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EVE AND THE FORBIDDEN FRUIT: REFLECTIONS ON A FEMINIST METHODOLOGY

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> When a particular way of seeing is analyzed, what was accepted as natural is made strange. Part of that strangeness is the realisation that beneath the accepted order of life lie hidden power relations.[1]

In traditional Western legal analysis, the standard approach to dispute resolution involves evaluating the respective rights in a given conflict, and imposing an ordered settlement with one right as paramount. This method is upheld as an objective process leading to inherent truths. In reality, traditional legal approaches are steeped in subjective and normative selections. The decision-maker infuses the analysis with the values and priorities of a limited segment of the community.

The consequence of this approach has been the entrenchment of legal principles which reflect traditionally male perspectives. For example, the legal approach of characterizing conflicts in terms of competing rights finds its philosophical underpinning in male approaches to reasoning. This focus on competing rights in defining and resolving conflict serves to overlook other perspectives, and ignores the realities of individuals actually before the decision-maker.

In an attempt to address both the individual and collective experience, feminist legal theorists have moved beyond the constraints inherent in liberal legalism. Feminists have critiqued the rights-based approach as one which neglects to address the realities of women. Insisting on the importance of process, Kathleen Bartlett espouses the necessity for a feminist methodology:

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[1] K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld & Nicholson, 1985) at 59.

> Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead "recreate the illegitimate power structures [that they are] trying to identify and undermine."[2]

In reaction to the valued certainty, predictability and rigidity of traditional legal rules, feminist legal methods emphasize flexibility and the capacity to recognize and respond to excluded viewpoints. Rather than ordering rights into an arbitrary hierarchy, feminist methodologies focus on the contextual realities of those most affected in order to reach a result which respects this context.

The difficulties in employing a rights-based approach are evidenced in the Supreme Court of Canada's decision in *Re Eve,*[3] which concerned the question of contraceptive sterilization of mentally incompetent women.[4] The Court based its decision on the *parens patriae* jurisdiction. Writing for the unanimous Court, LaForest, J. restricted the exercise of that jurisdiction to exclude the contraceptive sterilization of the mentally incapacitated woman before it. This decision has been hailed by many as a victory for the mentally disabled. These accolades, however, are short-sighted.

As the Court acknowledged in its analysis of the historical development of this doctrine, *parens patriae* directs the court to focus on the well-being of the particular individual before it. The Court in *Re Eve* recognized that the scope of the best interests doctrine is unlimited. They chose, however, to limit it to the authorization of *necessary* surgical procedures for the mental and physical health of the person on behalf of whom the jurisdiction is exercised.[5] This limitation is inappropriate with respect to with a doctrine that not only *allows,* but demands, a contextual approach.

The *Re Eve* decision must be viewed in light of past abuses of court-ordered sterilization. In the recent past, eugenic sterilization

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[2] K. Bartlett, "Feminist Legal Methods" (1990) 103 Harv. L. Rev. 829 at 830 citing J. W. Singer, "Should Lawyers Care About Philosophy?" [1989] Duke L.J. 1752.

[3] *Re Eve* (1986), 31 D.L.R. (4th) 1.

[4] While arguably, this law applies to both men and women, the cases indicate a far greater incidence of women before the courts on this issue. As such, a contextual approach suggests that this is indeed a women's issue, and I will address it as such.

[5] *Supra* note 3 at 28–29.

of mentally disabled persons was widely practised in the United States,[6] and two Canadian provinces had statutes providing for the sterilization of mentally "defective" people.[7] One might argue that the Court sought to correct past violations by erecting steep barriers to sterilization. The unfortunate effect was to shift the focus away from Eve's personal situation, as is mandated by the *parens patriae* jurisdiction, to a more abstracted analysis centred on an evaluation of conflicting rights.

The Court would have reached a different result if it had truly evaluated Eve's interest in reproductive autonomy, rather than assessing such freedom in isolation. Then, in comparing Eve's interest in procreation with her interest in sexual autonomy, a more contextual decision addressing the unique situation of this woman would have been reached. As Professor Elizabeth Scott notes:

> As a result of the trend toward de-institutionalization, a growing number of mentally disabled individuals live with their parents. Because current law reacts primarily to the state's historical wrongful treatment of institutionalized persons, it is not sufficiently responsive to the needs of retarded individuals who live with their families.[8]

Implicit in the approach employed by the Court was the assumption of the primacy of the right to reproduce. The likely effect of this decision, namely, the denial of Eve's social development and sexual expression, seems not to have been considered.

The focus on past abuses resulted in the Court upholding the presumption of the right to reproduce as fundamental. By extension, this freedom is beyond regulation by non-therapeutic sterilization, unless clear and meaningful consent can be given. Justifying the Court's position, LaForest, J. noted that medical science might one

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[6] See the landmark case of *Buck* v. *Bell* (1927), 274 U.S.R. 200 at 207, where a majority of the U.S. Supreme Court sanctioned the sterilization of Carrie Buck, the mildly "retarded" daughter of a similarly afflicted woman, after having given birth to a "retarded" child. Holmes, J. stated: "three generations of imbeciles are enough." This decision is considered the high-water mark of eugenic theory. See also R. L. Burgdorf & M. P. Burgdorf, "The Wicked Witch is Almost Dead: *Buck v. Bell* and the Sterilization of Handicapped Persons" (1977) 50 Temp. L.Q. 995.

[7] *The Sexual Sterilization Act*, R.S.A. 1970, c. 341, as rep. by 1972, c. 87; *Sexual Sterilization Act*, R.S.B.C. 1960, c. 353, as rep. by 1973, c. 79.

[8] E. Scott, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy" [1986] Duke L.J. 806 at 808.

day provide for a correction of Eve's mental incapacity. At that point, he suggested, she would likely choose to exercise her reproductive autonomy, thereby justifying its preservation.

This rationale is doubly problematic. While there appears to have been no evidence before the Court indicating Eve's likelihood of eventual mental recovery, this possibility was given heavy consideration in denying her sterilization. Also, the implication that Eve, if "competent," would choose to exercise her right to procreate echoes the claim of some critics, theorizing that the "maternal instinct" is one which has been artificially constructed to fulfil the societal norms of reproduction.[9] The glorification of motherhood, these critics argue, may be largely a patriarchal attempt to control a function which is biologically beyond the control of men. The effect of a rights-based approach is to uphold certain values without addressing their differential impact on men and women. In this case, the value given to the freedom to reproduce is emphasized at the expense of sexual autonomy.

By creating the dichotomy between Eve's right to sexual freedom and her freedom to procreate, the Court was forced to compare conflicting entitlements and to make a normative choice as to which is of primary importance. The traditional approach attempts to *objectify* this necessarily subjective selection, suggesting the ultimate result as the *only* logical conclusion based on the facts and principles at bar. A closer look at this decision exposes extreme, hidden subjectivity in the reasoning. As Anne Bolton identifies: "a woman's right to procreate, (whether she wants children or not), is worth more than her right to experience her sexuality without the threat of pregnancy."[10] When faced with the choice between "let's sterilize them all" and "let's not sterilize any of them," the latter would be preferable.[11]

The exclusion of Eve's context from the Court's analysis is perhaps the single most problematic aspect of this case. If the process had allowed for a more meaningful consideration of the individual who was before the court, such artificial polarization would have

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[9] See S. MacIntyre, "Who Wants Babies? The Social Construction of Instincts" in D. L. Barker & S. Allen, eds., *Sexual Divisions and Society: Process and Change* (London: Tavistock, 1976) at 150.

[10] A. Bolton, "Whatever Happened to Eve? A Comment" (1987) 17 Man. L.J. 219 at 226.

[11] *Ibid.*

been avoided. Had the Court been willing to explore the benefits and detriments of both sterilization and its alternatives contextually, they would have recognized sterilization as the *least* restrictive alternative for Eve.

In his judgment of this case, Campbell, J. of the P.E.I. Court of Appeal employed a contextual approach, concluding that "without the protection of a permanent sterilization the *protected* environment will become a *guarded* environment and the loss to 'Eve' in terms of her social options and her relative freedom would cause substantial injury . . . "[emphasis added].[12] The Supreme Court did not take effective notice of the fact that increasingly, more disabled people are de-institutionalized, living either with parents or in community group homes where there is potential for restrictions on sexual expression and freedom.

Before the Court, there was substantial evidence of the concerns of Eve's mother that Eve would become pregnant unintentionally. While there was no explicit indication of the effects of this judgment on Eve's life, the logical inference is that her freedom and personal autonomy would be curtailed. Arguably, the very freedoms which were more important to Eve were sacrificed in order to uphold a right that was less valuable to her.

The way in which the Court considered the perspective of Eve's mother exemplifies the inadequacies of an abstract system of decision-making. LaForest, J. went to some lengths to explain that an exercise of the *parens patriae* jurisdiction is strictly limited to the interests of the individual requiring its exercise.[13] The concerns of Eve's mother regarding the care she could give to an unplanned grandchild were irrelevant. He stated:

> One may sympathize with Mrs. E. . . . [b]ut the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise

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[12] *Re Eve* (1980), 74 A.P.R. 97 (P.E.I.C.A.) at 142. Compare this to the finding of Mr. Justice La Forest, *supra* note 3 at 30, that "[i]n the present case there is no evidence to indicate that a failure to perform the operation would have any detrimental effect on Eve's physical or mental health."

[13] *Supra* note 3 at 29.

> great caution to avoid being misled by this all too human mixture of emotions and motives.[14]

In fact, a consideration of the "human mixture" is the *only* way a meaningful decision could have been reached. It is through a consideration of the mother–daughter relationship that the "best interests" of Eve would have been properly assessed. Instead, the Court assumed a conflict between the interests of Eve and those of her mother. Assuming the focus of Mrs. E. to be upon her *own* best interests, rather than those of her daughter, the Court worked from the premise that an evaluation of Eve's best interests must necessarily exclude the viewpoint of her mother. By removing a large factor of Eve's personal context from consideration, the Court failed in its obligations under the doctrine of *parens patriae.* By unnecessarily restricting this doctrine, "its individualized focus is lost and its beneficial thrust is overridden."[15] Notably, the concluding portions of this judgment are markedly detached, with no direct reference to Eve.

A contextual approach would have extended beyond the blind protection of the right to procreate, to consider the realities of Eve's circumstances. For feminist theorists, the legal method of "practical reasoning"[16] provides an approach to conflict resolution based on the particulars of a given situation rather than the application of predetermined rules and norms. Instead of treating problems as unique conflicts having only one solution, feminist practical reasoning mandates a consideration of the various divergent perspectives and calls for solutions based on the contextual integration of these viewpoints. In more traditional models of legal reasoning, the particular, unique details of a given problem are often ignored, as judges apply fixed legal rules which presuppose polarity of conflicts. With a practical reasoning approach, particular details and new facts "present opportunities for improved understandings and 'integrations'."[17]

Using this method, the more facts the decision-maker is exposed to, the more informed and balanced the decision will be. In this way, feminist methodology has sought to reject *abstract univer-*

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[14] *Ibid.* at 31.

[15] P. Peppin, "Justice and Care: Mental Disability and Sterilization Decisions" [1989] Can. H.R.Y.B. 65 at 74.

[16] Bartlett, *supra* note 2 at 850.

[17] *Ibid.* at 851.

sality in favour of *concrete universality*, which recognizes *difference* as the norm rather than the exception.[18] A broader approach to reasoning from context is capable of including this difference rather than ignoring it as irrelevant to the objective rule.

In *The Second Sex*, Simone de Beauvoir refers to asking "the woman question."[19] While deceptively simple, this approach is central to any feminist analysis of the law. Asking the woman question identifies "the gender implications of rules and practices which might otherwise appear neutral or objective."[20] By examining the law's failure to consider the experiences of women, the first step toward changing the system is taken through recognizing insidious biases. Asking the woman question begins the process of deconstructing tenets of the judicial system, such as the rights-based analysis, and replacing them with inclusionary alternatives which respect an infinite variety of realities.[21]

In applying the woman question to *Re Eve*, one must ask whether or not this decision is a step forward for the position of women in society. This requires a consideration of not only Eve and women like her, but also their mothers and those women upon whom the burden of raising their children would fall. Former Madame Justice Bertha Wilson, a member of the Court in *Re Eve*, has since reconsidered the relevance of these questions. In a recent article on the doctrine of privacy, she wrote:

> While I would not wish to be thought to have changed my position on the correctness of our difficult decision in *Re Eve*, the finding that the interests of care-givers are to be disregarded obviously has problematic consequences for women. Since it is primarily women who carry the burden in our society of child rearing, it would likely be

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[18] C. Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982). While her definition of the existence of two separate models of reasoning has been widely accepted, her linking of these differences to gender has been criticized. See A. C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373 at 1382–1384.

[19] S. de Beauvoir, *The Second Sex* (New York: Alfred A. Knopf, 1976) at xxvi.

[20] Bartlett, *supra* note 2 at 837.

[21] Heather Wishik poses a series of questions which could assist, at this stage in the inquiry, in recognizing how traditional legal concepts are subtle in their disadvantage to women. See H. R. Wishik, "To Question Everything: The Inquiries of Feminist Jurisprudence" (1985) 1 Berk. Wom. L.J. 64 at 72–77.

> a woman and not a man who would be responsible for rearing the child of a woman such as Eve. [22]

Asking the woman question demonstrates that this decision is likely to have a disadvantageous impact on a least *some* women; namely, those who are mentally incapable of consenting to a contraceptive sterilization, and those women who are responsible for their care. As it stands, this decision precludes mentally "incompetent" women from legally obtaining a contraceptive sterilization, either through the consent of their guardian or by judicial exercise of *parens patriae.* In a position that has attracted substantial criticism for its extremism,[23] the Court held that sterilization "should *never* be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction" [emphasis added].[24] The intrusive impact of this decision falls disproportionately upon women as a community. It is not a decision which limits the freedoms and opportunities of men. Mentally "incompetent" women do not have the same opportunities for freedom and development as do "competent" women. Upholding motherhood and the right to procreate does not recognize the realities of mentally disabled women. Either this right is meaningless in a situation similar to Eve's, or its enforcement is harmful in restricting their opportunities for autonomy in an increasingly de-institutionalized system. Since Eve would likely be unable to care adequately for a child, one must also consider the impact of such a decision on those upon whom the responsibility would fall.

The Court's characterization of contraceptive sterilization as non-therapeutic precludes mentally disabled women from access to a procedure that other women have available to them. Protecting Eve from a pregnancy and birth which could be threatening to her should have been characterized as therapeutic. In the House of Lords decision in *Re B,* Lord Oliver expressed his disagreement with the *Re Eve* decision:

> If in that conclusion the expression "non-therapeutic" was intended to exclude measures taken for the necessary protection from future harm of the person over whom the

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[22] B. Wilson, "Women, the Family, and the Constitutional Protection of Privacy" (1992) 17 Queen's L.J. 5 at 18. See also Peppin, *supra* note 15 at 80.

[23] See especially *Re B,* [1987] 2 All E.R. 206 (H.L.) at 213, 214 and 219 where Lords Hailsham, Bridge, and Oliver all indicate their opposition to this claim.

[24] *Supra* note 3 at 32.

> jurisdiction is exercisable, then I respectfully dissent from it for it seems to be [*sic*] me to contradict what is the sole and paramount criterion for the exercise of the jurisdiction.[25]

By asking the woman question, the implications of the abstract, non-contextual reasoning of this decision crystallize.

The woman question also identifies a variety of views and concerns from the community of women, many of which may diverge. The process of consciousness-raising, a basis of feminist method, serves to encourage the expression of these varied perspectives as a necessary step in determining the best solution.[26] Through the process of articulating and "telling" one's experiences and comparing them with the experiences of others, the effect of showing individual encounters to mirror collective encounters is achieved.[27] This is yet another step in the process of reaching a solution to conflict which is both equitable and reflective of contextual realities. By fully exploring the various issues and perspectives surrounding any given legal dilemma in this way, the traditional position as espoused by the Supreme Court of Canada in this instance may be challenged.

Within the context of *Re Eve* and the "sterilization dilemma," the rights-based analysis so central to our traditional legal method of decision-making shows inherent inadequacy and limitation. In a system which reapplies past values and norms through the doctrine of precedence, the opportunity to sensitize the courts to new realities is rare at best. By critiquing the way in which a focus on rights and rules does not reflect the experience and needs of women like Eve, and by employing alternative methodological models, movement toward a more representative system begins.

Elsewhere, Canadian courts have shown the capacity to acknowledge the experience of battered women as requiring a broader

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[25] *Supra* note 23 at 219.

[26] See C. MacKinnon, "Feminism, Marxism, Method, and State: An Agenda for Theory" (1982) 7 Signs 515 at 519. See also Scales, *supra* note 18 at 1401–1402; Bartlett, *supra* note 2 at 863–866.

[27] See: L. Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Leg. Educ. 3 at 9: "Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression."

interpretation of self-defence.[28] Similarly, the reality of incest victims has been recognized through the court's extension of limitation of actions legislation in the civil context.[29] Ripe for reform is the issue of access to contraceptive sterilization for mentally disabled women. The doctrine of *parens patriae* mandates courts to emphasize the subjective reality of these women and to assist them in maximizing their opportunities for personal growth and development rather than forcing them to sacrifice these opportunities in the name of an abstracted right to procreate.

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[28] See *R.* v. *Lavallee*, [1990] 4 W.W.R. 1 (S.C.C.).
[29] *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 3.