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UNIVERSITY OF ALBERTA

THE DISRUPTIVE FEMINIST VOICE IN LAW

BY

ANNA S. PELLATT
B.A., LL.B.

A Thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of MASTER OF LAWS.

FACULTY OF LAW

Edmonton, Alberta

FALL 1993

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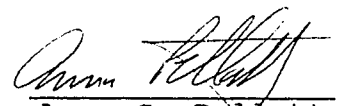

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FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "The Disruptive Feminist Voice In Law" submitted by Anna S. Pellatt in partial fulfillment of the requirements for the degree of Master of Laws.

Professor Annalise Acorn

Professor Lillian MacPherson

Professor Sheilah Martin

Professor Lynn Penrod

Date: October 5, 1993

ABSTRACT

Can feminist initiatives in law contribute to the process of fundamental social change? What kinds of strategies and disruptive voices can be employed to transform legal and social discourse? These are the central questions addressed in this thesis.

Chapter I examines the concept of social transformation. Chapter II considers whether it is possible to bring about a metamorphosis in all things social by working from within prevailing social structures, and specifically from within law, and explores the difficulties associated with the feminist project in law. Chapter III examines how feminist theorists envision manipulating law for socially progressive ends, and Chapter IV explores the transformational impact of feminist legal initiatives launched by the Women's Legal Education and Action Fund (LEAF).

This thesis concludes that it is possible to contribute to the transformational process by working within the legal system, but that efforts to do so are subject to substantive constraints. In order to advance women's interests through legal struggle, feminists must balance a variety of theoretical ideals, issues and interests, and raise a host of dissonant, disruptive voices.

Acknowledgements

I would like to thank Professor Lillian MacPherson for sharing her knowledge of feminism and the law with me, and for her many kindnesses and support throughout the graduate program. My thanks, as well, to Dr. Lynn Penrod for providing materials and inspiring talks about Cixous, the "feminine" and the law, early on in the development of this thesis.

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A. Tracing The Path Back To Legal Scholarship

> I shall speak about women's writing: about what it will do. Woman must write her self: must write about women and bring women to writing, from which they have been driven away as violently as from their bodies - for the same reasons, by the same law, with the same fatal goal. Woman must put herself into the text - as into the world and into history - by her own movement.[1]

Let me begin by explaining why I decided to return to law school to pursue a graduate degree after all of these years.[2] It was actually an unlikely thing to do based upon my undergraduate law school experience. I disliked law school intensely the first time around and vowed when I left never to return. Whereas my undergraduate education in Anthropology and English had provided intellectual challenges and excitement, the law, as it was presented to me in the late 1970s at Osgoode Hall Law school, did not. Most of my legal education- with several important to note exceptions[3]- was a crashing bore and a demanding bore, to boot.

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[1]H. Cixous, "The Laugh Of The Medusa", in E. Abel and E.K. Abel, eds., The Signs Reader: Women, Gender and Scholarship, trans. K. Cohen and P. Cohen (Chicago: University of Chicago Press, 1983) 279 at 279.

[2]I attended Osgoode Hall Law School from 1977 to 1980 and obtained my LL.B. in 1980. I was called to the Bar in Ontario in 1982.

[3]I spent one term and one summer at Parkdale Community Legal Services doing case work and community legal work and enjoyed my experiences there immensely. Mary Jane Mossman's "Women and the Law" course stands out as by far the most stimulating course I took during law school. See discussion infra note 4.

I love to analyze and debate questions and points of principle, and thought that law school would be a rich and stimulating experience in this regard. In another age and other-gendered body I would have delighted in the life of a Jewish scholar, engaged in intense study and debate of Jewish law and scriptures. But alas, despite bearing an uncanny resemblance to the Yeshiva in certain respects - notably in the historical maleness of the institution - law school was not the Yeshiva. It was more of a cross between bible college and a trade school. I was taught to revere the law, to engage in its study and debate with religious fervour, but not to go beyond certain restrictive critical boundaries. In the Yeshiva, questions of morality pervade and are fundamental to discussion and debate. In law school, questions of morality, of the ultimate moral correctness of the law's pronouncements, were, for the most part,[4] off limits and served to contain rather than spark debate.

I felt stultified by the containment and diminished by the diminished status the law accorded "non-legal" questions,

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[4]Mary Jane Mossman's "Women And The Law" (1977-78) course stands out as an exception to this rule. In this course Professor Mossman strove to integrate gender issues and the law, and in the process broke with tradition in establishing a critical framework for legal analysis which went beyond the boundaries of traditional legal critique. There were several other courses that I took at Osgoode during the late '70s which attempted to expand the purview of the traditional critique in law, eg, Psychiatry and the Law, Children and the Law, Environmental Law. None, however, were as ground breaking as Professor Mossman's course in challenging the fundamental legitimacy of the law's perspective.

issues and pursuits near and dear to my heart and my life. The theory and practise of my legal education appeared to be based upon the promotion of a legal vision of the world to the exclusion of all other ways of seeing and knowing. I was taught, in both explicit and implicit terms, that I would have to relinquish "extraneous" interests and pursuits and "un-learn" alot of what I already knew in order to learn the law. Separation or alienation from self, and primarily from my status as a woman in law, and my experiences as a woman in a society governed by legal precepts and standards, was a fundamental part of this learning process. In short, my undergraduate law school experience was extremely alienating because I was expected to understand and relate to the law at extreme distance from my own interests.

Working within the profession has been no less alienating, for many of the same reasons. Despite the influx of women into the legal academy and the practise of law over the past two decades, the discipline remains male dominated and, in many respects, openly hostile to the presence and interests of women, and especially feminists. It also demands the adoption of norms, values and ways of viewing and approaching the world which are largely antithetical to my own. I have dealt with this dilemma by distancing myself from the centre of the profession and working to effect both legal

and social reforms during the course of my career.[5] But in the past several years, I have found myself questioning the value of the work I have been doing, and re-thinking my involvement in the profession altogether.

Why then, go back to law school at this point in time? I decided to return primarily for two reasons. First, I wanted to try and counter the sense of alienation I felt as a law student and lawyer by approaching the law in a deeply personal way. My goal was to study and write about the law in the context of my own life and passionate interests. In coming to write this thesis, I put myself into the text of law and legal scholarship.

I have also been drawn back to legal studies by a desire to reconsider the nature of the work I have been doing in the discipline. I am passionately committed to the project of social reform and have worked both within the feminist movement and within law to effect fundamental social change. One of the reasons I decided to do a graduate degree was to gain the time and opportunity to read feminist theory and feminist legal theory widely, and think about ways of integrating my feminism and my reform work in law. I also wanted to grapple and come to terms with the following questions concerning the employment of the discipline for

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[5]I have worked as a legislative and policy advisor for government, aboriginal organizations, and other non-governmental agencies. My work has focused on achieving legal and social reforms in the aboriginal rights, poverty law, child welfare and social service fields.

progressive ends: Is it possible to work from "within" to effect fundamental social change? Can law be mastered and manipulated to dismantle the existing social order and forge a more equitable and hopeful future? How do feminist legal theorists envision the process unfolding? Can feminist initiatives in law substantively contribute to the transformational process? These questions form the base of this study. The central issue I explore in this thesis is whether the feminist project in law can contribute to the process of social transformation.

B. Hélène Cixous And The Law

Working within law to effect fundamental social change involves finding ways of transforming the material conditions in which women and other disadvantaged groups live their lives. But it also involves effecting a transformation in the way in which key issues are conceptualized and responded to within the social sphere. In attempting to sort through these and other issues associated with this project, I have turned to the work of the French feminist writer, Hélène Cixous.[6]

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[6]Cixous' writing crosses many forms and genres. In addition to her theoretical work which is markedly poetic, she also writes poetry and plays and is a prolific novelist. I am familiar with a segment of her work, notably, her essay "The Laugh of the Medusa", supra note 1; the essays contained in a collection entitled Coming To Writing And Other Essays, D. Jenson, ed., trans. S. Cornell (Cambridge, Mass.: Harvard University Press, 1991); the piece "Sorties" in H. Cixous & C. Clément, The Newly Born Woman, B. Wing, trans. (Minneapolis: University of Minnesota Press, 1975) at 63-135; the convocation address she delivered at the University of Alberta

Cixous is perhaps an odd choice as an inspirational influence in this context. She is, after all, a passionately poetic writer who opposes rigid oppositional thinking and advocates "blow[ing] up the Law"[7]. But it is precisely because of her insistence upon the collapse of stultifying categories of thought and the introduction of disruptive "feminine" voices as a mechanism for achieving this end, that I find her work so compelling and pertinent to this project.

More than any other writer I have come across, Cixous has made clear to me the deep and important connection between the personal and political realms. In "The Laugh of the Medusa", as well as other pieces, Cixous explores how the systemic oppression of women extends beyond material deprivation to the appropriation of souls, psyches and a distinctly female sexuality. According to Cixous, women are denied subject status pursuant to a discourse which is "phallocentric" and rigidly dichotomous. Under this language system, the category "woman" has no meaning separate and apart from that ascribed to the category man. Woman is, in fact, constructed as a lack, a negation which serves to highlight male subjectivity and serve male sexual desire:

> Men have committed the greatest crime against women. Insidiously, violently, they have led them to hate women, to be their own enemies, to mobilize their immense

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on June 3, 1992 and interviews she gave to Victoria Conley printed in V. Conley, Hélène Cixous: Writing the Feminine (Lincoln: University of Nebraska Press, 1984).

[7]Cixous, supra note 1 at 291.

> strength against themselves, to be the executants of their virile needs. They have made for women an antinarcissism! A narcissism which loves itself only to be loved for what women haven't got! They have constructed the infamous logic of antilove.[8]

According to Cixous, breaking the codes which negate women's existence is key in the struggle for social transformation. And women can break up the logic of the discourse, she suggests, by giving voice to the "feminine". Drawing on Lacanian psychoanalytic theory, Cixous and other French feminists identify the "feminine" with a pre-oedipal stage of development in which the child perceives herself as inseparable from the mother and the entirety of her sensual surroundings. The connection to the mother and this sensual realm is terminated when the child gains language and admittance to the realm of the father. According to Cixous, memories of a fluid, heterogeneous sense of the world remain accessible, especially to women, and can be invoked to produce a powerfully disruptive from of writing known as l'écriture feminine.[9] The act of women writing or expressing themselves in this manner is highly subversive because it marks the return of the repressed:

> An act that will also be marked by woman's seizing the occasion to speak, hence her shattering entry into history, which has always been based on her suppression. To write and thus to forge for herself the antilogos weapon. To become at will the taker and initiator, for

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[8]Cixous, supra note 1 at 282.

[9]See Cixous's discussions of the "feminine" in Ibid. at 280 and 285 and T. Moi, Sexual/Textual Politics (London: Routledge, 1985) 99-101 and 114-115.

her own right, in every symbolic system, in every political process.[10]

The question is, how can legal codes of language which negate women's existence be disrupted and displaced? What kinds of personal, expressive acts contribute to law reform and the process of social transformation? These issues are central to my thesis. Throughout this study, I consider the difficulties legal language poses to feminist initiatives in law, as well as various ways in which disruptive voices contribute to the reform project. I explore how the articulation of women's stories of social oppression and visions of a radically altered social sphere advances the feminist cause. I also critically examine how feminist legal theorists and practitioners construct the disruptive feminist voice in law.

C. The Nature And Structure Of The Beast

The discussion in this thesis spans four chapters. In Chapter I, I discuss ways of understanding a concept which is key to this discussion, i.e., social transformation. I explore the impetus for working for fundamental social change in the first place, and discuss the kinds of strategies which might contribute to the process. I also consider ways of tracking the process of social metamorphosis and the major components of a utopian social order.

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[10]Cixous, Ibid. at 284.

Chapter II explores the contentious question of "working within" to effect fundamental social change. I canvass feminist critical views on the subject across disciplines, and also review aspects of the debate raging in law regarding the political utility of rights employment. In the final third of the chapter, I discuss the specific difficulties facing feminists who choose to work within law to effect fundamental social change.

Chapter III explores how a variety of feminist legal theorists envision employing law for socially progressive ends. I focus on the work of three major feminist legal scholars, Catharine MacKinnon, Robin West and Patricia Williams, and examine each theorist's prescription for legal and social reform. In addition to reviewing the substance of their writing, I consider how they employ language and the medium of legal scholarship to advance their transformational vision.

In the final chapter, I consider how feminist visions of transformation have been translated into practice and assess the transformational impact of these initiatives. Toward this end, I explore the work which the Women's Legal Education and Action Fund (LEAF), a Canadian feminist litigation organization, is doing in pursuit of equality rights for women. I critically examine and assess the organization's analytical approach to equality matters and the strategies it

employs in its attempt to advance women's interests through legal action.

Chapter I: Conceptualizing Social Transformation

A. Introduction

In recent years, there has been a plethora of legal writing exploring the potential for using law - and specifically rights granted under law - to radically transform the social order. Critics from a variety of theoretical backgrounds have flooded legal scholarship with material on point.[1] Though I find some of this work thought-provoking and helpful in terms of my own efforts to sort through the issues, I am disappointed, overall, by the quality and texture of much of the debate. What I find specifically problematic about this body of work is the fact that little attention is paid to a concept which is critical to the discussion, i.e., the concept of social transformation. Some writers seem to simply assume that we all know what they mean when they talk about transforming the terms of the social order and don't bother to define the term at all or discuss what the process of social

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[1]See as a tiny example, A. Bartholomew and A. Hunt, "What's Wrong With Rights" (1990) 9:1 L. and Ineq. 25; J. Fudge, "What Do We Mean by Law and Social Transformation" (1990) 5 CJLS/RCDS 47; J. Fudge and H. Glasbeek, "The Politics of Rights: A Politics with Little Class (1992) 1 Soc. & Leg. St. 45; P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1983-84) 62:2 Tex. L. Rev. 1563; P. Gabel and P. Harris, "Building Power And Breaking Images: Critical Legal Theory And The Practise of Law" (1982-83) XI N.Y.U. Rev. of L. & Soc. Ch. 369; D. Herman, "Beyond The Rights Debate" (1993) 2 Soc. & Leg. St. 25; E. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement (1986) 61 N.Y.U. L. Rev. 589; P. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. C.R.- C.L. L. Rev. 401 and The Alchemy of Race and Rights (Cambridge, Mass.: Harvard University Press, 1991).

metamorphosis might involve or look like. Others appear bent on discussing the issue in theoretical terms far removed from the field in which theory is put into practice. Their writing does not capture the complexities of the process by which all things social are fundamentally altered. Nor does it give the reader a sense of the difficulties involved in attempting to conceptualize, contribute to and track the transformational process.[2]

This study of the transformational potential of feminist strategic initiatives in law begins by defining and attempting to come to terms with the difficult-to-grasp concept of social transformation. In attempting to give meaning to this term, I explore the following questions: What's at stake in our efforts to transform the social order? What kinds of strategies might contribute to the transformational process? How do we track the process of change? What would be the

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[2]Patricia Williams' work, Ibid., Didi Herman's piece,"Beyond The Rights Debate", Ibid., and "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" by Elizabeth Schneider, Ibid., are striking exceptions to the rule. Williams' book, The Alchemy of Race and Rights, paints a wonderfully complex portrait of what's involved in working from within law to combat racism and sexism. Her article, "Alchemical Notes: Reconstructing Ideal from Deconstructed Rights", provides apt criticism of the critical legal studies critique of rights from a minority perspective and all of her work includes explicit descriptions of her utopian vision. Herman and Schneider draw on their own experiences and those of others engaged in activist work in law to discuss the complexities and difficulties of the process of working for social change from within. Williams' views on the politics of rights debate will be considered further in the following chapter and her scholarship will be examined, in depth, in Chapter 3. Herman and Schneider's work will be discussed further in the following chapter.

major components of a social order constructed along utopian lines?

B. Definitions

According to the Concise Oxford Dictionary of Current English, to transform is to "make a thorough or dramatic change in form, outward appearance, character, etc."[3] The word transformation has a more complex meaning. It is both "an act or an instance of transforming" as well as the "state of being transformed."[4] The term refers both to the end point in the process of radical change and to the moments leading up to or contributing to the metamorphosis. The question I am concerned with in this thesis, is whether feminist legal interventions can contribute to the process of social transformation, that is, whether feminist initiatives, together with other kinds of legal and social actions, can succeed in bringing about a metamorphosis in social norms, values, relations and processes.

C. What's At Stake

How do we begin to conceptualize the process by which all things social are fundamentally transformed? We start by considering the impetus for working for change and making the

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[3]H. W. Fowler, F.G. Fowler, eds., The Concise Oxford Dictionary of Current English, 8th ed. (Oxford: Clarendon Press, 1990) 1296.

[4]Ibid.

journey in the first place. Under the present social order, reality is conceptualized in logically and rigidly dichotomous terms. A thing, person or group is either A or not-A, pursuant to this order. One cannot be both A and not-A at the same time, nor can one be anything other than what the categories allow for. Nancy Jay makes the point that this particular vision of the world can only be maintained if alternatives or other possibilities, i.e., the middle ground between A and not-A, are excluded.[5] Take gender, for example. One can, at the present time, be socially recognized as either a man or a woman. One cannot be acclaimed as a little bit of both and there are zero social possibilities for being recognized as neither and something else. Hence the denial or exclusion of anyone who might dare to transgress the rigid gender dichotomy.[6]

It is important to note and condemn the way in which difference is constructed as a negative pursuant to this vision of social reality. Nancy Jay's piece makes it clear

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[5]N. Jay, "Gender And Dichotomy" in S. Gunew, ed., A Reader In Feminist Knowledge (London: Routledge, 1991) 89 at 98.

[6]I came face to face with this truth when I was working at a poverty law clinic as a law student. A woman came into the clinic seeking assistance. She had recently undergone a sex change operation and wanted to renew her expired passport as a woman. I remember trying to find ways of manipulating the law so that her change of gender and persona would be recognized. I came to the realization during this struggle that one loses one's social and legal identity and enters, literally, a "no (wo)man's land" when one jumps the gender boundary.

that the meaning of the categories A and not-A is, in fact, brought into sharp focus by the censure of all that they are not. Ross Chambers describes the "excluded other" as a "cultural mediator" for this reason. Culture, he argues, "is the precondition of there being community"[7] and the establishment of community, in turn, is what makes communication possible.[8] It is commonly believed, he notes, that our efforts to establish cultural identity and build community are threatened by the introduction of differences, i.e., that the concepts of equality and difference are antithetical. Thus an "us versus them" mentality is able to develop and flourish. He is gay, this thinking goes, and therefore must be excluded from the group because our membership is straight and the survival of the group depends upon maintaining its sexual purity. But, as Chambers argues, it is precisely the fact of his gay-ness that gives form and substance to the conversation which takes place among "straights":

> It is an actual constituent of their communication, and arguably its substance, since it is that which defines and qualifies them as the communicating parties. Who the qualified speakers <u>are</u> is as much the message as what they say.[9]

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[7]R. Chambers, "No Montagues Without Capulets, Some Thoughts on Cultural Identity" (Work In Progress) [unpublished].

[8]Chambers argues that those who seek to communicate with each other must establish common ground, eg, a common language, in order to do so.

[9]Chambers, <u>supra</u> note 7.

Chambers argues that the excluded third is actually not excluded from the cultural sphere, but rather is present and the subject of oppression therein. Individuals and groups marked by difference are excluded from the exercise of discursive power and hence the process of community building.[10]

A social order played out in these terms sets the "the stage for insidious assassination" and "war".[11] As Catharine MacKinnon notes in her writing, it is the attempt to suppress the difference women pose which lies at the root of gender oppression. She notes that women and men are constructed as gender opposites in the social sphere and are therefore equal in conceptual terms.[12] Yet they are not equal socially, she points out. The difference between them marks a difference in power that is played out in hierarchical terms to the distinct disadvantage of women:

> Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality from the standpoint of what it is going to take to get it, is at root a question of hierarchy which - as power succeeds in constructing social perception and reality - derivatively becomes a categorical distinction, a difference.[13]

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[10]Ibid.

[11]H. Cixous, "Untitled", trans. L. Penrod (Address to Convocation, University of Alberta, 3 June, 1992) [unpublished] [hereinafter "Address to Convocation"].

[12]C. MacKinnon, Feminism Unmodified: Discourses on Law and Life (Cambridge, Mass.: Harvard University Press, 1987) at 37.

[13]Ibid. at 40.

Relations of domination and subordination serve not only to subordinate women's interests to men's in all social spheres, but to construct male subjectivity at women's expense. A distinctly female sexuality and social identity are obliterated in the process. While men become the measure of all things positive in the social sphere, women come to represent a lack, an absence, a "sex which is not one".[14] As Luce Irigaray points out, the subjugation and objectification of women is vital not only to the creation of male subjectivity but to the construction of economic and social relationships between men:

> The exchanges upon which patriarchal societies are based take place exclusively among men. Women, signs, commodities, and currency pass from one man to another; if it were otherwise we are told, the social order would fall back upon incestuous and exclusively endogamous ties that would paralyse all commerce. Thus the labour force and its products, including those of mother earth, are the object of transactions among men and men alone.[15]

The liberal state is marked not only by gender oppression, but by division and hierarchy between and among other groups, and by the colonization of other cultures. According to Roberto Unger, the system of rights and

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[14]"This Sex Which Is Not One" is the title of an essay and book of essays by Luce Irigaray. The phrase is a play on words. Irigaray is referring to the fact that in the social scheme of things women do not count. She is also referring to the fact that women's eroticism, unlike men's, is not centred on a singular sex organ. Women's sexuality, she argues, is plural. It begins with two lips and is therefore "always at least double", and extends over the entire body. See L. Irigaray, This Sex Which Is Not One, trans. C. Porter (Ithaca, N.Y.: Cornell University Press, 1985) at 28.

[15]Ibid. at 192.

principles embraced by the present social system promotes the interests of the individual over and above those of the collective and a communal, caring social lifestyle. Unger singles out the right to property granted by liberal democracy as an especially divisive force and a threat to democracy because it gives "the occupants of some fixed social stations the power to reduce the occupants of other social stations to dependence."[16]

The colonization of First Nations people worldwide is another determining and damning feature of the Canadian federation and other liberal democracies. In his book The colonizer and the colonized[17], Albert Memmi describes the nature of the colonization process as complex and destructive to both colonizer and colonized. Memmi suggests that issues of economic privilege are central to the relationship, but do not fully explain its dimensions:

> To observe the life of the colonizer and the colonized is to discover rapidly that the daily humiliation of the colonized, his objective subjugation, are not merely economic. Even the poorest colonizer considers himself to be - and actually was - superior to the colonized. This too was part of colonial privilege.[18]

He notes, as well, that the success of the colonial arrangement depends upon the colonized and colonizer assuming

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[16]R. Unger, "The Critical Legal Studies Movement" in A. C. Hutchinson, ed., Critical Legal Studies (Totowa, N.J.: Rowman & Littlefield Publishers, 1989) 323 at 337.

[17]A. Memmi, The colonizer and the colonized (London: Earthscan Publications, 1990).

[18]Ibid. at 10.

distinct and specific roles. While the colonizer must play out the part of oppressor, concerned only with his "privileges and their defense"[19], the burden assigned to the colonized is far greater, in both material and spiritual terms. Like the role played by women in relation to men, the colonized is completely dehumanized in the colonization process. He is constructed as a series of negations[20] in order to reinforce the positive attributes and further the interests of the colonizer. As Memmi points out, the colonization process is insidious because it demands that the colonized come to view himself through the eyes of the colonizer and accept his place in the dyad. According to Memmi, the colonized can do one of two things to escape the destructive terms of the colonization process: assimilate or revolt.

What's at stake in the feminist quest for social transformation? The cost, in human terms, of the institutionalization of hierarchical and oppressive power relations is almost unfathomable. Many have been killed and many others lead lives diminished by the greed and needs of those in positions of power. Their lives are marked by spiritual and material poverty, exclusion, brutality and containment. A social system based on the colonization of one individual or group by another also "distorts relationships, destroys or petrifies institutions, and corrupts men, both

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[19]Ibid. at 155

[20]Ibid. at 149.

colonizers and colonized."[21] What we seek in the quest to transform the social order is an end to brutal and exploitive modes of relating.

D. Transformational Strategies

What kinds of strategies can we employ to bring an end to the institutionalization of colonizing relations of power? Hélène Cixous suggests that our efforts to bring about change must be double-edged. They must seek "to break up, to destroy; and to foresee the unforeseeable, to project."[22] I envision the process in similar terms. In order to effect fundamental social change we must work to break up the prevailing social system and put forward alternatives to the present model of power relations. Our reform initiatives must embrace both halves of the strategy. Efforts to undermine the terms of the present social order must be driven by our vision of a more hopeful, positive future. The dreams and visions we project must, in turn, be incorporated into the struggle for change. We certainly can't "dream away" gender oppression. We need concrete strategies designed to pick apart the system and achieve material gains for women in order to achieve this end. But we also need visions, dreams and poetic manifestos

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[21]Memmi, supra note 17 at 217.

[22]H. Cixous, "The Laugh of the Medusa", in E. Abel & E.K. Abel, eds., The Signs Reader: Women, Gender and Scholarship, trans. K. Cohen and P. Cohen (Chicago: University of Chicago Press, 1983) 279 at 279.

to provide direction for our reform initiatives and inspire and move us to action.[23]

Terry Eagleton suggests another reason why visions of utopia are vital to the reform process. The most difficult aspect of emancipation, he argues, "is always a matter of freeing ourselves from ourselves".[24] The dominant social order manages to sustain itself precisely because it has succeeded in "intensively colonizing the space of subjectivity itself", i.e., it has entwined "itself with people's needs and desires, engaging with vital motifs of their actual experience".[25] Perhaps envisioning and embracing other modes of attaining fulfilment is a necessary first step in the process of breaking free from false and empty dreams.

Our reform strategies must be double-edged in another sense. Certainly the material conditions in which women live their lives must be the focus of our struggle, but we must also work to transform the way in which issues are conceptualized and dealt with. It is not enough to combat individual instances of sexual harassment, for example. We must also attack a way of thinking about sexually harassing

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[23]As I indicated in the Introduction, Hélène Cixous' poetic prose - specifically her political manifesto "The Laugh of the Medusa", Ibid. - has inspired and directed my thinking with respect to ways of bringing about social transformation.

[24]T. Eagleton, ed., The Significance of Theory and Other Essays (Oxford, U.K.: Blackwell, 1990) at 36.

[25]Ibid. at 37.

behaviour which normalizes it and allows it to continue unabated, at women's expense.

Our goal must also be to challenge the dichotomous orthodoxy which marginalizes those who differ from socially sanctioned norms. It is not enough, as the Yale Collective of Women of Colour and the Law have so forcefully argued[26], to allow all women's experiences of sexual harassment to be thought of and responded to in the same way, as a manifestation of sexual discrimination. Some women of colour, they point out, experience sexual harassment as a function of race subordination as well as discrimination based on sex. Under current categories of legal thought, both in the U.S. and Canada, their experience comes to be misrepresented solely in terms of gender. The substantive difference that being female means in this context is accepted, but the differences which mark women's lives are not. It is this kind of rigid, unyielding, exclusionary categorization of reality, and specifically women's reality, which we must work to counter.

In designing and implementing strategies to radically transform the social order, we must also be aware of the kind of work we are undertaking. Change will not come easily, nor will it come overnight. What we do must be designed to contribute to the process, i.e., to build on what has already

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[26]See Yale Collective on Women of Colour and the Law, "Open Letters To Catharine MacKinnon" (1991) 4 Yale J. of L. and Fem. 177. The argument put forward by the Collective will be explored in further depth in Chapter III.

been accomplished in law and other social spheres. Constructing coalitions and working in concert with others who are working for change must therefore be a vital part of the work we do.

It must also be remembered that working for change is a tireless, repetitive business. Our social system is designed to sustain itself in countless ways[27] and so the challenges we mount must often be repeated in different ways and contexts. We have to keep on plugging, pushing and working in the face of all roadblocks and apparent defeats.

E. Tracking The Process Of Change

The fact is that no one knows for sure how, precisely, social transformation will come about. The process of un-doing the social order is inherently "non-social", i.e., it is not a process which operates by the rules or logic which govern other social and legal processes. We therefore cannot expect to measure its progression in the way we do other social phenomenon. Progress, in transformational terms, does not necessarily follow a linear grid. Because of the relative foreignness of the process, it is difficult to track or evaluate the impact of the strategies we implement. Initiatives we consider successes or defeats in strictly legal

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[27]I will be discussing specific ways in which the legal system undermines reform initiatives and wards off challenges in the following chapter.

terms do not necessarily translate into success or failure in the context of the struggle for change.

Take the Seaboyer[28] case, for example. The appellants in Seaboyer argued that the rape shield provisions in the Criminal Code[29] contravened their right to a fair trial. The provisions in question limited the introduction of evidence concerning the sexual history and reputation of complainants in sexual assault prosecutions and were enacted to protect women from savage treatment at trial. The Women's Legal Education and Action Fund (LEAF)[30] intervened in the case as part of a coalition of groups concerned about violence against women and children. LEAF argued in support of the provisions. It suggested that the kind of protection extended under the provisions was critical in the struggle to secure equality rights for women and children. According to Christie Jefferson, LEAF's Executive Director at the time, the coalition intervened because

> [it] was important that the Court hear and take into account the perspective of women and children, who are most often the victims of sexual assault, in making any decision about a law designed to benefit victims.[31]

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[28]R v. Seaboyer, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193.

[29]Criminal Code, R.S. 1985, c.C-34, s.276, 277.

[30]LEAF's project will be discussed in great detail in Chapter IV.

[31]"Rape shield law struck down" (1992) 4:4 Leaf Lines 4 at 4.

The Supreme Court was persuaded by the appellants argument, and struck down Section 276, the provision extending protection against intrusive sexual history interrogations.

Now no one can say that this decision constitutes a step forward for Canadian women or that the coalition's intervention was, technically speaking, successful. But it also cannot be said, given the events that occurred following the decision, that intervening and putting forward arguments highlighting the shortcomings of the law's approach to sexual assault matters, was all for nought. The decision outraged those who had participated in the litigation as well as many members of the public, and galvanized efforts to seek a political solution to the problem. A coalition of women's groups formed and successfully lobbied for fundamental legislative reform of the sexual assault provisions.[32] The coalition's efforts at trial obviously had a significant impact on what eventually occurred. The arguments it advanced helped to raise public consciousness regarding the law's

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[32]Pursuant to the amendments, sexual assault prosecutions have been made more sensitive to equality concerns. The new provisions define consent as the voluntary agreement of the complainant to engage in sexual activity, and place a positive duty on men to ascertain whether women have given their consent. They also makes it clear that there is no consent in certain circumstances, eg, when the complainant is incapable of giving her consent. The amendments also restrict the introduction of evidence relating to the sexual activity of complainants.

response to sexual assault matters, and to strengthen support for legislative reform.[33]

The point that I want to make here is that what we do in law and other social spheres in the struggle for social change has ramifications beyond the scope of the immediate intervention and often beyond our wildest and most hopeful imaginings and greatest fears. We need to bear this fact in mind when we build strategies as well as evaluate the consequences of the work we have done.

F. Envisioning A Difference

In working for change, we seek an end to colonization but we seek something else as well. We seek to create a more equitable social alternative. Given the constraints of a language and conceptual orientation which is rooted in the present social order, the task of envisioning a difference is, to say the least, not easy. But neither is it impossible. It seems to me that if we can imagine an end to racism, sexism and other forms of oppression, we can imagine a new beginning as well.

The question is, what would be the key components of a social order reconstructed along utopian lines? I join Andrea Nye in calling for the recuperation of "inter-

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[33]The struggle to make sexual assault prosecutions more humane and sensitive to women's interests does not, of course, end with the passage of the legislation. Much will depend on how the legislation is interpreted and applied.

personality" as a founding social value.[34] Our society has banished the interpersonal as a primary social value in favour of an orientation to a social life grounded in logic. Ways of speaking and relating to others are, as a consequence, marked by separation, the will to power over others and conflict between individuals.[35] Our first act in recreating ourselves socially along utopian lines must be to re-introduce what is missing, ie, a focus on relating to others in an equitable and loving way.

How do we begin to conceptualize a fundamental shift in relations of power along these lines? Cixous writes and speaks of interactions which seek to preserve "the enigmatic kernel of the other" rather than consume or eradicate difference.[36] She describes this mode of relating as a "gift" that gives rather than takes in "hierarchizing exchange".[37] It involves a movement towards the other not for the purposes of possession, but rather so that one can understand and accept without violence that aspect of the other which cannot be understood.[38]

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[34]A. Nye, "Women Clothed With The Sun: Julia Kristeva And The Escape From/To Language" (1987) 12 Signs: J. of Wom. in Cult. and Soc. 664 at 683.

[35]Ibid. at 685.

[36]V. Conley, Hélène Cixous: Writing the Feminine (Lincoln: University of Nebraska Press, 1984) at 144.

[37]"The Laugh of the Medusa", supra note 22 at 297.

[38]Address to Convocation, supra note 11.

This kind of shift in power relations necessarily involves an alteration in conceptions of the self as a social being. While those currently occupying positions of power in society would be required to cease trampling on the lives of others and contract the boundaries defining their subject[illegible] those who have historically been subjugated would have [illegible] engage in a fundamentally different exercise. They would need to redefine themselves as subjects rather than as the perennial objects of history. In "The Laugh of the Medusa", Cixous urges women to do just that. She calls on women to write themselves and in the process to do away with patriarchal conceptions of women's difference/sexuality:

> Woman must write her self: must write about women and bring women to writing, from which they have been driven away as violently as from their bodies- for the same reason, by the same law, with the same fatal goal. Women must put herself into the text- as into the world and into history- by her own movement.[39]

Nancy Harstock also suggests that marginalized groups must reject the object status assigned to them by the colonizer and reformulate their identities in more positive terms, in order to participate in the making of history.[40] In a world sensitive to difference, Harstock argues, those who had hitherto been subjugated in the social sphere would have the

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[39]"The Laugh of the Medusa", supra note 22 at 279.

[40]N. Harstock, "Foucault on Power: A Theory for Women?", in L.J. Nicholson, ed., Feminism/Postmodernism (New York: Routledge, 1990) at 170-171.

space to "name themselves, speak for themselves, and participate in defining the terms of the interaction".[41]

Difference would neither be suppressed nor assimilated in a community constructed on this basis. In what Ross Chambers refers to as a "politics of community", difference would come to be valued in a radically different way. Rather than viewed as antithetical to the concept of equality and a mark disqualifying one from community membership, difference would come to be viewed as a qualifying characteristic.[42] Cultural identity, in turn, would reflect our similarities as well as our differences. To draw once more on the example I used earlier, the sexual difference posed by gays would be just as critical to the cultural landscape in this utopian community as the common ground shared by "straights".

G. Conclusion

Conceptualizing the process by which all things social are undone and remade is not an easy task. The process is fundamentally "non-social" and hence foreign and difficult to track. Yet we do know certain things about the phenomenon. We know, first of all, the beginning and end points of the journey. In seeking a metamorphosis of all things social, we seek to put an end to hierarchical and oppressive relations of power, a rigidly dichotomous world view and the suppression of

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[41]Ibid. at 171

[42]Chambers, supra note 7.

differences. We also seek to create a social order which promotes equitable and loving relationships, and the affirmation and inclusion of differences.

We also know that the struggle to effect fundamental social change is a long and arduous one, and that it involves careful planning and difficult choices. Our efforts to break up the prevailing social order and project a viable social alterative must be multi-layered. We must work to transform the material conditions as well as the conceptual framework which determine women's lives. In working to overcome the barriers to women's substantive equality, we must also strive to counter essentialist conceptions of women's reality. Our reform efforts must also make room for individual and collective self-determination, and articulate a vision of a more positive social future. Utopian projections are a key part of the process of working for social transformation because they give our work direction, and inspire and sustain our efforts.

Chapter II: The Question Of Working Within

A. Introduction

Feminists working within the legal sphere to effect fundamental social change have a difficult project on their hands. Conceptualizing and engaging with the process by which all things social are undone and remade is hard and frustrating work. Attempting to use the "masters tools"[1] to do the job adds a whole other dimension to the project and raises a fundamental question which feminists and others in law and across disciplines have long debated: the question of working within.

In this chapter, I consider whether it is possible to bring about social transformation by working from within, and specifically from within the legal sphere. Toward this end, I examine the views expressed by feminists across disciplines regarding the efficacy of the project. I also review aspects of the debate raging in legal scholarship regarding the political utility of rights claims. In the final section of the chapter, I discuss some of the difficulties feminists in law can expect to encounter in their quest for social transformation.

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[1]This term is drawn from the title and substance of Audre Lorde's essay, "The Master's Tools Will Never Dismantle The Master's House" in C. Moraga and G. Anzaldua, eds., This Bridge Called My Back - Writings By Radical Women Of Color (N.Y.: Kitchen Table: Women of Color Press, 1983) 98.

B. The Question Of Working Within

1. The Debate Among Feminists Across Disciplines

a. Arguments Against

i. The Necessity Of Working From Without

Feminists working for social change in a variety of contexts and disciplines have long struggled with the question of where to situate themselves and how best to work for social transformation. Some argue in favour of entering social institutions such as law and politics for the purpose of adapting the "master's tools" to the feminist project. Others, like Audre Lorde, argue strongly against such a choice. In her essay, "The Master's Tools Will Never Dismantle The Master's House", Lorde states her position on the question in clear and blunt terms:

> ...the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.[2]

Lorde argues that recreating the social world in inclusive terms involves

> learning how to stand alone, unpopular and sometimes reviled, and how to make common cause with those others identified as outside the structures...[3]

Cixous, too, suggests that society can not be reconstructed from within existing social structures. As noted in the previous chapter, Cixous envisions the process by

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[2]Ibid. at 98.

[3]Ibid.

which the new emerges from the old in two stages. We must break up the existing social order, she argues, and project a social alternative. She advocates struggling within in order to "dislocate" and "explode" male language and conceptualizations of reality which have served to restrict women's social existence.[4] The point of the struggle being not to "appropriate their instruments, their concepts, their places" but to wrest possession of our language and lives from the control of others, and then to "dash through and to 'fly'", and recreate the social order somewhere else.[5] According to Cixous, it is imperative that distance be taken from the constraining influences of the existing social order to ensure that the social alternative we project is untainted by the existing paradigm of power relations.

ii. The Master's Tools Can Not Dismantle The Master's House

Some feminists doubt the project because they are doubtful that social institutions designed to sustain prevailing power arrangements can be successfully adapted to the feminist project. Andrea Nye, for example, is sceptical of feminist efforts to use the master's discourse as a base

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[4]H. Cixous, "The Laugh of the Medusa", in E. Abel & E.K. Abel, eds., The Signs Reader: Women, Gender and Scholarship, trans. K. Cohen and P. Cohen (Chicago: University of Chicago Press, 1983) 279 at 291.

[5]Ibid.

for the development of emancipatory theory for this reason.[6] She notes that feminist theorists have drawn heavily on the philosophies of man in order to construct a transformational perspective and points out that these philosophies are geared toward explaining the world in terms which support the prevailing social order. It is therefore difficult, if not impossible, she argues, to adapt them to the feminist project.[7]

Sherene Razack, too, raises concerns about litigation as a means of securing feminist goals because of the role law has historically played in the construction of gender relations and the subjugation of women. How is it possible to advance women's interests in the courtroom, she wonders, when the litigation process is structured to deny women's experiences?[8] Razack also suggests that the dichotomous nature of legal thinking undermines efforts by feminists to push for the recognition of women's differences:

> When they attempt to introduce into a court of law some of the gender-based harms women experience, they must clothe their arguments in scientific dress. In effect this requires feminists to reduce the complexities of daily life to, if not a formula, at least something that is empirically provable and arguable as applying to most women. Inevitably, there is a tendency in this process to simplify and universalize women's experience, to deal in grand truth claims that oppose the prevailing

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[6]A. Nye, Feminist Theory And The Philosophies of Man (New York: Routledge, 1988).

[7]Ibid. at 229.

[8]S. Razack, Canadian Feminism And The Law (Toronto: Second Story Press, 1991) at 51.

stereotypical assumptions and representations about women's realities.[9]

Judy Fudge also raises doubts about the transformative potential of bourgeois rights claims in law. In evaluating feminist efforts to secure the right to reproductive choice through the use of the Canadian Charter of Rights and Freedoms[10], she argues that women and other disadvantaged groups are better off going to the state rather than the courts to secure substantive reforms because that is where the real power resides.[11] According to Fudge, rights struggles cannot, in and of themselves, bring concrete reforms because the law simply reflects and cannot alter existing configurations of state power. Battles must be waged in the political sphere in order to achieve this end, she argues.

iii. The Dangers Of Struggling For/With Power

Some theorists are critical of the direction and substance of feminist interventions in law and other disciplines, arguing that they succeed only in reinforcing

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[9]S. Razack, "Issues Of Difference In Constitutional Reform: Saying Goodbye To The Universal Woman" in D. Schneiderman, ed., CONVERSATIONS Among Friends- Proceedings of an interdisciplinary conference on Women and Constitutional Reform (Edmonton: Centre For Constitutional Studies, 1992) 39 at 39.

[10]Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 [hereinafter Charter].

[11]J. Fudge, "What Do We Mean By Law and Social Transformation" 1990 5 Can. J. of Law and Soc. 47 at 57.

rather than disrupting and transforming existing power relations. Drucilla Cornell, for example, argues that the feminist quest for equality in law promoted by Catharine MacKinnon and others is actually a power grab, and as such, can only bring about a reversal of relations of domination and subordination, with women coming out on top this time round.[12]

Vicky Kirby is equally pessimistic about feminist efforts in anthropology to transform the historically exploitive relationship between the ethnographer and the subject of her research. She is critical of the call issued by fellow feminist anthropologists, Mascia-Lees, Sharpe and Cohen[13] for the embrace of a clear feminist politics in the ethnographic process. These three theorists argue that a reliance on feminist methodology in the ethnographic process may resolve the power imbalance between the western ethnographer and non-western other which undermines anthropological inquiry. They suggest that the power dynamic can perhaps be neutralized by framing research projects in concert with and for the benefit of oppressed groups, and by demanding close scrutiny of the ethnographer's research goals and motivations.[14] Kirby points out that the power structure in an ethnographic relationship

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[12]See D. Cornell, Beyond Accommodation (New York: Routledge, 1991) 119 to 164 and especially 132 and 139.

[13]See F.E. Mascia-Lees, P. Sharpe and C. Cohen, "The Postmodernist Turn In Anthropology: Cautions From A Feminist Perspective" (1989) 15:1 Signs: J. of Wom. in Cult. and Soc. 7.

[14]Ibid. at 33.

is complex, deeply and historically rooted and not easily transformable. Citing arguments put forward by Gayatri Spivak, she argues that good intentions and earnest effort alone are clearly not enough to bridge cultural differences, combat western conceptions of the non-western other and resolve the difficulties posed by the very nature of anthropological inquiry itself.[15] She suggests, instead, the development of a muddied, postmodern politics which attempts a sustained critique of the foundations upon which the ethnographic relationship is constructed.[16]

b. The Other Side Of The Debate

i. The Necessity Of Struggling For Power From Within

Lorde and Cixous are most persuasive in their arguments against appropriating the mind set and tools of power as a transformational strategy. I would agree that identifying with the master's project and playing strictly by his rules cannot, as both contend, advance the cause. I am also persuaded by Cixous' contention that the new must break away

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[15]V. Kirby, "Comment on Mascia-Lees, Sharpe and Cohen' 'The Postmodernist Turn in Anthropology: Cautions from a Feminist Perspective'" (1991) 16:2 Signs: J. of Wom. in Cult. and Soc. 394 at 400.

[16]According to Kirby, the power dynamic which characterizes the ethnographic relationship is derived from the "power/knowledge nexus through which anthropology constructs its object", "epistemological assumptions that inform and privilege Western thought and cultural representations", and our desire to render the space of alternity into a generalized equivalence, whether between women or between cultures." Ibid.

from the old, i.e., that the process of renewal and reconstruction must take place somewhere else, at a distance from the constraining influences of prevailing social thinking and structures.[17]

But even Cixous herself suggests that before we can fly off to create utopia we must struggle within to free our minds and bodies from the constraints exerted by the prevailing social order. And how else can we do this except by countering and overcoming the force which is exerted against us? In my view, advancing the transformational process necessarily involves striving for power in the terms dictated by the dominant social order.

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[17]As I noted in the first chapter, social transformation necessarily involves the reconstruction of subjectivities. Women and other marginalized groups must reject the object status assigned to them and recreate their identities in more positive terms. Luce Irigaray contends that withdrawing from active social engagement and working from without are necessary stages in this process:

> For women to undertake tactical strikes, to keep themselves apart from men long enough to learn to defend their desire, especially through speech, to discover the love of other women while sheltered from men's imperious choices that put them in the position of rival commodities, to forge for themselves a social status that compels recognition, to earn their living in order to escape from the condition of prostitute...these are certainly indispensable stages in the escape from their proletarization on the exchange market.

L. Irigaray, This Sex Which Is Not One, trans. C. Porter (Ithaca, N.Y.: Cornell University Press, 1985) at 33.

Catharine MacKinnon envisions the struggle for equal power for women in social life in similar terms.[18] Throughout her work, MacKinnon argues that any feminist theory worth its salt derives from feminist practise which is, in turn, grounded in the material conditions in which women live their lives.[19] Women are unequal to men in the social sphere, MacKinnon points out, and as a consequence live lives which are marked by physical and sexual violence and economic deprivation. According to MacKinnon, women's oppression is structurally determined, produced by both legal and social constructs which deny women equal access to power. As MacKinnon points out, these barriers to equality cannot be wished or imagined away.[20] In order to free women from gender oppression, they must be confronted and overcome.

But what of the concerns raised by Cornell? Does feminist struggle framed in the terms that MacKinnon suggests and I endorse involve assuming the dominant position? Clearly it does. How else do you get someone's foot off your neck[21]- in both a literal and figurative sense - except by eclipsing the force he exerts against you for the amount of time it

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[18]C. MacKinnon, Feminism Unmodified- Discourses on Life and Law (Cambridge, Mass.: Harvard University Press, 1987) at 45.

[19]See specifically C. MacKinnon, "From Practise To Theory, or What is a White Woman Anyway" (1991) 4:1 Yale J. of Law and Fem. 13 at 13-14.

[20]Feminism Unmodified, supra note 18 at 219.

[21]Ibid. at 45.

takes to break his hold and break free? I want to make it clear that I am not endorsing a struggle for power to continue the reign of terror. Rather, what I do support is striving for power in order to break free from and break up the current mode of power relations.[22]

But is it possible to assume power without slipping permanently into the role of oppressor? I believe that it is. But one must approach the project carefully, in full awareness of the difficulties and dangers this kind of work presents. One must also be prepared to undertake a sustained critique of one's efforts in order to stay the course.[23]

ii. Finding Room To Manoeuvre

And what of the arguments put forward by Nye, Razack and Fudge, among others? Are feminists naive to think that the master's tools can be manipulated and adapted to do their bidding? Certainly we are naive if we think that disciplines such as law and philosophy can be easily accommodated to the feminist transformational project. I would agree with the

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[22]As I argue in the following chapter, Cornell's characterization of MacKinnon's project is incorrect. MacKinnon's ultimate goal is not the subjugation of men, rather her work is geared toward freeing women from gender oppression and - once this part of the project is completed - the recreation of the social world in equitable terms.

[23]I realize in adopting this position that I raise a host of critical ethical questions which are beyond the scope of this thesis to consider, eg, How long does one need to assume the dominant position in order to ensure one's freedom? When and how does the transition from this power configuration to another, more equitable model occur?

contention made by many theorists that social institutions such as these reflect existing power configurations and that their primary raison d'être is to explain, support and normalize what goes on in the social sphere, not to put a stop to it. But the critical question is, do the interests of the liberal state absolutely determine the logic and operation of these disciplines thus precluding the possibility of orchestrating substantive reform from within?

Arguments put forward by Didi Herman persuasively counter a deterministic point of view. According to Herman, those who argue that liberalism is a static, omnipotent presence fail to take account of legal reform initiatives which continue to reshape its boundaries. In examining the history of lesbian and gay legal reform in Great Britain and Canada, Herman notes that "[l]iberalism was not born committing itself to the formal equality of lesbian and gay men."[24] Rather, strong and persistent legal reform initiatives by gays and lesbians succeeded in securing human rights reforms and these reforms, in turn, transformed social thinking regarding the essential humanity of homosexuals and the material circumstances of the gay community.

If legal reform can shift social consciousness and the material conditions in which individuals live their lives, as Herman's work indicates, then Judy Fudge's vision of the

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[24]D. Herman, "Beyond The Rights Debate" (1993) 2 Soc. & Leg. St. 25 at 32.

relationship between the legal and political spheres is inaccurate. Legal matters neither perfectly reflect nor are necessarily always determined by political configurations of power. There are obviously differences, gaps and inconsistencies between the two realms and hence room to manoeuvre and manipulate law toward progressive social ends. Herman's work also points to the conclusion that the relationship between law - and possibly other social disciplines as well - and the political sphere is much more complex than Fudge allows.

I will be exploring the arguments put forward by Fudge and Herman regarding the political utility of rights claims in the following section, in the context of the debate about rights.

iii. Working On Other Possibilities

> It is true that if we enter society to become men, we have lost everything. In this case, we leave the space of repression to win another repression, which will please men who are also wasting their lives. Can one win? Only on condition that upon entering society one does not identify with men but that one works on other possibilities of living, on other modes of life, on other relationships to the other, other relationships to power, etc., in such a way that one also brings about transformation in oneself, in others, and in men. That is a long project.[25]

As I indicated above, I support entering society to struggle for power for the purpose of ending the oppression of

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[25]V. Conley, "Appendix: An Exchange With Hélène Cixous" in V. Conley, Hélène Cixous: Writing The Feminine (Lincoln, N.B.: University of Nebraska Press, 1991) 135-136.

women and other disadvantaged groups, and ending oppression generally. Put like Cixous, I believe that it is only possible to win if, as we struggle, we also work on other possibilities of living, relating and wielding power. As I argued earlier, in working with the master's tools, we run the risk of getting stuck in the role of colonizer, both within our professional lives and without. Maintaining a clear vision of the utopian future we seek and actively working on more equitable forms of relating in all aspects of our lives is necessary in order to sustain the direction of our work.

Working on other possibilities of relating can be important to the transformational project in another respect. As I argued in the first chapter, we do not know how, precisely, to counter oppressive power relations. Perhaps one way to do so is to bring forward other social alternatives and, in the process, make clear that the way in which power is currently organized and expressed is corrupt and harmful, and not the only possible way of doing so.

For this reason I am favourably disposed to efforts like those of Mascia-Lees, Sharpe and Cohen which attempt to bring reform to oppressive power structures. There is no doubt that projects of this kind can be highly problematic. As Kirby suggests in her critique, it is very easy, in trying to build more equitable structures and relationships, to make assumptions about what the other needs and wants which have little to do with the reality of their situation and much to

do with our own interests and ethnocentrism. That is why I believe that refusing to engage in relationships of this nature and complexity - a choice Mascia-Lees et al. have made in their own profession - is the best route to take. But does this mean that we should forego attempting to push for institutional reforms or work in more equitable, inclusive ways if we are engaged in these relationships? I would argue no. Of course our initiatives will be far from perfect and for this reason must be subject to sustained critique and alteration, as Kirby and Mascia-Lees et al. suggest. But this should not stop us from trying to initiate reforms or from attempting to know the other in a way which honours, respects and attempts to preserve rather than annihilate differences. Honest, earnest and intelligent efforts of this kind can make a difference. As Mascia-Lees et al. suggest, they can enhance the quality of interactions, and perhaps, as a consequence, the quality of lives:

> We groped toward answers that would bring to bear the insights of feminism and postmodernism on anthropological practices, even as we recognized that they could never be comfortable ones. Of course, we can never really know what the other "wants and needs," but much of human contact involves guesses about these, some more sensitive than others, some more attentive.[26]

These kinds of initiatives can also contribute to the transformational process by making the shortcomings of the

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[26]F.E. Mascia-Lees, P. Sharpe and C. Cohen, "Reply to Kirby" (1991) 16:2 Signs: J. of Wom. in Cult. and Soc. 401 at 407.

current approach patently obvious, and bringing into view other, more positive ways of working across differences.

2. The Debate About Rights

a. An Overview Of The Debate

The question of working within is debated in legal scholarship primarily in terms of the political utility of using rights and making rights claims. This issue is one aspect of a larger debate about rights which has burgeoned in recent years as liberalism and the liberal roots of jurisprudence have come under increasing scrutiny from legal scholars.

Feminist critique, together with the rise of the Critical Legal Studies (CLS) movement, appear to be particularly responsible for turning the focus of legal scholarship in this direction. CLS membership is comprised primarily of progressive lawyers, law students and academics who, though diverse in theoretical background[27], are united "in their opposition to the intellectual and political dominance of the liberal establishment."[28] Liberalism, they suggest, is the root of all social evils and can no longer be counted on to advance a progressive social agenda. Nor, they argue, can a

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[27]Rights critics are influenced, to varying degrees, by feminism, marxism and postmodern theory.

[28]A. Hutchinson, "Introduction" in A. Hutchinson, ed. Critical Legal Studies (Totowa, N.J.: Rowman & Littlefield Publishers, 1989) 1 at 3.

legal system steeped in liberal traditions and politics be relied upon as a tool in the struggle for social justice. Hence their distrust and disavowal of rights struggles as a mechanism for achieving social transformation. The overall goal of many in the movement is to turn progressive social efforts in another direction by destroying illusions about the law's objectivity and distance from politics, and exposing its deep complicity in creating and maintaining current power configurations.[29]

While much of the debate regarding the political utility of rights has been argued in abstract terms, theorists have also turned their critical attention to efforts by Blacks, feminists, gay and lesbians and other disadvantaged groups to employ rights to further their causes. These groups have attempted to re-conceive rights discourse in order to confront the social and legal spheres with their concerns and push for substantive equality. In recent years, there has been a spate of articles scrutinizing efforts by Canadian social movement groups to use the Charter and human rights instruments to advance their cause.[30]

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[29]Ibid.

[30]See for example, Fudge, supra note 11; H. Glasbeek, "Some Strategies For An Unlikely Task: The Progressive Use Of Law" (1989) 21 Ottawa L. Rev. 387; J. Fudge & H. Glasbeek, "The Politics of Rights: A Politics With Little Class" (1992) 1 Soc. & Leg. St. 45; Herman, supra note 24; A. Bartholomew & A. Hunt, "What's Wrong With Rights?" (1990) 9 L. and Ineq. 1.

b. The Concept Of Rights

In our society, what rights mean and what they can or can not achieve is a highly contested and variable concept. Rights are a key symbol of liberal democracy and a certain degree of rights consciousness seems to pervade all aspects of social life. In common usage, rights are understood as "legal or moral entitlement(s)"[31], and the term is frequently employed in a variety of contexts to define and strengthen a claim to something. Amy Bartholomew and Alan Hunt suggest that it is important to distinguish four broad categories of rights specific to legal, moral and political discourse and to the debate about rights:

> "legal rights" (rights recognized, and potentially protected, by litigation), "constitutional rights" (rights recognized, and potentially protected, by litigation appealing to express constitutional provisions), "moral rights" (rights-talk placed within moral discourse) and, finally, "rights-claims" (claims or demands advanced by social interests or movements involving an aspiration to convert a moral right into a legal or constitutional right).[32]

Patricia Williams makes the important point that rights hold different meanings for different groups depending upon their social status. While some white male members of the CLS movement advocate their abandonment on existential grounds, Blacks and other groups who have been denied social recognition hold rights very dear:

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[31]D. Thompson, The Oxford Dictionary of Current English, 2nd ed. (Oxford: Oxford University Press, 1992) at 783.

[32]Bartholomew & Hunt, supra note 30 at 7.

> For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referenial range of self and others, which elevates one's status from human body to social being.[33]

In a functional sense, rights operate to define the parameters of social behaviour in support of prevailing political principles and economic arrangements. According to Roberto Unger,

> [a] system of rights describes the relative positions of individuals or groups within a legally defined set of institutional arrangements. These arrangements must be basic and comprehensive enough to define a social world that encourages certain instrumental or passionate dealings among people and disfavors others.[34]

Elizabeth Schneider, too, suggests that rights are empty boxes which can be filled up to articulate a particular social vision. She asserts that legal entitlements operate either to protect the individual from state incursion or establish an affirmative right to do something or act in a certain way. In this way, a system of rights defines a normative theory of the

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[33]P. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. C.R.-C.L. L. Rev. 401 at 416.

[34]R. Unger, "The Critical Legal Studies Movement" in A. Hutchinson, ed., Critical Legal Studies (Totowa, N.J.: Rowman & Littlefield Publishers, 1989) 325 at 340.

individual vis á vis the state and other members of society.[35]

c. The Critique Of Rights

i. General Theoretical Claims

There are a number of general theoretical arguments made against the political utility of rights employment and they all rest on the notion that law is inextricably tied to a liberal agenda. Some critics target the exclusionary, dichotomous grounding of liberal thought as the root of social evils and note that the employment of rights tends to reinforce rather than challenge this conceptualization of reality.

Unger is one of several critics to decry the individualistic, hierarchical and divisive nature of the current social order and promote a democratic alternative which is strongly communal. He and other theorists suggest that a formal legalism rooted in the rights paradigm is

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[35]E. Schneider, "The Dialectic Of Rights And Politics: Perspectives From The Women's Movement" 1986 61 N.Y.U. L. Rev. 589 at 593. Roberto Unger has taken a more integrated look at the question of how, at a mechanical level, legal and constitutional rights construct a social vision. In suggesting ways of restructuring the social order along more communal lines, he identifies four categories of rights basic to his utopian social vision and to social organization in general: immunity rights which secure the individual against incursion by the state, other organizations and individuals; destabilization rights which provide for the disruption of certain specified social practises; market rights representing claims to divisible segments of social capital; and solidarity rights which provide legal entitlements to communal life. See Unger, Ibid.

responsible for maintaining rabid individualism as the primary social value and thus stands in the way of social transformation. Peter Gabel argues, for example, that the current system of rights creates a society of passive, disconnected, alienated selves:

> Seen as a whole, therefore, the "world" of this rights-based schema is one in which originally passive and disconnected individuals enter into relations with each other because they are allowed to, relations which have the quality of being "okayed in advance" because they occur only insofar as one is engaging in the right to do them.[36]

Rights claims, it is also suggested, tend to create false and arrested or reified conceptions of social life and social possibilities and thereby blunt the desire for real connection and for change.[37]

Still other theorists argue that focusing on rights as a means of achieving substantive social change is a waste of valuable time and resources because the outcomes of rights struggles are indeterminate.[38] Rights in the abstract offer nothing concrete to disadvantaged groups, it is pointed out.[39] Rights only take on substantive meaning through litigation, and the results of these struggles often favour the interests

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[36]P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of th Withdrawn Selves" (1983-84) 62:2 Tex. L Rev. 1563 at 1577.

[37]Ibid. at 1580.

[38]M. Tushnet, "An Essay On Rights" (1984) 62 Tex. L. Rev. 1363.

[39]Fudge, supra note 11 at 57.

of those with privilege and power. Victories in the struggle over rights are the exception rather than the rule, it is suggested, and offer only "momentary advantages"[40] in the struggle for social change.

ii. The Critique Of Charter Rights Claims

Far more interesting and persuasive are the critiques of Charter-based rights claims put forward by Fudge[41], and Fudge and Harry Glasbeek[42], writing in tandem. In "What Do We Mean by Law and Social Transformation", Fudge articulates the difficulties involved in making rights claims but does not foreclose the possibility of employing rights for progressive ends. She and Glasbeek do make this categorical claim in the piece they wrote together. They take the position that efforts by feminists, gays and lesbians and other social movement groups to adapt and expand rights discourse to incorporate their interests are not transformative. These efforts are fatally flawed, they suggest, because they serve to reinforce the dominant hegemony rather than challenge the root cause of all forms of subordination: the means of production.

Central to the critique is their disavowal of the development of multiple, fragmented social movement reform

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[40]Tushnet, supra note 38 at 1371.

[41]Fudge, supra note 11.

[42]Fudge & Glasbeek, supra note 30.

agendas rooted primarily in the politics of culture or identity rather than economics. Conditions in this post-fordist economic era, they argue, have created the differences and divisions which mark the current struggles. What is needed, they suggest, is not further division in the struggle for social change, but rather a totalizing theoretical approach which is class based.[43]

Fudge and Glasbeek make a number of strong points about the de-radicalizing aspects of Charter rights struggles, and legal struggle in general, to support their argument. They argue that the master's tools cannot dismantle the master's house because politics determines legal outcomes:

> Changes external to law drive the politics of litigation, not the other way round. Capital and neo-conservative allies understand this. And, indeed, sometimes the proponents of the politics of rights acknowledge that the genesis of the difficulty for their proposed strategies lies here.[44]

The political forces at play within law are deeply entrenched and cannot be countered no matter how radically rights discourse is adapted to the project:

> The distinction between the public and private spheres and the profound emphasis on individualism, negative liberty and commodification exert real limits on the types of rights claims that courts will recognize on a systematic basis. Over several centuries these limits have become deeply entrenched within legal discourse and cannot be neutralized simply by mouthing an alternative interpretation of contested rights.[45]

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[43]Ibid. at 62-64.

[44]Ibid. at 56-57.

[45]Ibid. at 59.

Rights discourse may itself be hegemonic, they also suggest, noting the de-radicalizing, colonizing influence rights discourse has exerted over social justice claims. They point out that in Canada, social movement groups have had to recast their claims in limiting ways in order to make them fit the language of rights.[46]

Fudge and Glasbeek cite the brief history of Charter rights litigation as proof of their thesis. Though there have been some due process advances and gains in the area of reproductive rights pursuant to the Charter, the results on the whole are not promising and certainly not transformative, they contend. They point out that because the Charter focuses on the public arena, attention is directed away from oppression rooted in the economic and private social spheres.[47]

They also note that the abstract, indeterminate nature of Charter rights has enabled corporations to advance their interests and has also strengthened the hand of those whose agendas run counter to the interests of social movement groups. Pursuant to Charter litigation, they point out, women have been put in the position of having to struggle to defend the legislative gains they have made in areas such as sexual assault. They conclude that struggling over rights has served

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[46]Ibid.

[47]Ibid. at 54.

to reinforce, rather than disrupt, the power dynamic within liberal democracy.

The authors also find no evidence to support claims made by theorists and practitioners alike that rights claims are important to the transformational project because they serve as a catalyst for political organizing. Indeed, they point out, it is just as easy to claim that the time and money spent on initiating rights claims, as well as the victim's distance from the project, serve as hindrances to the development of a truly progressive form of politics.[48]

d. Counterclaims

i. Indeterminant As Compared To What?

To say that one shouldn't engage in rights struggles because positive outcomes are not assured is to suggest that there are other ways in which to work for social transformation where success is guaranteed. But as I suggested in the last chapter, struggling for substantive reform is a difficult and complex business. Outcomes are indeterminant no matter which way one chooses to approach the project. For example, lobbying for legislative and policy reforms - a project Fudge appears to endorse[49] - is subject to many of the same constraints as rights litigation. Access to power and money also determine one's ability to counter the

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[48]Ibid. at 56.

[49]See Fudge, supra note 11 at 57.

agendas of other interest groups in the lobbying process and gain the desired result. Instead of dismissing rights as instruments of reform on the basis of indeterminacy, perhaps we should be considering which forums are better bets in the struggle for substantive reform, i.e., which venues are more likely or better equipped to listen and respond to the interests of disadvantaged groups.

ii. Problematic Concepts Of Power

According to Fudge and Glasbeek, power resides on high and flows downhill determining all matters in its wake, including legal ones. The authors do not allow for the possibility that the flow can be in the other direction, i.e., that legal initiatives can change the way in which power is organized and expressed in the social sphere. Advances which are achieved through legal struggle are inconsequential, they argue. They are mere allowances granted by the state in support of its own agenda. Fudge and Glasbeek therefore suggest that those who want to secure fundamental social reforms should bypass the legal sphere and go directly to the source and repository of power: the political realm. There are a number of problems with this perspective. First, Fudge and Glasbeek seem to forget that legal and policy matters are intricately bound up. Securing passage of legislation favourable to the interests of disadvantaged groups is only half the battle. One must also work to ensure that the

legislation in question is favourably interpreted and applied if the advantage secured in the political realm is to be realized. Because of the way in which legal and policy matters are organized and administered, going to court to fight for favourable rulings is a critical part of this struggle.

Fudge and Glasbeek are also wrong to suggest that the process of legislative and policy development is disconnected from what goes on in the courtroom. Clearly this in not the case. Charter determinations are monitored closely by legislators and civil servants and do shape the substantive content of legislation and policy.

Fudge and Glasbeek's conceptualization of the rigid divide between legal and political realms also flies in the face of the substantive political gains rights struggles have achieved. Herman's research, as noted above, indicates that gay and lesbian efforts in the legal sphere have altered the boundaries of liberalism's thinking and approach to homosexuality:

> ...demands for lesbian and gay rights in the areas of adoption and fostering, reproductive technologies, and a whole host of other 'family sphere' areas have confronted the liberal Wolfenden consensus. The 'public/private' distinction is no longer as tenable. In the area of sexuality, then this 'element' has indeed been transformed; in fact, it has been rendered tangential to many social policy discussions.[50]

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[50]Herman, supra note 24 at 32.

Contrary to what Fudge and Glasbeek suggest, feminists have also made a number of significant gains pursuant to the Charter in areas such as pregnancy discrimination and sexual harassment, to name but two.[51]

In arguing that these and other legal victories are not only inconsequential but represent some sort of capitalist plot, Fudge and Glasbeek paint a portrait of a monolithic, omnipotent and impenetrable state authority. Their representation of the power of the state does not appear to allow for any form of social resistance and renewal short of a coup d'état. If the state controls all legal outcomes then it follows that it also can and does determine the outcome of reform initiatives launched in other spheres. Why would anyone bother lobbying for legislative or policy reforms, if what one can achieve is already pre-determined by current configurations of power?

iii. Problematic Concepts Of Transformation

I also find fault with Fudge and Glasbeek's conceptualization of transformation as reflected in their

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[51]LEAF's efforts have been key in persuading the Supreme Court of Canada to adopt a purposive approach to equality matters and in securing substantive reforms for women. In Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321, the Supreme Court recognized pregnancy discrimination as discrimination based on sex within the purview of the equality rights gaurantees in the Charter. The Court came to the same conclusion about sexual harassment: Jantzen/Govereau v. Platy Enterprises, [1989] 1 S.C.R. 1252, 4 W.W.R. 39.

evaluation of the transformative impact of legal initiatives. They consider cases which do not produce immediate, tangible political results as a waste of time in terms of the transformational project. But as I argued in the previous chapter, transformation is a process, not a one shot deal, and its progression does not always follow an easily discernable path. It is just plain wrong not to look at the impact of legal initiatives in a broader and more imaginative way in assessing their value to the project of substantive reform.

Take Seaboyer/Gayme, for example, a case Fudge and Glasbeek cite as proof of the futility of making rights claims to advance a feminist agenda. There's no doubt that the decision was a devastating one, but, as I pointed out in the last chapter, it cannot be said, in retrospect, that the intervention of women's groups in the case was all for nought. There is evidence to suggest that the arguments they advanced regarding the law's shortcomings with respect to sexual assault matters, and the decision itself, raised public consciousness and galvanized political resolve. As a result, substantive legislative reforms were secured. Now one could say that a whole pile of time and money could have been saved had the court intervention been skipped altogether and the political route followed from the beginning. But the fact that political intervention followed rather than preceded the legal intervention suggests that the case produced the shift

in consciousness and political opportunity necessary to initiate and secure the required legislative reforms.

The "extra-legal" impact of rights struggles must also be considered in evaluating their contribution to the transformational project. Gay and lesbian activists value rights claims for the publicity they generate about gay and lesbian issues. Raising public consciousness regarding the social context in which homosexuals live their lives is a key part of their project, they point out. The media attention focused on their cases advances their cause in this respect.[52] Activists also report that the publicity they receive enables them to reach out to and politically mobilize other members of the gay community.

iv. The Role Rights Play In Galvanizing Political Struggle

Though Fudge and Glasbeek deny it, rights struggles have sharpened the political focus and direction of social movement groups and encouraged the development of supportive alliances across differences. According to rights activist Gwen Brodsky, the enactment of the Charter encouraged social movement groups to conceptualize their demands for equality in concrete terms and build coalitions across differences.[53] The development of a rights consciousness, she maintains, also sensitized equality-seeking groups to the issues and concerns

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[52]Herman, supra note 24 at 33-34.

[53]Brodsky cited in Herman, Ibid. at 34.

of others and encouraged the development of mutually supportive legal strategies.[54]

Schneider, too, argues that rights assertion has served to advance the politics of the grassroots feminist movement. She suggests that feminist rights claims drew on, informed and advanced grassroots political struggle in a complex, dynamic and dialectical manner. Citing the work that she and other women lawyers engaged in at the Centre for Constitutional Rights, Schneider also suggests that rights work can be a form of political practise:

> We asserted rights not simply to advance legal argument or win a case, but to express the politics, vision, and demands of a social movement, and to assist in the political self-definition of that movement. We understood that winning legal rights would not be meaningful without political organizing to ensure enforcement of an education concerning those rights. Through the work at the Centre, the law was used to capture a vision of and advance a burgeoning sense of community. There was an important understanding that lawmaking could be a form of praxis.[55]

While rights assertion has been valuable to the external political process of collective self definition, rights have also proved to be of symbolic importance in the internal struggle for transformation. As I have argued earlier and in the previous chapter, liberation begins with the self and the individual and collective psyche. The process of social renewal involves, as a critical first step, finding the strength and wisdom to come to know the object status one has

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[54]Ibid.

[55]Schneider, supra note 35 at 605.

been assigned by the current social order as illegitimate and undeserved. It also involves a fundamental re-conceptualization of the self as the determining force in one's own life and as an active participant in the struggle for social renewal. Williams suggests that rights have proved to be critical to the black struggle for social legitimacy in this regard. While black dreams of freedom have infused and thereby transformed the concept of rights, rights symbolism has, in turn, brought Blacks back to a positive sense of self:

> The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self.[56]

Schneider also argues that rights assertion can be a way for individuals and groups to reconstruct their identities in positive terms.

v. The Promise Of A Politics Of Rights Strategy

Fudge and Glasbeek discount the transformative potential of a politics of rights primarily because it is devoid of "class". But they are wrong to say that social movement groups do not take on class-based concerns. As Herman notes, economic issues also concern gay and lesbian activists and are reflected in the political and legal initiatives they undertake. The Aids activist movement, she notes, includes

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[56]Williams, supra note 33 at 414.

housing and employment issues on its political agenda.[57] Feminists, too, have taken on cases which address workplace issues, entitlement to social assistance and maintenance in the context of their battle against gender oppression.[58]

But are Fudge and Glasbeek wrong to say that the politics of rights movement is doomed to failure because it does not give priority to class issues? This is a difficult "chicken and egg"-like dilemma to address. The critical question is, do the means of production determine all forms of oppression, as Fudge and Glasbeek suggest, or do all oppressions, including class oppression, originate somewhere else?

Though I would agree with Fudge and Glasbeek's contention that a class analysis reveals a great deal, I also note that the theory falls far short of explaining the totality of various forms of oppression. According to Albert Memmi, class analysis does not fully capture the nature and complex configurations of the colonization process.[59] Nor can it be said that the theory provides a full and satisfactory explanation of gender discrimination and other forms of oppression. If social movement groups have turned away from a class-based theoretical approach to politics it is because

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[57]Herman, supra note 24 at 31.

[58]Workplace and economic concerns have figured prominently on LEAF's agenda during its first eight years. I will be exploring the organization's initiatives in this regard, in Chapter IV.

[59]A. Memmi, The colonizer and the colonized (London: Earthscan Publications, 1990) at 10.

they don't find their situation fully represented therein, and are not convinced that changing the means of production will necessarily bring about a transformation in their status.

But what have they turned to in the alternative? In seeking rights, social movement groups are seeking social legitimacy. They are attempting to gain entry into a system which has historically denied and suppressed their interests. The question is, can this approach successfully transform the dominant hegemony? In my view, the project is promising because it addresses what I consider to be the root cause of all forms of oppression: a conceptualization of the interests of the other as antithetical to those of the self. As I argued in the previous chapter, the social order institutionalizes relations of dominance and subordination. This paradigm of relating is itself built upon the notion that I can only exist and prosper as a social being by denying your right to self-determination and membership in the social sphere. But what would happen to this way of thinking and relating were all socially marginalized groups to speak out about their experiences and demand to become part of the social contract? Cixous suggests that the return of the repressed is a powerful transformative force.[60] I agree. In a system built upon the silencing of dissonant voices, the act of articulation is, in and of itself, a radical one and highly disruptive. Were we to see the project of rights assertion

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[60]Cixous, supra note 4 at 290.

come to fruition and all groups acquire a place within the social sphere, the boundaries of social thinking and practice would be broken wide open and the way made clear for social renewal.

e. Finding A Balance

While I dispute the conclusion Fudge and Glasbeek come to regarding the transformative potential of rights employment, I do not embrace rights struggle as a panacea either. Employed in strategic ways, rights can contribute to the transformational project. But we should never lose sight of the fact that what can be achieved through rights struggle is not unbounded. Fudge makes an important point about the substantive impact of gains made through rights struggle. Radical rights claims operate, optimally, at a conceptual level to shift legal and social consciousness. Other strategies must be employed in law and other social contexts to ensure that the conceptual gains achieved have the desired effect in practice. We must also remember that rights are the master's tools and, as such, their employment for radical purposes is subject to very real constraints. In the following section, I consider some of the constraints endemic to the feminist struggle in law.

C. The Difficulties Of Working Within

1. A Split Status Within Law And Feminism

Feminists working in law to effect social transformation occupy a complex, "double" position within both the legal profession and the feminist movement. As practising lawyers, legal academics, politicians, administrators, legislative and policy analysts they work with the master's tools and occupy a position within the master's house. But because of their gender, their politics and the nature of their project, they are at once members of the inner circle and foreign to it. Trying to negotiate this split status raises a host of difficulties and contradictions. It must be remembered that law is a profession which has, until very recently, completely excluded women from its ranks and still resists and resents their presence. The discipline has even less tolerance for feminists and, as a consequence, many feminist lawyers who openly proclaim and practise their feminism are marginalized and isolated within the profession. And those who downplay their feminism in order to fit into mainstream legal culture are forced to deny an essential part of who they are.

Because of the nature of legal process and institutions, all feminists engaged with the discipline must, at some point in their professional lives, act in ways which are antithetical to their feminism. The challenge is to maintain a feminist consciousness and sense of purpose while working with the master's tools. As I noted earlier, this is a

difficult project in its own right. Law exerts its own transformative influence on the psyches of those who work within the discipline. It is hard not to be co-opted by the power and status the profession offers and the value system and way of viewing the world that mainstream legal culture promotes. Feminist lawyers engaged in a progressive practice must therefore continually confront, critique and adjust their strategies in order to remain on course.

Though occupying a position both within the profession and on its margins is fraught with difficulties, it can also afford certain strategic advantages. Julia Kristeva argues that women who become proficient at the master's game are well placed to disrupt and subvert in the modern world because of the very fact of their exclusion from the centre of power.[61] But at the same time, "what playing with fire!".[62]

The position feminists occupy in law is mirrored within the feminist movement. While their feminism marks them in the legal sphere, their involvement with the legal profession, and the class advantages they enjoy as a consequence, render them foreign within feminism. Their split status within the movement is, once again, a source of difficulties and

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[61]J. Kristeva, "Women's Time" in T. Moi, ed., The Kristeva Reader (Oxford: Basil Blackwell, 1986) 187 at 202. It must be stressed that Kristeva, in this piece, is wholly against feminist attempts to secure a new social order. She argues that these efforts can only lead to a new form of tyranny. She advocates, instead, working within to reform the current system.

[62]Ibid.

contradictions. The skills and practices which serve them well in law work against them in the movement, and must be put aside when they engage in feminist politics. Class differences hamper legal reform initiatives because they tend to isolate feminist lawyers from the grassroots movement and the vision and political acumen of other feminists. Working at a distance from the views and interests of many of the women they purport to represent also calls into question the legitimacy of their analysis and the work they do.

2. Lack Of Money

Money - or more specifically the lack of it - poses a major obstacle to feminist initiatives in law. The fact is that translating legal rights into claims costs alot of money which most women don't have. In order to push for substantive equality for women, feminists lawyers must find funding from other sources. Drawing on government to support radical feminist initiatives in law is not the long-term answer, for two reasons. First, it is not a good idea to rely on public pools of funding in this era of government cutbacks. Second, developing a dependence on public monies is problematic because of the nature of the feminist project in law. Government legislation and policy are prime targets of feminist legal interventions. Having to answer to government for the expenditure of funds could potentially constrain reform initiatives. Without public funding to rely on,

feminists in law must spend a significant amount of their time and resources seeking private sources of financing to sustain their work.

3. The Problem Posed By Legal Language

> Such is the dilemma of the woman speaker. That the categories of patriarchal language distort what she might like to say is no longer in question. Whether she is a literary critic or theorist, poet, linguist, philosopher, sociologist, or natural scientist, the formalities of her discipline, the syntax of its proper practice, the canons of its acceptable style have been exposed as carrying the sexist reasoning it is her task to replace. This difficult realization - difficult because it requires a critique of one's own categories of thought both acrobatic and punishable as women scholars, critics and researchers transgress respected standards of rationality - now marks women's work in all disciplines. What is not yet clear is what can be said.[63]

Feminist efforts to employ law for radical purposes are also stymied by the language of the law. I became acutely aware of the way in which legal discourse limits what can be said - and hence blunts progressive initiatives - in attempting to discuss the subject of violence against women with a group of fellow graduate law students. We had gathered to discuss feminist issues. As a means of launching the dialogue, we were shown a video of Catharine Mackinnon addressing an international human rights assembly on the subject of violence against women. MacKinnon spoke passionately to the gathering, employing women's own graph

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[63]A. Nye, "Women Clothed With The Sun: Julia Kristeva An The Escape From/To Language" (1987) 12 Signs: J. of Wom. in Cult. and Soc. 664 at 665.

accounts of their experiences of violence in the private sphere to argue for the recognition and classification of this phenomenon as a form of political torture.

Following the video, we gathered in a circle and began to discuss the issues generated by MacKinnon's talk. I and several other women present were deeply affected by what Mackinnon had to say and spoke out angrily against male violence. Several male students were clearly offended by her presentation. They attempted to discount the pervasiveness of the phenomenon and reframe the debate in terms of the individual rights of those accused of abusive behaviour. This enraged me and many of the other women present even further. I responded by relating my own experience of sexual violence as a way of trying to counter their denial. At that point, the discussion completely broke down.

It is striking to note the contrast between the two languages employed by the men and women in the seminar to discuss the issue of male violence, and the fact that neither was adequate to the task. In essence, several languages formed the basis of our discussion. Several women present spoke from a direct experiential level to bring home the seriousness and pervasiveness of the phenomenon, and a number of men employed the language of rights as a means of addressing the issue in extreme abstraction.

The men relied upon criminal characterizations of sexual and physical assault matters to distance themselves from the

accounts related by MacKinnon, as well as our anger and experiences. They effectively used legal discourse to disengage from and deny both the pervasiveness of the problem and the affective dimensions of the experience of sexual assault. The language of the law thus enabled them to avoid both caring and needing to do anything about the phenomenon of violence against women and children.

The language adopted by the women, in contrast, was far removed from formal legal thought and categorization. Our language spoke out our anger and our pain in a way that brought the experience of male violence palpably close. While the men spoke to establish and maintain distance from the experiential level, we spoke to confront them with the reality of our experiences. Bringing an intensely subjective voice to the discussion effectively neutralized their attempts to maintain stories of violence against women as a distant abstraction. It did not, however, enable us to engage them in a constructive debate on the issue.

What I have come to realize, based upon this incident, is how difficult it is to articulate and sustain radical claims within the legal sphere. Employing formal legal discourse for this purpose is clearly not the answer. As Fudge and Glasbeek have suggested, there is a hegemonic quality to the discourse which works against the project. Encoded in the rational, dichotomous cast the law imposes on the world is an ethic of disconnection and separation, an ethic of uncaring about those

who occupy a subordinate position of power in society based upon their gender, race, class, sexual preference, age and disability. Their experiences of oppression together with the rich multiplicity of their lives all but disappear in the process of translation into legal language, because the point is not to see and therefore have to deal with this reality. If our goal is to make these experiences visible in the legal sphere in order to break down categories of thought and practice which are inherently exclusionary, then we can not adopt legal discourse in unaltered form as our mode of communication.

But what of the language adopted by the women in the seminar? Is a language which directly reflects the subjective experiences of disadvantaged groups more appropriate to the task? A language rooted in the experiential is certainly more attractive because it is based upon, and thus remains relatively true to, the stories recounted by marginalized people themselves. However, it is also not the appropriate language to utilize in order to sustain radical claims in the legal sphere. If our goal is to engage with and manipulate the legal system for the benefit and protection of others, we can not simply jettison legal terminology and expression in favour of a language rooted in the experiential. Stories presented in these terms can too easily be discredited and discounted by judges and others in positions of authority because they breach the formalities of the discipline.

Clearly, we risk the outright rejection of individual and group accounts if we speak in ways which are too jarring to the legal ear.

If neither strict adherence to, nor escape from the rigid formalism of legal discourse is the answer, what langauge should we use in a transformational legal practise? Catharine Mackinnon's approach suggests an answer. She peppered her discussion of the law with women's own accounts of domestic violence thus combining legal discourse and a language rooted in the experiential. In so doing, MacKinnon was able to both engage with her audience and challenge established conceptual patterns of thought regarding the separation of private and political spheres. Her poetic use of women's own stories of violence was also effective in forcing her audience to confront the reality of violence against women in close personal terms.

I would argue that a feminist transformational practice in law must follow MacKinnon's lead and articulate radical claims in a language which draws on both legal discourse and as well as the experiential realm. The former provides the basis for engagement in the legal sphere and the latter acts as a disruptive force which challenges established modes of legal thinking. Constructing a language along these lines is by no means an easy task. If we stray too far from legal formalism we risk being dismissed by legal authorities. And if we speak in ways which betray the experiences of women and

other groups relegated to the margins in society, we work against their interests and contribute little to the project of social transformation.

4. The Difficulty Of Establishing Proof Of Harm

Pursuing a radical agenda in law involves, as I have suggested, establishing proof of the harm done to women and other socially marginalized groups as a consequence of social configurations of power. It is up to the individual or group which has been harmed by a particular social practice to prove the reality of their situation. This approach to establishing the truth or falseness of claims presupposes that those who have been victimized have survived the experience and are capable of providing a clear, lucid and detailed description of what occurred and how it affected them. Yet, we know that many women have not survived gender oppression and therefore cannot bear witness to what has been done to them. We also know that many others have been so traumatized by their experiences that they are unable to either recall or verbally articulate what has occurred. As Lyotard suggests, it is patently absurd to burden those who have been victimized with proving the fact of their victimization because, as victims, they have been stripped of the means to do so:

> It is in the nature of a victim not to be able to prove that one has been done a wrong. A plaintiff is someone who has incurred damages and who disposes of the means to prove it. One becomes a victim if one loses these means. One loses them, for example, if the author of the damages turns out directly or indirectly to be one's judge. But

> this is only a particular case. In general, the plaintiff becomes a victim when no presentation is possible of the wrong he or she says he or she has suffered...Reality is always the plaintiff's responsibility. For the defense it is sufficient to refute the argumentation and to impugn the proof by a counterexample...Likewise it cannot be said that a hypothesis is verified, but only that until further notice it has not been falsified...That is why it is up to the victims of extermination camps to prove that extermination.[64]

Even if one succeeds in meeting the almost unbearable burden of proof required, one runs the risk of having one's story re-interpreted in ways which are less politically threatening. This phenomenon occurs in the realm of child welfare law. One would think that the plethora of accounts of intra-familial child abuse and neglect brought forward pursuant to the operation of child welfare law would cast doubt on the viability of the family structure and the nature of power relations therein. Yet this is not the case. The child protection approach in virtually all jurisdictions centres on validating and supporting the primacy of the family unit rather than calling it into question.[65] Problems are

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[64]J. Lyotard, The Differend Phrases in Dispute, G. Van Den Abbeele, trans. (Minneapolis: University of Minnesota Press, 1988) at 8-9.

[65]In Alberta, for example, the pre-eminence of the family was heralded by provincial authorities as the centrepiece of the province's revamped approach to child protection. In introducing Bill 35 - the precursor to the Child Welfare Act, S.A., 1984, Ch. C-8.1 - for second reading, the Minister of Social Services made it clear that the promotion of the family unit was a primary legislative goal:

> "Mr Speaker, it has been a difficult process to try to balance in the particular Act the pre-eminence of the family and family responsibilities against the

attributed to individual pathology and individual family pathology as opposed to being viewed as endemic to the family structure. In choosing to embrace the theory of sheer coincidence to explain why so many children are victimized within the private realm, child welfare law repudiates a theoretical understanding of the problem which is at once patently obvious and politically disruptive.

D. Conclusion

There are no simple or straightforward answers to the question of working within. Feminists who argue that working within can not effect fundamental social change have much in common with those in law who disavow the transformational potential of rights employment. Feminist critics of the project argue that the master's tools cannot dismantle the master's house and suggest that attempts to do so only serve to reinforce existing configurations of power and sustain current social arrangements. They suggest that it is necessary to work at a distance from existing social structures to remake the social order in inclusive terms.

Rights critics argue that legal discourse at once embodies and supports the exclusionary politics of liberal

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recognition and protection of the interests of the child. We think we have a fair balance in that respect. Also, I think we do stress the very, very important aspect that even though it's called a Child Welfare Act, it does recognize the family as a basic unit of society." (Albert, Legislative Assembly, Alberta Hansard, No. 32 at 748 (8 May 1984))

democracy and therefore cannot be employed for truly progressive ends. According to these theorists, the law reflects but cannot alter social configurations of power determined by the state. Fudge and Glasbeek dismiss attempts by social movement groups to employ the Charter for progressive ends. They argue that the politics of rights movement cannot bring about social transformation because it is not rooted in a unifying, class-based theory of oppression.

Critics on the other side of the debate suggest, on the other hand, that working within is necessary if we are to confront and overcome all that blocks the road to substantive equality. They argue that striving for power in the terms in which power is used oppressively is necessary in order to effect the liberation of women and other disadvantaged groups. Herman disputes Fudge and Glasbeek's deterministic view of law and its relationship to social and political life. She points out that liberalism continues to be shaped by legal reform initiatives like those launched by the gay and lesbian community, and argues for a much more complex and dialectical understanding of the connection between the legal and political spheres.

In sorting through these arguments, I have come to the conclusion that working within law and other social spheres to counter the prevailing power structure is a critical part of the struggle for social transformation. Striving for power in the terms in which it is oppressively wielded is necessary

if we are to liberate women and other disadvantaged groups, and break up the current social system. In taking this position, I am not unmindful of the extraordinary dangers associated with this kind of work. It is far too easy in struggling for power, to become corrupted by the process and slip permanently into the role of colonizer. Those who undertake this kind of work must do so with great care and in full awareness of the dangers involved. In order to stay on course, they must also, as Cixous suggests, work on other possibilities of living, and undertake sustained critiques of their efforts.

I am also pursuaded by Herman and Schneider's arguments in support of the transformational potential of rights employment. The fact is that the inter-connection between the legal and political spheres is much more complex and dynamic than Fudge, Glasbeek and other rights critics allow. Law is not inextricably tied to a static liberal agenda but actually can be manipulated to support a particular set of social arrangements at a particular time. To suggest otherwise is to take an ahistorical look at the development of liberalism and the role that law has played in fundamentally altering its boundaries.

I also take exception to Fudge and Glasbeek's denunciation of the politics of rights movement. In my view, the project of seeking social recognition and legitimacy through rights struggle is a viable transformational strategy.

It involves an articulation of voices long silenced by the prevailing discourse and thus poses a threat to a politics rooted in the objectification and exclusion of the other.

While I endorse the project of working within law to effect social transformation, I do not do so blindly. Working with the master's tools to dismantle the master's house is an initiative fraught with constraints. Feminists in law must cope with a host of difficulties in attempting to bring the project to fruition: a split and contradictory status within law and feminism, lack of money, the problem posed by legal language, and the difficulty of proving women's victimization in a system constructed to deny the existence of gender oppression. In working to overcome these obstacles and the barriers to substantive equality, feminists in law must also undertake sustained critiques of their work, as well as focus on other social possibilities in order to remain true to the vision and spirit of what they are trying to accomplish. To paraphrase Cixous, that is a long and difficult project.

Chapter III: Visions Of Transformation In Feminist Legal Theory

A. Introduction

Working within the legal sphere to effect fundamental social change is, as I have suggested in the previous chapter, an undertaking fraught with difficulties. The question is, how is the process envisioned in feminist legal theory? In this chapter, I consider how three major feminist legal scholars, Catharine MacKinnon, Robin West and Patricia Williams, conceive of using the law to combat the fundamental failings of the existing social order and pave the way for social renewal. Toward this end, I explore what each has to say regarding what's wrong with the present social order, the law's culpability in sustaining unequal power arrangements, ways in which law can be used to achieve social transformation and the fundamental characteristics of a renewed social system. I also examine the critiques levelled at their work by other theorists. In addition to reviewing the substance of their writing, I explore how MacKinnon, West and Williams employ language and the medium of legal scholarship to express their transformational vision.

B. Why These Three

There are many feminist legal theorists whose writing is worthy of consideration in this context. I have chosen to examine what MacKinnon, West and Williams have to say about

the transformational project in law because each has made a major contribution to the development of feminist legal thinking on this topic over the past decade.

MacKinnon's project reflects a radical feminist agenda. Her theoretical work and legal practice have served to revolutionize feminist thinking regarding the use of law as a vehicle for ending women's oppression. MacKinnon's critique of the liberal state and her efforts to reformulate liberal rights discourse in radical feminist terms have been particularly critical to the development of feminist strategies in the courtroom and other legal spheres.

Robin West draws primarily on cultural feminism to develop her thinking on issues specific to the feminist transformational project in law. For West, the re-introduction of an ethic and morality that is distinctly female is key in the struggle for social transformation. In much of her writing, she grapples with the question of what constitutes women's essential difference, and it is this aspect of her work more than any other which has served as a catalyst for debate in feminist legal theory.

Patricia Williams' writing differs markedly from MacKinnon's and West's in a number of respects. She focuses on issues of racism and the law, drawing on her own experiences as a black lawyer and law professor, as well as the experiences of other African Americans, to develop her thesis. Williams breaks with traditional legal scholarship in

bringing an intensely subjective critical voice to her examination of the law. Her work has made a major contribution to feminist legal thought with regard to issues of difference, the inter-connection between different forms of oppression and the development of a liberation theory and practice. It also serves as a powerful example of what can be accomplished in legal scholarship through stylistic manipulation and transformation.

C. Catharine MacKinnon

1. What's Wrong With The Social Order

MacKinnon identifies the institutionalization of hierarchical relations of power between the genders as the source of women's oppression. Power relations in our society are organized in hierarchical and brutal terms, she argues. One is either doing the kicking or getting kicked pursuant to this power dynamic[1], and the position one occupies is very much determined by one's gender. According to MacKinnon, sexuality is a fundamental organizing principle of society, and the question of sexual difference is really "a question of power, specifically of male supremacy and female subordination."[2] The objectification of the female sex is

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[1]C. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987) at 77.

[2]Ibid. at 40.

the primary way in which women's subordinate status is maintained:

> Sexual objectification is the primary process of the subjection of women. It unites act with word, construction with expression, perception with enforcement, myth with reality. Man fucks woman; subject verb object.[3]

MacKinnon argues that the social order creates and sustains itself through the systemic appropriation of women's sexuality, and, in the process, creates for women lives marked by exclusion, degradation, poverty and brutality. Society has not only perpetrated these crimes against women, it has managed to hide what it has done, she notes. It is only through recent feminist efforts to unearth this information that we are now able to grasp the extent of women's subjugation within the social sphere:

> This new information includes not only the extent and intractability of sex segregation into poverty, which has been known before, but the range of issues termed violence against women, which has not been. It combines women's material desparation, through being relegated to categories of jobs that pay nil, with the massive amount of rape and attempted rape - 44 percent of all women - about which virtually nothing is done; the sexual assault of children - 38% of girls and 10% of boys - which is apparently endemic to the patriarchal family; the battery of women that is systemic in one quarter to one third of our homes;...[4]

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[3]C. MacKinnon, Toward a Feminist Theory of the State (Cambridge, Mass.: Harvard University Press, 1989) at 124 [hereinafter Feminist Theory].

[4]Feminism Unmodified, supra note 1 at 40-41.

2. The Culpability of Legal Liberalism

In MacKinnon's view, the liberal legal regime is deeply implicated in women's oppression. She argues that the role of law under liberal legalism is to reflect back and support the social organization and expression of power. Law and social life fit seamlessly together, creating a jurisprudence that legitimates male dominance and female subordination and appears neutral in the process. In Towards A Feminist Theory Of The State, MacKinnon describes the role law plays in legitimating the false social constructs which support these corrupt social arrangements:

> Through legal mediation, male dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group. To the degree it succeeds ontologically, male dominance does not look epistemological: control over being produces control over consciousness, fusing material conditions with consciousness in a way that is inextricably short of social change. Dominance reified becomes difference. Coercion legitimated becomes consent. Reality objectified becomes ideas; ideals objectified becomes morality. Discrimination in society becomes non-discrimination in law. Law is a real moment in the social construction of these mirror-imaged inversions as truth.[5]

She also details how male dominance is maintained through the operation of the liberal rights regime. The liberal rights model is based upon a male standard and experience of social reality and thus works to the distinct advantage of men and disadvantage of women, she argues. Women seeking equality pursuant to this paradigm must either prove that they are

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[5]Feminist Theory, supra note 3 at 238.

similarly situated to men, or so different from them that they deserve special consideration or protection. MacKinnon credits the "sameness" approach with achieving reforms for some women:

> It has improved elite access to employment and education-the public pursuits, including academic and professional and blue collar work - to the military, and more than nominal access to athletics.[6]

She notes that it has also helped men get access to some of the few benefits extended to women in areas such as child custody and the awarding of spousal support post-divorce.[7] The "difference" approach, on the other hand, "is in rather bad odour, reminiscent of women's exclusion from the public sphere and of protective labour laws."[8]

What the sameness/difference approach to equality cannot do, MacKinnon argues, is to address issues which arise as a consequence of women's subordinate status. She notes that matters such as pregnancy discrimination and violence against women do not raise sex equality issues pursuant to this analysis because men do not suffer these kinds of abuses. It is the law's failure to grasp and respond to the material conditions of women's lives, MacKinnon argues, which blocks systemic reform and makes traditional legal liberalism such a dead end for women.

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[6]Ibid. at 221.

[7]Ibid. at 221-222.

[8]Ibid. at 219-220.

3. MacKinnon's Utopian Vision

Drucilla Cornell describes MacKinnon's vision and project as "anti-utopian".[9] She is wrong. MacKinnon's project is explicitly and passionately utopian. She wants to see women achieve substantive equality in social life, and in the process regain control over their lives. Though her vision for the future is predominantly expressed in negative terms, i.e., in terms of countering the forces which degrade and deny women's existence, it nonetheless articulates a positive conception of a renewed social order:

> Not to mention that to consider "no more rape" as only a negative, no more than an absence, shows a real failure of imagination. Why does "out now" contain a sufficiently positive vision of the future for Vietnam and Nicaragua but not for women? Is it perhaps because Vietnam and Nicaragua exist, can be imagined without incursions, while women are unimaginable without the violation and validation of the male touch?[10]

MacKinnon also expressly delineates the constituent elements of the social alternative she envisions in broad terms. In a world free from gender oppression, women would be able to live lives of reasonable physical security, respect and dignity, and would also be able to participate in defining the terms of a social order.[11] Neutralizing gender inequality

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[9]See D. Cornell, Beyond Accommodation Ethical Feminism, Deconstruction And The Law (N.Y.: Routledge, 1991) at 119 to 164 and especially at 130. Cornell argues that MacKinnon's project is fatally flawed because she doesn't affirm an ideal re-conception of the social order.

[10]Feminism Unmodified, supra note 1 at 219.

[11]Ibid. at 228.

would also, she speculates, fundamentally change the nature of social relations for the better:

> In the legal world of win and lose, where success is measured by other people's failures, in this world of kicking and getting kicked, I want to say: there is another way. Women who refuse to forget the way women everywhere are treated every day, who refuse to forget that that is the meaning of being a woman, no matter how secure we may feel in having temporarily escaped it, women as women will find that way.[12]

MacKinnon goes this far but no further in sketching out the terms of utopia. She is emphatic in resisting calls for re-conceptualizing the moral parameters of a renewed social order in concrete terms before substantive equality has been achieved. She is critical of those who would engage in this project, on several grounds. MacKinnon chastises academics caught up in postmodern theoretical dreams of utopia[13], and others engaged in imagining a future which hasn't arrived yet[14], for being too far removed from women's material reality to do anything real about it. Advocates of the "let's pretend"[15] strategy are also to be condemned for playing an exclusionary form of politics, she asserts. They are re-conceiving the terms of the social order without input from

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[12]Ibid.

[13]C. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" (1991) 4:1 Yale J. of L. and Fem. 13 at 13-14 [hereinafter "White Woman"].

[14]Feminism Unmodified, supra note 1 at 219.

[15]Ibid.

many women who, because of gender oppression, cannot participate in the project at this point in time.

MacKinnon also mistrusts a moral blueprint for the future conjured and conceived in the context of gender oppression. She is very hard on those who would celebrate and promote what women have been valued for under patriarchy, i.e., their caring, ethical nature, as a moral construct for the future:

> I do not think that the way women reason morally is morality "in a different voice". I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men...All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.[16]

4. Details Of A Transformational Theory And Practice

According to MacKinnon, bringing the transformational project to fruition requires a fundamental re-conception of the role of law in life and political struggle.[17] Although law, to date, has not responded to women's needs and interests, it can be made to do so, she asserts. And the first strategic step in the process of reconstituting jurisprudence in feminist terms "is to claim women's concrete

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[16]Ibid. at 39. In this passage, MacKinnon is referring to Carol Gilligan's work examining the distinction between male and female concepts of morality and the development of women's different moral voice. See C. Gilligan, In A Different Voice (Cambridge, Mass.: Harvard University Press, 1982).

[17]Feminist Theory, supra note 3 at 248.

reality."[18] Women must engage in the collective process of consciousness-raising in order to understand how their subordinate social status determines their existence. They must re-examine all aspects of their lives through the lens of sex inequality theory. By examining "society's deadest ends"[19], MacKinnon suggests, women learn that their condition is not a social imperative but a function of this society. This realization is both freeing and empowering because it affirms that this social order is not all there is nor can be and that women can act to remake the social landscape.[20] Armed with this knowledge, women are thus prepared to move out into the public sphere to fight for substantive equality.

Flooding the legal sphere with stories documenting women's experiences of gender oppression is the critical second step in the process. The point of this strategy is to delineate the dimensions and source of the problem and make it clear that the promise of sex equality in law cannot be realized unless the forces which determine women's subordinate political status are countered through legal process. As MacKinnon notes, the challenge is to make the law recognize, care about and respond to the material consequences of sex inequality.[21] A "harms-based" analysis forces the law to

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[18]Ibid. at 244.

[19]Ibid. at 100.

[20]Ibid. at 101.

[21]Ibid. at 242.

confront and deal with the power issues underlying sexual discrimination. It thus constructs an active role for law in reforming social arrangements:

> Equality will require change, not reflection - a new jurisprudence, a new relation between life and law. Law that does not dominate life is as difficult to envision as a society in which men do not dominate women, and for the same reasons. To the extent feminist law embodies women's point of view, it will be said that its law is not neutral. It will be said that it undermines the legitimacy of the legal system. But the legitimacy of existing law is based on force at women's expense. Women have never consented to its rule- suggesting that the system's legitimacy needs repair that women are in a position to provide.[22]

It is important to point out in this context that the line between theory and practise is blurred in MacKinnon's work. As noted in the previous chapter, MacKinnon believes that any theory worthy of the label "feminist" is an articulation of women's practice, i.e., "women's resistance, visions, consciousness, injuries, notions of community, experiences of inequality."[23] As both theorist and practitioner, her own work rebounds between these two spheres. Her theoretical approach to sex inequality matters is both drawn from and developed within the context of her legal practice.[24]

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[22]Ibid. at 249.

[23]"White Woman", supra note 13 at 14.

[24]MacKinnon has employed the harms-based analysis in her efforts to counter pornography, sexual harassment, violence against women and the activities of white supremacist groups. She has also been active in formulating LEAF's litigation strategies.

5. MacKinnon's Strategic Use Of Language

MacKinnon's discourse is, at base, emotionally charged and hard hitting. Care and concern for women infuse her writing as does a passion for her particular brand of reform politics. In Feminism Unmodified, a collection of her oral presentations, MacKinnon's anger is palpable as she discusses the injustices done to women in the social and legal spheres, and condemns those in the feminist movement who have opposed her efforts to counter pornography.[25] There are also tender moments in the text as MacKinnon discusses the harms individual women have suffered and survived, and the depth of commitment to the feminist project she has encountered in her

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[25]In the late 1970s and early 1980s, MacKinnon and Andrea Dworkin drafted and promoted the enactment of an anti-pornography ordinance. The ordinance made pornography actionable as sexual discrimination. It gave women harmed by material depicting the sexual subordination of women a civil remedy. MacKinnon and Dworkin's campaign generated heated debate among feminists, creating a serious rupture in the feminist community. See M.J. Frug, Postmodern Legal Feminism (London: Routledge, 1992) 145 to 153. In "On Collaboration", MacKinnon blasts feminist lawyers who opposed the campaign:

> Women who defend the pornographers are defending a source of their relatively high position among women under male supremacy, keeping all women, including them, an inferior class on the basis of sex, enforced by sexual force.
>
> I really want you to stop your lies and misrepresentations of our position. I want you to do something about your thundering ignorance about the way women are treated. I want you to remember your own lives. I also really want you on our side. But failing that, I want you to stop claiming that your liberalism, with its elitism, and your Freudianism, with its sexualized misogyny, has anything in common with feminism. Feminism Unmodified, supra note 1 at 205.

work.[26] Toward a Feminist Theory of the State is a more formal theoretical work and less explicitly emotional. However, the affective root of the writing shines through the book like an electric undercurrent.[27]

It is MacKinnon's ability to bring raw emotion and information documenting the extent of gender oppression to her discussion of the law which enables her to reach and move her audiences. As I noted in the last chapter, MacKinnon uses language strategically to communicate her themes and advance her transformational project. She infuses legal analyses with personalized accounts of women's oppression, citing names, circumstances and graphic details in an attempt to make those she is addressing confront and care about the reality of women's degraded and demeaned lives.[28] She also cites statistics outlining the dimensions of gender oppression to achieve the same effect. In making gender oppression a palpable reality in her texts and speeches, MacKinnon is engaging in the political method she preaches and practices in the courtroom.

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[26]See for example, "Linda's Life and Andrea's Work", Ibid. at 127-133.

[27]MacKinnon's passionate commitment to her project is evident throughout the book and particularly in the final chapter, titled "Toward Feminist Jurisprudence", where she discusses the transformation of legal practise and jurisprudence along feminist lines.

[28]See, for example, "Linda"s Life And Andrea's Work" in Feminism Unmodified, supra. note 1 at 127-133.

MacKinnon uses other rhetorical devices to advantage in her work. She plays with and twists the order of words and concepts in her writing in order to convey points which go against the grain of traditional thinking. For example, she will often state something in one way and then turn around and say it in exactly the opposite way in order to make a point clear.[29] The effect is startling and unsettling, and forces the reader to think the way MacKinnon thinks and see what she sees. MacKinnon also makes use of inversions to stand mainstream legal analysis on its head and expose weaknesses and lies:

> But no law gives men the right to rape women. This has not been necessary, since no rape law has ever seriously undermined the terms of men's entitlement to sexual access to women. No government is yet in the pornography business. This has not been necessary since no man who wants pornography encounters serious trouble getting it, regardless of obscenity laws.[30]

6. Critical Reflections On MacKinnon's Project

a. Denying The Importance Of Utopian Visions

Though, as noted above, MacKinnon embraces some women's visions as the base for a liberation theory and practice, she explicitly rejects dreams and visions which go so far as to map out a new moral frontier. According to MacKinnon, these kinds of revelations are the product of false consciousness

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[29]For example, "What is a gender question a question of?" Ibid. at 32.

[30]Feminist Theory, supra note 3 at 239.

and detract from the feminist project because they divert attention away from the work that needs to be done to counter gender oppression. Yet, in denying the viability of a positive alternate social vision defined by women, MacKinnon undermines her own project because she re-affirms the male view of reality as the only legitimate one:

> Put very simply, MacKinnon's central error is to reduce feminine "reality" to the sexualized object we are for them by identifying the feminine totally with the "real world" as it is seen and constructed through the male gaze.[31]

According to Cornell, feminist reform efforts in law will only succeed in fundamentally altering the terms of power if we embrace ethical feminist visions of the way in which the social world "should be" organized. I agree. As I have argued in previous chapters, we need women's visions and dreams of an equitable social alternative to inspire and sustain our reform initiatives. If we work without a visionary base, we risk replicating current power configurations.

b. A Project Of Revenge?

Cornell makes a startling claim about the nature of MacKinnon's project. In MacKinnon's brave new world, she argues, women would rule and men would be relegated to the subordinate position. MacKinnon does not seek equality, she

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[31]Cornell, supra note 9 at 130.

seeks revenge.[32] Cornell is way off base in asserting that MacKinnon's political project is about vengeance. She seriously misreads MacKinnon in suggesting that the assumption of power in male terms is the ultimate goal of her project. Rather, it is a means to an end, a strategy designed to get women, literally, out from under foot so that they are then positioned to participate in the process of re-defining the social order:

> I say, give women equal power in social life. Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak.[33]

And, as I argued in the previous chapter, how else can women free themselves except by struggling within and attempting to counter the oppressive forces exerted against them? The path to social transformation is certainly grounded in the visioning Cornell promotes but it also, most certainly, involves doing battle in MacKinnon's terms. Cixous, whom Cornell cites with approval, makes this point clear in her manifesto, "The Laugh of the Medusa"[34]. What Cixous envisions is not some sort of bloodless transformation of the terms of power, but a scenario in which women fight to counter the forces which bind them so that they can be free to recreate

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[32]Ibid. at 139.

[33]Feminism Unmodified, supra note 1 at 45.

[34]See H. Cixous, "The Laugh of the Medusa", in E. Abel & E.K. Abel, eds., The Signs Reader: Women, Gender and Scholarship, trans. K. Cohen & P. Cohen (Chicago: University of Chicago Press, 1983) 279.

themselves and the terms of the social order some place else.[35]

c. A Problematic View Of Consciousness

West is highly critical of MacKinnon for rejecting women's depictions of their "internal" reality as manifestations of false consciousness. She suggests that MacKinnon seriously misreads cultural feminism's celebration of women's different moral voice. Feminists have embraced this moral construct in spite of not because of patriarchy.[36] Their actions reflect a resisting mind and spirit rather than a consciousness which is completely subjugated.

West's critique raises an important point about MacKinnon's theory of consciousness formation. In suggesting that all visions of a positive moral alternative are tainted by patriarchal constructs, MacKinnon is saying that our consciousness is completely colonized. Our psyches contain only what we have been socially programmed to think, dream and feel, nothing more and nothing less. The problem with this position is that it posits no space from which to resist the dictates of the present social order in the first place. How can we even conceive of engaging in consciousness-raising and political resistance if our only possible response to the

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[35]Ibid. at 291.

[36]R. [illegible] "Jurisprudence And Gender" (1988) 55 Univ. of Chic. L. [illegible] at 50.

social forces shaping our lives is submission and compliance? The fact that individuals and groups do resist suggests that there must be some aspect of self, some space within, which remains separate and apart from colonizing influences. Feminism, I would suggest, was borne out of such a resisting space and MacKinnon's own work detailing the transformational process is the product of this creative expanse. MacKinnon should not be so quick to deny the creative power of the human psyche, nor to judge and dismiss other women's visionary work. It is certainly not in the interests of the transformational project to do so.

d. A Problematic Prescription For Sexual Liberation

Several critics take issue with MacKinnon's representation of women's sexuality and her prescription for erotic liberation. According to MacKinnon, women are socially programmed to embrace a sexuality that is rooted in sadomasochism.[37] Through the process of consciousness-raising, MacKinnon asserts, women can recognize how they have been socially programmed to embrace a subordinate sexual role and liberate themselves from false desires. Yet, as West points out, the objective ideal expressed by MacKinnon and other radical feminist legal theorists does not match what some women have to say about what they want sexually:

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[37]Feminism Unmodified, supra note 1 at 161.

> But women report - with increasing frequency and as often as not in consciousness raising sessions - that equality in sexuality is not what they find pleasurable or desirable. Rather, the experience of dominance and submission that go with the controlled, but fantastic, "expropriation" of our sexuality is precisely what is sexually desirable, exciting and pleasurable - in fantasy for many; in reality for some.[38]

West argues that MacKinnon does not understand the true nature of these desires and thus misconstrues them as the product of false consciousness. Cornell, too, takes issue with MacKinnon's understanding of women's sexuality. She argues that MacKinnon fails to pay attention to the unconscious and thus oversimplifies the nexus between the exercise of power and the formation of desire:

> Desire, for MacKinnon, is expressed by women in one way, because male power makes it so. Certainly if psychoanalytic theory has taught us anything, it has taught us that the relationship between desire and politics is extremely complicated and, indeed, much more complicated than MacKinnon would have it.[39]

Whatever the source of these fantasies and desires, the critical question is, what is to be done with them in the context of the feminist struggle? MacKinnon and other radical legal feminists dismiss them outright. West takes issues with this approach[40] and so do I. If our goal is develop reform initiatives which fully address the issues in

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[38]R. West, "The Difference In Women's Hedonic Lives: A Phenomenological Critique Of Feminist Theory" (1987) 3 Wisc. Wom. L.J. 81 at 117-118 [hereinafter "Hedonic Lives"].

[39]Cornell, supra note 9 at 134.

[40]See "Hedonic Lives", supra note 38. I will be discussing West's position on this issue further, in the following section.

women's lives, we need to acknowledge and explore the complexity and variation of women's erotic reality. In saying this, I am not suggesting that we stop working to free women from systemic sexual subordination because some women want to be sexually dominated in a controlled context. Rather, what I am arguing is that in struggling to liberate women from gender oppression and the appropriation of their sexuality, we should work in ways which open rather than foreclose possibilities for sexual expression, and MacKinnon's approach doesn't do this. I am also arguing for the establishment of an honest and open dialogue about how we are to strategically represent the nature of our sexual desires in the context of the struggle for equality.

Mary Joe Frug raises another important point about MacKinnon's approach to sexual liberation politics. She suggests that ending women's sexual oppression involves changing the way in which "people think and talk and act about sex".[41] The language and rhetorical style adopted by MacKinnon and others in the context of the anti-pornography ordinance campaign was not successful in achieving this end, she argues. Rather the analysis they put forward polarized the debate, drawing a line in the sand between advocates and "anti-feminists". It also oversimplified the content of the pornography genre:

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[41]Frug, supra note 25 at 152.

> Not all pornography is simply about women being fucked. There are some pornographic works in which the objectification of the orgasming penis is not repeatedly depicted and valorized; and many works in which the subjectivity of a female character is a dominant and successful thematic concern. These works do not depict what the ordinance advocates suggested pornography "is."[42]

Frug's critique raises, again, the dilemma language poses to those engaged in the feminist project in law. In order to engage with and confront those who have turned a blind eye to the harms women suffer as a consequence of the proliferation of certain kinds of pornography we must use a hard-hitting, dichotomous rhetorical style which tends to oversimplify the issues as stake. This is the strategy employed by MacKinnon and others involved in the ordinance campaign. However, as Frug's critique suggests, it is also critical that we attempt to break down the dichotomous conceptualization of the issues underlying gender oppression, and that requires a radically different rhetorical style. Frug suggests that MacKinnon et al. could have used a less gendered language to advantage in the ordinance campaign. I would argue that what was required was the strategic employment of different language forms to fit different audiences and contexts. A hard-hitting, "no-holds-barred" approach to conceptualizing the issues at stake would certainly have been appropriate in addressing groups ignorant of and hostile to women's issues. However, it was not the right rhetorical approach to take with those who were

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[42]Ibid.

more sympathetic to the feminist cause and it certainly wasn't the right way to talk to anti-censorship feminists. A more balanced exploration of issues and differences in these contexts would have benefited the project.

e. The Question Of MacKinnon's Essentialism

MacKinnon has also been roundly criticized for essentializing women's experiences of oppression in her theoretical work. Angela Harris and Marlee Kline contend that MacKinnon's characterization of gender oppression is fundamentally flawed because it does not capture issues of race and class, as well as other factors which determine women's experiences of social reality.[43] According to Kline, it is MacKinnon's attempt to define a collective experience of gender oppression, i.e., to capture the essential experience of discrimination based on sex which all women suffer, which gets her into trouble.[44] Race and class issues disappear in her attempt to define gender oppression in universal terms. As a result, Kline argues,

> MacKinnon's insights with regard to the relationship between gender and race only marginally capture the complex and powerful role that racism plays in the lives of women of colour.[45]

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[43]See A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581 and M. Kline, "Race, Racism And Feminist Legal Theory" (1989) 12 Harv. Wom. L. J. 115.

[44]Kline, Ibid. at 136.

[45]Ibid. at 140.

Kline also points out that MacKinnon's thesis denies the power issues embodied in race and class differences which determine relationships between women.

Harris also takes issue with the breadth of MacKinnon's theoretical focus. In attempting to isolate the essential experience of being a woman, MacKinnon's dominance theory fails to challenge the law's tendency to promote an abstract and unitary voice, she argues. MacKinnon's work is itself exclusionary because it fails to take account of the extent to which race subordination has historically determined black women's experiences of sexual violence. Blackness is just an "add-on" issue in MacKinnon's work, a difference which intensifies the negativity of the experience of oppression rather than a factor which fundamentally changes its nature.[46] It is white women's experiences she is addressing in her work, not the complex reality which marks black women's lives:

> Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender - of being enmeshed always in multiple, often contradictory, discourses of sexuality and colour.[47]

Harris argues for the development of a theoretical approach and a jurisprudence that is grounded in this multiple, complex experience of self.

MacKinnon makes a number of points in defence of her theoretical work and the theory and practice of sex inequality

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[46]Harris, supra note 43 at 601.

[47]Ibid. at 604.

in general. She angrily suggests that these and similar challenges to her dominance theory are really attacks on the notion that women are oppressed simply because they are women.[48] These critics are suggesting that discrimination purely on the basis of sex isn't a reality, and in doing so, they are negating the theory and practice of sex inequality:

> What I am saying is, to argue that oppression "as a woman" negates rather than encompasses recognition of the oppression of women on other bases, is to say that there is no such thing as the practice of sex inequality.[49]

But the practice of sex inequality is real and inclusive, MacKinnon asserts. She cites the cases of two African American women who benefited from the employment of the analysis, as proof of its relevance to women of colour:

> Wasn't Mechelle Vinson sexually harassed as a woman? Wasn't Lillian Garland pregnant as a woman? They thought so. The whole point of their cases was to get their injuries understood as "based on sex", that is because they are women.[50]

In sorting out the claims made on both sides of this argument, I have come to the conclusion that what is being contested, again, is MacKinnon's mode of conceptualizing gender issues and the terms of the struggle for women's liberation. Kline and Harris allege that her work is fatally flawed because of its singular focus and consequent inattention to other power issues determining women's

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[48]"White Women", supra note 13 at 20.

[49]Ibid.

[50]Ibid.

experiences of oppression. What they are saying is that it is never O.K. to essentialize women's experience in pursuit of the feminist project in law. Harris suggests that it is, in fact, counterproductive to do so.

I disagree. There are moments in the struggle when it is necessary to essentialize women's experience of gender oppression in order to advance the cause. Gayatri Spivak, a literary critic Harris cites with approval, makes a strong case for the strategic use of essentialism. She argues that while it is necessary to repudiate essentialism as a concept, it is not possible to do so in practice. She suggests that a strategic use of essentialism is necessary to counter the negative attributes assigned to women as a whole:

> The universalism that one chooses in terms of anti-sexism is what the other side gives us, defining us genitally. You pick up the universal that will give you the power to fight against the other side and what you are throwing away by doing that is your theoretical purity.[51]

What Harris and Kline both seem to forget is that the kind of gross sexism Spivak refers to exists in law and must be understood and countered before we can move on to push for a different approach to the recognition of women's differences. This is what MacKinnon is attempting to do in her work. She is trying to define and combat the way in which women, as a group, are viewed and dealt with in the legal and social spheres. Harris is wrong to suggest that work of this

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[51]G. Spivak, "Criticism, Feminism And The Institution - An Interview with Gayatri Chakravorty Spivak" (1984/85) 10/11 Thesis Eleven 175 at 184.

kind is not sufficiently disruptive and subversive of legal categories of thought. MacKinnon's theory and practice have played a key role in transforming the way in which gender differences are conceptualized in law. Her work has also been invaluable in providing a base for further enquiry and debate and paving the way for other approaches to difference - like the one Harris envisions - to be promoted in the legal sphere.

I support MacKinnon's project for these reasons. But I am also critical of her apparent unwillingness to acknowledge the limitations of the theory and practice of sex inequality, and the need to go further. In responding directly to MacKinnon's defence of the analysis, the Yale Collective on Women of Color and the Law (hereinafter Collective) notes that the approach MacKinnon endorses has failed to capture the complexity of black women's experiences of sexual harassment:

> Mechelle Vinson brought action against her employer as a woman, but more accurately as a Black woman. You fail to recognize this in your description of the acts Mechelle Vinson's employer committed against her. Perhaps Ms. Vinson would not articulate her experience differently. Although shaped by the case of Meritor Savings Bank v. Vinson [477 U.S. 57 (1986)], sexual harassment legal doctrine is not centred on women of color. That Mechelle Vinson, a Black woman, was the plaintiff in this landmark case has not automatically protected women of color from being marginalized in the legal theory of sexual harassment. The theory needs expressly to encompass those forms of sexual harassment which involve race as subordination. Sexual harassment as a theory focuses on sexual exploitation as linked to reproductive or sexual capacity. It neglects sexual exploitation in the context of race subordination, and the practice of sexual

harassment law does not fully address harms done to women of colour.[52]

Harris and the Collective argue for the development of legal categories which are "explicitly tentative, relational, and unstable"[53], and capable of capturing how gender, race, class, sexuality and other factors intersect and interact to determine women's experiences of oppression. I support this project. Present conceptions of gender oppression in law do not fully capture the diversity of women's experiences. But, as I argued above, we also need to employ essentialist conceptions of women's reality in certain contexts to address certain situations. The fact is, that MacKinnon's analysis does capture what some women - and not just white women - experience. Mechelle Vinson and Lillian Garland may have felt that what happened to them was predominantly about sex and not about race, as MacKinnon contends. We need to work strategically to fully address the issues in women's lives, and this involves employing different strategies at different times, in a context specific manner.

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[52]Yale Collective on Women of Colour and the Law, "Open Letters to Catharine MacKinnon" (1991) 4 Yale J. of L. and Fem. 177 at 180.

[53]Harris, supra note 43 at 586.

D. Robin West

1. An Overview Of West's Work

West's scholarship is more difficult to catalogue than MacKinnon's. Whereas MacKinnon's theoretical gaze is focused squarely on matters relating to the feminist project in law, West's is cast more widely. She has subjected the legal academy and legal scholarship to feminist scrutiny[54], and has also taken on the law and literature and the law and economics movements[55] in her work. But it is West's struggle to develop a feminist standpoint and consciousness about legal matters which is the source of her richest work. For West, it is critical to understand what constitutes woman's essential difference from man, and to promote this difference in the legal and social spheres, in order to effect social transformation. She grapples with this question throughout her writing. She also struggles to understand how the contours, complexities and variation of women's internal reality can be made part of the feminist project in law.

West's writing is bulky. Whereas MacKinnon gives you only the bare bones of her thinking in her scholarship, West makes the evolution of her analysis patently clear in her writing. In attempting to identify the social factors which

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[54]See R. West, "Love, Rage and Legal Theory" (1989) 1 Yale J. of L. and Fem. 101 [hereinafter "Love and Rage"].

[55]See R. West, "Communities, Texts and Law: Reflections on the Law and Literature Movement" (1988) 1 Yale J. of L. and Hum. 129 and R. West, "Economic Man and Literary Woman: One Contrast" (1988) 39 Mer. L. Rev. 867.

determine women's subordinate status and come up with effective transformational strategies, she explores a range of issues, philosophical perspectives and critical thinking. Her writing is infused with lengthy discussions of the nuances of liberalism, postmodernism, cultural and radical feminism, critical legal studies and other critical movements. She also examines the work of Foucault, Irigaray and other theorists across disciplines to determine whether their insights can contribute to the feminist project in law.

West is also a passionate writer and theorist who takes risks in her scholarship. She not only advocates the development of an intensely personal and passionate approach to feminist scholarship[56], she follows her own advice in her treatment of feminist themes. Her piece, "The Difference In Women's Hedonic Lives"[57], is truly remarkable for its candour about West's own experiences, and for the way in which it interweaves personal and political themes.

2. West's Conception of Society's Fundamental Failings

Patriarchy symbolically and materially denigrates women, West argues throughout her writing, and it does so in brutal ways. Under patriarchy, men have power and women do not, and this arrangement is maintained primarily through violence, i.e., the production of discourse which is violent in its

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[56]"Love and Rage", supra note 55.

[57]"Hedonic Lives", supra note 39.

exclusion of women's truths and the perpetration of overt acts of violence against women.

Like MacKinnon, West fills her work with images of the physical and psychic violence women endure under a patriarchal regime. She discusses in great detail how the legitimization of violence against women and the essential devaluation of women in patriarchal society has shaped the quality and character of women's lives. In "Feminism, Critical Social Theory and Law", she notes that the exercise of patriarchal power has had devastating effects on women's "internality" or sense of self.[58] Patriarchal culture promotes the appropriation of women's sexuality and thus destroys women's natural eroticism and will to create and assert a positive sense of self, she argues. Explicit acts of sexual violence many women endure go even further in destroying souls and creative, subjective lives.[59] West also suggests that the promotion of a dichotomous, exclusionary male vision of the world as all there is creates a schism between what women internally know to be true and what they are presented with on a daily basis. This phenomenon, too, generates a further sense of alienation from self.

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[58]R. West, "Feminism, Critical Social Theory and the Law" (1988) U. of Chic. Leg. For. 59 at 89. [hereinafter "Critical Social Theory"]

[59]See Ibid. at 68 to 78 and especially 75 where West describes the brutal and silencing effects of explicit acts of sexual violence and patriarchy's "inattentiveness" to the silences it produces.

West contends that patriarchal society is not only characterized by the fact of its violent exclusion of women, but by the absence of women's different moral voice. According to West, women, morally, have something profoundly different and better to offer the public realm than do men. She suggests that while men embrace autonomy as a founding social principle, women value their connection to others and thus organize and live their lives in profoundly relational terms. West does not clearly articulate the source of this essential difference and absence in her work. In some parts of her writing, she seems to attribute women's sense of connectedness to others to the fact of their biology, i.e., to women's ability to engage in intercourse, bear children, and breast feed.[60] In other places, she appears to suggest that women's care and concern for others is at least partly the outcome of social conditioning.[61] In "Feminism, Critical Social Theory and Law", on the other hand, she describes the essential female self excluded by patriarchy in psychoanalytic terms. Citing the work of Luce Irigaray, West contends that patriarchy

> destroys, excludes, negates and renders fantastic women's internal, pre-lingual and even pre-symbolic sense of ourselves as witness to the truth that the violence done upon the world by discursive categorization - this

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[60]"Jurisprudence and Gender", supra note 36 at 57 and "Hedonic Lives", supra note 38 at 140.

[61]See "Jurisprudence and Gender", Ibid. at 70 to 72 where she acknowledges the fact that men can physically connect to others but don't because of their social conditioning.

> breaking into subjects, objects, principles, rights and wrongs- is false, is wrong, and is not all.[62]

What our social system has done in denying women's connection to this pre-oedipal sense of self is to cut off the "source of fulfilled need, pleasure, desire, communion, inter-subjectivity and jouissance".[63]

3. West's Critique Of Patriarchal Jurisprudence

West, like MacKinnon, sees the legal sphere as deeply implicated in gender oppression. According to West, modern American jurisprudence is "masculine" because it reflects a vision of human consciousness and association that is fundamentally male, and because it is has been authored and administered by and for the benefit of men.[64] In "Jurisprudence and Gender", West argues that the rule of law values and protects autonomy because a sense of a separate and self-contained self is central to men's subjective experience of social reality. The law does not, however, embrace the values which are central to women's lives:

> The values that flow from women's material potential for physical connection are not recognized as values by the

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[62]"Critical Social Theory", supra note 58 at 93. West is referring to Irigaray's conception of the female imaginary or the "feminine". See discussion of the "feminine" in the Introduction, p. 5-8.

[63]West, Ibid. at 94.

[64]"Jurisprudence and Gender", supra note 36 at 58-61.

> Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law.[65]

West mourns the absence of intimacy and the ethic of care as official values in the legal sphere. She also decries the denigration and exclusion of a subjective, affective approach to legal analysis and debate in legal scholarship as well as practice. In "Love, Rage and Legal Theory", West notes that the dominant legal culture's emphasis on objectivity and neutrality

> precludes the sense of engagement, identification, connection, participation, shared victimization, and collective rage that inform feminist conceptions of justice.[66]

Legal scholarship, like jurisprudence, reflects

> an essentially masculine view of the relation of affect to action, of emotion to reason, of particular to universal, of context to principle, of nature to culture, and of self to other, that is threatened to the core by the affective root and motives of feminist legal work and by its substantive content.[67]

4. Utopian Dreams And Strategies

As noted above, West does not shy away from mapping out the moral frontier of a reconstructed social order. In West's utopia, inter-subjectivity would be embraced as a founding social principle. She envisions the creation of a caring, nurturing world in which all forms of life would be accorded

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[65]Ibid. at 58.

[66]"Love and Rage", supra note 54 at 103.

[67]Ibid. at 101.

recognition, honour and respect and all forms of difference, including sexual difference, would be celebrated.[68] Law, in West's utopia, will operate to "protect against harms sustained by all forms of life, and will recognize life affirming values generated by all forms of being."[69]

West advocates the employment of a number of different strategies to take us from here to there. In "Jurisprudence and Gender", West argues that countering the conceptual and political barriers to women's equality is the route to take to effect fundamental social change. She promotes the development of a feminist jurisprudence towards this end, and argues that feminist initiatives in law must be grounded in the social alternative we envision:

> Feminism must envision a post-patriarchal world, for without such a vision we have little direction. We must use that vision to construct our present goals, and we should, I believe, interpret our present victories against the backdrop of that vision.[70]

West suggests that reconstructing jurisprudence along feminist lines is a two-stage process. The first stage involves unmasking the patriarchal underpinnings of jurisprudence in order to show how the law operates to define and protect men, not women.[71] Like MacKinnon, West promotes the use of women's stories of oppression and an archaeology of

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[68]"Jurisprudence and Gender", supra note 36 at 72.

[69]Ibid.

[70]Ibid. at 72.

[71]Ibid. at 60-61.

the silences patriarchy produces in order to reveal how women have fared

> under a legal system which fails to value intimacy, fails to protect against separation, refuses to define invasion as a harm, and refuses to acknowledge the aspirations of women for individuation and physical privacy.[72]

The second stage of the process involves reconstructing jurisprudence in feminist terms. The goal of this aspect of the project is to make the law both reflect and respond to women's values and the issues which determine women's reality.[73] She argues strongly for making the moral precepts basic to women's lives - the ethic of intimacy and care - a central part of legal process and decision-making. West also advocates drawing on aspects of the "feminine" to guide us in the process of reconstructing the rule of law.[74]

In "Womens' Hedonic Lives", West suggests an entirely different strategic approach to women's liberation and social transformation generally. In this piece, she disputes radical legal feminism's thesis that subordination is the root cause of women's suffering and that achieving equality will ensure women's happiness and fulfilment. Not all relationships characterized by dominance and subordination are the source of pain and suffering, she contends, noting that many women identify sexual submission in the context of a relationship of

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[72]Ibid. at 61.

[73]Ibid. at 68-70.

[74]"Critical Social Theory", supra note 58 at 96.

trust as highly pleasurable. She proposes the adoption of a critical legal method which is rooted in women's hedonic lives and aims "directly for women's subjective well-being."[75] Only by focusing on what gives women pleasure and what causes their suffering will we

> be able to develop a description of human nature which is faithful to our lived reality, rather than one which ignores it. From that set of descriptions, and only from that set of descriptions, can we construct, or reconstruct, our own political ideals, whether they be autonomy, equality, freedom, fraternity, sisterhood, or something completely other, and as yet unnamed.[76]

According to West, legal scholarship can also be strategically employed to advance the feminist project in law. She argues for the adoption of an intensely subjective and passionate narrative voice in feminist legal writing in order to communicate, more palpably, the nature of the harms done to women by the patriarchal social order.[77]

5. Critiques of West

a. The Need For Synthesis

Though I enjoy and have learned a great deal from West's critical rambles and wide ranging discussions, I feel frustrated by the many disparate points she raises about the feminist project in law. After reading "Jurisprudence and Gender" and "Critical Social Theory", for example, I was left

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[75]"Hedonic Lives", supra note 38 at 142.

[76]Ibid. at 144-145.

[77]"Love and Rage", supra note 54 at 108.

wondering whether West thinks that women's different moral voice and the "feminine" are one and the same. I was also intrigued by her discussion of a hedonic critical methodology in "Women's Hedonic Lives", but wanted to know how she would integrate this approach with the quest for equality she endorses in "Jurisprudence and Gender". West's work is in need of some kind of global synthesis in order to resolve these and other contradictions evident in her writing.

b. The Radical Feminist Legal Roots Of West's Hedonic Thesis

Though she would be loathe to admit it, West's hedonistic methodology is very close to radical legal feminist politics. In "Women's Hedonic Lives", West suggests that women's subordination is not inherently bad and argues against a political methodology which centres on the eradication of hierarchical power arrangements. The feminist project in law should focus, instead, she argues, on how interactions are played out, i.e., whether they cause pain or bring pleasure to women, and respond accordingly. Pursuant to her analysis, sadomasochistic sexual expression is O.K. if borne out of love and trust and not O.K. if fear and intimidation are factors determining the interaction.

West's analysis is flawed because she mistakenly suggests that both of these sexual encounters reflect unequal power relations. They don't. Relationships characterized by mutual trust and love are, by definition, equitable ones, and those

characterized by fear and intimidation are not. Two (or more) people who are equally empowered can decide to construct a sexual scenario which is about dominance and subordination. This does not mean that their relationship is fundamentally unequal, as West asserts.[78] What West is condemning in her analysis are relationships rooted in dominance and subordination, and what she is supporting are connections in which those involved share power. She is using different words and concepts to target what radical legal feminists target - the hierarchical distribution and expression of power.

c. Further Critical Thoughts On West's Hedonic Analysis

As noted above, West condemns MacKinnon and other radical legal feminists for dismissing women's sadomasochistic desires as manifestations of false consciousness. She argues that what women come to know about the dimensions of their internal and external reality through the process of consciousness raising represents a "true" reflection of their subjective lives and should be treated as such. What West is suggesting is that it is possible to shed the social conditioning which binds one sexually simply by being aware of how one is bound. But as I argued earlier, the nexus between politics and sex is

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[78]By the same token, it wouldn't be accurate to characterize a relationship which is, at root, hierarchical and oppressive as equitable just because the individuals involved acted as if they were on an equal footing in certain social contexts.

complex, not easily discernable and certainly not easily resolvable through conscious exploration. West's central error is that she does not explicitly allow for the possibility that what women discover in the deepest reaches of their psyches is not truly their own but a reflection of social power constructs. She makes the same mistake MacKinnon does, only in reverse. Whereas MacKinnon does not allow space for self-expression in sexual matters, West does not seem to allow room for anything else.

At the end of the day, West is not completely true to the method she espouses. She does draw a line in the sand when it comes to sadomasochistic sexual encounters determined by fear rather than love and trust. In so doing, she is dismissing the way in which presumably some women would define and choose to express their sexuality and putting forward her own theory of false consciousness. Like MacKinnon, she is making a critical determination based on an ideal she holds dear regarding the validity and value of what women have to say about their subjective lives. I am not critical of her for doing this but rather for denying that it is necessary to be discerning and make strategic choices in working with women's accounts of their internal and external reality.

d. West's Essentialism

West's efforts to essentialize women's nature have been roundly criticized. Harris takes issue with West's conception of the self as essentially gendered. West posits gender as primary to the formation of selfhood and, in so doing, denies that issues of class, race and sexual orientation play important roles in this process.[79] In suggesting that gender is a more significant factor than race, West's approach privileges the experiences of white women over those of black women, Harris argues. She also criticizes the claim West makes regarding the profoundly relational nature of women's lives:

> As with MacKinnon's theory, West's theory necessitates the stilling of some voices - namely, the voices of women who have rejected their "biological, reproductive role" - in order to privilege others. One might also question the degree to which motherhood, or our potential for it, defines us.[80]

Cornell, too, is critical of what West has to say about the essence of women's nature. As noted earlier, Cornell argues that affirming an ethical feminist alternative to the present mode of power relations is critical to feminist initiatives in law. She is therefore sympathetic to West's efforts to define the difference that women represent in the struggle against patriarchy.[81] But West's project is fatally

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[79]Harris, supra note 43 at 603.

[80]Ibid.

[81]Cornell, supra note 9 at 34.

flawed, she suggests, because of her attempts to pin down women's essence. We can only understand women's essential nature through present language constructs, Cornell points out, and this ends up tying women to the role prescribed by the patriarchal social order. Cornell sounds a lot like MacKinnon in articulating this point:

> What gets called the essence of Woman is precisely this metaphorical transport of the so-called proper. Therefore, what one is really doing when one states the essence of Woman is reinstating her in her proper place. But the proper place, so defined through her essential properties of what women can be, ends by shutting them in once again in that proper place. In this special sense, the appeal to the essence of Woman, since it cannot be separated completely from the prescription of properties to her, reinforces the stereotypes that limit our possibilities.[82]

I agree with the points these critics make. In positing an essential female nature, West ends up excluding the experiences of many women who, for a variety of reasons, do not live their lives in the terms she envisions. Her depiction of what women are not only excludes women of colour, but those who are childless, lesbians and other women who do not engage in heterosexual sex, as well as women who do not live their lives in relational terms. West's essentialism is hard to reconcile with her insistence that feminist legal initiatives remain true to the reality of women's lives. In "Women's Hedonic Lives", West admonishes radical legal feminists for imposing their ideal conception of human

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[82]Ibid. at 31.

association on women. Yet, West does something quite similar in defining an essential female nature.

Cornell's critique makes clear the difficulty that West and other feminists in law face in attempting to affirm an equitable social alternative. In striving to articulate the terms of a new morality, we risk re-invoking sexual stereotypes and roles promoted by the present one. One way of dealing with this dilemma, which West touches on in "Critical Social Theory", is to affirm the "feminine" as a psychoanalytic concept rather than as a prescription for female behaviour. This approach has appeal, as Cornell suggests, because it does not promote an essential view of women's nature, but rather its rich heterogeneity:

> The "feminine" is not celebrated just because it is the feminine, but because it stands in for the heterogeneity that undermines the logic of identity purportedly established by phallogocentrism.
>
> This position has appeal because it does not claim to show what women's nature or essence actually "is." Instead all that is demonstrated is how the feminine is produced within a particular system of gender representation so as to be disruptive of gender identity and hierarchy.[83]

Invoking the feminine is a powerful force for social change, but it falls short of affirming a more equitable model of social relations. So the question remains, how do we do this without getting caught in the trap of essentialism? Patricia Williams' project suggests a way.

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[83]Ibid. at 34-35.

E. Patricia Williams

1. The Spirit of Williams' Writing

Trying to capture the spirit or essence of Patricia Williams' theoretical work is a daunting task. Williams is a brilliant, complex writer whose work crosses genres and in many ways defies categorization and hence theoretical analysis. I therefore approach a critical reading of her work with great trepidation. I want to describe the depth and richness of her theoretical project but fear I will flatten its poetic edge in the process of analysis. I struggle here to find a way to examine what she has to say about the project of social transformation without taking anything away from the spirit of her writing.

2. An Overview Of Williams' Scholarship

To a much greater degree than MacKinnon and West, Williams brings together legal theory and a radical political practice in her texts. Williams' writing is the site for the communication of her transformational vision, and it is also, as she tells us in the following passage, where she puts her prescription for social change into action:

> It is my deep belief that theoretical legal understanding and social transformation need not be oxymoronic. I want this book to occupy the gaps between those ends that the sensation of oxymoron marks. What I hope will be filled in is connection; connection between my psyche and the readers', between lived experience and social perception,

and between an encompassing historicity and a jurisprudence of generosity.[84]

In attempting to bridge the gap between theory and praxis, Williams employs a radically different mode of legal writing and analysis. She breaks with traditional legal scholarship in grounding discussions of legal matters in the teachings of other disciplines and in the wider world in general, and in revealing the "inter-subjectivity of legal constructions".[85] Her goal in doing so, she indicates, is to reach and educate the reader by forcing her to be conscious of the way in which meaning is ascribed, and to actively participate in its construction. This is an ambitious and complex project, but Williams pulls it off by employing a host of literary strategies and by drawing on her own considerable skills as a writer.

Williams' writing exposes the gaps, lies and inconsistencies which characterize the production of meaning in the social and legal spheres. She takes on some of law's most sacred concepts and entrenched ideals toward this end, e.g., traditional analytic approaches to commercial, contract and property law, traditional approaches to legal scholarship and legal education. She is also relentless in her efforts to expose the falseness of media accounts as well as the moral

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[84]P. Williams, The Alchemy of Race and Rights (Cambridge, Mass.: Harvard University Press, 1991) at 8 [hereinafter Race and Rights].

[85]Ibid. at 7.

bankruptcy of positions taken by law professors, the editors of law journals, law deans and prominent political figures.

It is the stories Williams tells and the ways she tells them which point out what is fundamentally lacking in mainstream discourse. The "official story", she indicates time and again in her writing, does not mirror the experiences of those who live on society's margins. Rather, it reflects and promotes the interests of a socially privileged class of individuals. What Williams does brilliantly in her writing is to make this fact patently clear by recounting stories which have been expunged from the official record, i.e., the accounts of those who have been historically disinherited and dispossessed within the social sphere.

She begins with her own accounts. As noted above, Williams adopts an intensely personal narrative voice in her writing. She expressly draws on her own experiences as a black woman, feminist, lawyer and law professor to examine the law's workings and many failings. In an effort to make communion with her readers, to "bridge the gap", Williams exposes the changing face of her own psyche as she examines the world around her. We are shown throughout the text the issues which exasperate, frustrate and anger her and those which bring her joy. The law, we learn, is a source of constant frustration and ambivalence. At the outset of her book, she tells us that she <u>hates</u> being a lawyer as she sits reading an 1835 commercial law decision which involves a

technical and impersonal discussion of whether a slave's madness is grounds for vitiating her sale.[86]

Williams' work is also marked by an extraordinary understanding of issues of race and the devastation that racism wreaks in the lives of Blacks. We are shown time and again in her writing how racism is both the root cause of the brutal treatment of Blacks and a force which legitimates the brutality. Williams' discussion of the murder of Eleanor Bumpurs, a sixty seven year old black woman killed by police while resisting eviction, is a case in point. Williams writes movingly about the factors which caused Eleanor Bumpurs to lash out at the police when she was confronted:

> I have tried to ask myself a progression of questions about the Bumpurs death: my life experiences prepared me to comprehend the animating force behind the outraged, dispossessed knife wielding of Eleanor Bumpurs. I know few blacks who have not had some encounter with police intimidation.[87]

She also explores, with great insight, the factors which framed the brutal police response to Bumpurs:

> Why was the sight of a knife-wielding woman so fearful to a shotgun-wielding policeman that he had to blow her to pieces as the only recourse, the only way to preserve his physical integrity? What offensive spirit of his past experience raised her presence to the level of a physical menace beyond what in fact was; what spirit of prejudgment, of prejudice, provided him such a powerful hallucinogen?[88]

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[86]Ibid. at 3.

[87]Ibid. at 143.

[88]Ibid. at 144.

We also learn first hand from Williams' writing what it feels like to be the victim of racism. The account of her exclusion from Benneton's, for example, gives her readers a sense of the pervasiveness of racism and the deep personal wounds it inflicts.[89]

3. Tracking Society's Basic Ills

Like MacKinnon, Williams tracks society's basic ills to the institutionalization of hierarchical and oppressive relations of power. Her writing explores the way in which the prevailing power structure operates and the terrible costs it exacts. The social order is based upon the exclusion and objectification of those who differ from socially-constructed norms, Williams points out often in her writing. What is insidious about this approach to difference, Williams argues, is that it does both overt and covert damage to those who have been turned into objects for society's purposes. Blacks are objectified through violence and by the workings of a violent discourse, and are also made to see and feel the rightness of their objectification:

> I often wonder if the violence, the exclusionary hatred, is equally apparent in the repeated public urgings that blacks understand the buzzer system by putting themselves in the shoes of white store owners - that, in effect, blacks look into the mirror of frightened white faces for the reality of their undesirability; and that then blacks would "just as surely conclude [they] would not let

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[89]See, for example, Williams' description of the rage she felt being denied entry to Benneton's, Ibid. at 44-51 and especially at 46.

> [themselves] in under similar circumstances." (That some blacks might agree merely shows that some of us have learned too well the lessons of privatized intimacies of self-hatred and rationalized away the fullness of our public, participatory selves.)[90]

Our social order teaches those on society's margins not to trust their own ways of seeing and knowing in deference to a higher authority:

> children are taught not to see what they see;...blacks are reassured that there is no real inequality in the world, just their bad dreams;... women are taught not to experience what they experience, in deference to men's ways of knowing.[91]

Williams also points out that those who have been victimized by racism, sexism and child abuse are similarly afflicted, suffering

> massive external intrusion into psyche that dominating powers impose to keep the self from ever fully seeing itself.[92]

Williams also credits the imposition of a value system rooted in market politics as the source of many of society's fundamental ills. Money has become both the sole measure of value in our society and the only thing we hold dear:

> The focus of politics is shifted from amassing the greatest amount of intellectual or social or erotic capital to the simple amassing of capital.[93]

This valuation system turns everything and everyone into a commodity to be bought and sold, valued or discarded. It

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[90]Ibid. at 46.

[91]Ibid. at 13.

[92]Ibid. at 63.

[93]Ibid. at 30.

"puts reality up for sale and makes meaning fungible: dishonest, empty, irresponsible."[94] In her chapter, "On Being the Object of Property", Williams describes how the valuation system has historically operated to construct social relationships and determine the lives of black people. "Whether something is inside or outside the market place of rights has always been a way of valuing it", she argues, noting that blacks could be bought and sold as slaves precisely because they were classified as "beyond the bounds of humanity".[95]

Denial is also a fundamental and damning characteristic of our social order, Williams argues. We have institutionalized the "act of not-seeing", she points out, and have failed, as a society, to consciously acknowledge the choices we have made and the consequences which flow from them:

> Categorizing is not the sin: the problem is the lack of desire to examine the categorizations that are made. The problem is not recognizing the ethical worth in attempting to categorize with not only individual but social goals in mind as well. The problem is in the failure to assume responsibility for examining how or where we set our boundaries.[96]

Williams also makes the point that those with power are not compelled to be aware of nor culpable for their actions, and

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[94]Ibid.

[95]Ibid. at 227.

[96]Ibid. at 102.

suggests that it is both a liability as much as a luxury to live in this way.

4. Williams' Critique Of The Rule Of Law

Like West and MacKinnon, Williams is critical of the role law plays in reflecting and promoting the priorities of the prevailing social order. She notes, pointedly, that

> Money reflects law and law reflects money, unattached to notions of humanity. The neat jurisprudence of interpretive transposition renders the whole into a system of equations in which money=money, words=words (or law=law). The worst sort of mindless materialism arises. The worst of punitive literalism puts down roots.[97]

In her writing, Williams details how the law functions to preserve the status quo. She notes and condemns the widespread adherence to a tightly drawn literal legalism which precludes a larger, more generous reading of the law. She also suggests that the law's reliance upon pure rationalism and rejection of emotion works to maintain things as they are by keeping decision-makers distant from the plight of those in need. Williams also points out how law flattens the heterogeneity of life, reducing what is complex and rich to simple formulaic equations:

> That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths.[98]

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[97]Ibid. at 41.

[98]Ibid. at 10.

It does this by hypostatizing "exclusive categories and definitional polarities" and "the existence of transcendent a-contextual, universal legal truths or pure procedures".[99]

Williams makes these points clear in her rich, textured analyses of cases and other legal matters. For example, in her discussion of the "Baby M" case, Williams describes how the operation of law reduced life to fairy tale.[100] She notes that the actions and feelings of Mary Beth Whitehead, the surrogate mother seeking to regain custody of her child, became completely obscured in the Judge's efforts to interpret the contract and sort out each party's obligations thereunder. Whitehead's attempt to vitiate the contract was not understood for what it was, i.e., the passionate desire of a mother for her child, Williams argues, but was deemed an act of non-performance. In the eyes of the judge and the law, giving up her child became a contractual obligation. Pursuant to this process, Whitehead's

> grief became hysteria and her passionate creativity was funnelled, whorled and reconstructed as highly impermissible. Mary Beth Whitehead thus emerged as the evil stepsister who deserved nothing.[101]

Williams' work also strives to counter the myth of neutrality and objectivity the law promotes about its workings. Theoretical legal understanding in Anglo-American

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[99]Ibid. at 8.

[100]Ibid. at 224.

[101]Ibid.

jurisprudence posits the "existence of objective, "unmediated" voices" through which universal legal truths find expression.[102] Williams reveals the falseness of this thesis in her texts by showing how the subject positioning of those who design, interpret and enforce the law determines legal outcomes. Race, class and gender privilege are not kept at the door, as legal theorists insist, she points out, but rather are very much present when decisions are made. Williams' analysis of the construction of slave law makes this point patently clear. Slave law was designed by and for the benefit of whites, and as a consequence, conveniently constructed blacks as only partially human:

> I would characterize the treatment of blacks by whites in their law as defining blacks as those who had no will. That treatment is not total interdependency, but a relation in which partializing judgements, employing partializing standards of humanity, impose generalized inadequacy on a race: if "pure will" or total control equals the perfect white person, then impure will and total lack of control equals the perfect black person.[103]

5. Williams' Vision of Utopia

Williams' utopian vision drives her work and is palpably there on every page and in every paragraph. As noted earlier, Williams' writing seeks to fill the gaps in social and legal discourse by recuperating the voices and stories of those

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[102]Ibid. at 9.

[103]Ibid. at 219-220.

whose "difference" marks them as social outcasts. In Williams' utopia, a "unified social vision" would be restored.[104] Those who have traditionally been excluded, abused and exploited within the social sphere will be accorded full social status. In her utopian society, rights will be given away "to all of society's objects and untouchables" so that they will be assured "privacy, integrity and self-assertion."[105]

In positing the construction of a social world where distance, respect and the right to participate in determining social matters will be extended to Blacks and other people previously relegated to the margins of society, Williams' imagery is similar to MacKinnon's. Both envision the creation of zones of autonomy and protection around those whose boundaries have historically been transgressed. But Williams goes further in mapping out the terms of human association in a utopian social order. In the world she envisions, materialism would be officially reviled as a founding social principle and would be replaced by a value system based upon generosity, inclusiveness and inter-subjectivity, i.e., the passionate regard for the needs, interests, rights and basic humanity of all persons. Williams sounds a lot like Cixous in describing how concepts of property law will be transformed in

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[104]Ibid. at 221.

[105]P. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. C.R.- C.L. L. Rev. 401 at 433 [hereinafter "Alchemical Notes"].

support of a mode of interaction based upon respect for the essential difference of the other:

> The task for CLS, therefore, is not to discard rights, but to see through them so that they reflect a larger definition of privacy, and property: so that privacy is turned from exclusion based on self-regard, into regard for another's fragile mysterious autonomy; and so that property regains its ancient connotation of being a reflection of that part of self which by virtue of its very externalization is universal. The task is to expand private property rights into a conception of civil rights, into the right to expect civility from others.[106]

6. Getting From Here To There: Williams' Utopian Strategies

Williams' prescription for achieving social transformation straddles the legal and social spheres. As noted above, she expressly calls for the construction of a jurisprudence of generosity as a means of bringing about fundamental change, and argues for the transformation of legal concepts and processes toward this end. Like Harris, she believes that new ways of seeing and categorizing human experience must be reflected in jurisprudence if we are to build a truly inclusive society:

> ... the perspective we need to acquire is one beyond those three boxes that have been set up. It is a perspective that exists on all three levels and eighty-five more besides - simultaneously. It is this perspective, the ambivalent, multi-valent way of seeing, that is at the core of what is called critical theory, and much of the minority critique of law.[107]

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[106]Ibid. at 432.

[107]Race and Rights, supra note 84 at 130.

Like MacKinnon and West, Williams suggests that society must be confronted by the evidence of crimes committed against Blacks, women and other oppressed groups in order for change to occur. This is difficult work because it involves facing the truth about the violent workings of social and legal discourse:

> ...the greatest challenge is to allow the full truth of partializing social constructions to be felt for their overwhelming reality...[108]

We must not only confront society with accounts from the margins, she suggests, but also find ways of combatting the social and legal mechanisms at work which promote a partial vision of reality:

> ...it is important to undo whatever words obscure the fact that slave law was at least as fragmenting and fragmented as the bourgeois world view - and in a way that has persisted to this day, cutting across all ideological boundaries.[109]

Williams also advocates listening intently to the voices of others as a means of bridging the gap which divides us racially and on other grounds.

What is perhaps most interesting about Williams' prescription for attaining social transformation is the way in which it is communicated. She expressly tells her readers what must be done, as in the following passage where she outlines what's required to develop a non-racist sensibility:

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[108]Ibid. at 221.

[109]Ibid.

> I think that the hard work of a non-racist sensibility is the boundary crossing, from safe circle into wilderness: the testing of boundary, the consecration of sacrilege. It is the willingness to spoil a good party and break an encompassing circle, to travel from the safe to the unsafe.[110]

She also shows her readers the actions that must be taken by recounting her own experiences doing battle in the course of her professional and personal life. Williams tells us, for example, about the difficulties she faced confronting her colleagues over racist and sexist depictions in the law school exams, and describes the lengths she goes to in the classroom to jar and advance her students' thinking. She also indicates what it takes to keenly listen across the barriers of race, class and gender in her efforts to discern and recount the stories hidden behind the "official story".

As noted above, Williams' style of writing also embodies the prescriptions she outlines for effecting fundamental social change. She challenges the boundaries of legal scholarship by employing an intensely personal narrative style. She also uses the medium to confront her readers with stories, images and information documenting the effects of racism, sexism and other forms of oppression.

The strategies Williams articulates also seem to be inwardly and outwardly directed. They outline what can be done at an individual and political level to alter the terms

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[110]Ibid. at 129.

of social existence, and, in so doing, collapse the gap between the personal and the political.

7. In Praise Of Williams' Project

> I shall speak about women's writing: about what it will do. Woman must write her self: must write about women and bring women to writing, from which they have been driven away as violently as from their bodies - for the same reasons, by the same law, with the same fatal goal. Woman must put herself into the text - as in to the world and into history - by her own movement.[111]

Williams' project deserves praise on a number of grounds. Her writing is "feminine" in the sense defined by Cixous, and powerfully transformative. In putting herself into her reading of the law, she challenges the boundaries of a scholarship and discourse designed to exclude women, blacks and the personal. In bringing back stories expunged from the official record, she goes even further in suggesting a different and more inclusive way of building community. Her writing sets the precedent for a radical, transformative mode of legal scholarship.

Williams' project is also strong because her theoretical vision is rich and full. Her work seems to embody the best of what MacKinnon, West, and Cornell have to say while avoiding the mistakes they make. Unlike West and Cornell, she recognizes the importance of equality based initiatives to the bodies and souls of those who have lived without the benefit of the law's protection. But she also, unlike MacKinnon,

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[111]Cixous, supra note 35 at 279.

recognizes the need to infuse transformational strategies with visions of an ethical alternative to the present social order. And she manages to do this without falling into the trap of essentialism in which West is caught.

F. Conclusion

MacKinnon, West and Williams share some common ground with regard to the way in which they envision the transformational project in law unfolding. Each views legal scholarship as both a means to communicate her views as well as engage in a transformational practice. While Williams is certainly more accomplished in this respect, West, and particularly MacKinnon, are also skilled manipulators of the medium. MacKinnon, West and Williams also recognize the law's deep complicity in sustaining a corrupt and exploitive power regime and view law as a key site in the struggle for transformation. They are united in believing that "society's deadest ends" must be confronted and a public recounting of stories of oppression must occur in order to remake legal and social discourse in inclusive terms.

Their views on a number of other critical issues diverge radically. While MacKinnon and Williams identify a politics rooted in hierarchy and exclusion as the source of this society's ills, West is less willing to target and condemn power relations rooted in dominance and subordination. She is critical of MacKinnon's prescription for women's sexual

liberation, preferring instead, a hedonistic methodological approach to ending women's suffering.

West and Williams also differ markedly from MacKinnon in suggesting that utopian moral visions are critical to the transformational project. West struggles to ground the terms of an ethical and moral social alternative in women's essential nature, while Williams takes the better approach and affirms a vision of human association rooted in generosity and respect for differences. However, Williams and MacKinnon do share a vision of the future founded upon the creation of zones of autonomy and respect for women, Blacks and others whose boundaries, rights and interests have historically been appropriated in the social sphere.

Williams parts company with MacKinnon in promoting a radically different approach to legal analysis and categorization. Like Harris, she wants to see difference recognized and affirmed differently in the legal sphere through the development of a jurisprudence based upon multiple experiences and consciousness. Although MacKinnon's writing is far from clear on this point, she has so far resisted calls for the revision of sex inequality theory along these lines.

Based upon a reading of these theorists' work, I have concluded that realizing feminist aspiration through legal struggle involves a careful balancing of theoretical ideals, strategies and interests. We need to struggle for substantive equality in law but not do so in a way which denies women's

utopian visions or prescribes the dimensions of women's sexuality. We also need to employ a host of languages and strategic approaches to combat the barriers to women's equality, as well as challenge essentialist conceptions of women's reality. Translating theory into practice, it is clear, requires the articulation of claims in a radical, multivalent voice.

Chapter IV- From Theory To Practice: Assessing LEAF's Project

A. Introduction

In this fourth and final chapter, I explore how feminist visions of transformation have been translated into legal practice, and assess the transformational impact of these initiatives. Towards this end, I examine the work that the Women's Legal Education and Action Fund (LEAF)[1] is doing in pursuit of equality rights for women. I discuss the roots and structure of the organization as well as its analytical approach to equality rights matters. I also provide an overview of LEAF cases, and explore, in depth, the arguments and strategies the organization employed in the controversial Butler[2] case.

As I argued in Chapter I, it is not easy to track the process by which all things social are undone and remade, nor to determine the transformational consequences of a particular undertaking. One must assess initiatives in a broad and imaginative way in order to determine their value to the project of substantive reform. In attempting to evaluate

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[1]I have chosen to examine LEAF's project in this context because it is the only national feminist litigation organization in Canada and has played a leading role in defining and attempting to actualize an equality rights agenda. This is not to deny or downgrade the contributions that other organizations and individuals have made to the feminist project in law in other ways, eg, political lobbying, the development of feminist legal education materials and courses.

[2]R. v. Butler, [1992] 2 W.W.R. 577, 70 C.C.C. (3d) 129 (S.C.C.) [hereinafter Butler cited to W.W.R.].

LEAF's project, I pose the following questions: have LEAF's initiatives succeeded in removing barriers to women's equality and redressing the systemic imbalance of power between the sexes; have they helped to undermine or subvert a politics rooted in oppression and the exclusion of differences; do they articulate a viable social alternative?

B. The Story Behind LEAF's Formation

As Sherene Razack chronicles in her book, Canadian Feminism And The Law[3], the story of LEAF begins prior to its founding in 1985. The organization took root in the late 1970s and early 80s, when a number of feminist lawyers together with feminists from mainstream women's organizations began actively lobbying to secure strong equality rights guarantees in Canada's new constitution. The approach to equality promoted by the women's lobby marked a major departure from the past. Lobbyists knew that the promise of formal equality entrenched in the Canadian Bill of Rights[4] had

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[3]S. Razack, Canadian Feminism And The Law- The Women's Legal Education and Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991).

[4]C. 1960, c.44, s. 1(b). The section reads as follows:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms, namely,
>
> (b)the right of the individual to equality before the law...

failed women miserably[5], and should not be replicated in the new constitutional document. Women's interests could not be advanced under this model of equality, they realized, because it embraced men as the standard for legal person-hood. Women's experiences of systemic oppression were thus rendered invisible in the process of examining and analyzing issues. Pursuant to this approach to sex equality, Stella Bliss, a woman who's entitlement to unemployment insurance benefits was denied because she was pregnant, was judged not to have experienced unequal treatment before the law on the basis of sex.[6] Rather, her differential treatment was deemed to be justified because of the difference her "condition" presented. What was needed, the lobbyists understood, was a different approach to equality rights matters, one which addressed the systemic barriers to women's equality and dealt in the reality of women's lives rather than mere formalities.

According to Razack and other writers[7], the women's constitutional lobby did not have an easy time of it in the constitutional reform process. Efforts to shape the content

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[5]Razack notes that of the ten cases brought before the Supreme Court pursuant to the equality guarantees in the Bill of Rights during the 1970s, nine were deemed not to raise sex equality issues. See Razack, supra note 1 at 30-31.

[6]See Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711.

[7]See M. Eberts, "A Strategy for Equality Litigation Under the Canadian Charter of Rights and Freedoms" in J.M. Weiler & R.M. Elliot, eds., Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1986) at 411.

of a revised constitution along feminist lines were blocked at every turn, and, as a consequence, lobbyists had to work strategically to break into the process. Though often difficult and frustrating, the lobbying campaign paid off. The vision of equality put forward by the women's lobby is credited with shaping a number of key provisions in the Charter of Rights and Freedoms[8]. Mary Eberts, a participant in the women's lobby and one of LEAF's founders, suggests that feminist input influenced the form of section 1 as well as the scope of the equality rights guarantee in section 15.[9] The women's lobby was also responsible for ensuring that section 28 - a provision guaranteeing all Charter rights and freedoms equally to men and women - was added to the Charter, and was

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[8]Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

[9]The text of the section 15 reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national and ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

not made subject to the override provisions contained in section 33.[10]

Securing the enactment of these provisions was only the first step. As Mary Eberts points out in her writing, in order to ensure that the promise of the new equality provisions would translate into substantive gains for women, it was also necessary to develop and implement an effective litigation strategy. The matter was studied and a report, Women and Legal Action, was produced recommending the establishment of a national organization to fund and directly participate in equality rights litigation.[11] Drawing on the recommendations contained in this report, a core group of feminist lawyers founded LEAF.

LEAF was established to promote women's substantive equality primarily through the employment of the equality provisions of the Charter. LEAF's mandate is two-fold: to do public education work on sex equality issues and to argue test cases before the courts, human rights commissions and government agencies.[12] As Mary Eberts relates, LEAF's approach to equality rights litigation was intended to be pro-

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[10]Eberts, supra note 7 at 412. The full text of section 28 is as follows:

> 28. Notwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[11]Eberts, supra note 7 at 418.

[12]LEAF, "Fact Sheet", undated.

active. The organization's founders believed that building up a track record was important in order to develop a reputation for expertise in the area.[13] It was felt that by taking on strong, winnable test cases and becoming proficient in equality rights matters, the organization would be able to have a significant impact on the development of equality rights law. Eberts describes how she envisioned this process working:

> Expertise can be applied in ways other than this case-by-case approach. Counsel and volunteers from the organization can become involved in legal writing, legal education, and continuing education of bench and bar. In this fashion, they may come to influence how decision-makers view the legal issues involved. Just as important, however, they may influence how lawyers prepare and present cases they bring forward.[14]

As Razack notes, LEAF was borne out of its founders' profound belief in the merits of working from within, and specifically within law, to advance women's interests.

C. LEAF's Structure And Working Process

LEAF is a national organization which has branch operations in each province and territory. Its operation is governed by a Board of Directors comprised of representatives from across Canada, as well as a host of national committees operating under the authority of the Board. The Board establishes the framework for LEAF's litigation strategy and

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[13]Eberts, supra note 7 at 422.

[14]Ibid. at 419.

criteria for the selection of cases the organization takes on.[15] The National Legal Committee, comprised primarily of women lawyers from across Canada, makes the actual selection of cases and determines the organization's litigation strategy in each case, and in the long term. Its responsibilities include the following:

> "-examining which cases focus on key equality concerns for women
> -assessing the potential for positive legal change through litigation
> -consulting with community representatives, equality-seeking groups and experts on issues and working in coalitions and partnerships
> -managing the direction of each case in consultation with counsel and the plaintiff
> -developing LEAF's equality theory and LEAF's immediate and long term litigation strategies."[16]

Legal committees attached to each branch develop and bring cases forward for consideration at the national level and support plaintiffs in their efforts to challenge the law.[17] LEAF's Board and Committee members volunteer their services as do the lawyers who appear as counsel on LEAF's behalf.[18]

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[15]C. Jefferson, "Leaf's litigation strategy" (1990) February LEAF Lines 3.

[16]"Who's Who on the National Legal Committee" (1993) Summer 5:3 LEAF Lines 12 at 12.

[17]Ibid.

[18]In response to criticism that its membership and governing structure are dominated by white women lawyers, LEAF adopted a policy for outreach and diversification in 1990. Under the terms of this policy, the organization is committed to actively recruiting immigrant women, women of colour, native women and women with disabilities to its national committees, branch membership and staff and confronting racism within its own operation. LEAF has developed a multi-phase plan to realize its goal and is currently engaged in outreach

D. LEAF's Analytical Approach To Equality

1. The Substance Of The Approach

LEAF's equality theory is the backbone of its litigation and public education work. The organization rejects a formal, aristotelian approach to equality matters, embracing, instead, the "harms-based" approach to sex equality endorsed by MacKinnon. Grounded in women's own accounts of gender oppression, the organization's thesis hinges on an understanding of women's inequality - and inequality in general - as systemic and the product of a power dynamic rooted in dominance and subordination. LEAF's analytic approach also rests upon a broad, purposive and progressive reading of the equality guarantees in the Charter and calls for the transformation of the role of law in the formation of social life. LEAF argues that the legislative purpose of s.15 is to equalize oppressive power relationships and promote

> a society in which the hitherto powerless, excluded and disadvantaged enjoy the valued social interests (such as dignity, respect, access to resources, physical security, membership in community and power) available to the powerful and the disadvantaged.[19]

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work with respect to aboriginal women as well as other women with diverse racial and linguistic origins. See "LEAF's Policy of Outreach and Diversification" (1993) Summer LEAF Lines 5:3 at 3.

[19]H. Orton, Litigating For Equality- LEAF's Approach To Section 15 Of The Charter (1989) [unpublished].

2. Details Of The Approach: Andrews v. Law Society of B.C.[20]

The details of LEAF's equality thesis were unveiled in Andrews, the first equality rights case to be considered by the Supreme Court of Canada. The case involved a challenge to a provision of the B.C. Barristers and Solicitors Act[21] which made Canadian citizenship a pre-requisite for admission to the bar. The respondent, a British subject, was denied law society membership pursuant to this provision. He alleged that the distinction made by the legislation contravened the equality rights guarantees set out in section 15(1), and could not be justified pursuant to section 1.

LEAF intervened in the case to argue for a broad and purposive reading of section 15 in concert with section 1. Citing the legislative history of section 15 as well as human rights jurisprudence focusing on the impact of legislative initiatives rather than legislative intent, LEAF argued in favour of a results-oriented, purposive approach to equality matters. It suggested that the purpose of section 15 is to promote the substantive interests of the powerless and excluded:

> The history of the Charter's guarantees of substantive equality shows that they were intended to benefit individuals and groups which historically have had unequal access to social and economic resources, either because of overt discrimination or because of the adverse effects of apparently "neutral" forms of social

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[20][1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, [1989] 2 W.W.R. 289 [hereinafter Andrews cited to W.W.R.].

[21]R.S.B.C. 1979, c. 26

> organization premised on the subordination of certain groups and the dominance of others.[22]

LEAF further recommended that courts develop a sensitivity to impact or adverse effect in order to address the roots of inequality beyond the facade of "facial" neutrality. It suggested that judges rely upon feminist scholarship documenting the reality of women's lives when assessing the impact of gender discrimination.

LEAF also provided guidelines for determining process and substantive equality claims in a purposive manner. It recommended that equality claims brought by members of a dominant group be viewed with caution, and the interests of the disadvantaged always be given priority in the evaluation process. LEAF noted that courts will be required to determine which of the groups falling into a "neutral" enumerated category, i.e., sex, national or ethnic origin, age, race, religion and colour, is dominant and which disadvantaged in a given context, in order to give effect to the purposive analysis. It suggested a formula for doing so:

> The historical and contemporary record will make such determinations relatively straightforward in some cases; indeed, the record is so clear in these instances that a categorical determination may be made. It is submitted, for example, that there is widespread agreement in society that women and people of colour have been disadvantaged in Canadian society. In other situations, the determination will depend more closely on the context of the inquiry: e.g., members of traditionally dominant

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[22]Factum Of The Intervener Women's Legal Education And Action Fund, Andrews v. Law Society of B.C., par. 23, p.10.

religious groups may, in some contexts, be in a minority and in need of certain guarantees...[23]

LEAF also made submissions regarding the protection of groups not specifically enumerated in section 15. It argued that protection should be extended in situations which approximate those which the section was designed to address, and put forward a formula for making such an assessment. It suggested that the court consider the following factors in determining whether the equality guarantees should be invoked: whether and to what extent the defining characteristic of a group claiming section 15 protection is related to an enumerated ground, eg, marital status and sex, citizenship and national origin; whether the group is subject to systemic discrimination in society; whether the group has historically been exploited and subjugated by dominant interests.[24]

LEAF also took issue with the B.C. Court of Appeal's importation of a "reasonableness" standard into the equality analysis. It argued that such a reading is in conflict both with the egalitarian purpose of section 15 and the role of section 1. It suggested that determinations regarding the reasonable limits on the exercise of rights and freedoms should be restricted to section 1 enquiries.

The majority decision in Andrews reflects LEAF's equality thesis. The Court rejected the "similarly situated" equality

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[23]Ibid. at par. 34, p.14-15.

[24]Ibid. at par. 50, page 22.

analysis as "seriously deficient"[25], noting that a literal interpretation of the "treating likes alike" approach could be used to justify the Nuremberg laws authored by Adolph Hitler. The Justices endorsed, in its wake, a results-oriented, equality standard:

> To approach the ideal of full equality before and under the law - and in human affairs an approach is all that can be expected - the main consideration must be the impact of the law on the individual or the group concerned.[26]

They also adopted a purposive approach to equality matters. They determined that section 15 has an important role to play in reformulating social arrangements along more equitable lines:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a remedial component.[27]

The majority decision set out guidelines for a purposive reading of the equality guarantees. Pursuant to the decision, treatment at law is deemed to be discriminatory when distinctions are made which impose special "burdens, obligations or disadvantages" on individuals and groups, or limit their access to "opportunities, benefits, and advantages".[28] The Justices also determined that the grounds

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[25]Andrews, supra note 21 at 301.

[26]Ibid. at 300.

[27]Ibid. at 305.

[28]Ibid. at 308.

of discrimination listed in the section are neither to be read as exhaustive nor open-ended. They indicated that section 15 protection is to be extended based on the grounds enumerated therein and those akin to them. They also agreed that section 15 enquiries should be kept separate from section 1 determinations, rejecting the imposition of a "reasonableness" test on the equality analysis.

The miracle of the Andrews decision is that it sculpts an expressly political and socially progressive role for the judiciary. In adopting LEAF's approach to the resolution of equality matters, the Court determined that section 15 is to be employed to reconstruct power relations in society in favour of the disadvantaged.

2. The Transformational Potential Of The Analysis

LEAF's equality analysis is promising because it is geared toward a fundamental restructuring of gender relations in society. In exposing and attempting to counter the way in which law has constructed male dominance and female subordination, the organization's strategy is designed to redress the systemic power imbalance in women's favour.

LEAF's strategic approach is also valuable to the transformational project because it promotes a radically different conceptualization of issues of difference. In insisting that the law give credence and respond to women's accounts of gender oppression, LEAF is both challenging and

disrupting a conceptualization of reality based on women's exclusion, and the "disempowerment" of all individuals and groups marked by a disqualifying difference. It is attempting to re-frame the boundaries of community to include women's interests and input and, in so doing, is promoting what Ross Chambers refers to as a politics of community, i.e., a concept of community building based upon the inclusion rather than exclusion of differences.[29]

In making the courts take notice of and care about the way in which certain social practices and the exercise of certain rights affect women's lives, LEAF is also challenging society's way of "not-seeing" the suffering of the powerless, and promoting a more inclusive, inter-subjective approach to community building. LEAF's analysis re-frames the rights debate. It shifts the court's gaze away from a consideration of the autonomous exercise of individual rights to a consideration of the nature of the relationships constructed by the operation of rights in law. In re-conceiving rights as relationship, LEAF is doing what Patricia Williams suggests must be done to combat a partial social vision, i.e., bringing to the foreground the stories which have been expunged from

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[29]See R. Chamber, "No Montagues Without Capulets, Some Th[illegible]ts on Cultural Identity" (Work In Progress) [unpublished] and discussion of Chamber's thesis in Chapter I, p.[illegible]16 and 29.

the official record.[30] It is also advancing a more positive vision of human association, one which is based upon a consideration of how one's actions affect the rights, interests and basic humanity of others.

3. Critiques Of The Analysis

a. A Potentially Exclusive Approach To Women's Differences

Though LEAF's equality approach holds great promise, it also poses certain dangers. In attempting to make clear how legal and social practices harm women, LEAF is employing a strategic form of essentialism. As I argued in the previous chapter, this kind of work is necessary to counter the gross levels of sexism which permeate law and society. But in defining the harms women suffer in global terms, LEAF risks excluding the realities of women whose lives are marked by homophobia, racism, class issues and other forms of oppression, and denying the power inequities which exist between women because of these factors. Rather than being a force for disruption and change, the introduction of women's voices pursuant to LEAF's equality analysis risks reinvoking the prevailing discourse and constructing women as just another viable, homogenous legal category.

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[30]Jennifer Nedelsky also recommends re-conceiving rights as relationship as a better means of sorting out rights claims and determining the parameters of democratic ideals. See J. Nedelsky, "Reconceiving Rights as Relationship" (1993) 1:1 Rev. of Const. St. 1.

What is the answer to this dilemma? How is LEAF to do the work that needs to be done to combat the law's discriminatory approach to the category "woman" without neglecting the issues raised by women's differences? A straight application of the harms-based approach is appropriate in certain situations, like Seaboyer, where women's interests, as a whole, are threatened by a particular social practice or reading of the law. But, the analysis is not the appropriate tool to use to deal with cases involving a complexity of interests and circumstances, as well as multiple forms of oppression. Clearly, the harms-based rationale must be re-worked to deal with these kinds of concerns:

> The need to use analytical models that are based on the indivisibility and simultaneity of oppressions is more than just theoretical quibbling. LEAF will be unable to present various women's realities in all their complexities if gender remains the prism through which all other oppression is viewed.[31]

b. The Politics Of Rights Critique Revisited

As noted in Chapter II, Judy Fudge and Harry Glasbeek, among others, argue persuasively against the transformational

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[31]Razack, supra note 3 at 133. LEAF recently launched a race, culture, religion and gender inequality project to consider how the equality analysis can be amended to reflect the intersection of sex and race, as well as other forms of oppression. See J. St. Lewis, "LEAF's race, culture, religion and gender inequality project" (1993) Summer 5:3 LEAF Lines 6-9.

potential of rights employment.[32] Below, I reconsider key aspects of their critique in relation to LEAF's project.

Fudge and Glasbeek argue, in tandem, that efforts to alter the power structure through Charter-based initiatives are ill-founded because power arrangements are determined on high and are thus impervious to legal challenge. As I indicated in Chapter II, their argument is not historically accurate. It denies the fact that law has played a major role in shaping social power configurations and continues to do so through law reform initiatives like those launched by LEAF. Their critique also denies the complex, dynamic interaction which clearly exists between the legal and political spheres.

Fudge makes a related point about the value of political vis à vis legal struggle. She alleges that legal gains often have little effect on women's lives, and argues that political struggle is the way to secure real, substantive advances. She cites the Morgentaler[33] case to support her argument. Though the case eliminated criminal restrictions on abortion, it did nothing to solve the problems women were having gaining access to abortion, she points out. She notes that women had to do battle in the political realm in order to secure the required health care services. What Fudge's analysis points out is not

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[32]J. Fudge & H. Glasbeek, "The Politics Of Rights: A Politics With Little Class (1992) 1 Soc. & Leg. St. 45 and J. Fudge, "What Do We Mean by Law and Social Transformation?" (1990) 5 Can. J. of L. and Soc. 47.

[33]R. v. Morgentaler, [1988] 1 S.C.R. 30.

that legal struggle should be jettisoned in favour of political lobbying, as she seems to suggest, but rather that both kinds of work are necessary to advance women's interests. Battles in the legal realm are necessary to shift the way in which issues are conceptualized and dealt with both within the legal and social spheres. Working in the political realm is also necessary, however, to ensure that the victories secured in law have meaning in the context in which women live their lives. The decriminalization of abortion was a critical first step in the process of securing safe abortion services for women. Working at the grass roots level to make sure that the required health care services are in place was, and still is, an equally critical next step.

Fudge and Glasbeek also dismiss the transformational potential of feminist initiatives in law because they are not rooted in a class-based analysis. I take issue with their argument on two grounds. First, Fudge and Glasbeek seem to ignore the fact that a class-based politics has shaped the way in which LEAF has employed the harms-based analysis. Economic and workplace issues have, in fact, figured prominently on LEAF's agenda throughout its history.[34] As I argued in Chapter II, I am also not persuaded that the eradication of capitalism will necessarily advance women's interests and end homophobia, racism and other forms of oppression, as Fudge and

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[34]I will be discussing the scope and breadth of LEAF's economic initiatives in the following section.

Glasbeek allege. I find LEAF's project more promising in this regard because it is geared toward combatting a hierarchical and exclusive form of politics basic to all forms of oppression.

c. Ignorance vs. Evil

LEAF has also come under fire for attempting to invoke the powers of the state to achieve social transformation. Critics allege that the organization's project is fatally flawed because it relies upon the benevolence of those who have historically acted as agents of women's oppression to make decisions in women's best interests.[35] Their argument has merit. LEAF's project does depend, to a great extent, on the basic humanity and compassion of those in positions of power. Efforts to make the judiciary, politicians, bureaucrats and the police aware of the impact of gender oppression are based on the premise that these individuals are capable of understanding and caring enough about the plight of women to do something substantive about it. The project is also premised on the notion that ignorance, not evil, is the root cause of women's continued subjugation, i.e., that those

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[35]This criticism has been levelled at LEAF in light of the strategies the organization employed in Butler. See, for example, B. Ross, "'Wunna His Fantasies': The State/d Indefensibility of Lesbian Smut" (1993) 2:38 Fireweed 38:2 38 and T. McCormack, "Keeping Our Sex 'Safe'" (1993) 1:37 Fireweed 25.

in power have, in the past, acted against women's interests because they did not know any better.

But the fact is that women have occupied a subordinate position of power throughout the ages primarily because men have wanted it that way. Pursuant to current power configurations, male power and privilege must be curtailed if women's interests are to be advanced, and many men, particularly those in positions of power, aren't exactly eager to relinquish the advantages they enjoy at women's expense. LEAF's analysis is deficient in not taking into consideration the role that malevolence and self-interest play in maintaining the status quo, and the barrier these factors pose to the feminist project in law. A question which is critical to LEAF's project, but not addressed by the equality analysis, is how this obstacle is to be overcome. How can we make the male-dominated judiciary care less about their own interests and more about what women experience?

E. LEAF In Action

1. The Nature Of LEAF's Work

How has LEAF's vision of equality played out in practice? Since its inception, the organization has supported over 100 equality-seeking initiatives.[36] Its involvement in cases takes a number of forms. It has initiated challenges to

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[36]"A Survey of LEAF Cases" (1993) 5:3 Summer LEAF Lines 4 at 4.

offensive legislation, lobbied for legislative and policy reforms, provided financial and other kinds of support to litigants and intervened in cases to raise equality issues.

2. Constraints On The Project

As noted earlier, LEAF's initial goal was to develop and implement a pro-active litigation strategy. The organization planned to initiate litigation so that it would be well-placed to shape the development of equality rights law. But because of the plethora of Charter challenges initiated by and on behalf of male interests[37], the organization has been forced to spend a great deal of its time and resources defending the legislative gains women have achieved rather than launching test cases.

LEAF's work has also been constrained financially. Since its inception, the organization has drawn on both public and private sources to fund its operation. In 1992, the organization lost a significant chunk of its operating budget when the federal government eliminated the Court Challenges Program. Because of funding restrictions, LEAF will only be

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[37]The equality rights guarantees have, in fact, been employed much more extensively by men than women. Brodsky and Day report that in the first three years of Charter litigation, only nine sex equality challenges were brought by or on behalf of women as compared to 35 by or on behalf of men. Clearly, this alarming development is attributable to the fact that men have much greater access to the financial resources required to initiate Charter challenges. See G. Brodsky & S. Day, Canadian Charter Equality Rights For Women: One Step Forward Or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 49.

able to take on 6 or 7 cases per year and will no longer be sponsoring test case litigation.[38] It will intervene at high court levels to make equality arguments in cases it deems high priority. The organization has determined that it will only intervene in cases involving multiple discrimination which touch on violence against women, and women's economic and family status.

3. An Overview Of LEAF Cases

LEAF's cases fall loosely into several categories: economic concerns, reproductive rights, multiple discrimination, and violence against women. Below, I review a sampling of LEAF's work in each of these areas.

a. Economic Issues

As noted above, LEAF has employed the harms-based equality analysis to address issues specific to women's subordinate economic status. The organization has worked to strengthen the rights of women on welfare and domestic workers, many of whom are women of colour. In one of its earliest initiatives, the organization launched a court challenge to Ontario's "spouse-in-the house" welfare rule. The rule was designed to "catch-out" individuals who were receiving welfare in addition to financial support from a

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[38]Interview with K. Busby, National Legal Committee member, LEAF, (24 August 1993).

spouse. In practice, the regulations operated to disqualify women who were found to be cohabiting, or in some cases simply sleeping with men, regardless of the actual financial aspects of the relationship. The rule was clearly sexist in that it targeted women and was based on the notion that women on welfare who become involved with men forfeit their economic independence. In response to LEAF's initiative, as well as years of lobbying by welfare rights groups, the government rescinded the rule.[39]

LEAF has also supported INTERCEDE, a group lobbying for domestic workers' rights, in its efforts to challenge restrictive overtime provisions in Ontario's employment standards legislation.[40] The legislation excluded domestic workers from its protective ambit, which meant that employers were not required to pay a fair wage for their overtime labour. The threat of court action moved the government to amend the legislation and extend legislative protection to domestic workers.

LEAF has also taken on cases which deal with women's unequal economic status during and upon dissolution of marriage. In the Moge[41] case, for example, LEAF intervened to make submissions regarding the awarding of spousal support.

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[39]Razack, supra note 3 at 129-130.

[40]"A Survey of LEAF cases", supra note 36 at 5.

[41]Moge v. Moge, [1992] 3 S.C.R. 813 [hereinafter Moge cited to S.C.R.].

The case was brought by a former husband who wished to terminate his spousal support obligations. He argued that his former wife, who was 55, partially disabled and the custodial parent, had had sufficient time since their separation to become financially self-sufficient. LEAF argued against the primacy of the economic self-sufficiency test. It suggested that courts consider the relative economic positions of women and men, both within marriage and post-divorce, in determining entitlement to spousal support. LEAF also pointed out that the gender-based division of labour within marriage favours men financially and puts women at a distinct disadvantage.[42] In a critical ruling, the Supreme Court adopted LEAF's reasoning and rejected the pre-eminence of the economic self-sufficiency objective. The Court suggested that the ultimate goal in making spousal support awards is to "achieve an equitable sharing of the economic consequences of marriage or marriage breakdown"[43]. It recognized that women tend to be the economically disadvantaged party both within marriage and post-divorce primarily because of the responsibilities they bear for child care. The majority directed judges to consider the social context in which support decisions are experienced when they determine the appropriate award. As Helena Orton, LEAF's Litigation Director, notes, this decision has important

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[42]"Spousal support decision important for women" (1993) 5:3 LEAF Lines 14 at 14 [hereinafter "Spousal Support"].

[43]Moge, supra note 41 at 866.

implications in terms of the economic issues which plague women's lives:

> While there are obvious limits of family law in addressing poverty, spousal support is an important mechanism for relieving against the economic disadvantage of women, particularly in the absence of significant government initiatives concerning child care, pay and employment inequity and income support.
>
> This decision should be extremely helpful in making the legal system and spousal support awards more accessible and responsive to women's needs, and likely will mean more women will be entitled to longer support from their ex-spouses.[44]

b. Reproductive Rights

LEAF's work on reproductive rights issues has also been effective in advancing women's interests in certain areas and "holding the line" in others. In one of its most important early interventions, Brooks v. Canada Safeway Ltd.[45], LEAF helped to bury the equality analysis promoted in Bliss, once and for all. The case involved a challenge to Canada Safeway's employee insurance plan which denied disability coverage to pregnant women during the 17 week period they were eligible to receive Unemployment Insurance maternity benefits. The lower courts followed the reasoning in Bliss and determined that the plan discriminated on the basis of pregnancy, not sex. In its submissions to the Supreme Court, LEAF argued that discrimination on the basis of pregnancy and sex are one and the same. Noting that women's reproductive capacity is the

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[44]"Spousal Support", supra note 42 at 17.

[45][1989] 1 S.C.R. 1219, 59 D.L.R. 4th 321.

single most significant sex characteristic, LEAF urged the Court to extend protection to pregnant women in the workplace and in society at large.[46] In determining that discrimination on the basis of pregnancy is discrimination on the basis of sex, the Supreme Court overruled Bliss, broke with the past and put into play a vision of equality designed to address the systemic issues in women's lives.

LEAF has also intervened in a number of cases to stave off the erosion of women's reproductive rights. In Re Baby R.[47], for example, LEAF intervened to contest the validity of an apprehension order granted pursuant to child welfare legislation with respect to a foetus. LEAF argued that the order was invalid in law because the term "child", in the legislation, does not cover a foetus. It also argued that the apprehension violated the mother's equality rights as well as her right to life, liberty and security of the person enshrined in section 7 of the Charter.[48] Mr. Justice Macdonnell decided the matter on narrow grounds. However, his reasoning was clearly influenced by LEAF's submissions. He determined that the child welfare legislation, read together with the common law, precluded the apprehension of foetuses.

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[46]"LEAF urges courts to give Charter clout" (1989) October 3:1 LEAF Lines 6 at 8 [hereinafter "Charter clout"].

[47](1988), 53 D.L.R. (4th) 69 (B.C.S.C.), 15 R.F.L. (3d) 225 [hereinafter Baby R. cited to D.L.R.].

[48]L. Hardy, "A Matter of Control" (1989) October 3:1 LEAF Lines 1 at 1.

Were it otherwise, he noted, the state would be able to exercise extraordinary control over women's bodies:

> For the apprehension of a child to be effective there must be a measure of control over the body of the mother. Should it be lawful in this case to apprehend an unborn child hours before birth, then it would logically follow than an apprehension could take place a month or more before term. Such powers to interfere with the rights of women, if granted and if lawful, must be done by specific legislation and anything else will not do.[49]

c. Multiple Discrimination

In addition to the Intercede case, LEAF has been involved in several initiatives designed to counteract the multiple forms of oppression many women suffer. The organization has intervened on a number of occasions in an attempt to counter discriminatory expressive acts targeting disadvantaged groups. In conjunction with the Congress of Black Women, LEAF intervened in an Alberta Human Rights Board of Inquiry hearing convened to consider whether the burning of a cross and the display of racist symbols by the Aryan Nations constituted an indication of discrimination or intention to discriminate pursuant to the province's Individual Rights Protection Act[50]. LEAF and the Congress of Black Women argued that these expressive acts adversely affect the equality rights and aspirations of marked groups, and should thus be prohibited as discriminatory. Women belonging to these groups are doubly

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[49]Baby R., supra note 47 at 80.

[50]R.S.A. 1980, c.I-2.

disadvantaged by such acts, they further noted. In a strongly worded decision, the Board of Inquiry noted the adverse impact of such displays on the groups targeted and the overall social environment. It determined that the signs and symbols employed by the respondent did indicate discrimination and an intention to discriminate within the meaning of the legislation and were thus subject to censor.[51] It further determined that the restriction of the respondent's freedom of expression was warranted to achieve the purpose set out in the legislation.

LEAF has also taken on a number of cases addressing key issues in the lives of Canadian native women. The organization is currently supporting a challenge to the "second generation cutoff" rule built into the registration criteria in the Indian Act[52] Under the current registration scheme, the grandchildren of women who lost their status pursuant to the operation of discriminatory provisions in the legislation are not eligible for reinstatement, whereas the grandchildren of men similarly situated to these women maintain their status.

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[51]In the Matter of Section 2 Of The **Individual Rights Protection Act, R.S.A. 1980, C.I-2; And In The Matter Of The Public Inquiries Act R.S.A. 1980, C.P-29**, Kane, Rutherford, Downey et. al. v. Aryan Nations (Board Of Inquiry Decision) at 106.

[52]R.S.C. 1985, C. I-5, as am. R.S.C. 1985 (4th Supp.), c.43, s.2.

d. Violence Against Women

In addition to Seaboyer, LEAF has been involved in a number of landmark cases dealing with the issue of violence against women. LEAF intervened in Janzen v. Platy Enterprises Ltd.[53], to argue that sexual harassment is a form of sexual discrimination. The case was brought by two women who had been sexually harassed by a fellow male employee. Their employer failed to do anything about the man's offensive behaviour and the women were eventually forced out of the workplace. LEAF argued that sexual harassment is behaviour which both reflects and is rooted in the unequal power dynamic between the sexes. It noted that such behaviour has deleterious consequences for women in the workplace and thus constitutes a significant barrier to women's equality.[54] The Court agreed. In a unanimous decision further explicating its approach to sexual equality matters, the Court determined that sexual harassment is a form of sex discrimination. Chief Justice Dickson labelled sexual harassment in the workplace an "abuse of economic and sexual power", and noted that given the "sex stratified labour market", harassers will predominantly be men and their victims, women.[55] He determined that requiring an employee to endure such behaviour "attacks the

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[53][1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 32 [hereinafter Janzen cited to S.C.R.].

[54]"Charter clout", supra note 46 at 8.

[55]Janzen, supra note 53 at 1284.

dignity and self-respect of the victim both as an employee and as a human being"[56], and held the employer in the case liable for the offensive actions of his employee.

Recently, LEAF intervened in K.M. v. H.M.[57], a case which has far-reaching implications for child sexual abuse survivors. The appellant had been sexually abused as a child by her father. At the age of 28, she sued her father for damages resulting from the incestuous incidents. She alleged that her father was liable for assault as well as for breaching the fiduciary duty existing between a parent and child. The trial judge determined that her suit could not progress because she had failed to file a claim within four years of reaching the age of majority, the time period specified by the Ontario Limitations Act[58]. LEAF argued against a stringent reading of the limitation period provisions. It noted that the complex nature of the psychological damage caused by child sexual abuse often precludes survivors from recognizing the nature and extent of their injuries and the culpability of the abuser, and thus interferes with their ability to file timely actions.[59] It suggested that the age and sex equality guarantees in the

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[56]Ibid.

[57][1992] 3 S.C.R. 6 [hereinafter K.M.].

[58]R.S.O. 1980, c. 240.

[59]E. McIntyre, "Supreme Court reduces barrier to court action for incest survivors" (1993) Summer 5:3 LEAF Lines 15 at 15.

Charter mandate a generous, sensitive interpretation of the provisions in question, and recommended that the doctrine of "reasonable discoverability" be adopted by the court in determining the issue.[60] Though the Court did not expressly adopt the equality analysis advanced by LEAF, it did embrace LEAF's approach to the matter in question. The Court explicitly recognized the nature of the harms suffered by incest survivors, noting that perpetrators condition their victims to blame themselves and maintain secrecy about the abuse. It determined that the reasonable discoverability rule should apply and the limitation period begin to run when the plaintiff has a substantial awareness of the harm she has sustained and its likely source.[61] The Court also decided that incest can give rise to a separate action for breach of the fiduciary relationship existing between a parent and child. The decision is "a significant step forward in making the law responsive to the realities of childhood sexual abuse and in removing the barriers to civil action."[62]

The implications of LEAF's efforts in Butler, a landmark case promoting women's equality through the regulation of pornography, are more difficult to fathom.

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[60]Ibid.

[61]K.M., supra note 57 at 24.

[62]McIntyre, supra note 59 at 17.

F. LEAF And Butler

1. The Facts In The Case

The accused owned a store selling and renting "hard-core" heterosexual and gay male pornographic videos and magazines. The police seized his entire inventory, and laid numerous charges under the obscenity provisions of the Criminal Code[63]. He was charged with selling obscene material, possessing obscene material for the purposes of distribution, possessing obscene material for the purposes of sale and exposing obscene material to public view. The case advanced to the Supreme Court on two key constitutional questions: whether the obscenity provision contravenes the guarantee of freedom of expression contained in section 2(b) of the Charter; and if it does, can the limitation it imposes on free speech be demonstrably justified pursuant to the operation of section 1?

2. LEAF's Submissions

LEAF intervened to argue in support of the obscenity law on equality grounds. It argued that pornography constitutes sex discrimination against individual women and women as a whole, and that its regulation could be constitutionally justified pursuant to the harms-based equality analysis.

LEAF made three major points in support of the impugned legislation. It argued against the extention of section 2(b) guarantees to violent forms of pornography on the grounds that

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[63]R.S.C. 1985, c. C-34.

violent expressive communication does not warrant Charter protection. It also suggested that violent pornography is an expressive form of discrimination proscribed by the equality guarantees in section 28. LEAF argued, in the alternative, that any incursion of free speech resulting from the operation of the provision is justified in the interests of promoting equality. LEAF's overall argument hinged on demonstrating the harms caused by the proliferation of pornography and the viability of a harms-based analytical approach. In the initial paragraphs of its factum, LEAF reviewed the materials seized, noting that the vast majority of visual depictions presented women as "used, hurt or abused for sex for men."[64] It also pointed out that a small number of the materials represented men engaging in sexually aggressive acts against other men, "analogous to the ways women are treated in the materials described above."[65]

LEAF then went on to review the development of obscenity law, noting that the community standards test traditionally applied was gender biased because it was constructed from the perspective of male consumers and audiences. LEAF also pointed out that the historical focus on morality obscured the real harms flowing from obscenity and created a weak and inviable test, long subject to criticism on the grounds of

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[64]Factum Of The Intervener Women's Legal Education And Action Fund, Butler v. R., par. 3, p.1.

[65]Ibid. at par. 5, p.1.

> vagueness, subjectivity, gender bias, potential for abuse as a mechanism of censorship, difficulties of proof and effective enforcement, and lack of compelling governmental interest to guide interpretation.[66]

It noted, with approval, the recent trend in law and policy toward a recognition of the harms pornography causes to women and the equality interests connected with its regulation. The organization argued in support of a judicial line of reasoning which identified obscenity as material which is "dehumanizing, degrading, subordinating, and dangerous for women."[67]

The bulk of LEAF's factum is devoted to a discussion of the harms caused by the proliferation of pornography. LEAF noted the growing body of legal and social literature indicating that "pornography is a systemic practice of exploitation and subordination based on sex that differentially harms women."[68] It went on to discuss the specific dangers associated with its production and distribution. LEAF pointed out that direct physical violence is inflicted on real people in order to produce certain kinds of visual pornographic imagery, and argued against the extention of section 2(b) protection to such depictions. It also suggested that the mass marketing of sexual assault as entertainment constitutes a violation of the physical liberty and integrity of those concerned.

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[66]Ibid. at par. 14, p.4.

[67]Ibid. at par. 17, p. 6.

[68]Ibid. at par. 22, p.7.

LEAF also argued that exposure to images which portray explicit sex and violence together - particularly those in which rape is portrayed as pleasurable or positive for the victim - increases the risk of violence against women:

> In particular, it is uncontroversial that exposure to such materials increases aggression against women in laboratory settings, increases attitudes which are related to violence against women in the real world, and increases self-reported likelihood to rape. As a result of exposure, 25-35% who report some proclivity to rape a woman, come to believe that violence against women is acceptable. Such materials hence constitute direct threats of violence.[69]

LEAF also cited studies indicating that these kind of materials have perceptual, long term effects which harm women, e.g., the desensitization of consumers to sexual violence, increased acceptance of women's sexual servitude, increased belief in male dominance. Pornography not only degrades women, LEAF suggested, it also causes harm by sexualizing "racism and racial stereotypes and eroticiz[ing] the vulnerability of children."[70] In what later turned out to be a highly controversial statement, LEAF also suggested that men are harmed by violent forms of gay male pornography:

> Individual men are also harmed by pornography, although this is exceptional in that this harm does not define the social status and treatment of men as a group. Indeed, there is not systemic data to support the view that men as such are harmed by pornography. However, LEAF submits that much of the subject pornography of men for men, in addition to abusing some men in the way that it is more common to abuse women through sex, arguably contributes

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[69]Ibid. at par. 34, p.11.

[70]Ibid. at par. 47, p.15.

to abuse and homophobia as it normalizes male sexual aggression generally.[71]

LEAF made a number of additional claims about the expressive quality of pornography and its impact on women's status in society. It submitted that pornography is a form of hate propaganda against women which lies about women and their sexuality. According to LEAF, pornography is a form of speech which silences women, inhibits truth seeking, diminishes women's public regard and thus deters women's equal access to social life.

In the final section of its factum, LEAF put forward arguments in support of the impugned provision on the grounds that the restrictions it imposes on free speech are demonstrably justifiable in a free and democratic society. It suggested that sex inequality is the context in which the restrictions on pornography must be evaluated, and noted that prohibiting pornography promotes equality. It also argued that adopting the harms-based equality approach establishes a viable legal test:

> When interpreted to promote equality, section 163 is neither vague nor over broad. The compelling and concrete interest in eliminating systemic social subordination provides a clear guide to interpretation and a limit which constrains any potential overreach in the statutory language.[72]

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[71]Ibid. at par. 48, p.15.

[72]Ibid. at par. 65, p.19.

3. The Decision In Detail

The Supreme Court in Butler unanimously supported the impugned provision. It determined that pornographic material does fall within the protective ambit of s. 2(b) of the Charter, but that its regulation is demonstrably justifiable pursuant to s.1. The Court's reasons for upholding the obscenity law mark a major break with the traditional legal approach to obscenity. The Court rejected immorality as a basis for regulating material, and adopted, instead, the harms-based rationale employed in recent case law and promoted by LEAF.

The Court rendered both a technical and philosophical reading of the issues under appeal. Its decision turned on the meaning it attributed to the word "obscene". Section 163(8), it noted, defines obscenity as the "undue exploitation of sex, or of any one of the following subjects, namely, crime, horror, cruelty and violence". In determining when the exploitation of sex will be considered "undue", the Court reaffirmed the validity of the "community standard of tolerance" test. It suggested that the standard to be applied is a national one that is concerned "not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to."[73]

The Court went on to consider what kinds of materials fail this test. Drawing on pronouncements in recent case law,

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[73]Butler, supra note 2 at 595.

the Court determined that material which exploits sex in a "degrading and dehumanizing" manner is obscene because it causes harm. The Court's thinking on this point was clearly influenced by LEAF's submissions:

> Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.[74]

The Court then proceeded to explain how judges should determine whether materials offend this standard:

> The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such an exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.[75]

The Court went on to discuss which kinds of pornography are caught by this test. It suggested that materials which combine explicit sex and violence will almost always constitute the undue exploitation of sex. On the other hand, depictions of explicit sex without violence which involve degradation or dehumanization fail the test if the risk of

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[74]Ibid. at 596.

[75]Ibid. at 600-601.

harm is deemed to be "substantial", and imagery which is explicitly sexual but not violent, degrading or dehumanizing is "generally" to be tolerated unless children are employed in its production.[76]

Even if material fails this test, it can still escape censor if it meets the "internal necessities" or "artistic defence" test established by the Court. According to the Court, the portrayal of sex must be viewed in context to determine whether the undue exploitation of sex is the main point of the work or whether the portrayal of sex is essential to a "wider artistic, literary, or other similar purpose".[77] As with the threshold test, community standards reign but are to be interpreted and applied in a generous manner:

> The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.[78]

The Court further explicated its approach to the regulation of pornography in its discussion of whether the obscenity law could be justified under section 1 of the Charter. It stated its intention not to suppress "good pornography" which celebrates human sexuality. The Court did not directly address how gay and lesbian sexuality is to be

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[76]Ibid. at 601.

[77]Ibid.

[78]Ibid.

dealt with under the law. It did, however, suggest that the law was not to be used to impose the sexual conventions of the majority on minorities, and described any attempt to do so as "inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."[79] The Court went on to reiterate its overriding objective: the avoidance of harm to society. It suggested that the barrier to equality posed by virulent forms of pornography is real, pressing and substantial enough to warrant the regulation of free speech:

> ...if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance."[80]

4. Butler On Paper: Sorting Through The Issues

Reading the Supreme Court's decision in Butler is a lot like going on an emotional and intellectual roller coaster ride. There is much in the text which is extremely positive and heartening, but there are also elements to the decision which leave one fearing the worst in terms of the future regulation of sexual imagery.

There is no doubt that the Court's affirmation of the principles and goal of gender equality in the context of the

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[79]Ibid. at 606.

[80]Ibid. at 609.

pornography debate is a big step forward. In embracing a harms-based approach to obscenity matters, the Court formally recognized the connection between the production and distribution of virulent forms of heterosexual pornography, violence against women and gender oppression. Its support for the regulation of expression for the purpose of preventing harm is truly heartening since it demonstrates a care and concern for the security and interests of women and children, and a willingness to redress the power imbalance in their favour. In equating the interests of women with those of society, the Court has also endorsed an approach to community building based upon a respect for, rather than a repudiation of, the difference women pose. This is certainly a much welcomed development.

The Court's rejection of the "obscenity equals immorality" approach to the regulation of materials, and its strong statements affirming "good" pornography, the rights of sexual minorities and freedom of artistic expression are also positive developments. Karen Busby, a member of LEAF's National Legal Committee, suggests that Butler also strengthens the hand of the artistic community vis à vis agents of state censorship. She argues that the internal necessities test developed by the Court may prove to be a marked improvement over the statutory defence of "public good" outlined in section 163, because the latter requires that

materials have "serious" artistic purpose in order to survive censorship and the former does not.[81]

I celebrate these aspects of the decision. However, I feel uneasy about the standard the Court has established for actualizing the harms-based rationale, for the following reasons. Though the Court officially repudiates a focus on morality in approaching obscenity matters, the language it uses to construct the new test invokes old ways of thinking about and regulating issues of sex and sexuality. The wording it employs appears to invite decision-makers to determine who is harmed by certain representations and how they are harmed, based upon moral considerations. The Court has, for example, indicated that material which promotes anti-social behaviour, i.e., conduct which society formally recognizes as incompatible with its proper functioning, is subject to regulation. What's not clear is what kinds of behaviour, apart from the physical or mental mistreatment of women by men, fall into this category. Is the Court referring to criminal acts only or do other kinds of anti-social practices fit this definition as well? Could depictions of gay and lesbian sexuality be prohibited, pursuant to this test, on the grounds that these images promote a form of sexual expression which is contrary to mainstream social aims and mores?

One would think, given the Court's strong statement in support of the rights of sexual minorities, that decisions of

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[81]Interview with K. Busby, supra note 38.

this kind could not be lawfully sustained. But it is difficult to see how the incursion of minority rights can help but occur pursuant to Butler because of the role that community interests play in determining both the threshold question and the internal necessities test. The Court in Butler clearly stated that a national community standard prevails in determining obscenity matters. This means that when it comes to making judgements about gay and lesbian sexual imagery, the "community as a whole" gets to decide. Much will depend on how decision-makers define this term and the nature of the national viewpoint. But it seems clear that the views of the sexual majority will reign when it comes to making determinations about what constitutes "explicit sex", whether depictions are "degrading or dehumanizing" and which images pass the internal necessities test.

Clare Barclay has also pointed out several damning features of the internal necessities test. In order to escape censor, one must demonstrate that one's work exploits sex for some grander artistic or literary purpose. All representations which constitute an undue exploitation of sex and are about nothing other than sex would appear to fail this test, she suggests.[82] Under Butler, it seems, no distinction is made between materials which unduly exploit sex and work which explores questions relating to sexual exploitation.

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[82]C. Barclay, "Obscenity Chill- Artists In a Post-Butler Era" (1992-93) XVI:2 Winter Fuse 18 at 18.

Barclay also points out that the test is unlikely, in practice, to protect material from censor at the grass roots level. It is unclear whether police and customs officials will pay heed to the internal necessities test when they make decisions regarding the regulation of sexual imagery. It is probable that they will seize all material they consider obscene, regardless of its artistic or literary value, thus forcing those charged under the provision to appear in court and raise the defense at trial. Barclay suggests that the prospect of this happening is bound to have a "chilling" impact on artistic expression:

> Artists faced with the costs of asserting in court that their work is indeed art will either remove the work upon a warning, as did La Hacienda[83], or plead guilty and pay a fine rather than much heftier lawyers' fees. A third and even more chilling alternative is that faced with this prospect, artists will self-censor and avoid controversial work of any kind of sexual nature. And the most threatened work will be work dealing with women's sexuality, or lesbian and gay work.[84]

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[83]Barclay relates that two days prior to the release of the Butler decision, the police warned La Hacienda, a Toronto restaurant, that several photographs hung on its walls included sexual imagery which it deemed "degrading and dehumanizing". Rather than face charges, the restaurant removed the photos, which included a depiction of a man, fully clothed, wearing a dog collar, and a representation of a nude woman, covered with tubing and saw blades. According to Barclay, this example clearly shows that authorities cannot distinguish between "pictures about exploitation and pictures of exploitation of sex." Ibid. at 19.

[84]Ibid. at 25.

5. The Chilling Aftermath Of Butler

Some answers to these questions have begun to emerge. Although charges relating to the distribution and sale of virulent forms of heterosexual pornography - the material specifically targeted by the Court in Butler - have been slow in coming[85], the police, judges and customs officials have been quick to use the decision to censor gay and lesbian sexual imagery.

In one of the first cases in which Butler was expressly considered and applied, Hayes, J., of the Ontario Court of Justice, judged gay male erotica to be obscene. The case involved an appeal of a decision made by Canada Customs officials to seize material bound for the Toronto gay and lesbian book store, Glad Day Bookshop, on the grounds that it was obscene. The material in question included pictures and short stories depicting a range of explicit sexual activity between men. Though some of the sexual imagery included sadomasochism, most did not. Citing the reasoning and language in Butler, Judge Hayes determined that all of the

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[85]Since Butler, there apparently have been a small number of raids on adult video stores and a few charges laid in relation to heterosexual material. The courts have considered, interpreted and applied Butler with regard to heterosexual pornography in a number of cases: See, for example, R. v. Ronish (7 January 1993), (O.C.J.) [unreported] and R. v. Jorgenson (20 August 1992), (O.C.J.) [unreported].

depictions were degrading and dehumanizing, posed a danger to society and were thus obscene.[86]

The decision is clearly moralistic and homophobic, but is it wrong in law? Certainly Judge Hayes' pronouncements with regard to explicit gay male sex without violence appear to contradict Butler. But his findings in relation to images of gay male sadomasochism seem consistent with the decision. Judge Hayes relied upon the definition of degrading and dehumanizing material provided in Butler to determine that the materials were obscene whether or not the appearance of consent was involved, and regardless of the context in which the imagery was created. He expressly repudiated the following expert testimony provided by Barry Adams, an authority on gay male sexual practices, regarding the distinction between violent heterosexual pornographic imagery and depictions of gay male sadomasochism:

> ...but my understanding of it is that there is a concern that has come out of the woman's movement that there are forms of pornography that function as a kind of hate literature which give warrant to providing, encouraging, and affirming violence against women, and this is literature that is written by men from a male viewpoint, impugning pleasure into woman to allow men to exert that domination and again what I found so remarkable about the text that I looked at was they were fundamentally the opposite of that kind of situation where they were not written from the viewpoint of the aggressor. The aggressor was often a kind of cardboard cut out figure in the story. They had no emotional life. All the emotional life was contained in the viewpoint of the subordinate person, and indeed, it would seem to me the only way to understand or even enjoy the story would be

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[86]Glad Day Bookshop Inc. v. Canada (14 July 1992), Toronto 619/90 (O.C.J.).

> that the reader would have to have some sympathy with that position,...(my emphasis)[87]

Judge Paris came to a similar conclusion regarding the harmful impact of lesbian sadomasochism in another case involving Glad Day Bookshop. In the first, and apparently only action it has taken on obscenity matters post-Butler, the Toronto police raided the book store and seized Bad Attitude, a lesbian magazine of erotic fiction. In determining whether the magazine was obscene, Judge Paris scrutinized one of the magazine's articles, "Wunna My Fantasies". He described the story in the following terms:

> the writer, a self-styled trash bar dyke describes how she stalks an unknown woman in a locker room of a school, tiptoes to the shower stall where she blindfolds and handcuffs the unsuspecting woman. She pulls her by the hair to the floor, screws clamps to her nipples and proceeds to a series of sexual acts. The woman is immediately aroused by the acts of the writer, becomes an eager participant and eventually has an orgasm.[88]

The article was aracterized very differently by Becki Ross, an expert on lesbian sadomasochistic sub-culture and imagery, called to give evidence for the defense:

> During my testimony, I gave a detailed reading of "Wunna My Fantasies" (the "most offending" Bad Attitude story, written by Trish Thomas), which included mention of the fully consensual sex play between two fictional lesbian characters - one of whom stalks the other in a shower room. I translated the story as one of sexual play and role reversal where the "aggressor" is left unattended in the end while her "prey" masturbates to orgasm, watching herself come in the mirror. Like a dog with a bone,

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[87]Ibid.

[88]R. v. Scythes (16 January 1993), Toronto (O.C.J.) [unreported].

> Granek[89] obsessively cited de-contextualized snippets of text to demonstrate his interpretation of the narrative's essentially coercive brutal and non-consensual thrust.[90]

Judge Paris rejected defense evidence and arguments documenting the difference between lesbian pornography and the material targeted in Butler:

> This material flashes every light and blows every whistle of obscenity. Enjoyable sex after subordination by bondage and physical abuse at the hands of a total stranger. If I replaced the aggressor in this article with a man there would be very few people in the community who would not recognize the potential for harm. The fact that the aggressor is a female is irrelevant because the potential for harm remains.[91]

What is striking about both of these cases is the fact that neither judge thought twice about transposing the logic of the harms-based approach articulated in Butler with regard to heterosexual pornography, to gay and lesbian material. They were not only unable to discern the significance of the differences between the material targeted in Butler and the sexual imagery before them[92], but they also misunderstood a central, underlying tenet of the decision. The harms-based rationale adopted by the Court imports political context into

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[89]The prosecutor in the case.

[90]Ross, supra note 35 at 41.

[91]R. v. Scythes, supra note 88.

[92]Ross describes the material context in which lesbian sexual imagery is created as follows: "the paltry financial resources, the intended lesbian audiences, the multiple meanings ascribed to the images by readers and viewers, the almost entire absence of accessible homoerotic texts and the challenges made by lesbians of colour to the structuring of white icons, narratives and ideologies in contemporary lesbian sexual/cultural production." Ross, supra note 35 at 40.

the decision-making process. The Court condemned as obscene violent, virulent heterosexual pornography because of what it plainly says to men about women's sexuality. It read and considered the material in the context of rampant male violence against women and children, and systemic gender inequality, and suggested that courts are to undertake similar kinds of exercises in determining whether material is harmful and thus obscene. The judges in the Glad Day Bookshop Case, in contrast, took no notice of the complex political issues involved in the production of gay and lesbian pornography in determining that the material was harmful and should thus be banned. They did not consider the political position of homosexuals in society vis à vis the sexual majority, the dearth of homoerotic imagery, nor the fact that the most significant harms inflicted on gay and lesbians do not flow from the sexual imagery they themselves create, but rather from the production of heterosexist depictions of human sexuality which promote homophobia and gay bashing.

Paris, J., in fact, took no notice at all of issues specific to gays and lesbians in coming to the conclusion that "Wunna My Fantasies" was harmful. Nor did he feel compelled to explain how he reached the conclusion that the story would promote violence against women.[93]

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[93]Despite the evidence before him documenting the distinction between the two genres of pornography, he clearly equated "Wunna My Fantasies" with the worst kind of violent, virulent heterosexual pornography. He seems to have assumed that the sexual imagery in the account would be read in the

6. Critiques Of LEAF's Strategic Approach

Because of the way in which Butler has been interpreted, enforced and applied since its release, the decision has come under fire from the artistic and gay and lesbian communities, as well as from anti-censorship factions. LEAF has also been heavily criticized for taking a position in support of the obscenity law and for the arguments it advanced in its factum. Some critics allege that the organization's overall approach is naive and misguided because it involves trusting agents of the state to act in socially progressive ways.[94] Others suggest that LEAF is responsible for inciting or promoting the crackdown on gay and lesbian material because of the way in which it characterized gay male pornography in its submissions.[95] LEAF has also been criticized for promoting the suppression of women's sexual expression and denying women status as sexual subjects, thus reinforcing old roles, stereotypes and ways of thinking about sex:

> Now, given the structuring of woman-as-object-to-be-violated-by-man in pro-censorship feminist, conservative and legal discourse, woman-as-sexual-subject becomes an oxymoron. How then is it possible to tell different stories.[96]

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same way and would provoke the same kind of response, presumably from lesbian consumers and others able to gain access to the two hundred copies of the magazine in circulation per month in Canada. Yet he doesn't discuss why or how he came to this conclusion.

[94]Ross, supra note 35 at 47 and McCormack, supra note 35.

[95]Barclay, supra note 82 at 25.

[96]Ross, supra note 35 at 41-42.

Some of this criticism is unfair and unfounded. It must be remembered that LEAF was founded to achieve substantive equality for women by transforming the relationship between law and social life, and making the law work in progressive ways. As I have indicated above, the organization has managed, in its own "naive" way, to achieve substantive gains for women through legal struggle. But the question is, was LEAF wrong to attempt to invoke the authority of the state to regulate violent, virulent forms of pornography? I have had to struggle with this issue anew in light of what has happened following the release of the Butler decision. Despite these occurrences, I continue to believe that the law has a role to play in prohibiting material which materially harms women, and that LEAF was right to try to make the obscenity law work in support of women's rights and interests.

It must also be remembered that the suppression of alternative sexual voices didn't begin with the construction of LEAF's factum or the release of Butler. The police and customs officials have historically used the obscenity laws to harass gay and lesbian book stores and suppress homosexual erotica.[97] It is also important to note that the harms-based

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[97]Janine Fuller, manager of Little Sister's, a gay and lesbian book store, reports that the majority of the books bound for the store are slowed down at the border because they are allegedly obscene: "It takes us six weeks to two months for shipments that other stores get in one month. The amount of money and energy required to fight this is phenomenal. It's hard to believe that it's not there to silence us, to force gay book stores out of existence." C. Creede, "Lesbian Erotica Caught In Porn Net" (1993) Winter 6:4 Herizons 9.

approach to obscenity which LEAF promoted and the Court adopted, would, if properly interpreted and applied, protect a great deal of gay and lesbian erotic material previously vulnerable to state censorship.

The question is, was LEAF right to explicitly include gay male pornography in its harms-based analysis? Given the discriminatory and abusive way in which obscenity laws have traditionally been enforced, I would suggest that it was, at the very least, strategically unwise for LEAF to flag gay male pornography as a problem area.

I would also argue that LEAF's failure to distinguish between different kinds of pornography in constructing its analysis was wrong on other grounds. The fact is, that the pornography genre is much more diverse and complex than LEAF allowed in its factum. As Mary Joe Frug notes,

> ... the proliferation and character of the pornography genre is one of the most complicated cultural events of our time, an event whose meanings are still quite indeterminant.[98]

In suggesting that pornography sexually objectifies women, LEAF oversimplifies the content of the genre and the messages conveyed. To quote Mary Joe Frug once again:

> Not all pornography is simply about women being fucked. There are some pornographic works in which women fuck, for example; some works in which the objectification of the orgasming penis is not repeatedly depicted and

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[98]M.J. Frug, Postmodern Legal Feminism (N.Y.: Routledge, 1992) at 153.

> valorized; and many works in which the subjectivity of a female character is a dominant and successful theme.[99]

Though LEAF was right to argue that certain kinds of material should be regulated because they promote brutal, imitative behaviour, the organization was wrong to oversimplify the breadth of possible consumer response to different pornography forms. As both Becki Ross and Barry Adams tried to demonstrate in their testimony in the Glad Day Bookshop cases, the context in which material is produced and consumed, i.e., who produces what images, for what reasons and which audience, can significantly affect how it is read and received.

The strategy of "homogenizing" the pornography genre was, in my view, counter-productive because it did not challenge the way in which issues of sex and sexuality are currently conceptualized. As both Frug and Ross suggest, in order to end women's sexual oppression it is necessary to challenge and change the way in which people think, talk and act about sex. Spaces have to be cleared in the discourse to allow for women to be something other than sexual victims. This is not to say that women are not sexually victimized or that LEAF should give up the tact of articulating the pervasiveness of women's systemic discrimination based on sex. This is an important and necessary strategy in the quest for substantive equality. But, as I have suggested throughout this thesis, it is also necessary to acknowledge and affirm other possible roles for

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[99]Ibid. at 152.

women and alternative visions of social reality in order to pave the way for social renewal. The language LEAF employed to make its case failed to do this.

LEAF's approach is also problematic because it is too far-reaching. In homogenizing and condemning all materials which portray the sexual objectification of women, LEAF's analysis captures work which does so for potentially other than exploitive purposes. Lesbian pornographic imagery is a case in point. Lisa Henderson locates lesbian publications such as "On Our Backs"- a magazine similar to "Bad Attitude"- within the terrain of lesbian sexual politics and describes the stories and images depicted therein as culturally transgressive and sexually demystifying.[100] The imagery is intended to play with and push cultural boundaries to the limit, and in the process create a sexual reality determined by and for women. Sexual self-determination is clearly the goal:

> Sex may seem like a trivial part of a radical, futuristic vision, but if we are not safe to indulge in this playful, vulnerable and necessary activity, pleasure ourselves and the others who fascinate us, how safe can a society be for women? A world that guaranteed food, shelter, medical care, full employment, literacy, day care, civil rights and democracy, but denied us sexual license, would make us nothing but well-fed domestic animals with suffrage.[101]

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[100]L. Henderson, "Lesbian Pornography - Cultural Transgression and Sexual Demystification" in S. Munt, ed. New Lesbian Criticism (N.Y.: Columbia University Press, 1992) 173 at 176

[101]P. Califia, Macho Sluts (Boston: Alyson, 1988) at 14.

The problem is that under LEAF's analysis and Butler, much, if not all, of this kind of imagery is subject to regulation because it juxtaposes sex and violence and depicts women in sexually subordinate positions, even as it also affirms women's sexual subjectivity. But what of claims that this kind of violent, sexual play cannot be allowed because it contributes to social and sexual inequality? The argument in favour of censorship rests on the notion that these depictions do nothing other than simply replicate and reinforce prevailing, oppressive power dynamics and should thus be locked away until such time as it is safe to go sexually exploring. The argument against points to the transformative value of these disruptive voices. The question is, are these voices dangerous or are they liberating? I would suspect that they are a bit of both. Trying to manipulate and redefine socially-loaded terms and concepts is, by definition, a dangerous business. Feminists in law know this all too well. Though many people on both sides of the issue may not like the comparison, working on the edge of legal discourse is not unlike working on the edge of sexual discourse. Both endeavours are difficult and risky, and both involve a resistance to, rather than a simple invocation of, prevailing power constructs. While it is certainly clear that lesbian pornography is shaped by social power dynamics, it is also evident that the production of at least some of these images is fuelled by a will to survive, resist and take sexual

pleasure in spite of it all. In my view, a movement which is geared toward the sexual emancipation of women and the transformation of souls and psyches can not afford to either ignore or condemn the expressive value of this kind of material:

> While social structures are always at work in private experience, such a rigidly deterministic view misses the survival value and the political momentum of small and great subversions, refusals, irreverences, new imaginings- particularly those made in the name and experience of pleasure. Their power is often to make and keep the struggle - for self determination - possible.[102]

LEAF should have constructed an argument which would have saved this kind of imagery and specifically targeted material which does harm women in real and substantive ways, i.e., violent, virulent forms of heterosexual pornography. The promotion of a contextualized, harms-based equality driven analysis would have gone a long way toward achieving this goal.[103]

The events which have occurred following the release of Butler raise another critical point about LEAF's strategic approach. As I indicated above, there is much to celebrate about the Butler decision on paper. But none of the positive aspects of the Court's pronouncements have been realized

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[102]Henderson, supra note at 189.

[103]The test I favour would prohibit sexually exploitive material produced by heterosexual pornographers for heterosexual men, primarily for economic gain, and would involve a consideration of the following factors: who produced the material, why they produced it and for whom.

because of the selective and discriminatory way in which the police, customs officials and several lower courts have chosen to interpret and apply the decision. What is desperately needed at this point in time are initiatives geared toward countering discriminatory enforcement practices and steering decision-makers in the right direction in terms of the interpretation of the provision and the regulation of obscene material.

G. Conclusion

LEAF's project is an exciting and ambitious attempt to transform the relationship between law and social life, and reconstruct social configurations of power in favour of women and other disadvantaged groups. The organization's equality analysis holds great promise in terms of the transformational project, on several grounds. Because it is geared toward neutralizing oppressive power relations, the analysis attacks the roots of gender oppression, and systemic inequality generally. In insisting, as well, that law give credence and respond to women's reality, LEAF's approach challenges and disrupts a conception of community built on the exclusion of women's interests, and the denial of differences generally.

But the question is, how does the promise of LEAF's equality approach translate into practice? The reviews are somewhat mixed. There is no doubt that LEAF's work has realized significant legal gains for women and other

disadvantaged groups. LEAF's efforts have been key in re-making the equality analysis into a progressive political tool. By delineating how certain social practices and readings of the law affect women, the organization has also helped to shift legal discourse and activate the law in support of women's rights and interests. Substantive gains have been made as a consequence in certain key areas, e.g., pregnancy discrimination, sexual harassment, the civil rights of child sexual abuse victims, welfare rights for women, the economic rights of women post-divorce and the rights of domestic workers. LEAF has also successfully employed the equality analysis to shield women's reproductive rights against incursion. It is important to note that in cases like Baby R, where judges have not formally adopted the equality analysis, they have clearly been swayed by equality rights thinking in determining the issues at stake. This is clearly an important breakthrough.

But not all of LEAF's interventions have gone this well. As the events surrounding the Butler case point out, LEAF's current approach is subject to certain very real limitations. LEAF's work in law is geared toward securing shifts in the way in which courts conceptualize and respond to gender discrimination. In focusing on litigation as a means of securing legal advances for women, LEAF neglects the other half of the battle, i.e., the translation of courtroom victories into substantive material gains. Without follow up

efforts geared toward translating judicial determinations into everyday reality, these victories will have no meaning and may, in cases like Butler, end up working against the interests of women and the transformational project.

Though LEAF's analytical approach seems to work very well when a unity of interests is at stake, it is not the appropriate tact to take when the issues involved are more varied and complex. In cases like Moge or K.M., for example, the introduction of women's global reality was sufficient to jar and radically shift the Court's thinking about the matters in issue. But a straight application of the analysis in Butler was ineffective, and, in a very real sense, counterproductive because it served to reinforce stereotypical ways of thinking about women and sexuality. The promotion of a de-contextualized, harms-based equality driven test in Butler also worked against the transformational project because it served to legitimate the silencing of radical, disruptive voices:

> ...exploring, pursuing and, accepting differences among women and differences among sexual practices is necessary to challenge the oppression of women by sex. Only when sex means more than male or female, only when the word "woman" cannot be coherently understood, will oppression by sex be fatally undermined.[104]

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[104]Frug, supra note 98 at 153.

Conclusion

The stakes are very high in the feminist quest for social transformation. The prevailing social system breeds misery and corruption, and diminishes, in untold ways, the lives of women and others relegated to the margins of society. Its perpetuation can, quite simply, no longer be borne. In seeking a metamorphosis of all things social, feminists seek to put an end to the promotion of a rigidly dichotomous world view and a politics rooted in the exclusion, exploitation and brutalization of others. We also seek to establish a more equitable, loving and inclusive society.

Conceptualizing the process of social transformation is by no means an easy task. The phenomenon is, by its very nature, "non-social", and hence foreign and difficult to track. Yet, there are certain things we know about what it will take to effect fundamental social reform. We know that the struggle to break up the prevailing discourse and project a viable social alternative is long, arduous and extraordinarily challenging. We also know that we must work on many levels to realize our goal, hold fast to utopian projections as we work, as well as provide space for the articulation of radical, dissonant voices.

The question is, can we do all this from within established social structures, and specifically, from within law? Feminists who oppose the project argue that the master's tools cannot dismantle the master's house. They suggest that

playing the master's game is counterproductive because it serves to reinforce prevailing power configurations. They recommend, instead, working at a distance from existing social structures to remake society in inclusive terms.

Critics in law make similar arguments about the use of rights discourse in the struggle for social transformation. They argue that law embodies, but cannot alter, state configurations of power, and that efforts to achieve substantive change through legal process simply serve to reinforce a liberal agenda. Fudge and Glasbeek are categorical in their dismissal of attempts by feminists and others to employ the Charter for radical, transformative purposes.

The question of working within cannot be answered this easily. A rigidly deterministic view of the nexus between the legal and social realms is overly simplistic, and not borne out by historical events. The fact that strong and persistent law reform efforts by gays and lesbians and others have managed to shift the boundaries of liberalism indicates that law is neither completely divorced from nor inextricably tied to a static liberal agenda. The connection between the two spheres appears to be much more complex and dynamic, and I would argue, subject to manipulation for socially progressive ends. The law's deep and historic complicity in the perpetuation of gender inequality, as well as other forms of

oppression, suggests as well that the discipline is, in fact, a prime site for political struggle.

While I believe that it is necessary to struggle within, and possible to contribute to the transformational process by working within law, I am under no illusions about the difficulties and dangers associated with the project. Struggling for power for the purpose of breaking free and breaking up current power configurations is an inherently perilous business. In doing this kind of work, one risks slipping permanently into the role of colonizer and re-invoking, rather than disrupting, the prevailing power structure.

The feminist project in law is subject to other constraints as well. Legal language poses a major barrier to the articulation of radical feminist claims. In order to engage with and manipulate law for the protection and benefit of women, feminists must employ legal discourse. But we must also find ways of subverting legal language, even as we use it, in order to break the codes which deny women and women's differences. Drawing on women's visions and stories of gender oppression in formulating legal claims can provide the necessary disruptive, poetic spark. But the difficulty comes in constructing and employing a language form capable of advancing women's interests without alienating legal authorities.

How do feminists in law envision manipulating the discourse for socially progressive ends? MacKinnon, Williams and West offer varying views on the subject. MacKinnon and Williams favour strategies which take aim at hierarchical and exclusive power relations and promote equality. MacKinnon envisions the development of a jurisprudence sensitive and responsive to women's needs and interests. Williams, on the other hand, promotes the re-conception of the rule of law in inclusive and generous terms. They both dream of a future founded upon the extension of full citizenship rights to women, Blacks and others whose boundaries have historically been subject to appropriation for social purposes.

Whereas MacKinnon's prescription for liberation and equality begins and ends with the articulation of women's stories of gender oppression, West, Williams and other theorists favour the promotion of a more complex, inclusive and positive vision of women's reality. West argues for the affirmation of women's sexual differences, utopian visions and essentially moral nature in the context of political struggle. Williams, Harris, Frug and Kline, on the other hand, promote a radically different approach to legal analysis and categorization. They favour the development of a jurisprudence based upon multiple consciousness and experience. Their goal is to make room in law and social life for the complexity and variety of women's experiences.

LEAF's project is rooted in MacKinnon's harms-based equality thesis, and reflects both the strengths and weaknesses of her approach. The thesis appears to work very well in practice when a commonality of women's interests is at stake, i.e., when a particular social practice or reading of the law denies women as a group. In cases involving pregnancy discrimination and the civil rights of child sexual abuse victims, for example, the introduction of women's global reality was sufficient to disrupt and shift judicial thinking in significant ways.

But a straight application of the harms-based analysis is clearly ineffective, and, in a very real sense counterproductive, where the issues are more complex and involve multiple forms of oppression. LEAF's argument in Butler worked against the transformational project because it failed to represent the diversity of interests at stake in the pornography debate. In casting women solely as objects of sexual oppression in this context, LEAF denied the difference marking women's experiences as sexual beings and thus reinforced stereotypical ways of viewing women and sexuality. The analysis it promoted also served to legitimate the silencing of radical, disruptive voices.

Realizing feminist aspirations through legal struggle can be done, but not with ease. The project involves a careful balancing of theoretical ideals, strategies and interests, as well as the construction and employment of a host of radical,

dissonant and disruptive voices. We must work to shift the discourse, but also struggle to translate legal victories into real, substantive gains for women. We must strive for equality, as MacKinnon and Williams contend, but not do so in ways which deny women's utopian visions or prescribe the dimensions of women's sexuality. In working to counter the categories which negate women as a group, we must also challenge and disrupt a mode of categorization which denies the richness of women's greatest joys and deepest sorrows. And as we try to do all this, we must also undertake sustained critiques and revisions of the strategies we employ, as well as work on other possibilities of living in order to remain true to the vision and spirit of what we are trying to accomplish. To paraphrase Cixous once again, that is a long and difficult project.

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