Dalhousie Law Journal

Volume 10 | Issue 2 Article 5

9-1-1956

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Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*

*N. Colleen Sheppard**

1. INTRODUCTION

> What is "common" in and to women is the intersection of oppression and strength, damage and beauty. It is, quite simply, the *ordinary* in women which will "rise" in every sense of the word—spiritually and in activism. For us, to be "extraordinary" or "uncommon" is to fail. History has been embellished with "extraordinary", "exemplary", "uncommon", and of course "token" women whose lives have left the rest unchanged. The "common woman" is in fact the embodiment of the extraordinary will-to-survival in millions of obscure women. . . . —Adrienne Rich[1]

The major objective of this article is to contribute to an understanding of the potential impact of the equality provisions of the *Canadian Charter of Rights and Freedoms*[2] on the lives of women. This requires an awareness of the realities of women's inequality in our society, an understanding of the legal conceptualization of equality, and a consideration of the role of "law" in remedying societal injustice. My focus in this article is on the second concern—that is, on legal theories

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* Hons. B.A., University of Toronto (1980), LL.B., University of Toronto (1984), Visiting Student, Dalhousie Law School, 1983–84, LL.M., Harvard University (1985). I wish to thank Derek Jones for helping me to clarify my ideas in the process of revising this paper. I also thank Christine Boyle for encouraging me to share my paper with others.

1 Adrienne Rich, *On Lies, Secrets and Silence, Selected Prose 1966–1978* (New York: W.W. Norton & Co., 1979), p. 255.

2 Part I of the *Constitution Act, 1982,* which is Schedule B of the *Canada Act,* 1982, c. 11 (U.K.).

of equality as they relate to women. I begin with a brief outline of the conflicting ideological approaches that infuse legal thought on general equality issues and their particular manifestations in the *Canadian Charter.* The interplay of these contrasting theories is then considered in a historical context of the legal treatment of women, followed by a discussion of the current debate about equality for women in Canada. Finally, I will offer some suggestions about the interpretive direction I think the equality provisions in the *Charter* should take.

2. APPROACHES TO EQUALITY

Two preliminary observations can be made in analyzing the legal conceptualization of equality. First, despite adherence to the principle of equality in the legal system, widespread inequalities persist in our society. Second, the legal treatment of equality is in a state of confusion resulting from the uneasy and even contradictory co-existence of different ideological concepts of, and approaches to, equality. On the one hand, a formal conception of equality, rooted in liberalism[3] and laissez-faire ideology, predominates. This conception is best encapsulated by the phrase "equality of opportunity" or procedural equality. On the other hand, equality theory is still influenced by conservative ideology, particularly by traditional patriarchal assumptions about the role of women in society. Moreover, "post-liberal"[4] conceptions of equality that focus on outcomes or "equality of condition" have become increasingly visible with the rise of the regulatory welfare state. To understand the current state of equality theory, therefore, it is critical to begin by clarifying briefly the differences between these ideological perspectives on equality.

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3 For discussions of the rise of liberal thought, see C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford Univ. Press, 1962); Macpherson, *The Real World of Democracy* (Oxford: Oxford Univ. Press, 1965); David Sugarman, "The Legal Boundaries of Liberalism and Legal Science, Book Review: Cosgrove, The Rule of Law: A.V. Dicey Victorian Jurist" (1983), 46 Mod. L.R. 102 at 108. For a discussion of the liberal notion of equality, see P. Kerans, "Philosophic Barriers to Equality", in *Inequality: Essays on the Political Economy of Social Welfare,* A. Moscovitch and G. Drover, eds. (Toronto: Univ. of Toronto Press, 1981), p. 27.

4 This phrase is used by Roberto Unger in *Law in Modern Society: Towards a Criticism of Social Theory* (New York: The Free Press, 1976). It has also been used in the context of the *Canadian Charter of Rights and Freedoms*; see M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 S. Ct. L.R. 131 at 154–157.

The liberal conception of equality embodies three central features. First, it is individualistic. It assumes that society is composed of autonomous individuals in contrast to the more communitarian or group focus of both conservative and emerging "post-liberal" approaches. Each individual has the right to be treated the same as (or "equal" to) every other individual. The very notion of rights is derived from liberal theory and contrasts with a more communitarian vision of society held together by duties and responsibilities. As Carol Gilligan explains, there is "a tension between a morality of rights that dissolves 'natural bonds' in support of 'individual claims' and a morality of responsibility that knits such claims into a fabric of relationship, blurring the distinction between self and others through the representation of their interdependence."[5]

Second, the liberal theory of equality contemplates a non-interventionist state which interferes in social relations only when the acts of one individual violate the individual rights of another. The state does not assume responsibility for securing substantive or distributive equality. Its obligations encompass only the duty to treat "like" individuals alike in areas where it has chosen to intervene.

The third important feature of the liberal notion of equality is its faith in the neutrality of the "rule of law".[6] As Dicey explained it, legal equality entails the "universal subjection of all classes to one law administered by the ordinary courts."[7] All members of society are to be governed by the rule of law; no longer is the formal application of the law to vary according to one's social class or position. To this extent, the liberal conception of the "rule of law" has been viewed as a significant step forward from the overt hierarchical relations that preceded it.[8] As Francis Olsen has pointed out, however, it was primarily "the mode of legitimation [that] shifted from a direct acknowledgement of pervasive hierarchy to an indirect justification of gross inequalities among juridical equals."[9] Equality, according to the "rule of law" requires facially-neutral treatment; everyone is to be

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5 *In a Different Voice, Psychological Theory and Women's Development* (Cambridge: Harv. Univ. Press, 1982), p. 132.

6 A.V. Dicey, *Introduction to the Study of the Law of the Constitution (1985)*, 10th ed. (London: MacMillan & Co., 1959), pp. 183–205; see also Sugarman, *supra*, note 3.

7 Dicey, p. 193.

8 E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon Books, 1975), pp. 265–266.

9 F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 Harv. L. Rev. 1497 at 1515.

treated the same. Yet, treating those who are unequal in terms of their access to power and resources as though they are the same allows economic and social disparities to persist, while an illusion of fairness is created. This formalistic conception of equality, in fact, contributes to substantive inequality and at the same time, helps to create "a consciousness that radically separates law from politics, means from ends, processes from outcomes."[10]

Although liberalism supplanted the former hegemony of conservatism, the latter continues to influence our societal world view. Conservatism accepts and justifies social inequality rather than attempting to deny its existence. It overtly sanctions hierarchical relations on the basis of factors such as status, religion or paternalism. The most relevant example, for our purposes, is male domination within the traditional family structure. A further important component of conservatism is its more communitarian perspective; it views individuals as integral members of social institutions, structures, and communities. The continued presence of conservative ideology, particularly in relation to issues of gender equality, makes it a prime consideration in any current analysis of equality theory and women.

Throughout the twentieth century, but particularly since the end of World War II, post-liberal influences have also had an important impact on equality theory. With the shift away from laissez-faire capitalism and the increase in economic concentration, we have witnessed a growing acceptance of government intervention in, and regulation of, the market. In addition, particularly since the 1930s, responsibility for social and economic welfare programs has been assumed by the state.[11] As Unger describes it, "[t]he response to unjustified hierarchy, a response the rule of law failed to provide, is now sought from the government . . . As the state becomes involved in the tasks of overt redistribution, regulation,and planning, it changes into a welfare state."[12] The nineteenth century liberal belief in the importance of equal treatment of autonomous individuals is undermined

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10 M. Horwitz, "The Rule of Law, An Unqualified Human Good!" (1977), 86 Yale L.J. 561. For a similar view, see Unger, *Knowledge and Politics* (New York: The Free Press, 1975), p. 151.

11 See generally, I. Gough, *The Political Economy of the Welfare State* (London: MacMillan, 1979). For an analysis of the United States, see T. Lowi, *The End of Liberalism—The Second Republic of the United States*, 2d ed. (New York: W.W. Norton & Co., 1979), p. 42. For a case study of the rise of unemployment insurance in Canada, see J. Struthers, *No Fault of Their own, Unemployment and the Canadian Welfare State, 1914–1941* (Toronto: Univ. of Toronto Press, 1983).

12 Unger, *supra*, note 4 at p. 193.

as it becomes apparent that social welfare programs operate on the principle that those in need should receive greater social assistance. Unequal treatment is required to generate just outcomes (*i.e.* an adequate level of food and shelter for everyone). Thus, there emerges a focus on equality of outcomes rather than on procedures.

Closely linked to the rise of the regulatory welfare state is an acknowledgement that social and economic equality, as well as civil and political equality, is important. One example of this development is the creation of two international covenants on human rights—the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*[13]

Finally, the recognition of myriad social groups and associations also characterizes post-liberal society, in marked contrast to the individualistic focus of nineteenth century liberalism. To some extent, liberalism has accommodated this shift by developing theories of pluralism whereby group units replace individuals in the competitive market.[14] An acknowledgement of diverse, cohesive, and discernible social groups in society has important implications on equality theory. It undermines the myth, central to the liberal vision of equality, of a society of undifferentiated individuals. The liberal concern with the treatment of individuals does not address inequalities between social groups.

A further dimension of this group-based perspective is the rise of a collective consciousness within various oppressed societal groups and their articulation of alternative visions of what equality means. At the core of these new visions is both a re-affirmation of the distinctive skills, values, and cultures of subordinated social groups and a rejection of the white male world view as universal.[15] To counter the

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13 *International Covenant on Civil and Political Rights,* G.A. Res 220 (XXI) U.N. Doc. A/6316 (1966); *International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 220 (XXI), U.N. Doc. A/6316 (1966); both instruments, as well as the Optional Protocol to the former Covenant, were adopted December 16, 1976 and acceded to by Canada May 19, 1976.

14 See H. Laski, *Grammar of Politics* (London: Allen & Unwin, 1925) at p. 60; Ivan Rand, "Responsibility of Labour Unions" in *Special Lectures of the Law Society of Upper Canada 1954—Labour Law and Labour Relations, Part I* (Toronto: Richard de Boo, 1954), p. 27 at p. 42; J.K. Galbraith, *American Capitalism* (New York: 1952), pp. 108–117 and pp. 135–141.

15 See Gilligan, *supra,* note 5; A. Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality" in *Feminism in Canada,* A. Miles and G. Finn, eds. (Montreal: Black Rose Books, 1982) for examples of this phenomenon in the women's movement. See also K. Lahey, *Feminism, Theory and Method: Developing Approaches to Legal Theory,* University of Windsor, 1984 (manuscript).

hegemony of the white male world view, the quest for equality entails the manifestation of differences rather than conformity to dominant norms. Equality thus requires the embracing of social diversity.[16]

The rise of the regulatory welfare state and the emergence of post-liberal society also brought changes in legal thinking. Most notably, the realist critique of legal formalism challenged the underlying premises of liberal legalism.[17] By bringing to light the historical contingency of legal doctrine and the indeterminacy of supposedly neutral and scientific legal rules, legal realists blurred the line between law and politics.[18] Indeed, they ushered in the modern legal orthodoxy of a continued but shaken faith in the neutrality of legal doctrine, carefully tempered by policy-oriented legal reasoning.[19]

In the context of equality theory, post-liberal thinking has stretched and modified the parameters of the liberal conception of equality. The ultimate threat post-liberal trends present to the coherence of liberal legalism, however, has ensured that any incorporation has been partial. This is illustrated by two doctrinal developments in equality law: the "reasonable classification" doctrine and "disparate impact" analysis.

(a) Reasonable Classification

The "reasonable classification" doctrine developed in the United States for assessing whether a statute adhered to the constitutional principle of the "equal protection of the laws."[20] In a society increas-

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16 A. Lorde, "Age, Race, Class and Sex: Women Redefining Difference" in Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg: The Crossing Press, 1984), p. 114 at pp. 122-123; see also M. Minow, *Learning to Live With the Dilemma of Difference: Bilingual and Special Education* (1985), 48 Law and Contemporary Problems 157.

17 For a summary of the rise of legal realism in the United States, see E. Purcell Jr., *The Crisis of Democratic Theory* (Lexington: Univ. of Kentucky Press, 1973); see also E. Mensch, "The History of Mainstream Legal Thought," in *The Politics of Law—A Progresive Critique*, D. Kairys, ed. (New York: Pantheon Books, 1982), p. 18 at pp. 26–29.

18 Mensch, note 17, *supra*.

19 This new orthodoxy is often referred to as the post-realist synthesis. It is represented by scholarly works such as H. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958).

20 The Fourteenth Amendment (1868) of the United States Constitution provides:
Section I. All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

ingly characterized by statutory regulation, some justifying mechanism was needed to save legislative classification from constitutional invalidity on the grounds of inequality. Tussman and tenBroek, in their classic article, "The Equal Protection of the Laws"[21] posed the problem in this way:

> Here, then is a paradox: the equal protection of the laws is a "pledge of the protection of equal laws". But laws may classify. . . . And the very idea of classification is that of inequality.[22]

Tussman and tenBroek proceeded to solve this paradox by developing the "reasonable classification" doctrine. They maintained that the primary principle of constitutional equality is that those similarly situated are to be treated similarly, or to put it another way, that "likes" are to be treated alike. A legislative classification is reasonable and therefore constitutionally valid, if it covers all those similarly situated with respect to the purpose of the law. While reinforcing the "equal treatment" idea of liberal equality theory and focussing on proceduralism, Tussman and tenBroek succeeded in finding a way to justify the instances of unequal treatment inherent in the task of legislating in a modern society.

It should be noted that in the United States, a formalistic gloss developed in the application of the "reasonable classification" doctrine. Legislation that was classified as economic or social regulation was subjected to a very weak test of constitutionality, namely, whether the law had a rational basis.[23] In contrast, racial and ethnic classifications were subjected to the "strict scrutiny" standard, whereby a compelling state interest and a close fit between means and ends were required.[24] Effectively, this test made it impossible to justify racial or ethnic classifications. A formalistic classificatory exercise, therefore, became determinative of the outcome. In contrast to racial classifica-

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wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 (1949), 37 Cal. L.R. 341.

22 *Ibid.*, p. 344.

23 L. Tribe, *American Constitutional Law* (New York: Foundation Press, 1978) at pp. 994–996, s. 16-2.

24 *Ibid.*, pp. 1000–1002, s. 16-6.

tions, sex-based classifications have not attracted strict scrutiny, although an intermediate level of scrutiny has emerged, in which legislative classifications must be "substantially related" to "important governmental objectives."[25]

While the "reasonable classification" doctrine appears somewhat formalistic, it incorporates non-formalistic reasoning to the extent that it relies on a general standard of reasonableness. The development of open-ended standards such as "fairness" or "reasonableness" requires the overt acknowledgement of policy considerations in legal decision-making. This shift away from formalism is a further manifestation of the influence of post-liberalism.[26] Furthermore, the reasonable classification doctrine resolves the contradiction between "legislative specialization and constitutional generality"[27] by virtue of its extreme malleability. A narrow or a broad interpretation of a law's purpose or the definition of "similarly situated" is determinative of the constitutionality of the law and the outcome of the exercise.[28] In some cases, "similarly situated" is simply defined to mean all those possessing the classifying trait which is the source of discrimination in the first place (*e.g.* pregnant persons).[29] Thus the reasonable classification doctrine, though coherent on the face, risks reducing the equal protection of the laws to a tautology.

(b) Disparate Impact

The second doctrinal development of importance to equality theory was the emergence of "disparate impact" analysis. It signalled a direct departure from a liberal focus on procedures to a post-liberal concern with outcomes. Though rationalized in liberal terms, it represents a critical threat to the theoretical coherence of the liberal paradigm of equality. In the path-breaking case of *Griggs* v. *Duke Power Inc.*,[30] the United States Supreme Court recognized that rules or procedures that were neutral on their face could have a "disparate

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25 *Ibid.*, pp. 1063–1066, s. 16-25; see, in particular, *Craig* v. *Boren* (1976), 429 U.S. 190.

26 Unger, *supra*, note 4 at pp. 199–200; see also *supra*, note 17.

27 Tussman and tenBroek, *supra*, note 21 at p. 344.

28 See Note, "Legislative Purpose, Rationality and Equal Protection" (1972), 82 Yale L.J. 123.

29 See *Geduldig* v. *Aiello* (1974), 417 U.S. 484.

30 (1971), 401 U.S. 424.

impact" on different classes of individuals. The Canadian Supreme Court has endorsed a disparate impact approach to the interpretation of human rights statutes. Legislation has also provided for such an approach.[31] Moreover, in the interpretation of the *Canadian Charter of Rights and Freedoms,* the Supreme Court has accepted the importance of an effects-based approach.[32] The consequences of effects-based reasoning and disparate impact analysis are far-reaching. They strike at the heart of the liberal formalist belief in the fairness of facially-neutral rules and procedures. These consequences also open to scrutiny and question the unequal outcomes institutionalized into the very fabric of social structures and practices. No doubt, courts will undertake to draw legal lines to lessen the potential effect of this new mode of reasoning.[33] Nevertheless, post-liberal influences are straining liberal equality theory.

3. THE CHARTER OF RIGHTS AND FREEDOMS AND THE EQUALITY PROVISIONS

In both form and content, the *Charter of Rights and Freedoms* represents an amalgam of the different ideological visions of equality that we have been discussing. At the same time, the ambiguity of the language of the *Charter* leaves it open to a number of possible interpretations. Given these two countervailing characteristics, ideology will play a vital role in determining the outcome of *Charter* cases, both in the values and beliefs of judges that infuse the interpretive task and in the ideological structure of the *Charter* as developed by the framers.

The first manifestation of ideological tension in the *Charter* appears in the Preamble, which affirms in one breath both the "supremacy of God"—an appeal to religious and conservative values—and

31 See *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears Ltd.* (1985), 52 O.R. (2d) 799, 17 Admin. L.R. 89, 23 D.L.R. (4th) 321, 64 N.R. 161 (S.C.C.); *Bhinder* v. *Canadian National Railway Co.*, [1985] 2 S.C.R. 561, 17 Admin. L.R. 111, 23 D.L.R. (4th) 481, 63 N.R. 185 (S.C.C.); see for example, *Canadian Human Rights Act*, S.C. 1976–77, c. 33, ss. 7 and 10; *Ontario Human Rights Code*, S.O. 1981, c. 53, s. 10.

32 See, for example, *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 37 Alta. L.R. (2d) 97, [1985] 3 W.W.R. 481, 18 D.L.R. (4th) 321, 58 N.R. 81, 60 A.R. 161, 18 C.C.C. (3d) 385 (S.C.C.).

33 For a United States example, see *Washington* v. *Davis* (1976), 426 U.S. 229; see also A. Freeman, "Antidiscrimination Law: A Critical Review," in Kairys, *supra*, note 17 at p. 96.

the "rule of law"—the foundation of liberal legalism.[34] The general idea of a *Charter*, however, is rooted in liberal theory. The *Charter* is viewed as a document that provides protection against obtrusive government power.[35] Yet, a strictly narrow focus on government abuses of rights and freedoms raises two obstacles to the attainment of equality.

First, to secure a greater measure of social equality, more, rather than less, government intervention may be required. If all the *Charter* does is to require non-discrimination in those areas in which the government has chosen to intervene, its ability to facilitate equality for women will be minimal. Whether the *Charter* goes beyond being a negative check on government action, to impose positive obligations on government, is unclear. Some commentators maintain that the *Charter* can be interpreted to support the concept of positive rights.[36] Such an approach reflects the influences of the post World War II development of the welfare state and diverges directly from classical liberalism.

The second problem of the narrow view of the function of the *Charter*, which limits it to a check on "public" or government power, is that it leaves non-governmental or "private" manifestations of arbitrary power or violations of constitutional rights unchecked. Such a reading would significantly limit the protection afforded by the *Charter*. In any event, it is becoming increasingly difficult to demarcate governmental versus non-governmental or public versus private spheres of activity. Neither a formalist nor functionalist approach provides a coherent means of line-drawing.[37]

The substantive scope of the *Charter* is also contested. Is it limited primarily to civil, political and legal rights and freedoms, or does it

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34 The Preamble reads:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

35 See, for example, P. Hogg, *Constitutional Law in Canada*, 2d ed. (Toronto: Carswell, 1985), p. 651.

36 See the discussion in C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984), pp. 32–41.

37 For contrasting discussions of the scope of application of the *Charter*, see K. Swinton, "Application of the Canadian Charter of Rights and Freedoms," in *The Canadian Charter of Rights and Freedoms, Commentary*, W. Tarnopolsky and G. Beaudoin, eds. (Toronto: Carswell, 1982), ch. 3, and D. Gibson, "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 213. See also Y. de Montigny, "Section 32 and Equality Rights," in *Equality Rights and the Canadian Charter of Rights and Freedoms*, A.F. Bayefsky and M. Eberts, eds. (Toronto: Carswell, 1985), ch. 13.

extend to economic, social and cultural rights? Different sections of the *Charter* appear to provide different responses.[38] Liberal theory focuses on the political, civil and legal rights of individual citizens, believing these to be essential prerequisites to the health and growth of a democratic society. Social and economic rights are not considered to be within the appropriate purview of constitutional adjudication since they require an inquiry into the substantive outcomes generated by the economic and social structures of society. Cultural rights are also minimized by liberals to the extent that they entail an acknowledgement of rights of collectives over rights of individuals. An illustration of the demarcation sometimes made between civil, legal and political versus social, cultural and economic rights is the creation of two separate international human rights covenants to cover these categories.[39]

The individual versus collective rights issue also has ideological underpinnings. Many of the rights and freedoms in the *Charter* appear to be designed to protect the individual citizen from the State or the majority.[40] Individual rights and freedoms are fundamental to the liberal vision of society. At the same time, however, the *Charter* may be interpreted to extend protection to certain collective rights, implicitly acknowledging the existence of distinct groups and collectivities that possess rights and duties.[41] The notion of collective rights, which contains faint echos of the conservative acceptance of community, represents an important post-liberal concept.

In addition to the substantive provisions of the *Charter*, the methodological approach to *Charter* adjudication has ideological implications. While some judges may try to apply traditional formalistic legal reasoning to *Charter* cases, identifying bright line categories or definitions of rights and freedoms in an attempt to retain the myth of the political neutrality and rule-like certainty of judging, others will adopt a more purposive and policy-based approach.[42] The latter ap-

38 The right to vote and legal rights provide examples of the former. For examples of the latter see section 15(2) as well as freedom of association, language rights and mobility rights.

39 *Supra*, note 13.

40 See, for example, sections 7–14.

41 This would depend on the interpretation given to sections such as section 2(*a*) and (*d*) and section 15.

42 In a recent address to the *University of Ottawa Conference on the Supreme Court of Canada*, Chief Justice Dickson endorsed a purposive and policy-based approach, October 4, 1985, at p. 12; see also *R. v. Big M Drug Mart Ltd., supra*, note 32 at p. 344 (S.C.R.).

proach diverges from classical liberal legalism, although it by no means acknowledges the direct link between law and politics. It represents a hybrid of legal formalism and legal realism; it admits the partial impurity or implausibility of legal formalism to sustain the fundamental message of formalism that the rule of law is more than just an imposition of the subjective values and political biases of judges. The inclusion of section 1 of the *Charter* exemplifies this shift away from traditional legal formalism. It provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section invites a purposive and interest-balancing approach to *Charter* violation cases. It demands the adjudication of constitutionality according to the vague and open-ended standard of "reasonableness". A law would only be demonstrably justified if its legislative purpose was reasonable, non-arbitrary and important in a free and democratic society. In addition, the trait chosen as the basis for classification should bear a reasonable or rational relationship to the purpose of the statute. Thus, a law would not be constitutional if it over or underclassified the group targeted by the legislation in question.

The equality provisions themselves also reveal ideological tension.[43] Subsection 15(1) provides:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

On the one hand, this section reflects the biases of liberal thought by emphasizing the individual and mandating equal treatment. On the other hand, it may be argued that the section does not simply require abstract procedural equality; it is broad enough to ensure substantive equality of outcomes. The right to "equal benefit of the law" in subsection 15(1) and the provisions of subsection 15(2) support this second interpretation. Subsection 15(2) states:

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43 For general discussions of section 15, see M. Gold, *supra*, note 3; W. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. B.R. 242 and "The Equality Rights" in Tarnopolsky and Beaudoin, eds., *supra*, note 37 at p. 395; S. McIntyre, "The Charter: Driving Women to Abstraction," in Broadside, March 1985, at pp. 8–9.

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This subsection explicitly recognizes the need for special treatment or affirmative action to redress inequities arising from discrimination, and ensures that such measures will not be precluded by an unduly restrictive or formal interpretation of subsection 15(1). Different individuals and groups are entitled to receive different treatment depending on the historical realities of their position in society. Subsection 15(2) acknowledges that society does not correspond to the traditional liberal myth of undifferentiated, atomized individuals.

Section 28 addresses solely the question of gender equality. As with section 15, the meaning of section 28 is ambiguous. It provides:

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

Some commentators argue that this section, when combined with the protection afforded in section 15, prohibits all sex-based classifications. According to Katharine de Jong, section 28 overrides section 1, which she maintains is the only mechanism through which limits on absolute equal treatment could be upheld.[44] Others suggest that section 28 "means and accomplishes nothing."[45] Still others interpret section 28 as a general affirmation of the importance of ensuring sexual equality in Canadian society.[46]

The *Charter* is not a panacea for the problem of continuing subordination of women in our society. Yet, given the importance of law as part of the "social totality,"[47] it is essential that feminists assess the potential of the *Charter* for advancing the human rights of women. In

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44 "Sexual Equality: Interpreting Section 28," in A.F. Bayefsky and M. Eberts, eds., *supra*, note 37, p. 493 at pp. 524–525.

45 E.A. Driedger, "The Canadian Charter of Rights and Freedoms" (1982), 14 Ottawa L.R. 366 at 373; see also discussion of this perspective in de Jong, note 44 at pp. 516–518.

46 See, for example, K. Swinton, "Regulating Reproductive Hazards in the Workplace: Balancing Equality and Health" (1983), 33 Univ. of T.L.J. 45.

47 This term is used by G. Lukacs in *History and Class Consciousness*, trans. R. Livingston (Cambridge: MIT Press, 1971). See also K. Klare, "Law-Making as Praxis" (1979), 40 Telos 123 at 128–133 for his discussion of the constitutive theory of law.

so doing, a review of the legal treatment of women constitutes a useful starting point.

4. THE LEGAL TREATMENT OF WOMEN

In reviewing the legal treatment of women, it is important to acknowledge the perceived division of society into public and private spheres. Historically, women have been relegated primarily to the household, men to the market. This division of labour has had critical implications with respect to the legal treatment of women and has deeply influenced theories of gender equality. While the liberal conception of equality prevailed with respect to men in the market sector, conservatism still informed the familial reality and the treatment of women active in the market or public sphere. Thus, the law treated women differently and as inferior to men either in the guise of special protection or through an outright denial of rights. The emergence of the "rule of law", which proclaimed the formal equality of "individuals" to exercise the right to own property and to contract freely, embraced only *male* individuals. Women were excluded from the "rule of law" because its concern was exclusively in the public sphere. The private sphere of the home and the family was beyond the reach of the law where the father or husband was considered sovereign. Since women did not belong in the public sphere, the juridical equality of citizens did not apply to them. Women were denied the right to vote and the right to hold public office. Upon marriage, women lost their right to own property and contract on their own behalf.[48]

The complete exclusion of women from the formal equality provided by the "rule of law" ideology is reflected in early case law. This jurisprudence is also interesting in that it embodies an unlikely harmony between conservatism and liberalism. Conservative notions about women's "proper" functions did not conflict with the growing hegemony of liberalism in the public sphere.

An interesting example is the 1905 case of Mabel French, who was denied the right to be admitted to the Barristers' Society in New Brunswick since the word "person" in the *Barristers' Act* was held not to include women.[49] As Chief Justice Tuck stated:

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48 M. Eberts, "The Rights of Women," in *The Practice of Freedom*, R. St. J. MacDonald, ed. (Toronto: Butterworths, 1978), p. 225 at pp. 225–226.

49 *In re Mabel P. French* (1905), 37 N.B.R. 359 (N.B.S.C.).

> My own opinion is that it was never in the contemplation of the legislature that a woman should be admitted an attorney of this Court, and that the word "person" in the section applies only to males, the only persons qualified at common law. I think the application of Miss French must be refused.[50]

As late as 1928 in the infamous "Persons Case", the Supreme Court of Canada held that women were not "persons" under the *British North America Act* and thus not eligible for the Senate. It was only upon appeal to the British Judicial Committee of the Privy Council that the decision was reversed.[51]

The logic of denying women access to the public sphere was based on what has been termed "separate sphere" ideology.[52] It was most plainly articulated in *Bradwell* v. *Illinois,* a United States decision involving the same issues as the Mabel French case:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, belongs to the functions of womanhood.[53]

The same rationale underlined the passage of special protective legislation for women workers. In Ontario, for example, the *Factory and Shops Act* was amended in 1901 to limit the hours of work for women and children and to prohibit the employment of children under the age of fourteen and of young girls and women whose reproductive capacity could be injured at work.[54] This kind of protective legislation was explicitly endorsed by United States courts through reliance on sexist reasoning.

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is *obvious.* This is

50 *Ibid.*, p. 362.

51 *Edwards* v. *Attorney General for Canada,* [1930] A.C. 124, [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 (P.C.); see also E. Atcheson, M. Eberts and B. Symes, *Women and Legal Action, Precedents, Resources and Strategies for the Future* (Ottawa: Can. Council on the Status of Women, 1984), p. 11.

52 See N. Taub and E. Schneider "Perspectives on Women's Subordination and the Role of Law," in Kairys, *supra,* note 17 at p. 117 and esp. at pp. 125–127.

53 *Bradwell* v. *Illinois* (1873), 16 Wall. 141 at 141.

54 N. Miller Chenier, *Reproductive Hazards at Work* (Ottawa: Can. Adv. Council on the Status of Women, 1982), p. 40.

> especially true when the *burdens* of motherhood are upon her. Even when they are not, by abundant testimony of the *medical fraternity* continuance for a long time on her feet at work . . . tend to injurious effects upon her body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest . . . in order to preserve the strength and vigor of the race. . . . Still again, history discloses the fact that woman has always been dependent upon man. He established his control in various forms, and with diminishing intensity, it has continued to the present.[55] (emphasis added)

Women workers, therefore, received the protection all workers needed at the expense of their alleged inferiority to men being reinforced by the courts.[56] Such judicial pronouncements represent a conservative ideological approach to gender inequities.

In recent years there has been a discernible shift in the legal treatment of women. The legal disabilities formerly imposed on married women have been abolished.[57] Most Canadian women obtained the right to vote following World War I.[58] It was not until the 1960s and thereafter, however, that legislation prohibiting sex discrimination developed. The focus of this reform was the treatment of women in the "public sphere". Anti-discrimination statutes mandated the equal treatment of men and women in employment, in the provision of goods and services and in housing.[59] In addition, the *Canadian Bill of Rights* was passed which included a provision against discrimination based on sex.[60]

The idea behind these reforms was the following. Individual women were not to be pre-judged according to stereotyped gender roles; rather, they were to be treated in accordance with what they individually merited. The law prescribed that women be treated the

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55 *Muller v. Oregon* (1908), 208 U.S. 551 at 556, 28 S. Ct. 324 at 326.

56 F. Olsen, *supra*, note 9 at p. 1559.

57 Eberts, *supra*, note 48.

58 C. Cleverdon, *The Women's Suffrage Movement in Canada*, 2d ed. (Toronto: Univ. of Toronto Press, 1974).

59 W. Tarnopolsky, *Discrimination and the Law* (Toronto: Richard de Boo, 1982) ch. VIII at p. 255.

60 S.C. 1960, c. 44. Section 1 provides:

> 1. It is hereby recognized and declared that in Canada, there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .
>
> (*b*) the right of the individual to equality before the law and the protection of the law, . . .

same as men in the public sphere. Thus, the influence of liberal ideology was being felt in the legal response to the problem of sex discrimination. At the same time, however, conservative ideology continued to affect legal theories of gender equality. The law maintained that where a "real" biological difference existed between women and men, the law should or could treat the sexes differently.[61] Thus, the judiciary reconciled the tension between liberal and conservative ideology by integrating strands of both into a hybrid liberal-conservative theory of equality.

There are a number of problems associated with this hybrid conception, even though it appears to be the most widely-accepted approach at present. The most important problem is the inherent contradiction it contains. The law is trying both to admit and to deny that differences exist between women and men. The result is confusion. For example, judges confound biological differences with socially-determined differences, or in confirming biological differences they justify detrimental differential treatment. Professor Catherine MacKinnon captures the essence of the problem when she writes:

> The relationship between woman's anatomy and her social fate is the pivot on which turns all attempts, and opposition to attempts, to define or change her situation. At every turn, nature appears hand in glove with culture, so that the special definition of woman's place within man's world appears to conform exactly to her differences from him. But the same reality can be seen as the fist of social dominance hidden in the soft glove of reasonableness—the ideology of biological fiat.[62]

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61 Even the *Equal Rights Amendment*, 86 Stat. 1523 (1972) in the United States, which was widely believed to mandate absolute legal equality between women and men, still was said to permit differential treatment with respect to "unique physical characteristics" according to its most widely accepted interpretation. As stated in G. Falk *et al.*, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women" (1971), 80 Yale L.J. 871 at 909:

> The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with a classification based on the broad and impermissible attribute of sex. This principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. . . . Legislation of this kind does not . . . deny equal rights to the other sex. So long as the law deals only with the characteristic found in all (or some) women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex.

62 C. MacKinnon, *The Sexual Harassment of Working Women* (New Haven: Yale Univ. Press, 1979), p. 101.

The case law dealing with pregnancy-related discrimination illustrates most clearly the shortcomings of this judicial reasoning. When Stella Bliss invoked the equality provisions of the *Canadian Bill of Rights* to challenge the *Unemployment Insurance Act*[63] on the grounds that it treated pregnant women more harshly than other workers, the Supreme Court of Canada denied her claim.[64] It rejected the argument that discriminatory treatment of pregnant persons constitutes sex discrimination. According to Ritchie J., "[a]ny inequity between the sexes in this area is not created by legislation but by nature."[65]

A second serious problem stemming more from the liberal component of the hybrid conception of equality relates to the formal demand for equal treatment. There are two ways in which this demand has inadvertently contributed to the continued oppression of women.

First, the doctrine of equal treatment in the "public sphere" only helps those women who can emulate men and meet the standards of a male-dominated world. It fails to pose the question of why many women cannot meet the standards in the first place. MacKinnon explains this with reference to the United States Supreme Court decision, *Reed* v. *Reed*,[66] the first case in which a sex-based legislative classification was struck down under the Equal Protection Clause of the Fourteenth Amendment of the United States' Constitution. The statute gave automatic preference to men as administrators of estates rather than requiring a hearing into the merits of the individual applicants. The Court held that to assume, for the sake of administrative convenience, that most men would be better administrators than women was discriminatory and unconstitutional. However, as MacKinnon points out, in a world where women have been systematically excluded from business affairs, "a legal guarantee of equal consideration would make little difference to most women who would merely be rejected individually as estate administrators."[67]

For a Canadian example, we can look at the human rights decision in *Larouche* v. *Emergency Car Rental*.[68] Larouche was refused the use of a five ton truck by a Montreal rental agency because she was

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63 S.C. 1970–71–72, c. 48.

64 *Bliss* v. *Attorney-General of Canada*, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 92 D.L.R. (3d) 417, 23 N.R. 527 (S.C.C.).

65 *Ibid.*, p. 422 (D.L.R.).

66 (1971), 404 U.S. 71.

67 MacKinnon, *supra*, note 62 at p. 108.

68 (1980), 1 C.H.R.R. D/119 (Que. Prov. Ct., Mont. Div.).

a woman and the rentor assumed that women were not as capable as men in driving trucks. Larouche was an experienced truck and bus driver. In concluding that the rental agency had discriminated, the Court stated, "il ne s'enquit même pas de son expérience et qu'il a présumé injustement et sans motif qu'elle ne pouvait conduire un camion parce qu'elle était du sexe féminin."[69] By implication, had the rental agency inquired into Larouche's experience and found it lacking, it may well have been justified in refusing to rent her a truck. It is likely that the majority of women still lack experience driving trucks. They lack the disposable income to buy cars as readily as men and they are discriminated against in seeking traditionally male jobs such as truck driving. As in the *Reed* case, a large number of women would have been excluded from renting a truck because of inadequate individual qualifications. Current equality theory, however, fails to address this problem. Rather than viewing this situation as a manifestation of even more serious sexual inequality, it would not be identified as a problem of discrimination:

> What about the women whom the stereotypes describe? What if, because a stereotype has set a standard that most women have had little choice but to meet, few women have escaped being measured against it and shaped by it? Why should the exceptional individual, who can argue that the stereotype does not apply to her, be the only one who can assert that the stereotype disadvantages her when most women live a sex-stereotyped reality?[70]

In practical terms, therefore, anti-discrimination laws often work to the advantage of a minority of women—the "exceptional" women have proven that they can be "successful" in the male-defined and dominated world. For those women who fail to achieve male-defined success, it becomes their fault rather than the system's. The blame-the-victim tendency continues subtly but powerfully.

The second way in which the demand for equal treatment inadvertently contributes to the continued subordination of women is by implicitly devaluing "female-associated"[71] skills, activities, and values. Male-defined standards are left unchallenged; women simply claim an equal ability to conform to them. In the process of doing so,

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69 *Ibid.*, at D/119.

70 MacKinnon, *supra*, note 62 at p. 122. See also Note, "Toward a Redefinition of Sexual Equality" (1981–82), 95 Harv. L.R. 487 for a discussion of the problems associated with an assimilationist approach to sexual equality.

71 Angela Miles uses the term "female-associated" to describe those skills, values and activities traditionally associated with women. See note 15, *supra*.

however, women's traditional work and values are devalued. The "career woman" is often viewed as superior to the "housewife". Women are thereby divided and victimization takes deeper roots. As Angela Miles writes:

> To claim women's humanity only insofar as women can show themselves to be like (as good as) men is to challenge men's definition of women but not their definition of *humanity*.[72]

Given the inadequacies of current equality theory, the women's movement has begun to re-evaluate its demands. Two alternative approaches have emerged. Both propose dramatically different solutions to the contradictions and shortcomings of earlier formulations of legal equality for women. One urges absolute gender neutrality in the law; the second proposes an open acknowledgement of sex differences stemming from the social reality of inequality.

The first response to the inadequacies of equality theory, the gender neutrality approach, requires the tensions between claims for equality and claims for special treatment be resolved by carrying the liberal perspective to its most extreme conclusion. The law is to be absolutely sex neutral. Under no circumstances should sex constitute a valid basis for legal classification, not even when seemingly justified or dictated by biological differences. For example, Wendy Williams argues that the need for compensated time off work around childbirth should not be addressed by special maternity leave legislation; rather, pregnancy leave should be covered under the general rubric of short term disability benefits.[73] To do otherwise, Williams argues, is to reinforce outmoded stereotypes. Special legislative measures for women will inevitably backfire to perpetuate gender stereotypes and discrimination against women.

Does this formulation of absolute equal treatment do justice to the legal struggle for women's liberation? It would no doubt effectively redress the judicial confusion over socially versus biologically

72 *Supra*, note 15 at p. 218.

73 "Sex Discrimination under the Charter: Some Problems of Theory" (1983), 4 C.H.R.R. C/83-1 at C/83-4; for a further elaboration of this perspective, see Williams, "The Equality Crisis: Some Reflections on Courts, Culture and Feminism" (1983), 7 Women's Rights L.R. 173. See also Canadian Advisory Council on the Status of Women, "Women, Human Rights and the Constitution: Submission to the Special Joint Committee on the Constitution" (1981), 2 C.H.R.R. C/35.

based differences. The persistent legacy of "separate sphere" ideology would finally be eradicated. However, the absolute gender neutrality solution fails to address other criticisms made of current equality theory. Indeed, it may even accentuate them. It fails to challenge male-defined standards, meaning "exceptional" women who do not fit traditional female stereotypes continue to be the main beneficiaries. Moreover, the facial neutrality of the law may mask the continuing reality of women's oppression. For example, the *Criminal Code*[74] now speaks of sexual offences as though both men and women are equally prone to sexual violence when in reality it is men who rape and sexually assault women or other men. As Christine Boyle notes, the law does not acknowledge "the unequal burden of victimization that women bear in this context."[75]

It should be noted that proponents of sexual neutrality in the law do not reject the need for affirmative action. It is justified, however, in a narrow and liberal way as a mechanism to achieve equality: groups that are discriminated against have been set back; affirmative action programs are devices for bringing such groups up to the starting line with everyone else.[76]

Many proponents of the absolute neutrality response do not believe it falls short of the full needs of feminist equality theory. Even those who perceive its shortcomings maintain that it is the best that may be done in the present constraints and biases of a male-dominated judicial system. According to Williams:

> [C]ourts will do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white, male middle-class interests and values. This means, to rephrase the point, that women's equality as delivered by the courts can only be an integration into a pre-existing, predominantly male world.[77]

The alternative response goes in the opposite direction. It begins by acknowledging real differences between men and women, an admission anathema to the liberal response. Given the importance of gender in our society, it maintains that women and men have funda-

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74 R.S.C. 1970, c. C-34, as amended S.C. 1980–81–82–83, c. 125, s. 19. The new provisions on sexual assault are contained in sections 246.1–246.3.

75 Boyle, *supra*, note 36 at p. 41.

76 See Williams, "Sex Discrimination Under the Charter," *supra*, note 73, at C/86–6.

77 Williams, *The Equality Crisis*, *supra*, note 73 at p. 175.

mentally different social experiences.[78] One manifestation of these differences is the sex segregation of society. Women continue to predominate in certain kinds of work and are associated with particular values and characteristics (*e.g.*, nurturing, altruism, caring). According to the proponents of this approach, "female-associated" skills and values must be recognized and encouraged in society rather than devalued or ignored. This constitutes one of the central tasks of the pursuit of gender equality. Indeed, differential treatment which takes into account the differences between the sexes is considered both acceptable and necessary in some instances. Thus, special maternity benefits are advocated on the grounds that the special abilities of women to have children should be reflected in the law and acknowledged by society.

Two tensions surface with respect to this approach. One stems from the celebration of the traditional values and activities of women and the concomitant condemnation of the subordination of women. The effects of male domination have been damaging to women, preventing us from being or becoming the individuals we would be in a non-sexist society. Thus, this approach should also embrace the demand for the kinds of social transformation that would give women the opportunities to develop to our fullest potential. This may mean gaining access to traditionally-male spheres of activity, while challenging the standards in those spheres when necessary.

The second tension relates to the role of law as a possible contributor to social change. A demand that the law not be sex neutral—that it make clear the different social realities inhabited by women and men—provokes a fear that the law will reinforce relations of domination and subordination between men and women, reproduce the effects of conservatism, and thereby limit societal attitudes about the abilities, aspirations and talents of women. In short, the law may be used to entrench the deleterious effects of sex stereotyping.

Given these two current responses to the problems of equality theory, what approach should be adopted with respect to the *Charter of Rights and Freedoms*?

5. RETHINKING SEXUAL EQUALITY

In this final section, I intend to present the general approach to gender equality I believe should be taken in the *Charter* cases. While

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78 See *supra*, note 15; see also Sarah Salter, *Extended Identity: A Feminist Intuition of Self/Other and its Implications for Theories of Justice and Rights*, New England School of Law, 1984 (manuscript).

it attempts to integrate some aspects of both of the responses just outlined, it relies primarily on the second approach.

The ongoing reality of women's oppression makes it essential that the attainment of sexual equality constitute a central objective of society. The starting point for a theory of sexual equality should be an acknowledgement of the subordination of women in society. The law should not mask social reality by speaking merely in terms of the differential treatment of the sexes. Rather, it must be recognized that women systematically have been treated as inferior to men. As MacKinnon notes, "the imagery of hierarchy, not just of difference"[79] must animate judicial decisions. This approach goes beyond liberal legalism by necessitating the identification of forms of social domination.[80] The central question to be asked, therefore, in interpreting the gender equality provisions of the *Charter* is: does the statute, policy, practice or action contribute to the social inequality of women?

The application of this open-ended test for gender equality necessitates a contextual approach[81] directed at the actual experiences of women. It also requires *Charter* litigation to entail a process of educating judges about how, why and when women are oppressed in society. Since the abstract and reified nature of legal reasoning has made it difficult in the past for judges to identify what most women would immediately recognize as inferior treatment, the "good sense"[82] of "ordinary women" about the realities of their oppression should be injected, whenever possible, into the legal process.

To identify problems of inequality, it is also important to go beyond procedures and intentions to a consideration of outcomes and effects.[83] A results-oriented approach ensures that institutionalized or systemic forms of discrimination and facially-neutral provisions which have a disparate impact on women are prohibited by the *Char-*

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79 MacKinnon, *supra*, note 62 at p. 102.

80 It was with parallel reasoning with respect to black oppression that the United States Supreme Court struck down racial segregation in the schools; see *Brown* v. *Board of Education* (1954), 347 U.S. 483.

81 Jill McCalla Vickers, "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in Miles and Finn, eds., *supra*, note 15, p. 27 at pp. 34–37. Madame Justice Bertha Wilson has also advocated a contextual approach to *Charter* adjudication; see *Goodman Lecture No. 2*, University of Toronto, November 27, 1985, p. 17.

82 This idea was inspired by Antonio Gramsci's discussion of common sense and good sense in relation to the "masses"; see *Prison Notebooks*, eds. & trans. Q. Hoare & G. Smith (New York: International Publishers, 1972), pp. 419–425.

83 A concern with effects is illustrated in *R.* v. *Big M Drug Mart Ltd.*, *supra*, note 32; see especially Wilson J.'s concurring judgment.

ter. By emphasizing equality of outcomes or results, concerns about fairness generated by any shift away from absolute neutral treatment are also assuaged. Differential treatment is justified when it is aimed at securing equal results.

With these two general suggestions in mind—that a contextual and results-oriented approach be adopted—how would courts confront specific questions about when differential and when similar treatment are necessary? In particular, we must consider how to respond to what Martha Minow refers to as the "difference dilemma":

> Identification or acknowledgement of a trait of difference, associated by the dominant group with minority identity, risks recreating occasions for majority discrimination based on that trait. Non-identification or non-acknowledgement, however, risks recreating occasions for discrimination based on majority practices, like tests, norms and judgments forged with regard solely for the perspective, needs, and interests of the dominant group.[84]

Courts will be faced with two types of situations relating to the social inequality of women. First, they will be confronted with cases where differential treatment is currently afforded to men and women. This may result in inequality if women are treated less favourably than men. It may be, however, that the differential treatment benefits women (*e.g.* maternity leave). Second, courts will encounter situations where facially-neutral treatment has a disproportionately adverse impact on women.

In both of these situations, a court's first task is to determine whether the impugned law, policy or practice is operating to the detriment of women. If so, the *Charter* should require a response. The nature of this response, however, deserves careful consideration and an appreciation of the "difference dilemma".

When differential treatment entails less favourable treatment of women, the remedy required will be equal treatment. Where differential treatment provides a genuine benefit to women,[85] this benefit

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84 *Supra*, note 16 at p. 160.

85 It is essential that the benefit be genuine since, historically, numerous legislative provisions labelled as beneficial to women were in fact burdensome. The decision in *R.* v. *Burnshine*, [1975] 1 S.C.R. 693 (S.C.C.), [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 44 D.L.R. (3d) 584, 2 N.R. 53, 15 C.C.C. (2d) 505 in which the Supreme Court of Canada held it was a benefit for the young offender to be incarcerated for a longer period, demonstrates the importance of this initial question. Although this approach requires judges to make difficult value assessments, I do not think this can be avoided.

should be retained in some way. The judicial inquiry, however, should not end at this point. To ascertain how best to retain the beneficial effect of differential treatment without contributing to the potential social stigma associated with difference, courts should ask themselves the following questions.

First, courts should ask why women as a group generally seem to need the special treatment. What social inequity or injustice does it serve to ameliorate? This inquiry will demand that judges consider the socio-historic roots of current inequality. In some cases, it may be possible for the legislator to reword the statute in question to respond more accurately to the social problem primarily faced by women. In form, the statute would be sex neutral; in effect, it would primarily affect women. If a man experienced the same difficulty, however, he would also be covered by the provision.[86]

The second question should be whether the special treatment could be extended generally to include men as well as women. One example might be the application of the occupational health standards, designed for women, to men.[87] If society can heighten protection for all workers, this would constitute a viable and desirable solution. Another example would be the extension of paternity leave provisions.

The third question should be whether it is possible to eradicate the source of the problem rather than merely treat its symptoms. Implicit in this consideration is the need to acknowledge the needs of women and to transform institutions, workplaces, and social structures to meet these needs. This constitutes a significant divergence from the strategy of changing women to fit into male-dominated institutions by either conforming to male-defined standards or being treated as an exceptional anomaly for whom special measures must be created. As Mary Daly has stated: "What is required of women at this point in history is a firm and deep refusal to limit our perspectives, questioning and creativity to any preconceived patterns of male-dominated culture."[88] An analysis of sexual equality issues through this re-

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86 A number of equality theorists have identified such an analysis. For instance, Professor Lahey has identified a "sex neutral/gender specific" approach, in "Equality and Specificity in Feminist Thought," paper presented to the Charter of Rights Education Fund Meeting, August 4, 1983. Diana Majury also suggested it in a lecture on "Women and Equality," Charterwatch class, Dalhousie Law School, November, 1983.

87 This suggestion was made by Nancy Miller Chenier, *supra*, note 54.

88 *Beyond God the Father, Toward a Philosophy of Women's Liberation* (Boston: Beacon Press, 1973), p. 7.

focused lens also contains the potential to enhance the goal of full human liberation.[89]

This last question should also be asked when courts are faced with a situation of discrimination resulting from the disparate impact of facially-neutral laws, policies or practices. Before adopting a differential treatment response to systemic discrimination, the validity of the norms, values and standards of the system should be challenged. Working for this transformation through the courts may prove difficult, given the typically narrow formulation of legal issues. Courts are often faced with options A or B when the solution is C. Nevertheless, judges and lawyers should make every effort to address both the immediate issues and the underlying assumptions and foundations of sex discrimination. One mechanism for doing this is through the creative structuring of remedies.

Judges may find themselves in a position where they believe differential treatment is needed to secure equality of outcomes, but still fear that such treatment may reinforce stereotypes about women and thereby perpetuate inequality. Should courts allow or promote differential treatment at the expense of perpetuating or creating female stereotypes? In responding to this question, we must begin by asking ourselves why the existence of female stereotypes is bad. Certainly, we do not want to endorse reliance on unfair generalizations in the assessment of individuals. Moreover, a rejection of the dichotomies of a sex-stereotyped world would allow the unfolding of each person's full human potential. Nevertheless, our fear of female stereotypes seems to reflect the very male dominance we seek to overcome. Female-associated stereotypes are considered undesirable; male-associated stereotypes are praised. Rather than acquiesce in this classification and bury female-associated stereotypes, we need to celebrate and encourage the extension of many of those stereotypes for their importance to the development of a caring, humane, and just society.[90]

In essence, this last point raises the problem of differences being conceptualized through the categories of "dominant/subordinate, good/bad, up/down, superior/inferior."[91] The process of validating female-associated stereotypes entails a willingness to claim our equality through the assertion rather than the denial of difference.

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89 *Ibid.*, p. 25.

90 Miles, *supra*, note 15 at p. 221.

91 Lorde, *supra*, note 16 at p. 114.

Returning to the specific equality provisions in the *Charter*, is it possible to adopt the approach outlined above? What guidelines can be provided for this interpretive task? Although I do not intend to engage in a detailed prescriptive analysis of how the text of the *Charter* should be interpreted, I shall make a few general suggestions.

First, a contextual, results-oriented approach is supported by the language of section 15. As previously noted, section 15(1) includes the right to "equal protection" and "equal benefit" of the law. The latter phrase, in particular, contemplates an outcomes-oriented approach.[92] In addition, the inclusion of the phrase "before and under the law" represents a clear message to courts that they are not to adopt the narrow Diceyan interpretation of equality applied for example in the intepretation of the *Canadian Bill of Rights* in *Attorney General of Canada* v. *Lavell; Isaac et al.* v. *Bedard*.[93]

Subsection 15(1) also includes a provision for non-discrimination. Equality before and under the law and equal protection and benefit of the law are to be secured "without discrimination". Although discrimination is sometimes defined simply as the making of a distinction or differential treatment of persons or groups, this definition is insufficient in the legal context. The detrimental effect or result of the making of such distinctions must be part of the definition. The latter approach has been adopted in some human rights documents. For example, section 10 of the *Quebec Charter of Human Rights and Freedoms* states:

> Every person has a right to full and equal recognition and exercise of his [or her] rights and freedoms, without distinction, exclusion or preference. . . . Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.[94]

Similarly, in the *International Convention on the Elimination of all Forms of Discrimination Against Women*, discrimination is defined in Article 1 to include

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment

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92 This phrase was included to respond directly to the outcome in the *Bliss* case, *supra*, note 64 and to ensure explicitly against a recurrence. See also discussion accompanying note 43, *supra*.

93 (1973), 23 C.R.N.S. 197, 11 R.F.L. 333, 38 D.L.R. (3d) 481 (S.C.C.).

94 R.S.Q. 1977, c. C-12, as amended.

> or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[95]

Discrimination, therefore, should be interpreted as the subordination of an individual by virtue of her or his membership in a particular class of persons or the subordination of a social group. This definition would not render all forms of differential treatment discriminatory. If the differential treatment ensured equal outcomes and did not therefore subject individuals or groups to subordination, it would not violate subsection 15(1).

The inclusion of subsection 15(2) in the *Charter* further buttresses this conclusion. As Tarnopolsky suggests, subsection 15(2) should not be read as an exception to subsection 15(1), but rather as an interpretive guide to subsection 15(1). In his view, subsection 15(2) was added out of "excessive caution":[96]

> In line with the argument suggested earlier, that equal laws can result in inequality if applied to persons in unequal circumstances, it is suggested that "any law, program or activity that has its object the amelioration of conditions of disadvantaged individuals or groups" cannot be in contravention of subsection (1) of section 15, even without subsection (2) saying so.[97]

Section 28 also lends itself to a contextual results-oriented approach by guaranteeing the rights and freedoms in the *Charter* equally to women and men. The radical potential of this section becomes apparent if we contemplate the notion of equal liberty or security of the person for women and men.

The final section that I wish to address is section 1—the linchpin of *Charter* interpretation. Section 1 should not allow society to justify the creation or perpetuation of sexual inequality. There are at least two ways to avoid compromising the objective of gender equality through section 1. First, in accordance with Professor de Jong's argument, section 28 could be interpreted to render section 1 inapplicable to issues involving equality between the sexes.[98] Second, it could be decided by the courts that it is never "reasonable or demonstrably justified in a free and democratic society" to uphold a provision or practice which

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95 U.N. Doc. A/RES/34/180 (1979), adopted December 18, 1979, in force for Canada January 10, 1982.

96 Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms," *supra*, note 43 at p. 250.

97 *Ibid.*

98 *Supra*, note 44.

creates or perpetuates the social inequality of women.

6. CONCLUSION

The impact of the equality provisions of the *Charter* on the struggle for sexual equality remains an open question. The language of the *Charter* is malleable and broad enough to support a number of interpretations. It would be impossible to devise a rule-like legal formula which would adequately respond to the myriad social realities of inequality. Moreover, the ideological and political leanings of judges will play an important role in shaping legal outcomes.

Current equality theory represents a confused amalgam of different ideological biases and beliefs. Its shortcomings are manifold. It is focused on procedural rather than on substantive equality; it implicitly accepts the dominant world view as universal; and it only helps those members of an oppressed group that can emulate and adopt the standards, values, and characteristics of those who dominate in society. These problems stem from its liberal assumptions, as does its methodological crisis, all of which result from a misplaced notion of the political neutrality of the rule of law. In addition, courts often revert to conservative assumptions about the role of women, thereby perpetuating the patriarchal bias of legal outcomes. Nevertheless, the influences of post-liberal thinking on equality theory have been positive. The most important has been the growing acceptance of effects-based reasoning with its acknowledgement of systemic discrimination and its focus on outcomes. It is into this theoretical context that the *Charter* has entered.

What is clear from the *Charter* is its strong affirmation of the importance of gender equality in Canadian society. Despite legal confusion and inevitable uncertainty in *Charter* interpretation, we need to think seriously about how the *Charter* can promote equality for women. In this regard, it is important to insist on an interpretation of the *Charter* that considers first and foremost whether the impugned law or social practice injures women and contributes to their continued subordination. In so doing, judges should affirm "female-associated" skills and values and denounce the exclusion of women from male-dominated spheres of activity. In the final analysis, however, the generation of ethical and moral answers to the difficult questions which will confront our courts will depend not on any elaborate legal theory of equality, but rather on the ability of judges to develop compassion and empathy for those who experience the realities of inequality and discrimination in our society.