1986

Canadian Feminist Perspectives on Law

Susan B. Boyd
Allard School of Law at the University of British Columbia, boyd@allard.ubc.ca

Elizabeth A. Sheehy

Citation Details

Susan B Boyd & Elizabeth A. Sheehy, "Canadian Feminist Perspectives on Law" (1986) 13 JL & Soc'y 283-320.

JOURNAL OF LAW AND SOCIETY
VOLUME 13, NUMBER 3, AUTUMN 1986
0263-323X $3.00

Canadian Feminist Perspectives on Law†

SUSAN B. BOYD* AND ELIZABETH A. SHEEHY**

INTRODUCTION

This article provides an overview of Canadian feminist perspectives on law. It includes a brief chronology of the development of such scholarship, a breakdown of the literature into five substantive areas, an examination of the major theoretical frameworks currently being used, and finally an identification of particularly Canadian feminist approaches to law. In selecting the accompanying bibliography, we used an expansive definition of "feminist scholarship": "scholarship which takes into account a woman's perspectives or interests".[1] While broad enough to include works which derive from diverse political perspectives, this definition did serve to exclude articles which purport to treat issues of concern to women in a "neutral" fashion.[2]

Theoretical work does not predominate in Canadian legal scholarship. We were therefore not surprised to find that much of the feminist legal literature also leaves theory unstated, and thus explicitly or implicitly adopts the liberal human rights paradigm. On the other hand, socialist and radical feminist theories on law, as well as recent attempts to redefine the meaning of equality for women, have made challenging contributions to the understanding of the relevance of law to Canadian women. We hope that this article will promote recognition that unstated, untested assumptions and political theories have the potential to constrain creative feminist critique and construction of law.

* *Department of Law, Carleton University, Ottawa, Canada, K1S 5B6.*
** *Faculty of Law, University of Ottawa, Ottawa, Canada, K1N 6N5.*

† This paper was originally delivered at the European Conference on Critical Legal Studies Conference on Feminist Perspectives on Law, London, April, 1986. Funding for this project was provided by Carleton University and the University of Ottawa. We would like to thank our research assistants Carol Bartels, Bernadette Dietrich, Carol-Lynne Saad, and Phillip Sutherland. Our thanks also to Estelle Corbeil for her patience and meticulous secretarial services. Another version of this paper will be published in the *Canadian Journal of Women and the Law*

The recent wave of Canadian feminist legal scholarship was stimulated by the *Report of the Royal Commission on the Status of Women*,[3] which had considerable popular appeal[4] and thus simultaneously legitimised women's issues and forced feminists to articulate a coherent response to its recommendations.[5] Much feminist legal scholarship in the 1970s was of a descriptive nature, expanding upon some of the specific issues identified as problematic in the report.[6] Other authors set about the task of mapping, in a very general way, the relationship between women and law. What emerged were chronologies of legal landmarks in the history of Canadian women,[7] historical accounts of legally significant events such as women's enfranchisement[8] and the "Persons" case,[9] and analyses of the judicial creation of the status of womanhood as a disqualification which cuts across race and class.[10] Clark and Lewis' description of rape as a property crime against the ownership rights of men constituted a major theoretical contribution in this decade.[11] Much of the remaining scholarship in the late 1970s focused on the Supreme Court of Canada's abysmal record on women's equality claims under the Canadian Bill of Rights[12] and on the limited potential of the Canadian Human Rights Act[13] to fill the gap left by the judiciary.[14]

By 1980 attention turned to the pending patriation of the Canadian constitution,[15] which prompted an outpouring of feminist views on alternative configurations of language in the future Charter of Rights and Freedoms[16] and doubts as to whether formal equality rights can advance women's struggle while economic dependence on men persists.[17] Feminist preoccupation with the Charter once proclaimed did not subside, and indeed one might well argue that there is a surfeit of literature on the Charter. Some feminists proposed innovative theories of equality rights,[18] while others emphasised the importance of feminist input into the drafting of legislation to comply with Charter guarantees[19] and feminist control over the litigation of equality issues.[20]

Charter fever has not completely absorbed Canadian feminist scholarship on law. Some radical and integrative feminists continue to concentrate on the understanding and transformation of law and social institutions without heavy reliance on the Charter,[21] and work developing socialist-feminist theories on law has also appeared in the past few years.[22] Finally, abundant attention has been given in recent years to different substantive legal topics, the bulk of which falls into the areas discussed in the following sections.

SUBSTANTIVE AREAS OF LAW

Given the recent proliferation of feminist literature on law, discussion of it will be broken into the following subject areas: 1) criminal law, 2) family law, 3) income redistribution, 4) employment law, and 5) legal education and legal profession.

Rape has been analysed by Clark and Lewis as a crime which is punished only when the victim is "a dependent female living under either parental or matrimonial control, and in possession of those qualities which make her desirable as a piece of reproductive property available for the exclusive use of a present or future husband . . . ."[23] These authors argued for reforms which de-sexualised rape and instead treated it as simply another form of assault. Backhouse's legal history research on rape law in nineteenth century Canada refined this analysis: even when parliament partially abandoned the property-rights paradigm and purported to protect women who fell outside it, the judiciary continued to enforce the property model by restrictively interpreting rape laws.[24] The spousal immunity exemption for rape has been highlighted by Boyle as another example of the property basis for rape, with its simple repeal being insufficient to effect behavioural change given the coercive nature of male/female sexual relations, particularly within marriage.[25]

In 1984 all overt vestiges of rape as an offence against property were removed via the creation of the new assimilated offence of sexual assault.[26] At that same time, some disquiet was expressed about the amendments because the gender-neutral label fails to capture the unique threat that rape poses for women and the accompanying lower sentencing range minimises the criminal nature of the assault.[27] Furthermore, legislation is not self-implementing nor is law autonomous in this context. Thus, the idea of rape as a property offence may enjoy continued vitality in social attitudes, police practices[28] and judicial discretion[29] in spite of the reforms, unless other changes follow.[30] Lahey also implies that the property basis for rape remains intact. She argues that these reforms reflect at best waning male concern about rape as chastity in female partners ceases to be revered.[31]

Dawson has assessed whether the new legislation is more responsive to women's experience of sexual assault. She concludes that the meaning of sexual assault continues to be "systemically determined by existing legal structures" as the judges use shared beliefs from the dominant male culture to infuse legal norms with meaning and legitimacy.[32] Boyle has set about the task of ascertaining how a feminist judge would interpret the offence. Her work offers a test which asks whether "the activity would have been sexual in a non-assault context",[33] but Boyle concludes that it is inadequate because "our society eroticises female lack of consent"[34] and because a neutral context cannot be conjured up: "[t]aken in its cultural, social, and economic context, in unconsensual touching of a man's bottom does not remind him that he is a sexual object".[35]

In response to the "subjective orthodoxy" of decisions such as *Pappajohn* v. *R.*,[36] Pickard has set forth a challenging alternative to the global concept of *mens rea* by formulating a contextualised notion of the mental element for rape.[37] Boyle uses the marital exemption for rape to observe that there is always a risk that a woman is not acting autonomously in consenting to

needs. She therefore argues that non-consent to intercourse should be presumed, pressure short of physical coercion should suffice for the *actus reus* of rape, and the *mens rea* should be based upon conscious exploitation of collective male power.[38]

Many Canadian feminists advocate some form of control over pornography on the basis that even if a link between viewing pornography and acting out violence against women cannot be established, pornographic materials permit the dominant class to maintain sexual inequality through a subtle socialisation of men and women which reinforces discriminatory attitudes and behaviour.[39] A "feminist" definition of pornography which incorporates the context and message of the sexual representation (e.g., does it eroticise sexual dominance?) is advanced by several authors.[40] Opposition to the "feminist" solution of censoring pornography has relied upon historical analysis of state use of feminist agitation to oppress women and concern about whether female sexual passivity will be further reinforced.[41] The work of Hughes and Cole attempts to meet these critiques by circumventing state intervention through use of an individually-initiated human rights remedy against pornographers.[42] Civil remedies have been advocated as a form of redress for "wrongs" such as pornography and rape on the basis that cathartic and educational functions can be fulfilled through such litigation.[43] Women might have more control in the civil process than they would in a criminal proceeding where, among other things, they may be subject to contempt proceedings if they refuse to testify.[44] However, the proponents of such suits also recognise that tort law often expresses the identical sexist norms[45] and that civil suits present a danger that the issue will be viewed as one involving only individuals and not requiring societal change.[46]

Abortion law literature in Canada has yielded a rich analysis of the complex ways in which law has been used to oppress female reproductive freedom. MacLaren has described the usurpation of birth control and abortion by the male medical profession from the hands of individual women through lobbying, controlling access to "scientific" information, and policing of recalcitrant doctors and "immoral" women. His work suggests that doctors settled for medical control over abortion when they acknowledged that their efforts to prohibit it were futile and that eugenics policies could be pursued through abortion.[47] Backhouse's work also documents the medical profession's unique influence on the scope of the abortion prohibition. She notes the relative disinterest on the part of physicians and judges in the behaviour of lower class women who aborted or who killed their newborn children, perhaps because these mothers were not under the same obligation to reproduce blood and property lines.[48] An insistence on a historically specific analysis of the direct and indirect ways in which the state has used abortion law at different conjectures to oppress women is pursued in Gavigan's work;[49] her thesis will be discussed in further detail under socialist-feminist theory. McDaniel has

also emphasised the ambivalent nature of control exercised by the Canadian government over abortion: it has abdicated political responsibility by vesting almost untrammelled powers in abortion committees which are vulnerable to local anti-abortion pressure, prone to enforcing moralistic judgments and to "granting only a certain number of abortions proportionate to numbers of live births".[50]

The morals offences in the Criminal Code have been described as both protecting women from male sexual aggression and as regulating the sexual activity of girls and women.[51] Judicial enforcement of the sexual double standard and sex roles through the wide discretion accorded to courts to define delinquency in juveniles has been exposed by several authors.[52] Writers have also speculated about the control over female criminal behaviour exerted by other social institutions such as the mental health system[53] and legal control over female sexual behaviour exercised by the law of prostitution. Backhouse, in the *Report on Prostitution*, characterises the various legislative approaches to prostitution as prohibition, regulation and rehabilitation. She postulates that all three approaches have failed to have any impact on the practice of prostitution "because of the persuasive class, race and sex discrimination inherent in their formulation or enforcement".[54] To avoid a sexual double standard in the area of prostitution, given that women are disproportionately represented among prostitutes by reason of economic disadvantage and given that police tend to exercise their discretion upon women rather than men, Boyle and Noonan argue that prostitution laws should punish customers alone to ensure that women and men are treated equally.[55]

Several comprehensive theoretical approaches to criminal law will be discussed in the result equality/integrative feminist section of the paper.

2. *Family Law*

Attention was given in the 1970s to the reinforcement of female stereotypes and roles by family law, as well as to the more blatantly inequitable results of matrimonial property cases.[56] Of more theoretical interest, Clark early challenged the traditional public/private distinction commonly applied to family law, arguing that rights to privacy must be subordinated to sexual equality.[57] Boyle, too, examined the implications of the public/private distinction in her argument that the differential treatment by the criminal of violence against wives demonstrated a process of decriminalisation of domestic violence.[58]

The flurry of feminist perspectives on family law did not emerge, however, until the beginning of the 1980s when authors like Abella examined the ways in which family law has historically reinforced societal assumptions about the status and roles of women.[59] Backhouse's work on nineteenth century changes in child custody law and marriage augments Abella's analysis of the social control of women.[60] Backhouse links the enhancement of mother's

profession, a double-edged sword which also required strict standards of female sexual conduct and justified the exclusion of women from the labour force. A pattern whereby the courts were less inclined than the legislatures to grant rights to women is reflected in the custody study as well as in her study of marriage and divorce. She demonstrates that while legislatures of the time seemed relatively progressive in adopting a companionate model of marriage, the judiciary tended to subvert this policy by adhering to a patriarchal model with power vested in the husband.

Some effort was made by feminists to examine the implications of extensive reforms in the late 1970s and early 1980s to provincial matrimonial property and support legislation.[61] Philosophical contradictions of individualism and mutuality between spouses in the Ontario legislation were also explored.[62] Further reforms such as the adoption of the full community of property model to replace the provincial regimes (which combine, in various permutations, separate property and deferred community of property models) were suggested[63] and the failure of the state to take an active role in the enforcement of maintenance orders was critically analysed.[64]

Recent feminist concerns in family law have included the growing tendency to embrace joint custody and "friendly parent" rules,[65] and the trend towards the dejudicialisation of family law by encouraging resort to mediation rather than resolution of disputes through the adversarial system.[66] Both joint custody and mediation have the potential to lessen the bargaining power of women, and joint custody in particular may devalue the primary parenting which a mother has undertaken while the relationship remained viable, as well as undermine her autonomy after the relationship terminates. The procreative autonomy of women has also been identified as threatened by reproductive technologies now controlled by both the medical profession and the legal system.[67] One author explicates the patriarchal assertion of control over female procreation as reflecting greater masculine uncertainty regarding biological paternity (a legal presumption), which has always been less verifiable than biological maternity (a biological fact).[68]

Efforts to analyse the role of ideology in reproducing patriarchal relations include Klein's exploration of the mystifying effect of the prevalent liberal individualist ideology when applied to family law, in particular focusing on the invisibility of and inadequate compensation for domestic and reproductive labour in support and property law.[69] Mossman and MacLean[70] demonstrate further that separated and divorced women often fall, to their detriment, between two ideologies evident in both the legislation and the cases. The first is the individualist ideology of equality, which expects individuals to be self-supporting and tends to deny women maintenance other than for "rehabilitative" purposes. The second, a familial ideology of mutual dependence between family members, tends to be applied to female welfare recipients to deny them quick access to income maintenance. Since most post-divorce one-parent families are headed by women, the result is that women tend to carry the costs of marriage breakdown, a factor aggravated when they

the state.[71]

Employed mothers claiming custody of their children in contested cases may also fall between ideologies. Boyd has shown that they may encounter difficulties because they fail on the one hand to meet the traditional expectations of the ideology of motherhood, and on the other hand, fail to demonstrate to the courts economic self-sufficiency comparable to their husbands as expected by the "ideology of equality".[72] Arnup's work demonstrates that while the courts no longer overtly penalise lesbian mothers in custody cases because of their sexual preference, the courts will award them custody only where their lifestyles resemble those of heterosexual nuclear families, thereby ensuring that children are socialised in accordance with dominant societal values.[73] Boyd and Arnup both show that changes in judicial attitudes do not necessarily transform the overall structure of gender relations within capitalism, but rather may reinforce it.

Finally, Lahey's provocative analysis of child abuse from a radical feminist perspective relates it to the patriarchal values inherent in our society which encourage us to view children (and women) as the property of men.[74] Lahey gives examples of specific legal rules which serve male interests in controlling and using children, and further notes that much research on child abuse hides male responsibility for abuse by locating the "cause" in the female parent, thus reinforcing male control in legislative policy choices and in judicial custody and guardianship decisions.[75]

3. *Income Redistribution*

The economic losses associated with maternity leave and inadequate, financially inaccessible daycare have prompted Canadian feminists to argue that women alone should not bear the costs of these social functions[76] and that the failure of government to universally subsidise daycare results in the segregation of children according to income.[77] Maternity benefits are currently provided under the Unemployment Insurance Act,[78] using stricter qualifying conditions than ordinary unemployment benefits. Feminists have articulated alternatives to this anomaly: complete assimilation of pregnancy to sickness benefits under the same statute;[79] provision of maternity benefits in separate legislation as a special right for women;[80] and provision for mandatory parental leave and benefits to either parent, with medical leaves under unemployment insurance legislation limited to actual physical disability.[81]

Women's unequal ability to command a "family" wage and their disproportionate representation as single heads of families mean that the welfare state is of crucial importance for women. Privatisation of social welfare benefits has been described as a major shift in income redistribution away from women, since they will not be able to compete for these services in the private sector and will also probably contribute additional unpaid labour to the economy through volunteer work.[82] Some authors recognise that welfare

economic dependency on men and conformity with notions of appropriate female sexual behaviour.[83] Mossman and MacLean compare the criteria of eligibility for unemployment insurance benefits, which men are most likely to meet, with those used for welfare benefits, which are primarily resorted to by women. Male-oriented benefits are for the 'deserving poor', are conceptualised as 'rights', and stress the value of independence. In contrast, welfare characterised as charity for the 'undeserving poor' and is narrowly conditioned on a woman's inability to receive financial assistance from her parents or spouse.[84]

Tax and pension schemes have been identified as not only failing to adequately redistribute wealth to women but also grossly undervaluing women's economic contributions. Some feminists point out that most employment benefit packages are designed with a male norm and/or traditional nuclear family in mind.[85] Salter goes further by urging that a more desirable long term solution would involve "a redefinition of 'executive' or 'professional' behaviour for both men and women that will include nurturing and personal attention to relations, activities and environments", perhaps making special benefits for women unnecessary.[86]

A radical challenge to the underlying premises of the taxation system is made by Lahey, who identifies traditional discourse on tax alternatives as male-oriented in its emphasis on wealth maximisation and in its assumption that "scientific" cause and effect relations between economic incentives and human behaviour can be predicted and controlled. Lahey argues that women's role in the home is not simply consumption, but involves much unacknowledged productive labour, meaning that most women who work for wage labour as well as in the home are taxed excessively:

> If we define the word "tax" as including any uncompensated taking from one for the benefit of another, then the double workload of women (which is only sometimes compensated by half a wage) amounts to a "tax" that is equal to 75 to 100 of women's labour.[87]

Taking a more liberal perspective, Dulude argues that the way to reform the Canadian taxation system is to remove from it family-based provisions (such as transferable benefits, attribution rules and spousal exemptions), although she might support transformation of the spousal exemption into a credit for housewives. Such rules and exemptions do not usually benefit women directly and detract from the egalitarian philosophy of Canadian tax and family law, which otherwise treat spouses as financial strangers rather than as a single unit. Dulude's objective is "to encourage the real sharing of income and properties between spouses whose economic positions are now unequal".[88]

In the area of pension law, private and public schemes have been criticised for only reflecting and rewarding male earning and career patterns.[89] Proposed solutions include minimal vesting periods, complete portability, automatic pension credit splitting between spouses upon separation or divorce,[90] and mandatory provision of survivor's benefits.[91] More radical

pension reforms are envisioned by feminists who advocate that the work of homemakers be included (and valued at half the average wage) in the public scheme and paid for by society at large in the case of homemakers who care for pre-school children and disabled relatives, and by the working spouse if he or she is the sole beneficiary of the homemaker's labour.[92] Although these writers do not seem to recognise the societal interest in housework apart from child-rearing, it is argued that forcing husbands to pay for housekeeping services will empower women economically and facilitate entry into the public labour market.[93] At least one feminist has cautioned that homemaker's pensions might reinforce the familial hierarchy of husband as 'boss' and discourage outside employment of women.[94]

4. *Employment Law*

Employment law literature spans a spectrum which includes equal pay legislation, affirmative action, sexual harassment, unions and reproductive hazards in the workplace. Equal pay for equal work legislation has been rejected as incapable of achieving any major redistribution of income to women,[95] and many writers urge that affirmative action programmes be imposed upon employers by either the government or the courts as the only effective solution for long-standing and systemic discrimination against women[96] A radical restructuring of the wage market through the concept of equal pay for work of equal value and mandatory job evaluation has also been strongly advocated.[97] Equal value legislation is viewed sceptically by several authors who observe that 'value' would still be determined by a male-dominated market.[98] One such author instead prefers initiatives to reduce the overall wage hierarchy throughout society.[99] In a slightly different legal context, Cooper-Stephenson has demonstrated the persistent undercompensation of women's lost working capacity in damage awards in tort cases, which he attributes to improper evaluation of the worth of domestic labour and sexist assumptions about married women's commitment to paid employment. Awards for lost income which replicate pay discrimination in the labour force should be shunned by the judiciary and should instead be based on "the pay scale [which] would be applied to a man with similar skills and training".[100]

The utility of the human rights model for sex discrimination in employment has been identified as limited due to reliance on individual initiation of complaints, use of concepts which reinforce stereotyped thinking (e.g., *bona fide* occupational requirement) and emphasis on conciliation and individual versus group remedies.[101] Several writers have moved beyond simple criticism of the liberal, human rights model to the development of solutions. Sheppard grapples with reconciling affirmative action goals and job security acquired through seniority rules by devising creative proposals for coping with lay-offs which treat employment as shared community property.[102] Struggling with an equally complex problem – protecting women's reproductive health

agenda for several Canadian authors.[103] Langton has produced a gender neutral concept: periods of "temporary reproductive sensitivity" which would apply to men and women who are trying to conceive and to pregnant and lactating women. This concept would be used to force employers to minimise reproductive hazards for both sexes, to provide for a right to alternative work assignments, and to give women control over their own removal from the workplace.[104]

The legal treatment of sexual harassment is the only employment issue which has received extensive theoretical attention. It has been analysed in terms of male sexual domination,[105] the economic advantage accorded to men through institutional tolerance of sexual harassment,[106] and hierarchical employment structures as facilitators of this type of power display.[107] Feminist input into the definitional and proof requirements of sexual harassment is advocated since adjudicators cannot easily find a male analogy that illuminates the subtlety, coerciveness, and intrusiveness of sexual harassment as experienced by women.[108] However, more profound change in workplace structures through democratisation is seen by other writers as a necessary precondition for the elimination of sexual harassment.[109]

5. *Legal Education and Legal Profession*

The language, socialisation process, and values of the legal profession have been identified as contributing to the oppression of women in subtle but effective ways. Women law students, professors, and lawyers may be denied credibility and justice on an individual basis,[110] but the hegemony of the legal profession accomplishes more: by purporting to deal with women fairly, it further legitimises the legal system as a just and democratic institution while simultaneously "masculinising" participating women by its presentation of male language and perspectives as the 'norm'.[111] Mossman also notes that when women tried to enter the legal profession their argument was that there was no difference between women and men which could justify their exclusion. Unfortunately, this argument indirectly reinforced the idea that women in law had to meet "male" standards,[112] and thus women may have inadvertently contributed to this hegemonic process.

Ritchie's early work on the legislative use of masculine terms to include both genders reveals the power which this draft device vests in judges: masculine pronouns have historically been interpreted as including women in the context of imposing pains and penalties, but excluding them in regard to rights and privileges.[113] Other objections to the male generic in legal literature include the "real danger that use of male language has a limiting and perverting effect on intellectual inquiry"[114] and the argument that "[t]he *Interpretation Act* makes the grammatical rule a rule of law and in so doing adds the power of the state to the power of language".[115] Strict gender neutrality in legal language is, on the other hand, rejected by writers who worry that without the inclusion

of female pronouns judges will continue to render male-specific interpretations given the male-oriented context of most positive law,[116] resulting in unequal treatment of women and men who are not similarly situated socially and economically.[117] Gender neutrality therefore reinforces inequality while concealing it with equality rhetoric.[118] Language which includes both sexes but which is designed to take into account actual physical, social and economic differences so as to have an equal effect on both sexes has been advocated as a drafting device by Eberts.[119]

O'Brien and McIntyre identify the values which are reproduced through the law school process as reverence for objectivity over subjectivity (identified as feminine), belief in the neutrality of law and legal concepts, respect for 'hard' law in 'core courses' (e.g., contracts) above 'soft' law in 'perspective options' (e.g., environmental law), and acceptance of the essential validity of the public/private distinction used to legitimise state intervention, or lack thereof, through law.[120] Mossman also notes the inherent conflict between legal method and feminist methodology and queries whether an acknowledgment of sexual difference which rejects the male as 'norm' can convert legal method.[121] O'Brien and McIntyre and Mossman see potential for transformation in women 'sticking it out' in law and challenging these values, in particular the abstraction and alienation which characterise 'hard' law.[122]

Miles has cautioned against women adopting an androgynous approach to professional pressures:

> At law school, an androgynous person will successfully leave behind cooperative behaviour to accommodate the competitive requirements of the context . . . There is no place in the political framework of androgyny, for instance, to value an individual's decision to try to establish supportive relationships and change hierarchical structures rather than adjust to the competitive requirements of law school.[123]

One solution to Miles' caution may be for a female perspective to be integrated into legal writing and education[124] and for the women's voice identified by Carol Gilligan to be integrated into the legal profession.[125] Both Boyle and Mossman acknowledge the difficulties in incorporating women's perspective into law teaching and practice without real changes in women's political power and wider societal structures, with Boyle itemising some of the factors which inhibit teaching law as if women really mattered.[126] Mossman articulates a further problem in adopting a woman's voice, namely that, as MacKinnon has noted, the female voice represents "the voice of women as dominated in our society" and thus the idea of sexual difference may assume a male standard in somewhat the same way as does the concept of equality.[127] Mossman urges further study of women in law[128] in order to determine whether women as lawyers have something different to contribute to the profession.

THEORETICAL EFFORTS

This part of the article describes the work of those authors who go beyond exploration of a substantive area to develop liberal, result equality/

integrative, radical, or socialist feminist theories on law. We have reservations about rigid categorisation of feminist theory, agreeing with Lahey's caution against dichotomous thinking and her observation that the most creative and potentially transformatory aspect of feminist theory is the recognition of contradiction, complexity and paradox.[129] Although categorisation is employed as an organisational tool to explicate new theoretical developments, labels are confined to the works rather than the authors themselves, lest we artificially restrict an author's scope. Our classifications have proved to be fluid: a given article may express themes from more than one "theory" and thus simultaneously "fit" under several headings.[130]

1. *Liberal Feminism*

Traditional liberal feminist theory, with its focus on equality of opportunity and equal application of presumptively fair, gender neutral rules, flourished in Canada in the late 1970s and early 1980s. Accepting the basic economic and political institutions of Canadian society and the precept that government should only interfere in the "public" sphere, this theory is confident that equality for women can be substantially achieved within the current framework.[131] While sometimes arguing for reformulation of the rules allocating benefits and burdens, liberal feminists do so by analogising to male norms: pregnancy benefits are thus advocated on the same basis as benefits for illness or disablement. The work of some liberal feminists presses at the outer limits of the liberal paradigm; their theoretical contributions will be discussed under the heading of 'Result Equality/Integrative Feminism'.

In 1981 Baines argued for a constitutional guarantee of formal equality in terms of government action and accepted the necessity of male-to-female comparisons as the benchmark: "Equality is a goal defining term the end product of which can only be described by words of relativity, such as 'evening up' ".[132] Baines moved beyond traditional liberal equality in her call for mandatory affirmative action, viewing legislated formal equality as an insufficient but necessary first step to the Canadian judiciary's refusal to recognise claims based on even a narrow theory of sex discrimination. Réaume's comparative analysis of the treatment accorded to equality claims by courts and human rights tribunals identified institutional features of the judicial process which militate against progressive common law decisions, but she posited that constitutional protection against discrimination and attention to women's justice issues in legal education were capable of producing equality for women in the courts.[133] Brent and Eberts have both developed analyses of the common law status of womanhood.[134] The ineffectiveness of piecemeal remedial legislation in lifting this disqualifying status led Eberts to argue for a constitutional principle of strict gender neutrality. However, even Eberts recognised biological differences as an exception since the unique condition of pregnancy severely strains the assimilation model.

Recent theoretical contributions to traditional liberal feminism are rare, perhaps because the protection of formal equality rights in the Charter has highlighted the limitations of this model or has freed feminists to move on to more radical analysis. Bankier's work on equality under the Charter continues the liberal tradition through her emphasis on equality of opportunity, and her lack of focus on non-governmental discrimination, mandatory affirmative action and equal results for women.[135]

2. *Result Equality/Integrative Feminism*

Patterson has identified another school of liberal feminism in Canada in addition to the traditional rule equality approach discussed above: result equality feminism.[136] Radical feminism has been identified as an influence both on result equality theory[137] and on another new phenomenon described by Miles as "integrative feminism".[138] This common source has persuaded us to discuss result equality and integrative feminism together.

In contrast to traditional liberalism, result equality feminism understands that "most aspects of modern society – including the law, jurisprudence, and the private sphere – are gendered" and that "feminist strategies must thus be gendered".[139] Result-equality feminism therefore demands a more extensive re-thinking of the underlying assumptions and content of legal rules on the theory that equal application of a male-orientated legal system cannot drastically alter women's disadvantaged position. It advocates careful scrutiny of proposed rules for their actual effects on the sexes, deviation from gender neutrality on some issues, and positive government action in order to ensure that women and men reap equal benefit from the law.

"Integrative feminism" is a term used to designate the works of Canadian feminists of diverse political allegiances which share major "feminising themes" of incorporation of gynocentric values into all major social institutions and recognition of the worth of child-bearing and child-rearing. The label of integrative feminist has also been used by Lahey to designate writers whose ideological ties are with radical feminism in terms of the analysis of male control of women through the institutions of patriarchy and devaluation of the "female", but who have rejected extreme positions and instead try "to integrate those (radical feminist) ideas into existing social patterns and into egalitarian feminist theory".[140] It is sometimes difficult to determine whether a given feminist's approach to 'equality' is result-equality liberalism or integrative feminism because both urge "a synthesis of the principles of equality and specificity" of women in implementing legal reforms.[141] While result equality feminism may be more committed to liberal discourse, the similarities between one feminist analysis which tests the boundaries of liberalism and another which shies away from the full implications of radical feminism may be greater than the differences.

De Jong, Eberts, Mossman, Lynn Smith and Vickers all utilise a result equality approach in arguing for a purposive interpretation of the Charter right to equality which will "ensure the same qualitative impact on the lives of

women and men given the particular circumstances of women's lives".[142] Thus, maternity leave and benefits have been framed as special rights which flow from section 15 and are essential to women's economic security because of their biological role as childbearers.[143] Smith's preferred method of ensuring equal rights is to select, for a given issue, the group with the greatest needs as the norm against which any proposed benefit or burden is tested. In this way, she manages to read in a constitutional guarantee of pregnancy benefits without conceptualising them as "special needs".[144] Vickers also argues for a "contextualised theory" of equality which takes the characteristics of particular groups into account. Equality is defined using the liberal framework because Vickers is pragmatic about the fact that liberal discourse in Canada constitutes the dominant paradigm both for equality seekers and equality resisters.[145]

Shrofel, another result equality feminist, provides some excellent examples of the unequal results which indiscriminate gender neutrality can produce in her review of the Saskatchewan government's efforts to comply with section 15 of the Charter. For instance, a provision which *prima facie* entitles a husband or wife to support from the deserting spouse gives no legal recognition to the reasons for desertion (e.g., wife assault) or the tenuous financial position of the typical deserting wife. In the absence of legislative curbs on judicial discretion, Shrofel argues that there is a serious risk that women will suffer more financial detriment under this "neutral" rule than when the presumption of support was reserved for deserted wives alone.[146]

Lahey's critique of recent criminal law reform efforts illustrates an application of explicitly integrative feminist theory. She argues that gender neutrality in the framing of sexual offences masks the specific harm that rape causes to women and that the vagueness of the offence of sexual assault, for example, further empowers men because "the state, the legal system and the very concept of equality are defined and controlled by people who are applying patriarchal norms".[147] Lahey advocates the incorporation of women's perspectives into the definitions of crimes. She argues that sex-specific 'protective' legislation which is drafted so as to equalise women socially and sexually *vis à vis* men would be retained by integrative feminists,[148] while abstraction and codification would be rejected as "antithetical to the particularity, specificity and contextualisation" of women's experience.[149] An integrative feminist approach to criminal law is also employed in a recent article by Bertrand[150] and in a major review of Canadian criminal law by Boyle *et al.*[151] Both of these works argue that women's "crimes" should rarely invoke the penal sanction since they almost never transgress basic societal values.[152] The Boyle review goes further and articulates some of the values which might underlie a feminist conceptualisation of criminal law including the right to express dissent, effective protection against physical assault, and protection from sexual harassment.[153]

Hughes translates her radical feminist analysis (discussed *infra*) into proposals for interpretation of the Charter which seem to derive from an integrative perspective. She argues for emphasis on the "life principle" related

to reproduction and its attendant values and activities in interpreting the Charter. Not only is an end to segregation of the private and public spheres needed but also a new understanding of the relationship between the two spheres, with the values of the "private" sphere becoming more dominant.[154] Interestingly, Hughes' specific recommendations regarding the principles by which the Charter should be interpreted strongly resemble the recommendations found in work more directly situated in the result equality category.[155]

The fact that both self-declared integrative feminists and result equality feminists want to "take sex into account" when defining equality[156] indicates that their work has much in common, but there may be distinguishing features. One is the specific emphasis by integrative feminists on radical feminist themes such as exposing the pervasiveness of male values and attitudes in law: "[L]egislation which has recognised women's differences has retained the male as norm and the androcentric undervaluation of female-associated activities".[157] Another aspect of the radical agenda adopted by integrative theory is the need to incorporate specifically female values into legal institutions and dispense with the public/private dichotomy by "radically revalu[ing] female activities" and redistributing social resources to women in recognition of the centrality of reproduction.[158]

A third feature which may separate result equality feminists from integrative feminists is the latter group's apparently greater cynicism about the actual potential for law, and especially Charter litigation, to "transform majority-minority relations in this country".[159] Miles clearly distrusts the rhetoric of individual rights "won by men and for men in a world in which the public and private are deeply divided and men's rights ensure them domain in the private realm to which women have been relegated".[160] McIntyre exhibits a similar reluctance to rely on the judicial system to vindicate equality rights:

> I am increasingly ambivalent about winning abortion victories the way our most recent victory was won – by a high-priced, high profile male lawyer representing male clients, using standard adversarial tools and classic rights arguments, and involving feminists only on a volunteer and extra-legal way.[161]

Integrative feminists instead often focus on the use of litigation to expose the biases and vested interests embedded in the legal system[162] or, alternatively, they advocate "restructur[ing] institutions in order to reduce the amount of control that the state exercises over women".[163] For instance, as an alternative to state prosecution or censorship of pornography, Hughes suggests empowering women by placing at their disposal an individual cause of action for sex discrimination under human rights legislation.[164]

3. *Radical Feminism*

Only a few Canadian authors add to the radical feminist[165] theoretical analysis of law. Lahey's work on methodology, research and theory posits that feminists must move beyond critique or adoption of male theories (e.g., socialism) toward construction of a positive feminist theory. She cautions

within a potentially subversive movement like feminism"[166] and challenges prior tendencies of the women's movement as "assimilationist".[167] Reliance upon male theory supports the ideology of male supremacy and facilitates adoption of counter-productive masculinist scholarly values (e.g., objectivity, neutrality, dichotomised thinking),[168] and techniques such as "trashing", "border patrolling" and polarisation.[169] For Lahey, a positive feminist theory would include consciousness-raising[170] as a methodological technique, acceptance and respect for female scholarly values including contextualisation,[171] theory-building on the work of others, refusal of polarity, tolerance of ambiguity and contradiction,[172] and integration of different theoretical perspectives.[173]

Lahey has provided, through example, blueprints for deconstructing law in order to expose male ideology and the perpetuation of male supremacy.[174] Her analysis of the tax system's promotion of the consolidation of male wealth and reinforcement of female economic dependency has already been discussed,[175] as has her examination of the ways in which laws and research on child abuse reinforce male prerogative.[176] In the area of corporate law, Lahey and Salter explore the concept that the business corporation is a "main situs of male domination".[177] They isolate "the values and practices of the legal subculture of the business corporation", including practices such as bureaucratic control through depersonalisation, mystification and abstract rules of justice and ownership rights.[178]

Hughes also uses radical analysis in condemning "the ideology of malism" evident in law as well as other disciplines and social institutions. Hughes shows how pornography exerts patriarchal control over female sexuality and other assertive behaviour by dividing women from each other, reinforcing woman's role as victim, utilising women participants as "primary agents of a socialisation process which perpetuates their own subordination",[179] and instilling in all women a fear of random male violence. Hughes also argues that women's self-determination and control over their own reproduction are intruded upon by male practices of rape and pornography and the minimal physical protection afforded by the state.[180] On the other hand, Hughes asserts that the state has directly intervened in the "private" sphere of contraception and abortion,[181] but has refused to assist women in integrating their public and private lives by providing adequate maternity leave and daycare.[182] Women's empowerment therefore depends upon "positing the reproduction synthesis as the core of public activity".[183] O'Brien and McIntyre have similarly argued that "[t]he conditions of transformation of patriarchal power are the ability of women to take back control of their reproductive capacity . . .".[184]

Biological and psychological differences between men and women also play a central role in J. C. Smith's psychoanalytic rendering of radical feminist jurisprudence. He argues that men have been more sexually dependent on women and are threatened by female sexual powers and reproductive connections with the natural world.[185] Smith believes that mythology

(including religion and some aspects of legal thought) reflects these basic truths and that law developed to maintain and legitimise a system which protected and satisfied male psychological needs.[186] Social and legal theory must be attentive to psychoanalytical understanding of sexuality and gender differences and feminists must reject all patriarchal institutions, concentrating instead on female values committed to eliminating hierarchy and "the development of the whole person".[187] Smith ultimately argues that the formal structure of law is "sexless" and the rule of law is capable of prevailing without hierarchy: "The basic postulates of freedom and equality before the law which underlie the juridical paradigm of social order, provide a basis for eliminating the sexist content of law".[188]

4. *Socialist Feminism*

One of the main themes which pervades the socialist feminist work of Gavigan is that although patriarchy is transhistorical in many ways, "working with a concept of patriarchy as a universal system determinative and definitive of women's lives leaves no room for an analysis of different 'patriarchal' forms or for an appreciation of the forms of women's resistance".[189] Gavigan searches instead for a "theoretical perspective which identifies the state as neither a neutral, courteous arbiter nor simply a wicked stepfather, but rather one which examines the nature of state intervention and non-intervention"[190] and which emphasises historical specificity, an approach which is particularly germane to Gavigan's analysis of abortion law in Canada.[191] Rather than regarding law as simply a direct oppressor, an agency of social control, or an embodiment of patriarchal ideology, Gavigan views law as not always reproducing social order directly, but as contributing to the securing and maintaining of the legitimacy of the state and the broader social order. Law may thus play an ideological role as well as being "a distinct category existing within capitalist economic relations, not abstract theory existing only in people's heads".[192] Gavigan's appreciation of the sometimes subtle role of the law permits an acknowledgment of the historical significance of early feminist battles to win the vote and other manifestations of formal equality: while substantive inequality of women persists, formal equality makes the specific character of oppression stand out more sharply.[193]

Gavigan questions not only the radical feminist concept of patriarchy as a universal system but also the use by Clark and Lewis of the Marxist method to argue that women's oppression is rooted in the system of ownership of private property, with women as the first commodities capable of being owned.[194] In contrast, Gavigan argues that the women as property thesis, despite "its powerful resonance", fails to accommodate complexity. Women are not simply objects of a male estate, as is evident in abortion law where, for example, consent from the husband of a woman seeking an abortion is not required.[195]

In the course of their investigation of legal education in Canada (discussed above), O'Brien and McIntyre have adapted sex-blind Gramscian theories of

hegemony and ideology to take gender into account. Noting that "[t]he familiar feminist concern with the dialectic of public and private is . . . an advance on Gramsci's work",[196] they call for further examination of the function of law in the private realm as an instrument of ideological reproduction: "Law is a vital instrument in the hegemony of male supremacy, for it legitimates the patriarchal form of family, and the separation of public and private life".[197] They further explore the role of legal education in reproducing "in a majority of students prescribed patterns of thought, conduct and socio-political allegiances essential to both capitalist and patriarchal hegemony".[198] Like Gavigan, they regard struggles for formal legal rights as "progressive in a dialectical way".[199] Unlike Gavigan, they emphasise the difference between male and female reproductive consciousness, which "is not rendered dialectically in terms of class struggle but in terms of gender struggle".[200] These authors argue that the participation of women in legal education will enhance greater recognition of the values associated with female reproductive consciousness: "[t]he exposure of the dialectic of hard and soft law means that the importance of soft law for historical development of justice cannot be exaggerated".[201]

Finally, the work by Arnup and Boyd in the family law area examines the role of law in reinforcing family structures which remain compatible with capitalism, despite certain changes in women's roles.[202] While judges may have adapted their definition of mother to include employed and lesbian mothers, the fact that these mothers have greater difficulty in obtaining custody of their children provides an incentive to women to assume a traditional motherhood role wherever possible. The judiciary may therefore reproduce ideological constructions of gendered behaviour within and outside the home, thereby legitimating both capitalist and patriarchal relations in society.

CONCLUSION

Although certain elements of feminist legal scholarship in Canada transcend national boundaries and share commonalities with such scholarship elsewhere (e.g., concern with recognising "hidden" work in the home), other themes are perhaps more unique to Canada. One theme which may have received less attention in Europe is the role of law schools in perpetuating hierarchy and patriarchal power.[203] Another is the recent effort, sparked by the proclamation of the Charter of Rights and Freedoms, to formulate theories of equality which accommodate the specificity of women's lives. While some of these equality theories might resemble American women's theories of equality,[204] the language and development of the Charter, as well as the contribution of integrative feminists, indicate that Canadians have furthered the feminist legal analysis of equality. It remains to be seen whether the existence of a vehicle such as the Charter diverts valuable energies of feminists away from the more aggressive and radical challenges to the legal system which might be pursued in countries such as England which have no Charter.

Much Canadian feminist legal scholarship is characterised by an avoidance of theoretical perspectives and a preference for tackling concrete issues such as pension reform without reference to a wider theoretical framework. Such work is not without merit, indeed quite the contrary. However, avoidance of theoretical perspectives can lead to a tendency to adopt the dominant liberal paradigm, as does most legal scholarship. Acknowledgment of the theoretical perspective utilised by a given work and why that perspective was chosen is crucial to the integration of suggested reforms in different areas of the law and to clarification of ultimate feminist goals. In particular, there may be significant differences and contradictions between short and long strategies for specific legal issues. Elaboration of a theoretical framework may enable feminist legal work to explain and reconcile such contradictions as, for example, Gavigan does when she identifies formal legal rights as "a precondition of the long term struggle for the transformation of the present society" into a socialist society.[205] Backhouse's observations about the surprising "compassion" demonstrated by nineteenth century courts towards women of the lower classes who killed their newborn children[206] might also be explained at least in part by the hegemony theory elaborated upon by O'Brien and McIntyre.[207] While exclusive concentration on theory is perilous, greater recognition of the theoretical backdrop to a given problem might shed more light on the complexities of the relationship between issues involving state, law and gender, as well as illuminate more fruitful sites for future struggle. Overall, attention should be paid to the development of feminist theories of law, building on the substantial contributions already made by scholars such as Gavigan and Lahey who have been attentive to the need to test theory against the realities of women's experience with the law.

NOTES AND REFERENCES

1 This definition is a composite of two definitions, one provided by Boyle: "scholarship which treats women and our concerns as worth writing about": "Criminal Law and Procedure: Who needs Tenure?" (1986) *Osgoode Hall Law J.* forthcoming, at p.11 and a more detailed definition also provided by Boyle, but borrowed from Professor Susan Sherwin: "Feminism is an awareness of the political and social implications of sex and discrimination within society. It is an awareness that the discrimination facing women is not just a concern about equality among individuals, but is systematic. Feminism is a political commitment to changing the systematic force and values inherent in patriarchy". "Book Review: Injunctions and Specific Performance; The Law of Damages" (1985) 63 *Cdn. Bar Rev.* 427 at 429.

2 We read every piece in our bibliography, and generally speaking excluded authors who write about sex equality (even when dealing with issues such as rape) in an abstract fashion which excludes women's perspective. No attempt was made to collect all Canadian work which deals with 'women and the law', and so our bibliography should be distinguished from others such as those produced by C. Mazur and S. Pepper, *Women In Canada: A Bibliography 1965–1982*, (3rd ed. 1984) and L. Freedman and S. Ursel, *Women and the Law in Canada: a Bibliography 1975–1982* (1983). We conducted the usual searches of periodical indexes and library catalogues, consulted some government publications (in particular those of the Canadian Advisory Council on the Status of Women), collected work commissioned