundamental that individual judges cannot substitute personal values and moral choices for those of elected legislatures—statutes, constitutions, and international human rights conventions do not interpret themselves. They are abstract concepts that require courts to breathe life into them. The judiciary has the power to permit equality to grow and flourish to meet the legitimate demands and aspirations of the female majority of the world's population. They also have the power to deny it. The ideas proposed here are only a means to an end. Their realization depends on judicial fidelity to their own ideals of objectivity, fairness, and impartiality.

Notes

1. Norcen Burrows, cited in *R. v. Morgentaler*, 1 S.C.R. 30 (1988) at 171–72 per Wilson, J.

2. Rosalie Abella, "The Evolutionary Nature of Equality," in *Equality and Judicial Neutrality*, ed. Kathleen E. Mahoney and Sheilah L. Martin (Toronto: Carswell, 1987), 4.

3. Laura Reanda, "Human Rights and Women's Rights: The United Nations Approach," *Hum. Rts. Q.* 3 (Spring 1981): 11; see also Margaret Schuler, ed., *Empowerment and the Law: Strategies of Third World Women* (Washington, DC: OEF International, 1986); and the North-South Institute, *Ours by Right*, ed. Joanna Kerr (London and New Jersey: Zed Books, 1993).

4. United Nations Department of International Economic and Social Affairs, *Compendium of Statistics and Indicators on the Situation of Women 1986* (New York: United Nations Statistical Office, Social Statistics and Indicators Series K, No. 5, 1989) 558–77; *Equal Time* (July 1985): 5; Brian Urquhart and Erskine Childers, "A World in Need of Leadership: Tomorrow's United Nations," *Development Dialogue* 1–2 (1990): 29; Andrew Brynes, "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of All Forms of Discrimination Against Women," *Yale J. Int'l L.* 14 (1989): 1; Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," *Am. J. Int'l L.* 85 (4) (1991): 613.

5. See Rebecca Cook, "International Law and Women," in *The United Nations Legal Order*, ed. Oscar Schachter and Christopher C. Joyner (Cambridge: Grotius Press, 1994).

6. For example, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 272 (1950); the Convention on the Political Rights of Women, 193 U.N.T.S. 135 (1953); the Convention on the Nationality of Married Women, 309 U.N.T.S. 65 (1957); and the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 521 U.N.T.S. 231 (1962).

7. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 34 U.N. GAOR Supp. (No. 21) (A/34/46) at 193, U.N. Doc. A/Res/34/180 (entered into force 3 September 1981).

8. See, e.g., Charlotte Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Hum. Rts. Q.* 12 (1990): 486; Charlesworth, Chinkin, and Wright, "Feminist Approaches," note 4.

9. At least 21 of the 126 states parties have filed a total of over eighty reservations to the Women's Convention, thereby limiting their obligations to ensure women's equality rights. By contrast, of the 123 states parties to the Convention on the Elimination of All Forms of Racial Discrimination, only two countries have filed reservations. Rebecca Cook, "Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women," *Va. J. Int'l L.* 30 (1990): 643, 644.

10. Rebecca Cook, "International Human Rights Law Concerning Women: Case Notes and Comments," *Vand. J. Transnat'l L.* 23 (1990): 779–818.

11. Schuler, ed., *Empowerment*, note 3. Kathleen Mahoney and Sheilah Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987); Elizabeth A. Sheehy and Susan B. Boyd, *Canadian Feminist Perspectives on Law* (Toronto: Resources for Feminist Research, 1989); Dorothy E. Chunn and Joan Brockman, "Researcher Index and Research Subject Index on Gender Bias in the Law," Feminist Institute for Studies in Law and Society, Simon Fraser University, Burnaby, British Columbia, Publication #2 (May 1992); Department of Justice of Canada, *Gender Equality in the Canadian Justice System* (Ottawa: Department of Justice, 1993). The World Conference on Human Rights also identified gender bias in the administration of justice as one of the barriers to the equal status and human rights of women. See *Report of the Drafting Committee: Final Outcome of the World Conference on Human Rights*, A/CONF.157/DC/1/Add. 1, June 25 (1993): 23 at 3.

12. Arvind Sharman, ed. *Women in World Religions* (Albany: State University of New York Press, 1987); Donna J. Sullivan, "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination," *Am. J. Int'l L.* 82 (1988): 515–17; Donna Artz, "The Application of Human Rights Law in Islamic States," *Hum. Rts. Q.* 12 (1990): 202.

13. For example, see Frances Raday, "Constitutional Evolution in Israel and Equality Between Men and Women," *Conference Proceedings*, Chartering Human Rights, Canada-Israel Law Conference, Faculty of Law, Mount Scopus Campus, Hebrew University of Jerusalem, 1992.

14. For example, Article 16(3) of the Universal Declaration proclaims that the family is the "natural and fundamental group unit of society and is entitled to protection by society and by the State."

15. Sény Diagne, "Defending Women's Rights—Facts and Challenges in Francophone Africa," in *Ours by Right*, ed. Kerr, note 3.

16. Florence Butegwa, "The Challenge of Promoting Women's Rights in African Countries" in *Ours By Right*, ed. Kerr, note 3 at 40–43.

17. Marilyn Waring, *If Women Counted: A New Feminist Economics* (San Francisco: Harper and Row, 1988), 134; Waring, "The Exclusion of Women from 'Work' and Opportunity," in *Human Rights in the Twenty-First Century: A Global Challenge*, ed. Kathleen E. Mahoney and Paul Mahoney (Dordrecht: Martinus Nijhoff, 1993), 109; Schuler, ed., *Empowerment*, note 3.

18. Norma Juliet Wikler, *Educating Judges About Aboriginal Justice and Gender Equality*, Western Workshop Series, 1989, 1990, 1991, An Evaluation Study Report, Department of Justice of Canada (Dec. 1991).

19. See note 9.

20. For example, the Human Rights Committee in its General Comment on nondiscrimination adopts a definition of discrimination that looks to discriminatory effects or purposes, yet their decisions indicate a lack of commitment to the concept and a consequent lack of leadership. See Communication No. 212/1986, (1988), A/43/40, p. 244; *Vos v. The Netherlands*, Communication No. 218/1986, (1989), A/44/40, p. 232 (CCPR/C/21/Rev. 1/Add. 1).

21. The largely unquestioned theory developed by Aristotle is found in his *Nicomachean Ethics*. See, e.g., trans. by David Ross, World's Classic Series (Oxford: Oxford University Press, 1980).

22. For a discussion, see Margaret Thornton, "Feminist Jurisprudence: Illusion or Reality?" *Austl. J. L. & Soc.* 3 (1986): 5, 8.

23. Catharine MacKinnon has observed that, in practice, this approach means that if men don't need it, women don't get it. "Reflections on Sex Equality Under Law," *Yale L.J.* 5 (1991): 1281.

24. Clare Dalton, "Where We Stand: Observations on the Situation of Feminist Legal Thought," *Berkeley Women's L. J.* 3 (1987–88): 1, 5.

25. For a discussion on judicial responsibility see Rebecca Cook, "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women," Chapter 9 in this book.

26. [1979] 1 S.C.R. 183 (1978). I have discussed this theme more extensively in "The Constitutional Law of Equality in Canada," *N.Y.U. J. Int'l L. & Pol.* 24(2) (1992): 759 at 765–68.

27. [1974] S.C.R. 1349.

28. Indian Act, R.S.C. Ch. 1–5, sec. 12(1)(b) (1985).

29. See Canadian Bill of Rights, R.S.C., app. III, sec. 1(b) (1970).

30. For a discussion of discrimination of Aboriginal people generally, see Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin, 1981).

31. Cook, "State Accountability," note 25; Ian Brownlie, *System of the Law of Nations, State Responsibility, Part I* (Oxford: Clarendon Press, 1983), 150.

32. See *Andrews v. Law Society of British Columbia*, 1 S.C.R. 143 (1989). See also two subsequent decisions that added further clarification to the principles articulated in *Andrews*, namely, *Reference Re Workers' Compensation Act* 1983 (Nfld.), 1 S.C.R. 992 (1989); *R. v. Turpin* 1 S.C.R. 1296 (1989).

33. The Supreme Court of Canada recognizes this possibility in *The Queen v. Schachter* 139 N.R. 1 (S.C.C.) (1992).

34. 1 S.C.R. 1219 (1992).

35. 1 S.C.R., note 34 at 1243–44.

36. *Janzen and Govereau v. Platy Enterprises* [1989] 1 S.C.R. 1252 (1989), 59 D.L.R. 4th 352 (1989), 10 C.H.R.R.D/6205.

37. *Janzen and Govereau*, note 36, 1 S.C.R. at 1284.

38. See N. Colleen Sheppard, "Recognition of the Disadvantaging of Women," *McGill L.J.* (1989): 207 at 215; see also Catharine MacKinnon, *The Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979), chapter 5.

39. *Janzen and Govereau*, note 36.

40. See also decisions of the Supreme Court of Canada, including *R. v. Lavallee*, 1 S.C.R. 852 (1990) in which the traditional concept of self-defense was found to be based on a male-centered "bar-room brawl" model and thus adapted the legal concept of reasonableness in self-defense to recognize the reality women face in battering situations; *R. v. Morgentaler*, 1 S.C.R. 30 (1988) in which criminal legislation relating to abortion was struck down for violating the constitutional guarantee of life, liberty, and security of the person, when the law forced a woman to carry a fetus to term unless certain criteria unrelated

to her own priority and aspirations were met; *Moge v. Moge*, 1 W.W.R. 496 (1993) in which it was held that women are economically disadvantaged in most marriages and that judges must not treat most divorcing women as if they have achieved equality; *Norberg v. Wynrib*, 2 S.C.R. 226 (1992), in which it was held that a doctor had demanded and received sexual favors from a drug addicted patient in return for drugs, and there could be no genuine consent to sexual activity given the power imbalance; and *McCraw v. The Queen*, 3 S.C.R. 72 (1991), in which it was held that rape is always harmful to women, and that to ignore the serious psychological harm it causes would be a retrograde step, contrary to any concept of sensitivity in the law.

41. 3 S.C.R. 697 (1990).

42. Criminal Code, R.S.C., Ch. C-46, sec. 319(2) (1985).

43. *R. v. Butler*, 1 S.C.R. 452 (1992).

44. Cook, "State Accountability," note 25.

45. Norma J. Wikler, "Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts," paper presented at the National Conference on Gender Bias in the Courts, Williamsburg, Virginia, 18 May 1989.

46. See references in note 11.

47. Ken Cooper-Stephenson, "Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims," in *Equality and Judicial Neutrality*, ed. Kathleen Mahoney and Sheilah Martin (Toronto: Carswell, 1987), 226.

48. Cooper-Stephenson, "Past Inequities," note 47.

49. In the American context see Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985). For the Canadian context see E. Diane Pask and Marnie L. McCall, *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (Toronto: Canadian Research Institute for Law and the Family, 1989).

50. Pask and McCall, *How Much and Why?* note 49.

51. See, e.g., *Report of the New York Task Force on Women in the Courts, Exhibit A* (New York: Office of Court Administration, March, 1986); *New Jersey Supreme Court Task Force on Women in the Courts*, June 1984 (first report) (Trenton, NJ: Administrative Office of the Courts, 1986).

52. Lynn Hecht Shafran, "Documenting Gender Bias in the Courts: The Task Force Approach," *Judicature* 70(5) (1987): 280, 285.

53. Shafran, "Documenting Gender Bias," note 52.

54. See Phyllis Chesler, *Mothers on Trial: The Battle for Children and Custody* (New York: McGraw-Hill, 1986).

55. Shafran, "Documenting Gender Bias," note 52.

56. John Henry Wigmore, *Evidence in Trials at Common Law*, rev. ed., vol. 3A (Boston: Little, Brown, 1970), 924a at 736. Leigh B. Bienen attacked Wigmore's views as being unscientific, based on manipulated authorities, and selectively and untruthfully used, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence," *Cal. W. L.R.* 19 (1983):235.

57. See Mona Brown, ed., *Gender Equality in the Courts: Criminal Law*, A Study by the Manitoba Association of Women and the Law (Winnipeg: Manitoba Association of Women and the Law, 1991); Department of Justice Canada, *Conference Proceedings*, National Symposium on Women, Law and the Administration of Justice (Ottawa: Ministry of Supply and Services Canada, 1991); *Gender Equality in the Justice System*, A Report of the Law Society of British Columbia Gender Bias Committee (The Law Society of British Columbia, 1992); National Center for State Courts, Williamsburg, Virginia, *Conference Proceedings*, National Conference on Gender Bias in the Courts (Williamsburg: National Center for State Courts, 1989), which summarizes the findings of state task forces in the United States; *Report of the Committee on Violence Against Women*, Department of Supply and Services Canada (Ottawa: Queen's Printer, 1993).

58. Lorenne M.G. Clark and Debra J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); B. Roberts, "No Safe Place: The War Against Women," *Our Generation* 15(4) (1983): 7.

59. Brad Daisley, "B.C.C.A. Affirming Penalty in Sexually Aggressive Tot Case," *Lawyer's Weekly* (9 Feb. 1990); *Sunday Times*, "Judges in the Dock," Judge Ian Stanforth Hill, 13 June 1993, p.1, Section 2.

60. Mona G. Brown, Monique Bicknell-Danaker, Caryl Nelson-Fitzpatrick, and Jeraldine Bjornson, in *Gender Equality in the Courts*, ed. Brown, note 57 at 3–51. See also Kathleen E. Mahoney, "Legal Treatment of Wife Abuse: A Case of Sex Discrimination," *U.N.B.L.J.* 41 (1992): 23.

61. Women in Transition, a Canada Works Project, Thunder Bay, Ontario (1978) cited in Linda MacLeod, *Wife Battering in Canada: The Vicious Circle* (Ottawa: Canadian Advisory Council on the Status of Women, 1980), 29. See also R. Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against Patriarchy* (New York: Free Press, 1979); L. Chalmers and P. Smith, "Wife Battering: Psychological, Social and Physical Isolation and Counteracting Strategies," in *Gender and Society: Creating a Canadian Women's Sociology*, ed. Arlene T. McLaren (Toronto: Copp Clark Pitman Ltd., 1988), 221; Lisa Freedman, "Wife Assault," in *No Safe Place: Violence Against Women and Children*, ed. Connie Guberman and Margie Wolf (Toronto: Women's Press, 1985), 41; Lee Ann Hoff, *Battered Women as Survivors* (London: Routledge, 1990).

62. See generally Mahoney and Martin, *Judicial Neutrality*, note 2.

63. Norma Juliet Wikler, "Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts," *Court Review* 26(3) (1989): 6.

64. See Mahoney and Martin, *Judicial Neutrality*, note 2; Brown, ed., *Gender Equality*, note 57.

65. This is a project of the University of Calgary, Group for Research, Education, and Human Rights, chaired by the author.

66. For example, see Kathleen Mahoney, *Report on the Geneva Workshop on Judicial Treatment of Domestic Violence*, February 5, 1992, Palais des Nations, Geneva (Calgary: University of Calgary International Project to Promote Fairness in Judicial Processes, 1992).

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3 - 15

Feminist Jurisprudence and the Nature of Law

What is feminist jurisprudence? One prominent feminist scholar, Catharine MacKinnon, explained that feminist jurisprudence is the analysis of law from the perspective of all women. This provides us with a good point of departure, as it captures the central focus of feminism, which is to attempt to represent women's side of things. Feminist theory recognizes that throughout history and even today, public discourse has been almost exclusively conducted by men from (quite naturally) the perspective of men. That is, the nature of women has been formulated by men, and the interests of women have been determined by men. Historically, women have never been allowed to represent themselves. They have always been represented by men, but this representation has hardly been accurate or fair. Even though it claims to represent all human beings, the fact is that public discourse has left out, silenced, misrepresented, disadvantaged, and subordinated women throughout all of history, relegating them to a single role and reserving the rest of life for men. MacKinnon's explanation underscores this point.

Using her explanation as a definition, however, might create the impression that there is a single perspective of all women, which is certainly false. Not even all feminists hold a single perspective, and not all women, of course, are feminists. But all feminism does begin with one presumption, namely, that a patriarchal world is not good for women. Virtually everyone agrees that the world is, in fact, patriarchal; that is, human societies have always been organized in a hierarchical structure that subordinates women to men. This is simply the observation of a social fact. Until recently it was virtually impossible to imagine the world any other way, and even now a great many men and women think that patriarchy is good, natural, or inevitable. Feminists think that patriarchy (the subjugation of women) is not good, not ordained by nature, and not inevitable.

The rejection of patriarchy is the one point on which all feminists agree. It is also apparently a distinguishing feature of feminism as a school of thought, as no other school of thought focuses on the critique of institutions and attitudes as patriarchal. Only feminism analyzes the patriarchal origin, nature, and effects of human attitudes, concepts, relations, and institutions and criticizes them on that ground. So we might take as a reasonable working definition that feminist jurisprudence is the analysis and critique of law as a patriarchal institution.

This analysis and critique manifests itself in a variety of ways, owing partly to the range of issues it covers and partly to divergence among feminists on virtually all points other than the rejection of patriarchy. Feminists tend to concentrate on issues of partic-

ular concern to women, such as equal protection law; discrimination in education, hiring, promotion, and pay; protection of reproductive freedom and other freedoms; protection from rape, sexual harassment, and spouse abuse; regulation of sexual and reproductive services such as surrogate mother contracts, prostitution, and pornography; and patriarchal bias in law and adjudication. But feminist analysis is appropriate to any area, concepts, relations, and institutions of law, and many legal theorists offer feminist critiques of standard legal categories such as contracts, property, and tort law. Clearly, the issues covered by feminist jurisprudence are as wide ranging as the areas covered by law. To appreciate the diversity of feminist jurisprudence, consider the differences among feminist theories.

Feminist Theories

The earliest explicit feminist writing is associated with the liberal tradition, as exemplified by Mary Walstonecraft's eighteenth-century book *A Vindication of the Rights of Women*, by John Stuart Mill's nineteenth-century *Subjection of Women*, and by Betty Friedan's twentieth-century *Feminine Mystique*. The general view is that the subordination of women is caused by the legal and social barriers that block or preclude their access to the public sphere of economic and political life. Liberal feminists demand that liberals follow their own principles of universal human rights. If all human beings are moral equals, as liberals have claimed since at least the seventeenth century, then men and women should be treated equally, which means that no one should be excluded from participating in political, educational, or economic life. Because they followed the classical liberal tradition, the early liberal feminists tended to be very individualistic, arguing for equal rights and equal freedom. They felt that the law should be gender blind, that there should be no special restrictions or special assistance on the basis of sex. Most of the gains made for women's equal rights and freedom in the 1960s and 1970s were made using liberal feminist arguments. The solution to the oppression of women, in this view, is to remove all formal barriers to their equal participation in social, political, and economic life, thus providing equal opportunity for all.

In the 1970s and 1980s some liberal feminists (including Friedan) began to rethink their position, as simply removing formal or legal restrictions did not seem to provide equal opportunity after all. Women still faced a great deal of informal discrimination and an uphill battle against old stereotypes that portrayed them as emotional, incompetent, and passive. Furthermore, even women who did manage to break into the male world of politics, economics, or academic life found themselves faced with a choice of eliminating any personal life whatsoever or working a double day, a choice that men did not have to face. Women found themselves responsible for home and family whether or not they also had a career, and this meant that most women could not compete on an equal footing with men who did not have this responsibility, precisely because it had been delegated to women. In response to this situation, many liberal feminists began to focus more on the socialization of children, the removal of stereotypes, the reorganization of family life, and the restructuring of state institutions to be more supportive of family needs. This change in focus mirrors the difference between classical liberal and modern welfare liberal views, but it is not a real change of position. The view of liberal feminists, whether classical or modern, is still that the solution to the oppression of women is to provide equal opportunity for all. The difference between the two views is in what constitutes equal opportunity.

Radical feminists believe that neither the classical nor the modern liberal view adequately explains women's oppression or provides effective solutions to it. Changing economic structures, eliminating political and educational barriers, and even socializing children will not abolish the subjugation of women so long as society is organized in a patriarchal system. Patriarchy is so pervasive that it structures our thoughts and attitudes, our assumptions and basic institutions, including the family and church. The only way to change the position of women is to change the way we think about gender itself, to reexamine our assumptions about our nature and relations to others. Although radical feminist views vary widely, most do focus on some aspect of the effect that biology has on women's psychology, their lives and their status, to recognize good effects as valuable and to overcome negative ones.

Some radical feminists (such as Adrienne Rich or Mary O'Brien) have concentrated on the significance of women as mothers (as child bearers and rearers), arguing either that women must be relieved of having the sole responsibility for these things or that because women are responsible for them, they must also be in control of them. Others (such as Shulamith Firestone or Kate Millett) look at the ways that gender and sexuality oppress women, for example, through sexual harassment, spouse abuse, rape, pornography, and the use of women as sex objects. Most radical feminists insist that male power or male dominance is the basis of the construction of gender and that this construction pervades all other institutions and ensures the perpetuation of patriarchy and thus the subordination of women. Some have suggested the promotion of androgeny (the appropriation of the full range of traits to both men and women) as a solution to the problem of patriarchy. Others contend that androgeny is not liberating for women and that the goal is, rather, to revalue those characteristics associated with the feminine role, such as nurturing and gentleness. Still others believe that because the feminine role and character have been constructed by patriarchy, women must reconstruct them for themselves—must find their true nature. Overall, in the most general terms, the focus of radical feminism is on the domination of women by men through the social construction of gender within patriarchy. For them the solution to the oppression of women is to reverse the institutional structures of domination and to reconstruct gender, thereby eliminating patriarchy.

Marxist and socialist feminists, however, believe that the construction of gender is not the primary issue. They think that equality for women is not possible in a class-based society established on the basic principles of private property and exploitation of the powerless. According to the Marxists, the oppression of women originated, or at least solidified, when the introduction of capitalism and private property sharply divided the world into private and public spheres of life, relegated women to the noneconomic private sphere, and devalued that sphere, that is, made it worthless in market terms. To relieve the oppression of women, the capitalist system must be replaced with a socialist system in which no class will be economically dependent or exploited by any other. The solution to the oppression of women is to change the economic system so that women will not be economically dependent, marginal, and exploited.

Many modern socialist feminists have nonetheless become dissatisfied with the traditional Marxist approach, as it fails to account adequately for the oppression of women as women rather than as workers, fails to explain the domination of women in the private as well as the public sphere, and fails to provide an analysis of gender and patriarchy.

Some feminists have tried to combine economic (Marxist or socialist) theories with radical theories or psychoanalytical theories that attempt to deal with gender and patriarchy as such. In fact, many modern feminists think that no single theory can account for all aspects of the domination and oppression of women.

Furthermore, some feminists deny altogether the usefulness of general theories in their traditional form. This skepticism or denial of the utility of theory, at least "Grand Theory," is commonly associated with a loose collection of views often called *postmodern* or *French feminism*. The term *French feminism* originated from the fact that most of the early contributors were French (e.g., Helene Cixous and Luce Irigaray) and that most follow the work of French thinkers associated with the postmodern movement, such as Jacques Derrida, Jacques Lacan, and Jean-François Lyotard. In law and jurisprudence, this approach is associated with a movement called *critical legal studies*, with which many postmodern feminists are closely associated. Like most postmodern thinkers, these feminists deny that categorical, abstract theories derived through reason and assumptions about the essence of human nature can serve as the foundation of knowledge. They call such ambitious theorizing *phallologocentric*, meaning that it is centered on an absolute word (*logos*) that reflects a male perspective (*pahllus*). They claim that it is a male approach to believe that a single answer or a single truth can be found that will organize all issues and lead to a single reformative strategy. Above all, postmodern feminism is critical. Often following Derrida, many postmodern feminists use techniques of *deconstruction* to expose the internal contradictions of apparently coherent systems of thought. This has been a useful method of debunking patriarchal structures of thought and social organization, including law. Other postmodern feminists, following Lacan, are interested in reinterpreting traditional Freudian psychoanalysis, with all its implications for biological determinism and the subordination of women.

In addition, many postmodern feminists display attachments to existentialism in terms of their focus on the "Other." Existentialists have always portrayed the Other as a negative status. To be the Other is to be objectified, determined, and marginalized. Simone de Beauvoir considered the fundamental question of feminism to be "why is woman the Other?" She considered the oppression of women to be an expression of their status as the Other, as the sex objectified by men. Postmodern feminists, however, celebrate Otherness. Because they are criticizing the mainstream of thought and society, the "Law of the Fathers" or the "Symbolic Order," there is a positive side to Otherness, as it disassociates itself from the mainstream accepted structures of reality, knowledge, and society: To be Other to patriarchy is not necessarily a bad thing.

In general, postmodern feminists do not offer a single solution to the oppression of women, first, because they do not think that there can be single solutions to anything. Second, to propose a single solution to *the* oppression of women suggests that all women's experiences are alike, that women's oppression is a unitary thing. But real human problems cannot be solved by abstract rules and generalizations. Rather, attacking the oppression of women requires contextual judgments that recognize and accommodate the particularity of human experience. As Deborah Rhode put it, "Such an approach demands that feminists shift self-consciously among needs to acknowledge both distinctiveness and commonality between sexes and unity and diversity among their members." For postmodern feminists there is no single solution and no single oppression of women, but only solutions tailored to the concrete experience of actual people.

One problem with postmodern views, particularly those associated with deconstruction, is that they tend to be better at destroying theories than at building them, which may

generate a debilitating skepticism that is not useful to the feminist cause in the long run. One response to this skepticism has been a revitalization of pragmatism within feminism. Pragmatism also subscribes to a postmodern antiessentialist theory of human nature and knowledge. In law it is associated with legal realist theory, which views law as a dynamic process of conflict resolution and focuses on the function of courts to analyze law and legal reasoning. Feminists are drawn to the practical, personal, contextual approach of pragmatism, which coincides with feminist rejection of traditional abstract categories, dichotomies, and the conceptual pretensions of the logical analysis of law.

Finally, a trend sometimes called *relational feminism* in some ways reverses the focus of some earlier theories, especially liberal theories that call for equal rights for women on the ground that men and women are fundamentally similar. Many recent relational feminist writers have been greatly influenced by the work of Harvard educational psychologist Carol Gilligan. In her book *In a Different Voice*, Gilligan hypothesizes that men and women are not fundamentally similar; rather, men and women typically undergo a different moral development. The predominant moral attitude of men she calls the *ethic of justice*, which concentrates on abstract rules, principles, and rights. The predominant moral attitude of women Gilligan calls the *ethic of care*, which focuses on concrete relationships, concern for others, and responsibility. The important thing for Gilligan is to recognize the value of both, and especially not to devalue the ethic of care.

Following Gilligan, many relational feminists have argued that the important task for feminists today is not to fit women into a man's world, not to assimilate women into patriarchy, and not to prove that women can function like men and meet male norms, but to change institutions to reflect and accommodate the value that should properly be accorded to characteristics and virtues traditionally associated with women, nurturing virtues such as love, sympathy, patience, and concern. It is not that women should change to meet existing institutions but that institutions should be changed to accommodate women (or at least the best virtues associated with women). Of course, when put in these terms, most feminists would agree. No feminist thinks that women should be turned into clones of men, and there is increasing concern over what might be lost in the unthinking assimilation of women into male institutions.

The difference between liberal feminists on the one hand and relational feminists on the other represents a split among feminists and others as to whether men and women are fundamentally similar or fundamentally different, particularly in psychological and/or moral terms. This split is actually an old one that was prominent in the early twentieth century in debates about women's rights. The question is whether women, being basically similar to men, require equal treatment or, being significantly different from men, require special treatment. This question is reflected in many jurisprudential and legal debates today, and each side has its hazards. The deficiency of the liberal view is that treating men and women as exactly alike ignores genuine physical and social differences that tend to disadvantage the vast majority of women. But the deficiency of the relational view is that it can easily be transformed into the old, traditional stereotype of women as biologically domestic and dependent, which perpetuate bias, discrimination, and domination instead of counteracting it. Many feminists now think that this old debate needs to be ended or transcended, but exactly how to do this is not clear. It is clear, however, that the sameness/difference debate is a snag that has often divided feminists and hindered social progress.

There are (at least) three points that provide some ground for optimism that the old sameness/difference debate may, this time, be overcome. First, for postmodern theorists, the sameness/difference problem is a nonstarter in the first place, because dichotomies

like sameness and difference are illusions caused by the flawed structural frameworks that generate them. That is, they rely on a faulty essentialist view of human nature. Insofar as postmodern thinking dominates intellectual life (which it may, at least among feminists, as the antiessentialist view is shared by pragmatists, existentialists, and many Marxists, socialists, and liberals), the sameness/difference problem has already been resolved by an overall critical view that does not recognize an essential human nature.

Second, unlike feminist theories of an earlier era, virtually every feminist theory today challenges male norms. This, for example, is the intended objective of relational feminism, even though it is highly susceptible to abuse or misinterpretation. So the following question has been raised: Even if men and women are different, why should the standard of measure be male? The simple (and accurate) answer, that historically it has always been male, is one explanation, but it is obviously not a justification. Because historical standards relied on historical discrimination, some ground other than history must be found for retaining them. But no other supportable ground has been forthcoming.

Finally, the fact that many feminists see the sameness/difference debate as a misformulation of the problem provides more possibilities for progress beyond it. To see how easy it is to fall into the patriarchal trap, look back to the statement that the question is whether women, being basically similar to men, require equal treatment, or being significantly different from men, require special treatment. What may not be obvious is that this essentially means, Heads I win, tails you lose. That is, it assumes the outcome in advance, for to agree that if women are "different" (i.e., different from men) they will require "special treatment" is to assume a male or patriarchal standard of what normal treatment is. Feminists today reject such a formulation of the problem, and so this question is no longer viewed as the crucial question that must be answered before further steps can be taken. In fact, many feminists now think that it is not even an answerable, or perhaps even a meaningful, question, and some have proposed alternative views. For example, some feminists suggest that it is not difference but disadvantage that should be the goal of legal and social reform; some argue that the focus should be directly on eliminating domination; and some seek common standards of human flourishing and/or pragmatic approaches that can contextualize the problem instead of presuming abstract or essentialist models of human nature or the structure of gender.

We do not need a final unified vision of society and gender, however, to argue against oppression, disadvantage, domination, and discrimination. We do not need to know beforehand the nature of the good society or the ideal person so long as we know what prevents a society from being minimally good or prevents an individual from realizing the basic potentials of personhood. We do not need an ultimate vision when we have not yet met threshold conditions for a minimally just society. Many visions are possible, and many theories are useful. The commitment to foster open dialogue that allows the expression of diverse views and gives particular attention to eliciting views not usually heard is a unifying thread among feminists that attempts to represent the commonality of fundamental values without misrepresenting the plurality of experience.

Some Basic Objections

The acceptance of diversity within feminism has led some critics (and even some feminists) to contend that there is therefore no common feminist perspective. There is no point of view of all women. Feminism can be reduced to those theories that inform its

many facets. Liberal feminism is reducible to liberalism; postmodern feminism is reducible to postmodernism; and so on. Thus, it is claimed, feminism provides no new idea, no new theory. It is simply the application of old theories to the particular problem of women's oppression.

This objection is mistaken, however, for several reasons. First, even if it were true of some views (such as liberal feminism or Marxist feminism), it cannot be true of radical feminism, because the centerpiece of radical feminism is the structure of gender or sexual identity itself. Radical feminism starts with the idea of sexism as gender, the idea that gender is socially constructed within a hierarchy that embodies male domination and female subordination. Everything else flows from that. One may agree or disagree with this idea, but it cannot be reduced to another theory.

Furthermore, this core insight now informs all other feminist theories, whose differences are largely differences of emphasis. Nearly all feminists are too eclectic to fit neatly into any one category, and so it is misleading to set up categories or theories as though they worked in that limiting sort of way for feminists. Creating distinct or rigid categories within which to fit particular accounts or limit dialogue is a decidedly antifeminist way of proceeding, as feminists generally oppose this sort of abstract conceptualization without attention to context and detail. Instead, the way to use the general descriptions of the various feminist theories, such as those in the previous section, is simply to note and trace their influences, interactions, and manifestations in the particular views that people offer on specific issues. The function of general descriptions of theories in feminism is clarification and simplification, not limitation or reduction.

Finally, the one thing that unites all feminist theories and distinguishes them from all other theories is that their primary goal is the rejection of patriarchy. No matter what differences there are among these divergent views, and there certainly are many, this one point of reference is always shared. It is an irreducible point, and it distinguishes feminism from all other theories.

Nonetheless, one can argue that if the entire project of feminist jurisprudence is to show that law is patriarchal, it is not intellectually very interesting. How can an entire jurisprudence be supported by the single ground of rejecting patriarchy? But this is a political position, one may contend, not a philosophical one.

The problem with this objection is that it assumes that the recognition and rejection of patriarchy is a small point, when in fact it is a revolutionary one. Likewise, noting that the world is not flat but round is a small point in the sense that it can be stated in a brief and simple sentence, and it is not philosophical in the sense that it is the observation of an empirical fact. But in another sense, it changes everything. Its implications are profound, and exploring some of those implications is of great philosophical interest, and so it is with the rejection of patriarchy.

Thus, the one new thing about feminism (or feminist jurisprudence) is the very fact that it is feminism, that it constitutes a critique of patriarchal institutions from the perspective of women. To put it more generally, it constitutes, at least potentially, a genuine critique of patriarchal institutions, structures, and assumptions from the perspective of a group that is outside those patriarchal structures, institutions, and assumptions, at least in the sense (among other things) that it did not participate in their formulation. This is the first time in the history of civilization that anything like that has been possible at a level that can be taken seriously.

Intellectually, this provides a new basis for an external critique of social structures. In *The Structure of Scientific Revolutions*, Thomas Kuhn explains such external critiques as

paradigm shifts that represent revolutionary changes in thinking. Internal critique refines thinking within a framework. External critique rejects the old framework altogether and proposes a new paradigm in its place. External critique is not everything, but it can be extremely useful, especially for spotting assumptions that otherwise go unexamined because they are unnoticed. Internal critique tends to develop and refine details and spot inconsistencies within a structure or framework. External critique can challenge the entire framework, and thus, external critique is also the most threatening and the hardest to understand or accept. It is like Martin Luther saying to the pope, "Why, as a Christian, do I need to be Catholic at all?" Luther's critique is external to Catholicism but still internal to Christianity and, of course, to religion. When Nietzsche declared that "God is dead," his critique was external to the idea of religion. Needless to say, both critiques were viewed with hostility and disbelief by those who were defending the status quo. Similarly, feminist jurisprudence challenges basic legal categories and concepts rather than analyzing them as given. Feminist jurisprudence asks what is implied in traditional categories, distinctions, or concepts and rejects them if they imply the subordination of women. In this sense, feminist jurisprudence is normative and claims that traditional jurisprudence and law are implicitly normative as well.

Because of this, feminist jurisprudence has the potential to offer some of the most intellectually stimulating critiques of legal structures today, and this would be much more readily recognized if it were not so politically and socially frightening. That is the problem with revolutionary critique: It is revolutionary. This means, first, that it is hard to understand or else to take seriously. Revolutionary external critique may sound strange, heretical, irrational, or silly because it starts from a different set of basic assumptions. The most difficult thing in the world for two people (let alone a group of people) to discuss reasonably are differing basic assumptions. They need some common ground to begin the discussion. So the first problem is just to understand the critique or to be able to take it seriously. The elimination of patriarchy would constitute a cultural revolution at least as profound as the Copernican revolution, the Protestant revolution, or the Industrial Revolution. Could anyone living before these revolutions imagine what life or human thought would be like after them? The first response to early feminism was ridicule. People could not imagine the status or role of women being different from what it always had been.

Second, if the critique is understood and taken seriously, it often scares people to death. Why? Why was the pope upset with Luther? Revolutionary critiques are frightening just because they are revolutionary. If they succeed, life will never be the same again. The end of patriarchy will be the end of social life as we know it. And so the critique of patriarchy tends to generate hostility, misunderstanding, ridicule, and fear almost as soon as it is mentioned. Like religion, it is one of the most difficult topics to discuss with, for example, nonbelievers. Accordingly, most feminists discuss the critique of patriarchy primarily with one another, and for good reason. Anyone who speaks of it too much "in public" is considered an extremist (and generally tiresome and ill tempered as well). For these reasons (and some others) many women disassociate themselves from feminism, and most men do not want to hear about it. It is dubbed a women's issue and ignored. And when some feminist takes the critique directly to the patriarchs, so to speak, it tends to be hostilely delivered or hostilely received, or both.

Feminists tend, therefore, to concentrate on more specific issues rather than on the general critique, and there are many good reasons for doing that, in addition to the difficulty of the more general topic. Nevertheless, the critique of patriarchy is the general

rationale behind feminism itself and behind all those discussions of more specific topics, such as pregnancy leave, rape, pornography, or child care. That means that all those issues also proceed from different basic assumptions, which in turn can lead to the same problems just mentioned: hostility, ridicule, disregard, and resistance. And this also expresses the progress of so-called women's issues.

All that is understandable, but it is not excusable, nor is it wise. Hostility is misplaced when directed against cultural revolutions, which is what we are talking about here. Cultural revolutions are profound but not violent. Cultural revolution is the discovery (usually after the fact) that everyone or almost everyone has joined a new order (usually without realizing it). It is internally developed rather than externally imposed. When women and men no longer think of women first and foremost as mothers, and secondarily as anything else, then the world will have changed. When women are thought of and think of themselves as primarily self-supporting and not as dependent, the world will have changed. In sum, when women and men actually think of themselves as equals, the world will have changed. In a cultural revolution, what changes is what people think, their basic assumptoins about what is normal. So, cultural revolutions are inevitable because they follow from a change of worldview.

Thus, cultural revolutions should not be confused with political revolutions, which are not necessarily internal and not inevitable. Hostility to political revolutions makes sense. Hostility to cultural revolutions is understandable but relatively useless. To return to my analogy, it really did not do the Catholic church any good at all to reject Martin Luther when the rest of the world was ready for him. At a certain point in time, certain ideas become part of history, and they cannot be reversed. They can be affected, sometimes revised or modestly changed, possibly guided or directed, but not reversed or erased.

This is now the status of the women's movement and feminist thought. It cannot be reversed or erased. The bridges have been burned. This can easily be seen by comparing the lives of women today with those of one hundred years ago. Some of the biggest steps in the revolution have already been taken, as is illustrated by the legal changes in the status of women, which recognize them as independent individuals and equal citizens. Whether the legal system fashions the future from cooperative endeavor or hammers it out of the adversarial system, it will respond to the requirements of social change. To think, therefore, that the rejection of patriarchy is philosophically or intellectually uninteresting is to underestimate the extent or profundity of the change entailed in rejecting it. For philosophers and social analysts to ignore the feminist revolution today, thinking their work is outside it, is like philosophers and social analysts some centuries ago who ignored the Industrial Revolution, thinking that their work was outside it. Basic revolutions such as this touch everything and change assumptions about human nature and human life. Nothing could be more philosophically interesting.

The Pervasiveness of Patriarchy

Obviously, some thinkers reject the idea that the feminist critique is as fundamental or as revolutionary as I am suggesting. Accordingly, the following chapters are intended to represent the breadth of feminist jurisprudence, which in turn illustrates the pervasiveness of patriarchy and the enormity of the change that follows from its rejection. Several important areas are, however, not represented, owing to limitations of space. Of partic-

ular note here is the feminist work on reproductive rights, the nature of self-defense, child custody and family law, divorce and property settlement, and the nature and function of rights.

This book is intended to illuminate the extent and subtlety of patriarchy, particularly in regard to an interesting recent phenomenon. Historically, the challenge was to prove that women were entitled to be treated equally with men. That battle is still not completely over, but many people today are convinced that women are entitled to equal treatment. The interesting twist is that although many people do believe that men and women are entitled to equal treatment, they also believe that this goal has already been accomplished in law. Because formal barriers (at least the most obvious ones) have, for the most part, been removed—women can vote, hold office, attend college, participate in business, own property, execute contracts, and so forth—many people think that legal equality has been achieved. So, discrepancies in accomplishments—the wage gap, for example—must be explained by differences in abilities or by social factors that are beyond the purview of law. But the chapters in this volume show that this view is premature. Law is affected by patriarchy in many subtle ways that have not yet been eradicated by the simple change of some obvious sexist barriers like the prohibition of women from voting or owning property. Patriarchy is an all-encompassing worldview, and as an institution of patriarchy, law reflects that worldview as well. But because of its distinctive features as law—its reliance on precedent, which perpetuates the status quo—law is not like an ordinary mirror that instantly reflects the reality before it. Rather, it is like a magic mirror that always reflects a vision that is slightly in the past; that is, it can reflect reality only if reality moves slowly. Transient changes are therefore not reflected. Big changes or fast changes are reflected only after a period of transition. Because law is a somewhat selective, delayed-action mirror, feminist jurisprudence is concerned with correcting the current lag.

Part I of this book addresses the issue of equality as it is central to all other issues raised by feminists. But what equality means is far from clear. Most of the chapters in this part discuss the problem of inequality in the workplace. Unequal treatment in the workplace reflects the patriarchal view of women as primarily homemakers and men as primarily breadwinners. Women are at a disadvantage in the workplace if they are viewed as mainly responsible for the home and family, because this marginalizes them at work and effectively requires them to hold two jobs. Furthermore, the standard of what is normal in the workplace is the ideal worker: a male breadwinner who has no family responsibilities himself. Today, this norm is unrealistic for both men and women and it puts women at a great disadvantage. But is it an issue for law to decide? There are laws prohibiting discriminatory employment practices, and the U.S. Constitution extends equal protection of the laws to all persons. All this requires interpretation, however: What are discriminatory employment practices? What is equal protection of the law? For example, recognizing that women get pregnant and men do not, what does equal treatment require in regard to pregnancy benefits? Should they be covered like any other medical need, or are they different? What does equality require in cases of difference? The point is that even if a society says that it is committed to equality, different conceptions of what equality entails can leave some members of society at a great disadvantage.

Part II explores the nature of harm, extending the point just made about equality. Our society has always been committed to the view that the intentional infliction of harm, coercion, and the restriction of freedom are unjust. These are supposedly the clear cases of actionable claims: physical assault, battery, harassment. But what counts as a harm, or

as coercion or restriction, limits what is thought of as unjust. It is surprising to think that what a harm is could be open to interpretation, but it is. Sexual harassment, for example, was not a cause of action until very recently. Although women employees were coerced into sexual relations, it was not recognized as an addressable harm. Indeed, there was no word for it. There was no way to speak of it. It was just the way of the world, like breathing or drowning. Similarly, wife battering was not thought of as a harm; rather, it was discipline. It reflected a patriarchal view of men as heads of households and women as subordinate dependents subject to the chastisement of authority. Rape law also reflects the patriarchal view of personal and sexual relations and in some ways illustrates even more clearly than wife battering and sexual harassment do that the law protects women from men who are strangers but not from men who know them. Accordingly, date rape is not a "real" harm, and spousal rape in many states is an impossibility.

Yet all three areas—sexual harassment, rape, and wife battering—represent areas of incipient change in the law. Even the fact that they are being discussed is a sign of progress. Sexual harassment, wife battering, and date rape all are formally recognized today as actionable legal claims, whereas not long ago, such claims were literally unthinkable. However, discriminatory informal barriers discourage most claims from being filed, and most that are filed are dismissed. The responses of many judges and prosecutors thus leave much to be desired, demonstrating that sexist attitudes are still common and raising the question of how legal procedures could be structured to alleviate the problem.

Part III considers the legal procedures of adjudication. What does it mean to say that the judicial system itself is sexist? Although the law presumes itself to be neutral, feminists argue that the law is not neutral. On the contrary, it is patriarchal, as it embodies the worldview of patriarchy that systematically subordinates women. It uncritically assumes a traditional male standard of what is normal. This is the problem illustrated in workplace norms that ignore the needs of families, or in attitudes toward rape and sexual harassment that define the offense from the perspective of the perpetrator rather than the victim and then try the victim rather than the accused. Many other examples could be given. Law is built on a worldview that presupposes patriarchy as normal, which means that law—the entire legal system—is based on the presumption that men and women are not equal and that women are subordinate to men. And this means that law is not neutral, that it supports a particular, traditional way of life that is now being called into question and that feminists claim is unjust.

This raises the question of what law should do—or what law can do—to address the systemic injustice, the comprehensive bias built into legal, social, and political institutions from the beginning of human association. Obviously, precedent cannot be used to correct it. If patriarchy (or the subordination of women) is now considered unjust (which, of course, many traditionalists would dispute) and the entire legal system is and has always been patriarchal, how can law address this problem? How can law correct its own bias if the bias is systemic? Feminist jurisprudence responds to this question. But it is clear that standard, narrow notions of adjudication cannot deal with systemic injustice because narrow notions of legal reasoning and judicial review preclude the evaluation of the system itself. Judges, it is claimed, are supposed to work within the system, not evaluate it. The impartial application of biased procedures to all cases, however, is a questionable practice. Feminists have made practical suggestions for enhancing the possibility of impartiality on the part of judges, by recognizing the nonneutrality of law and enlisting views that often go unheard. If feminists are right that law is not neutral, then it is not reasonable or just to adhere to old legal methods that limit what counts as a cause of

action, what and who can be considered, who can be heard, what can be thought, and what counts as a legal judgment. New methods of legal reasoning must be advanced that can open up the process to provide truly equal access and genuinely equal consideration for all.

Part IV moves from the procedural issues of the judicial process back to particular substantive issues central to the oppression of women. The most fundamental of these is the issue of reproductive freedom, which is a precondition to any other freedom for women. Yet the legal treatment of reproductive freedom demonstrates the unequal treatment of men and women in regard to freedom and reflects the central patriarchal premise of women as primarily reproductive vessels or reproductive property. This is the core issue of the women's movement, and it will cause the greatest fight between progressives and traditionalists. On the one hand, reproductive freedom is the prerequisite for any other freedom or equality for women. On the other hand, reproductive destiny is the focus of the meaning of life for women in the traditional view, and the organizing principle of patriarchy.

In the patriarchal view, women are mothers first and foremost in the service, and for the benefit, of their husbands. This is their biological destiny and the best way for them to fulfill themselves and benefit *man*kind. Throughout all of history, men have controlled the reproductive capacities of women because it is the only crucial ability that women have that men do not have. Furthermore, if women controlled their own reproductive ability, they would also control men's ability to reproduce. So women have been viewed as biologically destined to be mothers in the service of mankind, under the control and protection of men. Legally, men are viewed as free and autonomous, whereas the status of women is much more open to question, especially the status of reproductive rights. It is inconceivable that any issue that comparably affected the basic individual freedom of any man would not be under his control in a free society.

Today, as we approach the twenty-first century, it is a matter of great controversy whether women should be entitled to control their own bodies. Because patriarchy sets the terms of the debate, women are forced to argue for their right to control their own bodily integrity, with the burden of persuasion set against them. The very conception of the identity or nature of women and of fetuses is established by patriarchal religions, customs, and laws. Women are fundamentally mothers, and therefore their pregnancies are blessings. Men are free. Women are determined by their biology. Men are autonomous. Women are "protected," which means that they are regulated. How can the differential treatment be justified? It goes right back to the old sameness/difference debate. Men are the standard of freedom. Women are different. They get pregnant. Therefore they must be protected, which means that they must be controlled. Surely they are not entitled to be in control of their own pregnancies. Feminists are fighting to challenge the assumptions that perpetuate the subordination of women to motherhood and that place the control over motherhood in the hands of a patriarchal state. It may be that this issue illustrates more powerfully than any other the effect of the patriarchal structure of law. It is the core of patriarchy and the greatest challenge that feminists face. The basic legal issue is whether the Constitution protects the reproductive autonomy of women through the right to privacy or the equal protection clause. Feminist support for both views is represented in Part IV.

Part V addresses the commodification of women as sexual or reproductive objects, which reflects the long history of viewing women in these terms. It is not quite as explosive as the issue of reproductive freedom is, but it is very closely related to it. In fact, in some

respects it is a broader issue, of which reproductive freedom is a special case. If women were viewed as equal subjects and not as sexual objects, the question of reproductive freedom might not be raised. But the objectification and consequent commodification of women present complex issues of freedom and equality for both men and women. Commodification is a cardinal feature of capitalist society. It is not unique to women, but what is virtually unique to women is their commodification as sex objects. The question is, What is significant about that? Is it worse than other forms of commodification? Or is the special condemnation of it an artifact of patriarchy? Does allowing women to sell themselves as sexual or reproductive objects free them or enslave them? Does it increase their options or seduce them out of better options? Can women sell their reproductive or sexual services without being sex objects themselves? Does banning such sales protect women in the long run, or is it just another mechanism of control and repression? Feminists are not united on these issues, but all do agree that women should not be exploited as a class. All feminists agree that women should be equal and free, but what it means to be equal and free in the context of sexual commodification is one of the most difficult questions that they face. The chapters in Part V discuss the feminist struggles to understand how the equality and freedom of women can be recognized in a society that conditions them to be sex objects.

In the last part, Part VI, we consider what feminists have to say about law and jurisprudence that reflects their project of countering patriarchy as the systematic oppression of women—of exposing the prejudices of patriarchy in law and jurisprudence. The chapters here represent the range and variety of approaches within feminist jurisprudence. What does it mean to say that the legal system is sexist? This is a question that literally could not have been asked less than thirty years ago. In 1971 the *Oxford English Dictionary* defined *sexism* as an archaic seventeenth-century term referring to a run of six cards in a game. In other words, sexism as we understand it today was not a word just thirty years ago. In those days (and notice what a short time that is) sexism could not be thought by ordinary people. Sexism could not be objected to because it could not be spoken; it certainly could not be a legal cause of action. But by 1980 all dictionaries recognized *sexism* as referring to prejudice against women. The appearance of the word is significant, for it means that new questions can be asked, new issues can be raised, and new objections can be formulated. Asking new questions demonstrates true progress of human thought, and shows that the biggest step in the feminist revolution has already been taken. Human thought has already changed. This is not to say, however, that no work is left to be done. The project now is to determine all the implications of that change.