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PANEL 2: WOMEN, WORK AND ACCESS TO JUSTICE

“SHOULDER TO SHOULDER”: GENDER AND ACCESS TO JUSTICE

by

Mary Jane Mossman*

“How just is gender? Why is it that when we turn to contemporary theories of justice, we do not find illuminating and positive contributions to this question? How can theories of justice that are ostensibly about people in general neglect women, gender, and all the inequalities between the sexes?”¹

These questions reflect both puzzlement and frustration about the ways in which intellectual inquiries about justice, and access to justice, are constructed. They represent challenges to our conceptualizing about justice and to the research methodology we use in our scholarly work. They demand that we take into account inequality on the basis of sex, both in theory and in practice, and use it to inform our debates about both the meaning of justice and our relative access to it. And these questions also require us to recognize the impact of power (and of powerlessness) on theories of justice and of the constraints thereby imposed on our differing conceptions about the issues of access to justice.

This paper is a reflection about these questions and the nature of the relationship between gender and access to justice. At the outset, I approached my task for this Symposium as a scholarly exercise focusing on the questions posed by the Symposium organizers under the title “Women, Work and Access to Justice”. In doing so, two insistent questions emerged, both of which reflect on our roles and responsibilities as access to justice scholars. One was a question about the specific focus of this topic on women, a focus absent from the titles for other panels. Such a focus might mean that women were to be the focus of one panel and that men would be the focus of all others. Alternatively, women and men might have been intended to be included in the discussion in all the panels, with a special focus in the panel on “Women, Work and Access to Justice” on issues relating to women. Although the Symposium organizers asserted from the beginning their intent that all panels focus on women and men, this aspiration was not always

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¹ Susan Moller Oken, *Justice, Gender and the Family* (1989), 8.

accomplished in practice, in my view. More significantly, the male norm implicit in the standpoint of some papers may have actually obscured the problems of access to justice for women. Thus, while the Symposium organizers conscientiously intended to make gender relevant, their expectations were not always fulfilled satisfactorily. Such a conclusion inevitably raises difficult issues for those involved in a woman-specific panel: problems about scholarship as well as of collegiality.

Second, in the course of my work on this paper, I became involved in a specific dispute about access to legal aid services for battered women in Ontario, a dispute which necessarily enlivened my ideas about gender and access to justice and the issues of substance and process involved. In this context, I became aware of the gendered ways in which access to justice scholars have traditionally constructed the issues, as well as the failure of such scholars to recognize the ways in which their gender neutrality has contributed to a formal equality approach and the denial of substantive access to justice for women. In reflecting on these issues, moreover, I have begun to respond to the need to ask questions about the process of social and legal change — and about the responsibility of scholars for such change — to make justice accessible to women.

This paper is, therefore, an exploration of these themes, including the need to reconceptualize justice from a gender perspective; to re-think the appropriate methodologies for defining access to justice for women and men; and the roles and responsibilities of access to justice scholars in the context of the gendered justice debate.

Reconceptualizing Women, Work and Access to Justice:

The starting point for my analysis was the series of five questions posed by the Symposium organizers,² all broadly related to issues of access to justice in the context of women and work. All five questions focused on women in the paid labour force, and all were framed in gender-neutral language.³ The underlying assumption of

² The program outline indicated that the panel on "Women, Work and Access to Justice" would

"... focus on the issues of justice related to women and work, specifically with regard to the following:

- a) access to education in the professions and trades;
- b) access to training programs and retraining programs;
- c) the recruitment and promotion of women within workplaces;
- d) adaptation of the workplace to accommodate needs of childbearing and childrearing; and
- e) the impact of working women on the private, public and corporate sectors."

As will be evident from this paper, the original focus of the panel evolved to include broader concerns about women and access to justice.

³ Note, however, that the language of gender neutrality about "childbearing and childrearing" assumes that such needs are ones which require accommodation, reflecting the existence of a norm which is male persons who do not have such needs.

the questions was the inequality of women in the paid labour force and the need for reforms to provide women with those employment opportunities which are now available to men. Although the implicit objective of such reforms is justice for women as workers, such a construction of the issues also reflects the traditional formal equality paradigm — how women can acquire what men already have just because they are men.⁴

Encouraged by the Symposium organizers to re-think these issues, however, my analysis first led me to define the issues about women and work in a different way. Instead of constructing the issues in terms of permitting women to participate in paid work as men do, we might instead re-examine our fundamental assumptions about the separation of work and family life, and thereby recognize the needs of both women and men for some balancing of their responsibilities at home and in the workplace.⁵ In this context, the issue is one about the ways in which gender affects our access to justice both as workers in the paid labour force and in our family life; it requires us to seek beyond the male equality paradigm and fundamentally define the relation between justice and gender.⁶

Refocusing these questions in the panel about “Women, Work and Access to Justice” also helped me to express my concerns about the impact (or not) of gender in the other panels at the Symposium. How is such an arrangement usually understood, both by those of us who participate in the woman-specific panel and by those involved in others? Is there general agreement, for example, that gender is a factor, a variable, a matter to be taken into account in all these panel discussions about access to justice? More theoretically, should we assume that men and women are similarly situated in relation to access to justice, and that all panels are (or should be) implicitly concerned with persons of both genders? Thus, should we assume that women are easily “added on” once we have

⁴ “Why should you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, not questioned on the basis of *its* gender, so that it is women — women who want to make a case of unequal treatment in a world men have made in their image . . . — who have to show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident of birth?”

See Catharine A. MacKinnon, *Feminism Unmodified* (1987), 37.

⁵ See Carrie Menkel-Meadow, “Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change” (1989), 14 *Law and Soc. Inquiry* 289.

⁶ An interesting effort to examine gender in the justice system is Frances Heidensohn, “Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice” (1986), 14 *Int. J. of Soc. of Law* 287, 289:

“Are we then justified in saying that there is a particularly female or feminist concept of justice which the criminal justice system of patriarchal society violates? If this is so, what would be special and distinctive about feminist justice: a just treatment of women?”

identified the pressing problems of men and access to justice? Or, instead, must we recognize our own gendered experiences of reality in constructing issues of access to justice from the beginning?⁷

These questions are not merely academic, although they are profoundly significant to the integrity of our scholarship. It has been suggested, for example, that men's and women's experiences may contribute to significantly different conceptions of what is the "problem":

Making women's real life experiences visible and understood as they relate to the law means, for example, informing the profession about the actual rates of sexual and domestic assault against women and the fear of this pervasive violence with which women live every day. A University of Kentucky law professor begins the rape section of her criminal law course by asking each male student to tell the class what he does on a daily basis to protect himself from sexual assault. The response is a puzzled silence. Then she asks the female students, each of whom has something to say: "I don't go to a certain mall because its parking lot is badly lit"; "Before I get into my car I look to see if anyone is in the back seat"; "I don't come to campus at times when there won't be many people around"; "I sleep with my windows locked no matter what the weather." The first time this professor tried this teaching technique, one woman said, "I don't worry about anything any more — I carry a loaded gun," and opened her handbag to take out a pistol.⁸

Just as these experiences about safety were gendered, so it may be significant for our conceptualizing about access to justice to take gender into account.⁹ What difference does it make for defining

⁷ Another way of focusing on this issue is to question why no men were asked to be commentators on the panel on "Women, Work and Access to Justice"; is this therefore just a "women's issue", or is it an issue about gender and access to justice? In this context, it is also interesting to try to assess the extent to which the decade of volumes of the Windsor Yearbook of Access to Justice has adequately reflected issues of gender and justice. Such an assessment is difficult to accomplish with certainty, in part (it is suggested) because the issue of gendered justice is so frequently obscured by an assumption that men and women are fungible as persons in the justice system. Both in the Yearbook and in the Symposium, there is a need to focus explicitly on whether defined issues affect both men and women, and if so, whether there are differences in the impact of access policies which are due to gender.

⁸ Lynn Hecht Schafran, "Lawyers' Lives, Clients' Lives: Can Women Liberate the Profession?" (1989), 34 *Villanova LR* 1105. See also Hecht Schafran, "Gender Bias in the Courts: Time is Not the Cure" (1989), 22 *Creighton LR* 413; and Hecht Schafran, "Women in the Courts Today: How Much Has Changed" (1988), 6 *Law and Inequality* 27.

⁹ See, for example, Judith Olans Brown, Wendy E. Parmet, and Phyllis Tropper Baumann, "The Failure of Gender Equality: An Essay in Constitutional Dissonance" (1987), 36 *Buffalo LR* 573; Colleen Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" (1986), 10 *Dal. LJ* 195; and Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989), 21 *Ottawa LR* 151.

the problem, for example, if we begin the analysis with a hypothetical tenant if the tenant is a welfare mother in public housing rather than a male student in an urban apartment building?¹⁰ What difference does it make to our conceptualizing of the problems of civil litigation if we start by imagining a mother seeking custody of her children rather than a male consumer suing a merchant?¹¹ What differences are there in the substantive and procedural arrangements for the battered wife seeking a restraining order¹² by contrast with a man suing for injuries at work? Whose problems, moreover, are most frequently addressed by our conceptions of access to justice and the law reform studies and proposals we discuss? And if legal changes occur more slowly in areas of law reform which more often affect women, how should we take this foot-dragging into account in thinking about the differential impact of gender on access to justice?

¹⁰ The problem of providing legal services to women who are poor and often in receipt of social assistance has been addressed frequently. For example, see Laurie Woods, "The Challenge Facing Legal Services in the 80's" (1982), 16 *Clearinghouse Rev.* 26; Diana Pearce, "Welfare is Not For Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty" (1985), 19 *Clearinghouse Rev.* 412; Elizabeth Holtzman, "Women and the Law" (1986) 31 *Villanova L.R.* 1429; Mary O'Donoghue, "Access to Family Law for Ethnic Women: Some Policy Initiatives" (Unpublished: 1988); and National Council of Welfare, *Women and Poverty Revisited* (1990).

¹¹ See "Developments in Women and Family Law: 1981" (1982), 15 *Clearinghouse Rev.* 748; Laurie Woods, "Challenges Facing Legal Services in the 1990's: Perspectives of Women and Family Law Advocates" (1988), 22 *Clearinghouse Rev.* 457; Carol Smart, "The Legal and Moral Ordering of Child Custody" (Unpublished: 1990); Susan Boyd, "Child Custody and Working Mothers" in Sheilah Martin and Kathleen Mahoney, eds., *Equality and Judicial Neutrality* (1987); and Elizabeth Pickett, "Women, Law and Family Mediation: A Feminist View of Formal and Informal Justice in Family Law" (LL.M. Thesis, OHLS: 1989).

¹² See Linda MacLeod, *Battered But Not Beaten . . . Preventing Wife Battering in Canada* (Can. Advisory Council on the Status of Women, 1987); N. Zoe Hilton, "One in Ten: The Struggle and Disempowerment of the Battered Women's Movement" (1989), 7 *Can. J. of Family Law* 313; Mary-Lou Fassel, "Wife Assault and the Criminal Justice System: Can Women Find Fairness in a System Built for Men?" (1990), 8 *Vis a Vis* #1, 1; Donna Denham, "Wife Assault and the Criminal Justice System: The Search for Better Ways to Stop the Violence" (1990), 8 *Vis a Vis* #2, 1; Community Legal Education Ontario, *Assaulted Women's Advocates' Manual* (1988); Donald Dutton, "The Criminal Justice System Response to Wife Assault" (Min. of Solicitor-General: 1984); Note, "The Battered Woman: When a Woman's 'Place' is in the Courts" (1988), 10 *Crim. Justice J.* 273; Naomi Archer, "Battered Women and the Legal System: Past, Present and Future" (1989), 13 *Law and Psych. R.* 145; Peter Neidig, "Women's Shelters, Men's Collectives and Other Issues in the Field of Spouse Abuse" (1984), 9 *Victimology* 464; and Jeffrey L. Edleson, "Violence is the Issue: A Critique of Neidig's Assumptions" (1984), 9 *Victimology* 483.

Gendered Justice and Research Methodology:

In exploring the relation between gender and justice, the choice of research methodology is critical. Because gender is constructed within a social context, it is necessary to document the extent of women's inequality of status in economic and political terms, as well as their double responsibilities in the paid labour force and at home.¹³ It is also necessary to take account of the impact of race and class on women's experiences of inequality;¹⁴ what kinds of barriers are experienced by women in different contexts and how do these different experiences shape our fundamental assumptions about gender and justice?

Litigation in recent years, particularly in the context of Charter claims, has significantly challenged the ways in which such questions of justice and gender are posed. The recognition on the part of the Supreme Court of Canada of the pervasiveness of sexual harassment (*Janzen*)¹⁵, the existence of the battered wife's syndrome (*Lavallee*)¹⁶, the appropriateness of a definition of inequality based on disadvantage and powerlessness (*Mark Andrews*)¹⁷ and of employment rights in the context of pregnancy (*Brooks*)¹⁸ all attest to the impact of questioning underlying assumptions about the nature of gender and justice.¹⁹ At the same time, however, different kinds of research questions must be posed to assess the impact of these pronouncements on women in Canadian society, and particularly on those who are most disadvantaged. Women receiving welfare benefits, for example, cannot benefit from pregnancy rights for employed workers; and there is little evidence that the concept of disadvantage and powerlessness will be extended to include issues of economic security (rather than political rights).²⁰ Moreover, while women receiving welfare benefits may experience sexual harassment or battering in their homes, nothing in the Supreme Court's decisions has concretely enhanced the resources of human rights commissions across Canada to ensure access to remedies for sexual harassment

¹³ For an overview, see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990).

¹⁴ See, for example, Sue Ellen M. Charlton, Jana Everett, Kathleen Staudt, eds., *Women, the State and Development* (1989); and Marlee Kline, "Race, Racism and Feminist Legal Theory" (1989), 12 *Harv. Women's L.J.* 115.

¹⁵ *Janzen and Govereau v. Pharos Restaurant and Grammas* (1989), 95 N.R. 81.

¹⁶ *R v. Lavallee* (1990), 108 N.R. 321.

¹⁷ *Andrews v. Law Society of British Columbia* (1989), 91 N.R. 255.

¹⁸ *Brooks v. Canada Safeway Ltd.* (1989), 94 N.R. 373.

¹⁹ See Susan Moller Oken, *Justice, Gender and the Family*, *supra* note 1.

²⁰ See Erika Abner, "The Merits of the Use of Constitutional Litigation to Unravel the Fabric of the Feminization of Poverty in Canada" (LL.M. Thesis, OHLS: 1989); and E. Abner, M.J. Mossman and E. Pickett, "'No More Than Simple Justice': Assessing the Royal Commission Report on Women, Poverty and the Family" (1991), 23 *Ottawa L.R.* (forthcoming).

or prevented the cutback in funding for battered women's shelters.²¹ A research methodology which begins with an analysis of gendered justice must take account of the gap between changes in the law's discourse and changes in women's lives.²²

A more critical research methodology is also needed to explore issues of gender and justice in the resources of the legal system as a whole. To what extent are women represented among the clients of large law firms in Canada, either as individuals or as corporate clients? What percentage of litigants before courts and tribunals are women? Are there significant differences in the extent to which women have access to tribunals by contrast with courts? And are women more likely to make use of some tribunals rather than others? Has the percentage of women using the legal system increased as the percentage of women lawyers and judges has increased over the past two decades? If not, does this mean that justice can be gendered even when our legal system is peopled by women as well as men?²³

In significant ways, such questions are difficult to answer. A study published a number of years ago²⁴ concluded that women did not use the courts as frequently as men, although the difference was smaller for women plaintiffs than for women defendants. The study assessed a number of possible explanations for the "underrepresentation" of women in the courts and concluded that:

the frequency with which women are found in civil or criminal cases across the nation is possibly an indicator of their less than full participation, as a class of persons in mainstream activities in this society. This underparticipation in social affairs is a product of culture (the accretion of habits, ways of doing things, socialization, and notions of what behaviour is appropriate for men and women, etc.)

²¹ For an imaginative legal response to the funding problem, see Michael Terry, Nina Balsam and Ruth Przybeck, "Litigation of the Necessaries Doctrine: Funding for Battered Women's Shelters" (1984), 17 *Clearinghouse Rev.* 1192.

²² The "gap theory" has been addressed frequently from a theoretical perspective — although it has a particular resonance for women and the justice system. More generally (and without reference to gender issues), see David Nelken, "The 'Gap Problem' in the Sociology of Law: A Theoretical Review" (1981), 1 *Windsor Yearb. Access Justice* 35. See also Donald Black, *Sociological Justice* (1989) and Susan E. Laurence, *The Poor in Court* (1990).

²³ See, for example, Lorraine Weinrib, "Women in the Legal Profession: Old Issues, Current Problems" (1990), 24 *Law Soc. Gazette* 71; Nina Burleigh, "Black Women Lawyers", [1988] *ABA Journal* 64; David W. Allen and Diane E. Wall, "The Behaviour of Women State Supreme Court Justices: Are They Tokens or Outsiders?" (1987), 12 *Justice System J.* 232; Carrie Menkel-Meadow, "Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law" (1987), 42 *U. of Miami L.R.* 29; Note: "The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts — 1984" (1986), 9 *Women's Rights L.R.* 129; and Note: "Report of the New York Task Force on Women in the Courts" (1986-87), 15 *Fordham Urban L.J.* 1.

²⁴ C. McKie and P. Reed, *Women in the Civil Courts* (Statistics Canada, 1979).

and of law (the inbuilt bias in favour of men being major property holders and manipulators).²⁵

Information about the participation rates for women and men before tribunals and in access to legal aid certificates is even more uncertain or not available; and for many tribunals²⁶, access rates are not collected or published by sex of litigants. Similarly, while legal aid statistics about the numbers of criminal and civil certificates suggest a disproportionately high rate of access for men, a more comprehensive methodology is needed to assess accurately the impact of gender on access to justice in the legal system.²⁷

Yet, the available research does suggest some difference in the status of women in society, a status which is reflected in the inequality of access and participation within the legal system. Such a conclusion may offer comfort to those whose objective is to ensure that the legal system merely responds to societal expectations, but it is cold comfort to those who expect justice ungendered.²⁸ It is as if these differing perspectives envisage the image of justice in two different ways: for some, the image of justice as a woman with the scales in her hand and her eyes blindfolded means that the law's role in society is neutral, reflecting rather than creating societal change; while for others, the image of justice as a woman is ironic, with her decidedly uneven (in terms of power and resources?) scales and her blindfolded eyes which cannot bear to see the gender bias of the justice system. In terms of research methodology, it matters a lot whether we begin with one or other of these images of justice. As scholars, moreover, we must confront these differences in our images of justice, in our research methods, and in our conceptions of the issues of access to justice: is gender-neutral justice possible in a gendered society?²⁹

²⁵ *Id.*, 20.

²⁶ The 1988-89 Annual Report of the Social Assistance Review Board indicated that 42.8% of its hearings involved women appellants, while 57.2% involved men (see Annual Report, Table 15, 43); while the 1988-89 Annual Report of the Ontario Human Rights Commission reported that there were 565 complaints (settled, dismissed and withdrawn) by males, by comparison with 755 by females (of which 152 concerned sex and pregnancy and 98 concerned sexual harassment — 32 male complaints concerned sex and pregnancy and 2 concerned sexual harassment).

²⁷ See Mossman, "Civil Legal Aid Services in Canada: Policy Options" (Dept. of Justice, 1990), especially, 67 and 101.

²⁸ See Martha Minow, "Foreword: Justice Engendered" (1987), 101 *Harv. L.R.* 10.

²⁹ See Isabel Marcus, "Reflections on the Significance of the Sex-Gender System: Divorce Law Reform in New York" (1987), 42 *U. of Miami L.R.* 55. This issue has been addressed most recently in the context of alternative methods for dispute resolution. For examples, see James Richardson, "Divorce and Family Mediation Research Study in Three Canadian Cities" (Dept. of Justice: 1988); Jane Mugford, ed., "Alternative Dispute Resolution" (Australian Inst. of Criminology, 1986); Thomas Christian, "Community Dispute Resolution: First-Class Process or Second-Class Justice?" (1986), 14 *Rev. of Law &*

Issues of Power and Change: Who Cares? Whose Responsibility?

These issues about the ways in which we conceptualize the problem of access to justice and the research methodology we adopt in our scholarship were enlivened for me by a recent and real-life issue of women's access to justice. In thinking about the real-life problem, it was necessary to confront the issues of scholarship in terms of the practice of access to justice, and to ask searching questions about power and powerlessness in the quest for justice, about the nature of societal and legal change, and about the impact of gender on the ways in which we assume, or do not assume, responsibility for women's access to justice.

The specific problem concerned a decision on the part of the Students' Legal Aid Society (SLAS) at the University of Ottawa Law School to provide legal services to battered women.³⁰ In adopting the policy, the students accepted the view that the existence

Soc. Change 771; Craig A. McEwan, "Differing Visions of Alternative Dispute Resolution and Formal Law" (1987), 12 *Justice System J.* 247; Linda Hay, Carol Carnevale and Anthony Sinicropi, "Professionalization: Selected Ethical Issues in Dispute Resolution" (1984), 9 *Justice System J.* 228; Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984), 7 *Harv. Women's L.J.* 57; Martha Bailey, "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims" (1989), 8 *Can. J. Family Law* 61; Christine B. Harrington, *Shadow Justice* (1985); Carrie Menkel-Meadow, "The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us", [1985] *J. Dispute Resolution* 25; Janet Rifkin, "Mediation From a Feminist Perspective: Promise and Problems" (1984), 2 *Law and Inequality* 21; Helen R. Weingarten and Elizabeth Douvan, "Male and Female Visions of Mediation" (1985), *Negotiation J.* 349; and Ross Cranston, "Courts, Tribunals and Alternative Institutions" (1986), 11 *Legal Service Bulletin* 21.

³⁰ The students' proposal was initially communicated in July 1990 in the context of the creation of a Women's Division within the University of Ottawa SLAS. Among other goals, the Women's Division was intended to provide victim accompaniment services, that is:

acting as agents for women who are survivors of assault and who are in need of support in dealing with the legal aspects of a prosecution. Our members would act on behalf of the client in contact with the police and the Crown's office. As well, they would inform the client of all available options so that she can make her own decisions. Our involvement would extend to matters such as peace bonds, restraining orders and related legal remedies.

See Proposal for the Creation of a Women's Division of the U. of O. Student Legal Aid Society, July 1990, 1. A similar policy was adopted at Parkdale Community Legal Services in Toronto in 1982, and at a number of other legal clinics funded by the Ontario Legal Aid Plan. The Parkdale policy was defined as follows:

That this clinic recognizes wife assault as a serious issue and wishes to pursue a program of community education and law reform on this matter and that to facilitate this program the clinic will not represent male clients in cases where spousal assault (spouse to be widely defined) is an issue, unless we are unable to find other representation for the client.

of violence against women in our society is a matter which should be addressed through the provision of timely legal advice and assistance on a broad range of legal matters which confront women subjected to spousal assault (including options about laying criminal charges, but also information about housing, employment, childcare, welfare, and civil actions for assault).³¹ Moreover, in adopting the policy, the students accepted the idea that women seeking legal advice in these circumstances would need to feel physically secure in the legal clinic setting. They therefore decided not to act for men charged with assault in any of these cases, thereby confirming and providing notice of their role as advocates for women subjected to violence.³²

The choices made by the students were not reached without consideration, and their policy was consistent with both the literature on the issue of wife assault³³ as well as with the practices of a number of other legal aid clinics in Ontario.³⁴ In this respect, their policy was arguably supportable in theory and in practice. Nonetheless, the policy was subjected to very serious attack on the part of members of the criminal defence bar in Ottawa,³⁵ investigated by a special committee of the Law Society of Upper

³¹ See Deborah Sinclair, *Understanding Wife Assault* (1985); and Laura Crites, "A Judicial Guide to Understanding Wife Abuse" (1985), 24 *Judges J.* 5.

³² See Education Wife Assault, *Factsheet: Wife Assault in Canada* (1988); and "Violence in Canadian Society" in (1987), 7 *Juristat* #2, 13.

³³ See Linda MacLeod, *supra* note 12; and other articles cited there. See also *R. v. Lavalee*, *supra* note 16.

³⁴ *Supra* note 30.

³⁵ Two complaints were filed, one to the Chair of the Law Society's Legal Aid Committee and another to the Chair of its Professional Conduct Committee. The complaints alleged that the students' policy violated "the most sacred principles on which our justice system is based" and constituted discrimination on the basis of sex. It was suggested also that the students were duplicating services available through the Victim Witness Assistance Program, and that the students' policy would "quite conceivably hamper their employability" as articling students, particularly if the students approached a criminal law firm for employment. As the complainant suggested, in support of this latter allegation:

It would obviously be of concern to a potential employer that such a student had spent one or two years in the Student Legal Aid Program operating under a policy that discriminated on the basis of sex. *Most criminal law firms, as you can imagine, are regularly retained by male accused charged with assault on a partner. If a student has a bias against such matters, the student is of no assistance to his employer.* I wish to state, however, that this latter proposition is not as important as the fundamental position that this policy violates the most sacred principles on which our justice system is based. (Emphasis added).

See letter from Michael J. Neville to Marc J. Somerville, Chairman (sic) of the LSUC Professional Conduct Committee dated October 3, 1990. See also a similar letter from Michael J. Neville to Thomas G. Bastedo, Chairman (sic) of the LSUC Legal Aid Committee.

Canada,³⁶ and became the focus of adverse media attention for several months.³⁷ During this period, many women lawyers and several women's organizations overtly offered support for the policy adopted by the SLAS³⁸; by contrast, few male lawyers or scholars regarded the matter with concern and fewer still became involved in the dispute as one primarily concerned with access to justice for women. Indeed, at the point where scholarship met praxis in this context, the issue of access to justice for women who were

³⁶ A special committee was established by Convocation of the LSUC on October 12, 1990. The committee included the Chair of Professional Conduct (Marc Somerville), Legal Aid (Thomas Bastedo) and Women in the Legal Profession (Fran Kiteley). The committee conducted an investigation and a full-day meeting with interested parties in October/November 1990. For a full chronology and list of documents, see Law Society materials prepared as background for the meeting with interested parties on November 24, 1990.

³⁷ See, for example, "Truce Called in Ottawa Legal Aid Dispute", *Law Times* Oct. 29 — Nov. 4, 1990; "Depriving Accused of Rights Wrong Way to Stem Violence Against Women", *Ottawa Citizen*.

³⁸ The National Association of Women and the Law attended the LSUC meeting and made submissions. There was also a letter of support filed by the Women's Legal Education and Action Fund. The letter submitted by LEAF stated in part:

Legal aid has been an important development in improving access to justice for all low-income Canadians. An important development in legal aid, particularly in Ontario, has been the availability of legal aid certificates for low-income individuals accused of crimes. The criminal legal aid system in Ontario is relatively generous and accused, including those in the Ottawa area, do not as a rule have difficulty obtaining counsel. By contrast, the legal aid system has not been successful in responding to the justice needs of women who are victims of violence, whether by their spouses, an acquaintance or a stranger. Where violence occurs raising family law issues, the reality is that women have a great deal of difficulty finding counsel to represent them. Many lawyers find that the legal aid system does not adequately compensate them for the necessary time to represent their clients properly in accordance with the rules set by the Law Society. The legal aid system is even less responsive to the legal needs in the criminal justice system of women as victims of violence.

In this light, the policy of the Ottawa clinic may be seen as promoting the equality of women, by promoting equal access to justice for women to address the violence that women specifically experience. It provides a service that is not otherwise available to a disadvantaged group without in any way jeopardizing the relatively significant societal resources already currently available to those accused of such violence. The clinic would be limited in its ability to accomplish its equality-promoting objectives if it did represent such male accuseds. It would be forced to reject particular women as clients because of individual cases of conflict of interest. It would not be able to dedicate its resources to developing a more comprehensive consistent service to a disadvantaged group. It would risk undermining that service by the temptation to put forward the type of defence to charges that feeds into myths about violence, frequently made part of a "complete" defence.

subjected to violence seemed to be essentially a "women's issue", and not an issue of access to justice.

The issues in such a dispute are complex, and require an analysis of a number of issues: the role of Student Legal Aid Societies within the overall context of the Ontario Legal Aid Plan, the relationship between students and members of the practising bar in the provision of duty counsel services, the extent of accountability for decisions about case priorities on the part of a SLAS, and the meaning of the Rules of Professional Conduct in relation to a decision not to act for a client, especially in the context of a legal aid system which is not comprehensive. All of these issues are important and need to be addressed.

Yet, what is fundamental to our conceptualizing about the issue of access to justice for women who are subjected to violence, and what is fundamental to assessing an appropriate research methodology here, are the ways in which the legal system has systematically organized access to legal aid so that men charged with violence are entitled to legal advice and assistance, while women who are their victims are not. Moreover, because the Ottawa SLAS embarked on a policy which was designed to change the status quo in terms of access to justice, the students' decision was subjected to a sustained attack by criminal defence lawyers who characterized the problem in terms of access to legal representation on the part of accused persons who face the resources of the state ranged against them in a criminal matter. In spite of this traditional characterization of what was at issue, it is undeniable that the dispute also occurred in the context of a question of gender and access to justice.

Because it is overwhelmingly men as a group who commit violent actions against their partners, making violence against women a systemic problem for our society, the gendered nature of access to legal aid services has to be taken into account in assessing women's access to justice. Moreover, the resistance to the provision of *student*

In recent jurisprudence the Supreme Court of Canada has recognized the importance of promoting the equality of disadvantaged groups, and that a distinction per se does not amount to inequality. (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143). True equality will require that government and others respond to the needs of disadvantaged groups; in other words, equality often mandates a positive action, rather than an inaction which reinforces inequality. The importance of ameliorating group disadvantage is recognized in sections 13 and 17 of the *Ontario Human Rights Code* and section 15(2) of the *Charter*. Further, recent Supreme Court of Canada jurisprudence has recognized sexual harassment, often including sexual and other assault, as a practice of sex discrimination to which our legal system must be responsive. (*Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1253.) Viewed in this light, the policy of the Ottawa clinic, reflecting a commitment to addressing sex inequality, is one that ought to be supported and encouraged as consistent with and furthering legislative and constitutional equality standards.

See letter from Helena Orton to LSUC, dated Nov.22, 1990, 2.

legal aid services to such women, in the context of legal aid services for accused persons (provided by *lawyers*) which disproportionately benefit men, suggests that the issue is also one of gendered access to power and gendered resistance to change. In such a context, it is appropriate for scholars to ask whether the responsibility for ensuring access to justice for women is similarly a gendered responsibility, a matter which belongs to women alone?

In the final analysis, who cares whether women and men have equal access to justice? Moreover, in the context of a Symposium celebrating ten years of access to justice scholarship, is it not time to ask scholars of both genders to accept responsibility for re-thinking the issues of gender and access to justice? As a colleague explained (in a slightly different context):

The question is not, as one commentator put it, who will speak to women's fundamental rights to pursue their interests with dignity and without harassment. Women are doing that. . . . *The real* question is *who will stand shoulder to shoulder with them.* (Emphasis added)³⁹

³⁹ Crystal Buchan, "Dancing in the Minefields?" (1990), 11 *Jurifemme* #1, 24, referring to J. Kierans, "Where Were the Guardians?", *Globe and Mail* May 1990, 4. This quotation referred more specifically, of course, to the issue of sex discrimination in universities. Significantly, the issue of violence against women is one which is shared by women who are lawyers, law professors and law students. For legal scholars who are also law teachers and university administrators, therefore, the issue of "standing shoulder to shoulder" with women seeking equality and access to justice is an issue of *both* scholarship and praxis.