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dilemmas, ideally, do not call for the choice of one principle over another, but rather 'imaginative integrations and reconciliations',[21] which require attention to particular contexts. Practical reasoning sees particular details not as annoying inconsistencies or irrelevant nuisances which impede the smooth logical application of fixed rules. Nor does it see particular facts as the objects of legal analysis, the inert material to which to apply the living law. Instead, new facts present opportunities for improved understandings and 'integrations'. Situations are unique, not anticipated in their detail, not generalisable in advance. Themselves generative, new situations give rise to 'practical' perceptions and inform decision-makers about the desired ends of law.

The issue of minors' access to abortion exemplifies the generative, educative potential of specific facts. The abstract principle of family autonomy seems logically to justify a state law requiring minors to obtain their parents' consent before obtaining an abortion. Minors are immature and parents are the individuals generally best situated to help them make a decision as difficult as whether to have an abortion. The actual accounts of the wrenching circumstances under which a minor might seek to avoid notifying her parent of her decision to seek an abortion, however, demonstrate the practical difficulties of the matter. These actual accounts reveal that many minors face severe physical and emotional abuse as a result of their parents' knowledge of their pregnancy. Parents force many minors to carry to term a child that the minor cannot possibly raise responsibly; and only the most determined minor will be able to relinquish her child for adoption, in the face of parental rejection and manipulation. Actual circumstances, in other words, yield insights into the difficult problems of state and family decision-making that the abstract concept of parental autonomy alone does not reveal.

Practical reasoning in the law does not, and could not, reject rules. Along the specificity-generality continuum of rules, it tends to favour less specific rules or 'standards', because of the greater leeway for individualised analysis that standards allow. But practical reasoning in the context of law necessarily works from rules. Rules represent accumulated past wisdom, which must be reconciled with the contingencies and practicalities presented by fresh facts. Rules provide signposts for the appropriate purposes and ends to achieve through law. Rules check the inclination to be arbitrary and 'give constancy and stability in situations in which bias and passion might distort judgment ... Rules are necessities because we are not always good judges'.[22]

Ideally, however, rules leave room for the new insights and perspectives generated by new contexts. As noted above, the practical reasoner believes that the specific circumstances of a new case may dictate novel readings and applications of rules, readings and applications that not only were not, but could not or should not have been determined in advance. In this respect, practical reasoning differs from the view of law characteristic of the legal realists, who saw rules as open-ended by necessity, not by choice. The legal realists highly valued predictability and determinacy, but assumed that facts were too various and unpredictable for lawmakers to frame determinate rules. The practical reasoner, on the other hand, finds undesirable as well as impractical the reduction of contingencies to rules by which all disputes can be decided in advance.

21 *Ibid*, p 274.

22 See M Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (1986).

Another important feature of practical reasoning is justification. The legal realist view is that rules allow a certain range of manipulation; judges may select on the basis of unstated, external considerations those interpretations that best serve those considerations. Thus, the 'real reason' for a decision – the social goals the decision-maker chooses to advance – and the reasons offered in a legal decision may differ. Practical reasoning, on the other hand, demands more than some reasonable basis for a particular legal decision. Decision-makers must offer their actual reasons – the same reasons that form its effective intentional description. This requirement reflects the inseparability of the determinations of means and ends; reasoning is itself part of the 'end,' and the end cannot be reasonable apart from the reasoning that underlies it. It reflects, further, the commitment of practical reasoning to the decision-maker's acceptance of responsibility for decisions made. Rules do not absolve the decision-maker from responsibility for decisions. There are choices to be made and the agent who makes them must admit to those choices and defend them.

Feminist practical reasoning

Feminist practical reasoning builds upon the traditional mode of practical reasoning by bringing to it the critical concerns and values reflected in other feminist methods, including the woman question. The classical exposition of practical reasoning takes for granted the legitimacy of the community whose norms it expresses, and for that reason tends to be fundamentally conservative. Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community. No form of legal reasoning can be free, of course, from the past or from community norms, because law is always situated in a context of practices and values. Feminist practical reasoning differs from other forms of legal reasoning, however, in the strength of its commitment to the notion that there is not one, but many overlapping communities to which one might look for 'reason'. Feminists consider the concept of community problematic[23] because they have demonstrated that law has tended to reflect existing structures of power. Carrying over their concern for inclusionism from the method of asking the woman question, feminists insist that no one community is legitimately privileged to speak for all others. Thus, feminist methods reject the monolithic community often assumed in male accounts of practical reasoning, and seek to identify perspectives not represented in the dominant culture from which reason should proceed.

Feminist practical reasoning, however, is not the polar opposite of a 'male' deductive model of legal reasoning. The deductive model assumes that for any set of facts, fixed, pre-existing legal rules compel a single, correct result. Many commentators have noted that virtually no one, male or female, now defends the strictly deductive approach to legal reasoning. Contextualised reasoning is also not, as some commentators suggest,[24] the polar opposite of a 'male' model of abstract thinking. All major forms of legal reasoning encompass processes of both contextualisation and abstraction. Even the most conventional legal methods require that one look carefully at the factual context of a case in order to identify similarities and differences between that case and others. The identification of a legal problem, selection of precedent, and application of that

23 See Abrams, 'Law's Republicanism' (1988) 97 *Yale LJ* 1591, pp 1606–07; Sullivan, 'Rainbow Republicanism' (1988) 97 *Yale LJ* 1713, p 1721.

24 See eg, M Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls Theory of Justice' (1986) 16 *New Mexico LR* 613 (extracted in Chapter 8); Ann Scales, *supra*.

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precedent, all require an understanding of the details of a case and how they relate to one another. When the details change, the rule and its application are likely to change as well.

By the same token, feminist methods require the process of abstraction, that is, the separation of the significant from the insignificant.[25] Concrete facts have significance only if they represent some generalisable aspect of the case. Generalisations identify what matters and draw connections to other cases. I abstract whenever I fail to identify every fact about a situation, which, of course, I do always. For feminists, practical reasoning and asking the woman question may make more facts relevant or 'essential' to the resolution of a legal case than would more nonfeminist legal analysis. For example, feminist practical reasoning deems relevant facts related to the woman question – facts about whose interests particular rules or legal resolutions reflect and whose interests require more deliberate attention. Feminists do not and cannot reject, however, the process of abstraction. Thus, though I might determine in a marital rape case that it is relevant that the wife did not want sexual intercourse on the day in question, it will probably not be relevant that the defendant gave a box of candy to his mother on St Valentine's Day or that he plays bridge well. No matter how detailed the level of particularity, practical reasoning like all other forms of legal analysis requires selecting and giving meaning to certain particularities. Feminist practical reasoning assumes that no a priori reasons prevent one from being persuaded that a fact that seems insignificant is significant, but it does not require that every fact be relevant. Likewise, although generalisations that render detail irrelevant require examination, they are not *a priori* unacceptable.

Similarly, the feminist method of practical reasoning is not the polar opposite of 'male' rationality. The process of finding commonalities, differences, and connections in practical reasoning is a rational process. To be sure, feminist practical reasoning gives rationality new meanings. Feminist rationality acknowledges greater diversity in human experiences and the value of taking into account competing or inconsistent claims. It openly reveals its positional partiality by stating explicitly which moral and political choices underlie that partiality, and recognises its own implications for the distribution and exercise of power. Feminist rationality also strives to integrate emotive and intellectual elements and to open up the possibilities of new situations rather than limit them with prescribed categories of analysis. Within these revised meanings, however, feminist method is and must be understandable. It strives to make more sense of human experience, not less, and is to be judged upon its capacity to do so ... .

Consciousness-raising

Another feminist method for expanding perceptions is consciousness-raising. Consciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences. As Leslie Bender writes, 'Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression'.[26]

25 *Cf*, K Llewellyn, *The Bramble Bush* (1960), p 48.

26 L Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *L Legal Educ* 3, 9; see also Z Eisenstein, *Feminism and Sexual Equality*, 1984, pp 150–57; T De Lauretis, *Alice Doesn't: Feminism, Semiotics, Cinema* (1984), p 185; J Mitchell, *Woman's Estate* (1971), p 61.

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Consciousness-raising is a method of trial and error. When revealing an experience to others, a participant in consciousness-raising does not know whether others will recognise it. The process values risk taking and vulnerability over caution and detachment. Honesty is valued above consistency, teamwork over self-sufficiency, and personal narrative over abstract analysis. The goal is individual and collective empowerment, not personal attack or conquest.

Elizabeth Schneider emphasises the centrality of consciousness-raising to the dialectical relationship of theory and practice. 'Consciousness-raising groups start with personal and concrete experience, integrate this experience into theory, and then, in effect, reshape theory based upon experience and experience based upon theory. Theory expresses and grows out of experience but it also relates back to that experience for further refinement, validation, or modification'.[27] The interplay between experience and theory 'reveals the social dimension of individual experience and the individual dimension of social experience' and hence the political nature of personal experience.

Consciousness-raising operates as feminist method not only in small personal growth groups, but also on a more public, institutional level, through bearing witness to evidences of patriarchy as they occur, through unremitting dialogues with and challenges to the patriarchs, and through the popular media, the arts, politics, lobbying, and even litigation. Women use consciousness-raising when they publicly share their experiences as victims of marital rape, pornography, sexual harassment on the job, street hassling and other forms of oppression and exclusion, in order to help change public perceptions about the meaning to women of events widely thought to be harmless or flattering.

Consciousness-raising has consequences, further, for laws and institutional decision-making more generally. Several feminists have translated the insights of feminist consciousness-raising into their normative accounts of legal process and legal decision-making. Carrie Menkel-Meadow, for example, has speculated that as the number of women lawyers increases, women's more interactive approaches to decision-making will improve legal process.[28] Similarly, Judith Resnik has argued that feminist judging will involve more collaborative decision-making among judges.[29] Such changes would have important implications for the possibilities for lawyering and judging as matters of collective engagement rather than the individual exercise of judgment and power.

The primary significance of consciousness-raising, however, is meta-method. Consciousness-raising provides a substructure for other feminist methods – including the woman question and feminist practical reasoning – by enabling feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality.

Consciousness-raising has done more than help feminists develop and affirm counter-hegemonic perceptions of their experiences. As consciousness-raising has matured as method, disagreements among feminists about the meaning of certain experiences have proliferated. Feminists disagree, for example, about whether women can voluntarily choose heterosexuality, or motherhood; or about whether feminists have more to gain or lose from restrictions against

27 (1986) 61 *NYU Law Rev* 589 pp 602–04.

28 See Menkel-Meadow (1985) 1 *Berkeley Women's LJ* 39, pp 55–58. (Extracted in Chapter 6.)

29 See Resnik, 'On the Bias: Feminist Reconsiderations of the Aspriations for our Judges' (1988) 61 *S Cal L Rev* 1877, pp 1942–43.

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pornography, surrogate motherhood, or about whether women should be subject to a military draft. If they disagree about each other's roles in an oppressive society: some feminists accuse others of complicity in the oppression of women.[30]

Feminists disagree even about the method of consciousness-raising; some women worry that it sometimes operates to pressure women into translating their experiences into positions that are politically, rather than experientially, correct.[31]

These disagreements raise questions beyond those of which specific methods are appropriate to feminist practice. Like the woman question and practical reasoning, consciousness-raising challenges the concept of knowledge. It presupposes that what I thought I knew may not, in fact, be 'right'. How, then, will we know when we have got it 'right'? Or, backing up one step, what does it mean to be right? And what attitude should I have about that which I claim to know?[32]

THE EMERGENCE OF FEMINIST JURISPRUDENCE[33]

Ann Scales[34]

Feminist Method Revisited

The term feminist jurisprudence disturbs people. That is not surprising, given patriarchy's convenient habit of labelling as unreliable any approach that admits to be interested, and particularly given the historic *a priori* invalidation of women's experience. That long standing invalidation also causes women, including feminist women, to be reluctant to make any claims beyond the formal reach of liberalism. Further, we are taught to ascribe the legal system's successes to the principle of detachment. In the understandable rush to render feminism acceptable in traditional terms, it is sometimes suggested that we ought to advertise our insight as a revival of the Legal Realism of the 1930s. We are surely indebted to the Realists for their convincing demonstration that the law could not be described, as the positivists had hoped, as a scientific enterprise, devoid of moral or political content. The Realists' description of the influence of morality, economics, and politics upon law is the first step in developing an antidote for legal solipsism. In the end, however, the Realists did not revolutionise the law but merely expanded the concept of legal process. The Realists did not press their critique deeply enough; they did not bring home its implications. In the face of their failure, the system has clung even more desperately to objectivity and neutrality. 'The effect of the Realists was much like the role that Carlyle pronounced for Matthew Arnold: 'He led them into the wilderness and left them there'.[35]

Feminism now faces the charge levelled at Realism, that it destroys the citadel of objectivity and leaves nothing to legitimate the law. Our response to this state of

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30 See CA MacKinnon, *An Agenda for Theory* (1982) *op cit*, pp 198–205 (accusing women who defend First Amendment values against restrictions on pornography of collaboration).

31 See Colker (1988) 68 *BUL Rev* 217 pp 253–54 (noting that consciousness-raising may influence women to adopt 'inauthentic' expressions of themselves).

32 *Feminist Legal Methods*, pp 838–67.

33 (1986) 95 *Yale LJ* 1373.

34 Professor of Law, University of New Mexico.

35 R Stevens, *Law School: Legal Education in America from the 1950s to the 1980s* (1983), p 156.

affairs begins with an insight not exclusive to feminist thought: The law must finally enter the 20th century. The business of living and progressing within our disciplines requires that we give up on 'objective' verification at various critical moments, such as when we rely upon gravity,[36] or upon the existence of others',[37] or upon the principle of verification itself. Feminism insists upon epistemological and psychological sophistication in law: jurisprudence will forever be stuck in a postrealist battle of subjectivities, with all the discomfort that has represented, until we confront the distinction between knowing subject and known object.

Feminist method is exemplary of that confrontation. The physics of relativity and quantum mechanics demonstrate that nature is on our side: nature itself has begun to evince a less hierarchical structure, a multidirectional flow of authority which corroborates our description of perception. We warmly embrace the uncertainty inherent in that perceptual model, recognising the humanity, and indeed, the security, in it. And because we do not separate the observer from the observed, 'feminism is the first theory to emerge from those whose interest it affirms'.[38] Feminist method proceeds through consciousness-raising. The results of consciousness-raising cannot be verified by traditional methods, nor need they be. We are therefore operating from within an epistemological framework which denies our power to know. This is an inherently transformative process: It validates the experience of women, the major content of which has been invalidation.

> Feminism criticises this male totality without an account of our capacity to do so or to imagine or realise a more whole truth. Feminism affirms women's point of view by revealing, criticising, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation ... Women's situation offers no outside to stand on or gaze at, no inside to escape to, too much urgency to wait, no place else to go, and nothing to use but the twisted tools that have been shoved down our throats. If feminism is revolutionary, this is why.[39]

Consciousness-raising is a vivid expression of self-creation and responsibility. To Wittgenstein's insight that perceptions have meaning only in the context of experience, feminism would add that perceptions have meaning only in the context of an experience that matters. Consciousness-raising means that dramatic eyewitness testimony is being given; it means, more importantly, that women now have the confidence to declare it as such. We have an alternative to relegating our perception to the realm of our own subjective discomfort. Heretofore, the tried and true scientific strategy of treating nonconforming evidence as mistaken worked in the legal system. But when that evidence keeps turning up, when the experience of women becomes recalcitrant, it will be time to treat that evidence as true.

The foundations of the law will not thereby crumble. Though feminism rejects the notion that for a legal system to work, there have to be 'objective' rules, we admit that legality has (or should have) certain qualities. There must be something reliable somewhere, there must be indications of fairness in the system, but neither depends on objectivity. Rather, we need to discard the habit

36 See T Kuhn, *The Structure of Scientific Revolutions* (2nd ed, 1970), p 108.

37 See L Wittgenstein, *Philosophical Investigations*, G Anscombe, trans (3rd edn, 1968).

38 CA MacKinnon, *An Agenda for Theory* (1982) *op cit*.

39 CA MacKinnon, *Toward Feminist Jurisprudence* (1989), *op cit*, pp 637, 639.

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of equating our most noble aspirations with objectivity and neutrality. We need at least to redefine those terms, and probably to use others, to meet our very serious responsibilities.

My admission that feminism is result-oriented does not import the renunciation of all standards. In a system defined by constitutional norms such as equality, we need standards to help us make connections among norms, and to help us see 'family resemblances'[40] among instances of domination. Standards, however, are not means without ends: They never have and never can be more than working hypotheses. Just as it would be shocking to find a case that said, 'The petitioner wins though she satisfied no criteria,' so it must ultimately be wrong to keep finding cases that say, 'Petitioner loses though the criteria are indefensible'. In legal situations, a case is either conformed to a standard or the standard is modified with justification. That justification should not be that 'we like the petitioner's facts better'; rather, it is that 'on facts such as these, the standard doesn't hold up'.

The feminist approach takes justification seriously; it is a more honest and efficient way to achieve legitimacy. The feminist legal standard for equality is altogether principled in requiring commitment to finding the moral crux of matters before the court. The feminist approach will tax us. We will be exhausted by bringing feminist method to bear. Yet we must force lawmakers and interpreters to hear that which they have been well trained to ignore. We will have to divest ourselves of our learned reticence, debrief ourselves every day. We will have to trust ourselves to be able to describe life to each other – in our courts, in our legislatures, in our emergence together.

FEMINISM AND LEGAL METHOD: THE DIFFERENCE IT MAKES[41]

Mary Jane Mossman

> The fact that our understanding of *homo sapiens* has incorporated the perspective of only half of the human race makes it clear that women's studies is not an additional knowledge merely to be tacked on to the curriculum. It is, instead, a body of knowledge that is perspective transforming and should therefore transform the existing curriculum from within and revise received notions of what constitutes an 'objective' or 'normative' perspective.[42]

These words appeared in *A Feminist Perspective in the Academy: The Difference it Makes*, a book of essays about the impact of feminist ideas on a number of academic disciplines, including literature, drama, economics, sociology, history, political science, anthropology, psychology, and religious studies. The authors of these essays suggested that a feminist perspective has only just begun to 'affect the shape of what is known and knowable in their respective disciplines'.[43] The authors also asserted that a feminist perspective 'challenges deeply held, often sacred beliefs, beliefs that are rooted in emotions and expressed in primitive imagery'. As well, it 'challenges vested interests, and uproots perspectives which

40 Wittgenstein, *op cit*, p 32.

41 (1987) *Wisconsin Women's Law Journal* (Footnotes edited).

42 Langland and Gove (1981), p 3.

43 *Ibid*, p 2.

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are familiar, and, because familiar, comfortable'. In short, 'feminist ideas are a challenge to the *status quo*'.[44]

Given these perceptions about the transforming impact of feminism on the world of ideas in general, it is curious that this collection did not include an essay about the impact of feminist ideas on law. Moreover, what seems at first glance a mere oversight becomes on closer inspection a question of great significance: to what extent can feminist theory impact, if at all, on the structure of legal inquiry? In the law's process of determining facts, choosing and applying principles, and reaching reasoned decisions, is there any scope for feminism's fundamental challenge to our 'ways of knowing?'

This question needs to be addressed in the context of the definition of feminism adopted by the editors of *A Feminist Perspective in the Academy*:

> All feminists ... would agree that women are not automatically or necessarily inferior to men, that role models for females and males in the current Western societies are inadequate, that equal rights for women are necessary, that it is unclear what by nature either men or women are, that it is a matter for empirical investigation to ascertain what differences follow from the obvious physiological ones, that in these empirical investigations the hypotheses one employs are themselves open to question, revision, or replacement.[45]

The first part of this definition, especially its assertion that 'equal rights for women are necessary' assumes the existence of inequality and the need for societal change; in this respect, it represents a clear challenge to the *status quo*.

Yet, it is the latter part of the definition which represents an even more fundamental challenge: feminism's quest for an understanding of the nature of men and women demands a reassessment of the structure of our inquiry and the ways in which we ask our questions. Not only are the answers subject to scrutiny, but also the ways in which we search for them. In challenging the validity of 'facts,' the possibility of 'neutrality' and the equity of 'conclusions' which result from such analysis, a feminist perspective directs attention to our 'ways of knowing' about men and women as well as to our efforts to seek greater equality for women. Such a quest, moreover, may require new methods of inquiry; as Jill McCalla Vickers has suggested, women may 'learn little of themselves useful for achieving change by employing the intellectual tools of their oppressors'.[46]

Can a feminist agenda be accommodated within the legal system? Traditionally, legal method has operated within a highly structured framework which offers little opportunity for fundamental questioning about the process of defining issues, selecting relevant principles, and excluding irrelevant ideas. In this context, decision-making takes place according to a form which usually 'sees' present questions according to patterns established in the past, and in a context in which ongoing consistency in ideas may be valued more often than their future vitality.

In beginning to explore this relation between feminism and legal method, I decided to try to identify the features of legal method in practice, and to do so in the context of 'women's rights' cases where the claims being asserted might be

44 *Ibid*, pp 2–3.

45 Barnes, as quoted in Langland and Gove, p 3.

46 Macalla and Vickers, in Miles and Finn (1982), p 32.

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expected to reflect feminist ideas and objectives. In this case study of two early 20th century cases, the approaches used by judges in deciding claims concerning new roles for women in society are very well illustrated. With the benefit of our historical perspective, moreover, it is clear that the structure of the legal inquiry significantly affected both these decisions. This conclusion, moreover, provides the basis for beginning to assess the potential impact of feminism's 'transforming perspective' in present day challenges to achieve sex equality.

The Idea of Difference

Just a few years before the 19th century drew to a close, Clara Brett Martin was admitted to the practice of law in Ontario, the first woman to become a lawyer in the British Commonwealth. Her petition for admission was initially denied by the Law Society on the basis that there were no precedents for the admission of women as lawyers. However, in 1892 a legislative amendment was passed permitting women to be admitted as solicitors; three years later, another legislative amendment similarly permitted women to be admitted as barristers. Clara Brett Martin herself was finally admitted in February 1897 as a barrister and solicitor.

Because of the admission arrangements in Ontario, it was the Law Society of Upper Canada, rather than a superior court, which reviewed the issue of Clara Brett Martin's entitlement to admission as a lawyer. By contrast, there was a court challenge in the Province of New Brunswick when Mabel Penury French sought admission as a lawyer there in 1905.[47] When her application was presented to the court, the judges decided unanimously that there were no precedents for the admission of women, and denied the application. In the next year, however, after the enactment of a legislative amendment, French was admitted as a lawyer in New Brunswick.[48] The same pattern of judicial denial of the application followed by legislative amendment) occurred again some years later when she applied for admission by transfer in British Columbia, and in a number of the other Canadian provinces when women applied for admission as lawyers.

In contrast to the cases where women sought to enter the legal profession and were denied admission by the courts, the celebrated Privy Council decision in the *Persons* Case[49]determined that Canadian women were eligible to participate in public life. In the *Persons* case, five women challenged the meaning of the word 'persons' in s 24 of the British North America Act. Section 24 provided that the Governor General 'shall ... summon qualified Persons to the Senate,' and there was no express requirement that Senators be male persons. Yet, even though the language of the section was gender-neutral, no woman in Canada had ever been summoned to become a member of the Senate.

The Supreme Court of Canada considered a reference as to the meaning of the word 'persons' in the British North America Act in 1928, and concluded that women were not eligible to become Senators. On appeal to the Privy Council the next year, the decision was reversed. Ironically, it was in the Privy Council, and not in the indigenous courts of Canada, that the claim of 'equal rights for women' to participate in public life was successful. The decisions in these cases offer an interesting historical picture of legal process in the cultural milieu of the

47 *In re French* (1905) 37 NBR 359.

48 6 Ed VII c 5 (1906).

49 *Reference re: Meaning of the Word 'Persons' in s 24 of the British North America Act* (1928) SCR 276; *Edwards v AG for Canada* [1930] 1 AC 124.

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early 20th century. In the cases about the admission of women to the legal profession, judges accepted the idea that there was a difference between men and women, a difference which 'explained' and 'justified' the exclusion of women from the legal profession. Yet, the Privy Council's decision in the *Persons* case completely discounted any such difference in relation to the participation of women in public life.

The issue is why there were these differing approaches: was it the nature of the claims, the courts in which they were presented, or the dates of the decisions? More significantly, what can we learn from the reasoning in these cases about the nature of legal method, especially in the context of challenges to 'deeply held beliefs, vested interests, and the *status quo*'? In other words, what do these cases suggest about the potential impact of feminism on legal method? *French's* case in New Brunswick provides a good illustration of judicial decision-making on the issue of women in law. Her case was presented to the court for direction as to the admissibility of women by the president of the Barristers' Society of New Brunswick (as *amicus curiae*), and the court decided that women were not eligible for admission. Indeed, Mr Justice Tuck emphatically declared that he had no sympathy for women who wanted to compete with men; as he said: 'Better let them attend to their own legitimate business'.[50] Mr Justice Tuck did not expand on his views as to the nature of women's 'legitimate business'. However, it seems likely that he would have agreed with the views expressed by Mr Justice Barker in the case. Relying on the decision of the United States Supreme Court in *Bradwell v. Illinois* in 1873,[51] Mr Justice Barker adopted as his own the 'separate spheres' doctrine enunciated there: ... 'the civil law, as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood'.[52]

The language of the *Bradwell* decision expressed very clearly an unqualified acceptance of the idea of difference between men and women, a difference which was social as well as biological. From the perspective of legal method, however, it is significant that no evidence was offered for his assertions about the 'timidity and delicacy' of women in general; no authorities were cited for the existence of 'divine law'; and no studies were referred to in support of the conclusion that the domestic sphere belonged 'properly' to women (and vice versa). The court merely cited the existence of divine and natural law in general terms.

The legal reasoning used by Mr Justice Barker does not seem consistent at all with the recognised principles of legal method: the reliance on relevant and persuasive evidence to determine facts, the use of legal precedents to provide a framework for analysis, and a rational conclusion supported by both evidence and legal principles. Yet, if Barker, J's ideas are not the product of legal method, what is their source?

The answer, of course, is that the ideas he expressed were those prevailing in the cultural and professional milieu in which he lived. The ideas of mainstream

50 At pp 361–62.

51 83 US (16 Wall) 130.

52 *In re French* (1905) 37 NBR 359, p 365.

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religion, for example, emphasised the differences between men and women. Moreover, even where women and men were regarded as equal in the eyes of God (in the ideas of reformers such as Calvin, for example), women were still expected to be subordinate to men, their subordination reflecting 'the divinely created social order' in which God 'ordained' the subjugation of wives to their husbands.

The idea of a divinely created 'social office' in the religious tradition, which required women and, men to perform quite different social roles, was reinforced by secular ideas in philosophy in which the role of the family prescribed defined roles for women. Even John Stuart Mill, who was well known for his progressive views about the rights of women, considered that equal rights to education, political life, and the professions could be granted only to single women without the responsibilities of family. Moreover, even if Mr Justice Barker had turned to scientific thought at the turn of the century, he would have found these views confirmed. Because scientific inquiry took place within an already existing framework of knowledge, it was almost inevitable that scientists would find the answers to questions they asked rather than to others which they did not ask, and confirmation of differences rather than similarities between women and men.

The ideas described from religion, philosophy, and science were those current in the mainstream of intellectual life at the turn of the century. There were, of course, other ideas also current at that time: ideas of religious equality among the Shakers, and also with liberals such as the Grimke sisters; ideas about sex equality, however flawed, in the work of philosophers like Mill and scientific ideas about the influence of environment on traits of men and women. Yet such ideas were less well accepted than those in the mainstream, those so warmly embraced in the court by Barker, J.

What is significant here is the court's uncritical acceptance of ideas from the mainstream of intellectual life, as if they were factual rather than conceptual. Moreover, in accepting these ideas and making them an essential part of his decision, Barker, J. provided an explicit and very significant reinforcement of the idea of gender-based difference. In this way, the particular decision denying French's claim to practice law had an impact well beyond the instant case. Thereafter, in the law, as well as in other intellectual traditions, there was a recognised and 'legitimate' difference between women and men.

Two other points must also be mentioned. It is significant to an assessment of legal method that the ideas about the role of women, first expressed in the *Bradwell* case in 1873, were adopted without question over thirty years later in *French's* case in 1905. That the court apparently did not question the appropriateness of applying a precedent from an earlier generation, and from a foreign jurisdiction, seems remarkable. The possibility of distinguishing the earlier decision is clear; and the court's acceptance, without question, of the *Bradwell* decision as both relevant and apparently binding is initially perplexing. As well, the *Bradwell* decision relied in part on the inability of married women to enter into contracts because of their common law disability, still in existence in 1873. Barker J might have been expected to comment on the fact that married women's property legislation, both in Canada and in the United States, had erased most of these disabilities by 1905, thereby providing a further reason for distinguishing rather than following *Bradwell*. As such analysis demonstrates, the *Bradwell* precedent was not self-applying; there was a choice to be made by the court in *French*. The more difficult problem, therefore, is to explain the reasons for the judicial choice. Even more fundamentally, the ideas accepted in *Bradwell*