McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 36 1991 *No 4*

On The Moral Presence Of Our Past

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The doctrine of precedence, the author argues, operates on two levels, providing both a doctrine for judicial decision-making and a justification for following past decisions. While the first is well understood, the latter has been given insufficient attention. The author explores several conceptions of the doctrine of precedent and the justificatory theories underlying them. He finds, however, that these theories fail, and suggests instead a justification based on the idea of keeping faith with our past and with each other. This is developed through an analysis of moral deliberation and the communal relations and obligations constitutive of genuine communities. The author concludes by elaborating the notion of critical history, which requires that we accept both the precedential value of our past practices and the failure of those practices to live up to the past we may wish to have had.

Selon l'auteur, la doctrine du *stare decisis* doit s'apprécier à deux niveaux. Au premier niveau, il s'agit d'un outil décisionnel alors qu'au second, il s'agit plutôt d'un argument justifiant le recours aux décisions passées. L'auteur examine plusieurs conceptions de la doctrine ainsi que les justifications théoriques qui les sous-tendent, les rejettant toutes. Il propose en revanche une justification basée sur la confiance en nous-mêmes et en notre passé. L'auteur développe sa théorie en analysant les délibérations morales ainsi que les relations et obligations collectives constitutives d'une véritable communauté. L'auteur conclut sa thèse en élaborant une notion critique de l'histoire. Cette notion nécessite que nous acceptions à la fois la valeur précédentielle des pratiques passées ainsi que la possibilité que la réalité du passé ne corresponde pas à ce que nous aurions espéré.

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Synopsis

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"Put me in remembrance, let us argue together..."
Isaiah 43.26

Introduction

In his *Eighteenth Brumaire*, Marx chronicled the inability of the revolutionaries of 1848 to break the strangle-hold of the past on their language and deliberations.

> The tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionizing themselves and things, in creating something that has never yet existed, preeisely in such periods of revolutionary crisis they anxiously conjure up the spirits of the past to their service and borrow from them names, battle-cries, and costumes in order to present the new scene of world history in this time-honoured disguise and this borrowed language.[1]

Marx's portrait is impatiently ironic. On his canvas, revolutionaries demand the radical transformation of the old order into something altogether new, using "the venerable disguise and borrowed language" of the very past they seek to destroy. These revolutionaries manifested what T.S. Eliot called a sense of *the presence of the past.*[2] Of course, Marx, his feet planted firmly in the future, decried the revolutionaries' weakness of resolve, although it is not clear that this was a weakness from their point of view.[3] My present concern, however, is not to debate with Marx this particular historical issue, despite its interest. Marx's observation is important for my purposes because it alerts us to *a practical or moral* dimension of Eliot's originally literary notion.

The past is morally present to us in familiar ways. We have made promises, we have undertaken projects, we have joined organizations, we have discovered ourselves already a part of a family or community with a long history and tradition. The past, like a potter's hands, molds the options available to us in the present; indeed, it molds the very aims and values through which we view and assess these options. Our individual histories give shape and substance to our individual options and identities; so too do the collective histories of the communities in which we live.

The moral presence of the past is so pervasive that we seldom pay it much heed. Occasionally, however, it forces us individually or collectively to reflect on it, as it did in Germany in the mid-nineteen eighties, when the scholarly and popular press was filled with debate over the present significance of Germany's

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[1]K. Marx, "The Eighteenth Brumaire of Louis Bonaparte" in D. McLellan, ed., *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977) 300 at 300.

[2]T.S. Eliot, "Tradition and the Individual Talent" in *Selected Essays* (London: Faber and Faber, 1972) 13 at 14.

[3]Cf. C.J. Calhoun, "The Radicalism of Tradition: Community Strength or Venerable Disguise and Borrowed Language?" (1983) 88 Am. J. Soc. 886.

Nazi past. Charles Maier, who chronicled the so-called *Historikerstreit*, observed that "insofar as a collection of people wishes to claim existence as a society or nation, it must thereby accept existence as a community through time, hence must acknowledge that acts committed by earlier agents still bind or burden the contemporary community."[4]

At the end of this essay I shall return to issues suggested by this example, but I will focus my attention primarily on another way in which the present is tense with the past, a way which is familiar especially to lawyers. In the summer of 1973, after lengthy interrogation, Frank Miller confessed the murder of Deborah Margolin.[5] Miller unsuccessfully sought to suppress the confession at trial and was convicted. The Supreme Court of New Jersey ruled that the confession was voluntary and properly admitted into evidence. Miller then sought a writ of habeas corpus in the U.S. Federal Courts. Federal District Court dismissed the petition without an evidentiary hearing on the grounds that the voluntariness of a confession is a factual issue within the meaning of 28 U.S.C. §2245(d), which provides that state-court findings of fact are presumed correct in federal habeas proceedings. The Court of Appeals affirmed the District Court's ruling, but the U.S. Supreme Court overturned it, resting its decision heavily on the fact that fifty years of Federal case law stood against the lower courts' ruling. They argued:

> we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." Thus, even assuming that contemporary considerations supported respondent's construction of the statute, nearly a half century of unwavering precedent weighs heavily against any suggestion that we now discard the settled rule in this area.[6]

In law, as in much of the rest of our lives, the past is present in our moral or practical deliberations in the form of *precedent.*

I. Law and the Past

A. *On the Essentially Historical Character of Law*

Why take our past as normative for our choices and decisions? As the passage from *Miller* clearly illustrates, this question arises with singular urgency within legal practice. This is true for all legal systems, not just for those with formal rules of *stare decisis.*[7] Law is essentially historical, not just in the sense

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[4]C. Maier, *The Unmasterable Past* (Cambridge: Harvard University Press, 1988) at 14.

[5]*Miller* v. *Fenton et al.* 474 U.S. 104 (1985) [hereinafter *Miller*].

[6]*Ibid.* at 115, quoting *Moragne* v. *States Marine Lines, Inc.* 398 U.S. 375 (1970) at 403.

[7]Anthony Kronman writes, "Respect for past decisions ... [is] a feature of law in general, and wherever there exists a set of practices and institutions that we believe are entitled to the name of law, the rule of precedent will be at work, influencing, to one degree or another, the conduct of

that the life stories of legal systems can be chronicled, but more importantly in the sense that it is characteristic of law to anchor justification to the past. Time is the soil of the lawyer's thinking.

Oliver Wendell Holmes expressed just this thought in his familiar but much misquoted *bon mot*: "The life of the law has not been logic: it has been experience."[8] We forget that he went on to say that to understand the scope and application of laws, we must know how they will be dealt with by judges trained in the past which the law embodies. For that we must ourselves know something of that past. "In order to know what [the law] is, we must know what is has been..."[9] Maintaining the law's "historic continuity with the past," Holmes said on another occasion, "is not a duty, it is only a necessity."[10] It is a necessity because without it we could not *understand* the legal rules, structures, and arrangements presently facing us, but also because law anchors *justification* in the past. For lawyers and judges, "the past is ... a repository not just of information but of value, with the power to confer legitimacy on actions in the present...."[11]

The issue in legal practice, then, is not *whether* the past is present in the prudence of jurists (and of the rest of us insofar as we seek to act within the law). The issue, rather, is *why should it be*? Why treat this past as normative? Why think the past has legitimating power?

The question, once posed, demands an answer, because the case for *not* doing so seems persuasive. Time itself seems to have no magical moral powers. Why should we not treat a decision of the past like a restricted railroad ticket, good for this day and train only? as Justice Roberts once mused.[12] Locke had a point when he said, with his typical moderation, that "at best an Argument from what has been, to what should of right be, has no great force."[13] Holmes, who thought the law's historic continuity with the past to be a necessity, put a sharper point on Locke's scepticism. "It is revolting," he said, "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[14]

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those responsible for administering the practices and institutions in question" (A. Kronman, "Precedent and Tradition" (1990) 99 Yale L.J. 1029 at 1032).

[8]O. Holmes, *The Common Law*, ed. by M. De Wolfe Howe (Boston: Little, Brown and Co., 1963) at 5.

[9]*Ibid.*

[10]O. Holmes, *Collected Legal Papers* (London: Constable & Company, Ltd., 1920) at 139.

[11]Kronman, *supra*, note 7 at 1032-33.

[12]*Smith* v. *Allwright* 321 U.S. 649 (1943) at 669 (diss.), quoted in F. Schauer, "Precedent" (1987) 39 Stan. L. Rev. 571 at 571 n. 1.

[13]J. Locke, *Two Treatises of Government*, ed. by P. Laslett (Cambridge: Cambridge University Press, 1967) c. 8, s. 103 at 354.

[14]O. Holmes, "The Path of Law" (1897) 10 Harvard L. Rev. 457 at 469. Lord Atkin: "When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper

Bentham raised the ante even further, arguing that the tendency to treat the past as normative for us is a kind of intellectual and practical blindness — an occupational disease to which lawyers are especially susceptible. In the hands of lawyers, he complained, precedent becomes "an avowed substitute for reason;" under its influence blind imitation replaces rational deliberation guided by a refined sense of human suffering. Judges "follow their leaders, — as sheep follow sheep, and geese, geese."[15] Lawyer's know dead men's thoughts too well, we might argue.[16] To give lawyers their way is to invite the dead to bury the living.

The case against the moral force of precedent, I think, demands an answer. I propose to meet this challenge, but first I must refine the issue I will address here, because important philosophical questions about the nature and significance of precedent abound and are easily confused with the one issue I shall address.

B. Refining the Question

"An argument from precedent," says Anthony Kronman, "asserts that something should be done in a certain way now because it was done in that way in the past."[17] Why is this so? What accounts for the moral force of precedent? My project is to explain in moral terms why we believe that the fact that a decision of a certain sort was taken in the past provides a sound reason for reaching a similar decision in the situation currently facing us.

Note that this phenomenon is not restricted to formal institutions (like the law) in which there is a recognized practice of precedent-following. For even outside these institutions — for example, in domestic life — we tend to feel the force of such appeals to the past. (Recall Lon Fuller's study years ago of the force of reasons of precedent in the context of informal arbitration.[18]) The question I wish to address is not a question about whether an *institution* of a certain

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course for the judge is to pass through them undeterred" (*United Australia, Ltd.* v. *Barclay's Bank, Ltd.*, [1941] A.C. 1 at 29).

[15]J. Bentham, *The Works of Jeremy Bentham*, ed. by J. Bowring (New York: Russell & Russell, 1962), vol. X at 511, and vol. IX at 322. Bentham was very fond of calling the doctrine of precedent the "sheep and geese principle." See University College London Manuscripts, Box lxxi, folio 126. This, however, represents only one strand in Bentham's very complicated view of precedent and its merits. See G. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986) c. 6 & 8 [herinafter *BCLT*].

[16]C. Sandberg, "The Lawyers Know Too Much" in *Smoke and Steel* (New York: Harcourt, Brace & World, 1963), 85.

[17]Kronman, *supra*, note 7 at 1032.

[18]L. Fuller, "Collective Bargaining and the Arbitrator" (1963) Wisc. L. Rev. 3. Larry Alexander recently observed that "even without a formal practice of precedent following, people can and will draw inferences from decisions in earlier cases about how future cases will be decided" (L. Alexander, "Constrained by Precedent" (1989) 63 S. Cal. L. Rev. 1 at 6 n. 3).

kind exists, let alone about the conditions of existence of certain familiar social institutional practices. In particular, it is not a question about whether there is an established doctrine of binding *stare decisis* in English or Canadian or American law, or what the "rules of precedent" in these legal systems are.[19] The question I wish to address is not one of social theory or descriptive jurisprudence, but rather a question of *moral* theory, albeit a question that arises with special urgency with regard to law because of the law's self-proclaimed historicity.

Our past decisions and actions seem to have the moral force of precedent. But not always. Some actions have moral *consequences* without having precedential force. This is especially true of actions or choices which are taken for no reason at all. However, *if* it is ever true that decisions and actions have the moral force of precedent, it is true of decisions and actions *taken for reasons*, or of those decisions and actions for which we legitimately *demand* that reasons be given. This may explain why the past seems to weigh more heavily in the deliberation of those who occupy positions of authority.[20] Thus to refine our earlier observation, we must say "decisions for reasons have the moral force of precedent."

At this point it is natural to ask, does a single such decision do the trick, or is the moral force the product of several decisions made on the same basis? Does the moral efficacy of such decisions depend on their being taken in the context of similar, overlapping, or reinforcing decisions? Does it make a difference to the moral causality involved that the decisions are spread over different decision makers? These are interesting and important questions, but they are not on my agenda. For the sake of simplicity, I will speak as if a single decision can enjoy the kind of moral efficacy we have observed, but I do not wish thereby to beg any of these questions.

Our focus, then, is on decisions for reasons. Once we recognize this, our problem seems easier. We have asked, "Why are past decisions normative for present decisions?" It is tempting to reply, "Since these are decisions for reasons, and since reasons are necessarily general (having to do with types or kinds of actions, rather than particular actions), these decisions must be taken logically to instantiate rules which then bind agents to specific decisions in the present." According to Theodore Benditt, "the question of whether, and why, judges should follow precedent is the question of whether earlier decisions establish rules of law."[21] However, while I do not want to reject the suggestion implicit in this explanation, I think it does not get our inquiry off on the right foot.

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[19]The point of departure for all discussions of this sort is R. Cross, *Precedent in English Law*, 3d ed. (Oxford: Oxford University Press, 1977).

[20]See N. MacCormick, "Why Cases Have *Rationes* and What These Are" in L. Goldstein, ed., *Precedent in Law* (Oxford: Oxford University Press, 1987) 155.

[21]T. Benditt, "The Rule of Precedent" in Goldstein, ed., *ibid.*, 89 at 94.

First, it joins issue on a matter tangential to my main concern, viz., whether the way in which past decisions for reasons give moral shape to the future is through establishing rules. This thesis seems very plausible, but many "particularists" deny it. They think arguments from past decisions are, as Roy Stone put it, arguments from "particular to particular — *similea e similibus* ..."[22] But this is *not* the issue before us. The "particularist" vs "rationalist" debate concerns the logic of the *inference from past decisions.* It *assumes* that past decisions generate present reasons and focuses on the *logic* of this inference. My concern is to explain and defend the truth of that prior assumption. Thus, the focus of my inquiry is not, "How logically do we move from past to present?" but "Why *start* with the past?" Not "How do decisions make rules?" but rather "How do past decisions for reasons provide reasons for present decisions?"

Second, with attention focused on decisions for reasons, it might be tempting to think that we can account for the moral force of past decisions in terms of the soundness of those reasons. However, there is an obvious problem with this suggestion: the reasons for which the earlier decision was taken may not have been morally sound. Indeed, there may be no morally sound reasons for the decision. Nevertheless, in some of these cases, the past decision is still regarded as providing a reason for a similar decision in the present. Surely, from the fact that an agent in the past *believed* certain considerations to justify the decision, it does not follow that they succeed in doing so. So an explanation of the moral force of a past decision in terms of the moral soundness of the reasons on which it might have rested cannot succeed.

Thus, if past decisions for reasons give reasons for present decisions, it is not the soundness of the past decision alone, nor the soundness of the reasons for which it was taken alone, that provides the reason. The moral force of precedent must be, at least to some degree, *independent* of the merits of the decision. I will call this the *independence thesis.* To clarify the independence thesis, consider a contrasting view of the authority of a judicial decision expressed by Chief Justice Taney in the nineteenth century.

> I ... am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[23]

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[22]R. Stone, "Ratiocination not Rationalisation" (1965) 74 Mind 463 at 481 and see 477-78. For suggestions of this view in classical common law theory see *BCLT, supra,* note 15, c. 1.3 and G.J. Postema, "Some Roots of our Notion of Precedent" in Goldstein, ed., *supra,* note 20, 9 at 20-21. Also see C. Fried, "The Artificial Reason of the Law, or: What Lawyers Know" (1981) 60 Texas L. Rev. 35 at 57; S. Fish, *Doing What Comes Naturally* (Durham: Duke University Press, 1989).

[23]*Smith* v. *Turner* 48 U.S. 282 (1849) at 470.

If we take his last clause at face value, Taney is suggesting that we regard the authority of the Court's decisions on issues of Constitutional construction to rest exclusively on the force of its reasoning. This, however, is to deny the decisions of any precedential force, because it maintains that there is no reason to follow the Court's past decisions other than the fact that those decisions rest on arguments which meet standards of reasonableness. Taney, it seems, is willing to accept the view that the Court's decision itself provides no basis for deciding in a similar way in the future. This may be the appropriate way to regard the decisions of the Court in Constitutional matters, or even in other areas of law, but it is clear that on this view it would no longer be plausible to say that the past decision *set precedent* for present decision making. If the decision set a precedent, then the fact that the case was decided in a particular way must itself give some reason, or figure essentially in some more complex reason, for deciding in the same way in the future, and this reason must be rooted in considerations independent of the specific merits of the case. This is the thrust of the independence thesis.

That much, I think, is relatively clear, but matters become more difficult as we realize that the independence thesis can take several different forms. Perhaps the weakest version of the independence thesis seems to have had some currency in seventeenth and perhaps even eighteenth century common law jurisprudence. (It *may* also lie behind Taney's proposal). On this view,[24] past decisions have authority not in virtue of their conformity with timeless standards of reason or justice, nor simply in virtue of having been decided, but rather in virtue of having a place within a body of common experience and of being the product of a process of reflective deliberation exercised within this body of experience, and thus invite and focus reasoning in future cases. No single decision, on this view, is exempt from the trained critical eye of subsequent jurists, and each has authority only if it passes critical scrutiny. Nevertheless, the standards of critical success are given concrete content only in and through the historically accumulated common experience reposited in the vast body of particular past cases. This view of past decisions recognizes the moral presence of the past, but, if it is a form of the independence thesis, it is a limiting case. The practical authority of any decision rests on the merits of the reasoning for it, yet the standards for assessing the merits are themselves self-consciously historical. The reasonableness of any argument is a function of its fit with widely recognized and historically rooted paradigms of such reasoning.

Another, slightly stronger, form of the independence thesis is analogous to a version of the epistemological principle of "methodological conservatism."[25]

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[24]In this paragraph I rely on my discussion of Coke, Sir Matthew Hale, and Blackstone in Postema, *supra*, note 22 at 18-23.

[25]See L. Sklar, "Methodological Conservatism" (1975) 84 Phil. Rev. 374, and W. Lycan, *Judgement and Justification* (Cambridge: Cambridge University Press, 1988) c. 8.

According to this epistemological doctrine, the very fact that a proposition is believed is warrant for maintaining that belief, until one has reason to challenge the veracity of the belief. The analogous doctrine of precedent holds that one has a sound reason to follow decisions in the past so long as they were not decided in error (alternatively: so long as the present decision maker does not have sufficient reason to believe they were decided in error).[26] On this version of the independence thesis, past decisions are thought to provide at least some reason for similar decisions in the present, *conditional* upon its not being the case (or its not being shown to the decision maker's satisfaction) that the past decision is in error. This leaves some — albeit a rather narrow — basis for the independence of the moral force of precedent from the merits of past decisions. On this view, past decisions give reasons for present similar decisions, independent of the merits of the case, but these reasons are defeated once it is shown that the precedent case was decided in error. Thus, as long as the precedent decision is one among several more or less equally reasonable solutions to the practical problems thrown up by the case, it can exert its own special moral force.

The modern doctrine of precedent since at least the nineteenth century insists on a stronger version of the independence thesis. It insists that past decisions retain their normative hold on our deliberation in the face of legitimate reservations about the merits of those decisions.[27] Larry Alexander, for example, thinks that the best way to isolate the moral (or rational) force of precedent is to focus on "constraint [on judicial decisions imposed] by incorrectly decided precedents."[28] However, we must take care not to overstate the independence thesis. We must keep in mind that one can acknowledge this independent moral force of precedent without accepting that the fact that a decision was taken in the past *always* gives a sound (let alone overriding) reason for making a similar decision in the present. That is to say, independence entails nothing about the logical or substantive relations between the moral reasons of precedent and other sound moral reasons. Moreover, the independence thesis does not entail that past decisions have moral force *regardless* of their merits (or demerits),[29] for the moral force of a precedential decision may be overridden, and even

[26]This seems to be the view expressed by Justice Powell in dissent in *Vasquez* v. *Hillery*: "when governing decisions are badly reasoned, or conflict with other, more recent authority, the Court 'has never felt constrained to follow precedent'" (474 U.S. 254 (1985) at 269, quoting *Smith*, *supra*, note 12 at 665). See also *Woods* v. *Lancet* 303 N.Y. 349 (1951) at 354-55. Stephen Perry calls this a "weak Burkean" conception of precedent. S. Perry, "Judicial Obligation, Precedent and the Common Law" (1987) 7 Oxford J. Leg. Stud. 215 at 221.

[27]Justice Brandeis's well-known statement in *Burnet* v. *Coronado Oil & Gas Co.* is illustrative. "*Stare decisis* is usually the wise policy," he wrote, "because in most matters it is more important that the applicable rule of law be settled than that it be settled right .... This is commonly true even where the error is a matter of serious concern ..." (285 U.S. 393 (1931) at 406). See also D. Lyons, "Formal Justice, Moral Commitment, and Judicial Precedent" (1984) 10 J. Phil. 580 at 583.

[28]Alexander, *supra*, note 18 at 4.

[29]This is the way Lyons interprets the moral principle of precedent. Lyons, *supra*, note 27 at 581.

entirely defeated by substantive considerations. The thesis does not even entail that the fact a certain decision was taken in the past is *by itself alone* a sound reason for making a similar decision in the present,[30] for the "historical pedigree" of a decision may only be part (albeit an essential part) of the reason for following it. The independence thesis maintains only that the moral force of past actions or decisions is not reducible to reasons for the decision regarded timelessly. A consequence of this is that there *may be* cases in which one has reason to follow precedent in spite of doubts we may have about the merits of the decision regarded timelessly.

This has three important implications for our inquiry. First, the independent moral force of precedent may be *limited* in certain respects. To see this, consider an analogy to promises. The fact that one has promised to perform some action is often sufficient to override or at least compete with reasons for not performing the action at the appointed time. We believe, however, that even sincerely made promises lose their moral force if the promisor has no right to perform the promised act. Contracts for murder, for example, are not morally binding. The moral force of past promises is conditional in a way on the merits of the action promised. In spite of this fact, promises have moral force independent of the merits of actions promised, although this independence is limited by the above condition. Similarly, the moral defects of a past decision may in some cases entirely defeat the moral hold that the decision normally would have on our deliberation. The moral force of the past again in such cases is conditional upon the merits of the actions or decisions in question; its independent moral force is thereby limited.

Second, the practical reasons generated by past decisions and actions may be *overridden* by conflicting considerations.[31] To recognize independence of reasons is one thing, to determine the relative weight of those reasons is another.

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[30]Fred Schauer says arguments from precedent have the following form: "The previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs" (Schauer, *supra*, note 12 at 571).

[31]This seems to be the view of the legal status of precedent in constitutional law adopted by Justice Brandeis in *Burnet*, *supra*, note 27 at 406-407 (arguing that prior decisions be overturned). Justice Marshall, following Brandeis's line, argued *against* overruling precedent in *Vasquez*, *supra*, note 26 at 265-66. "Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective" (*supra* at 266). Marshall seems to embrace what Stephen Perry calls a "strong Burkean" conception of precedent (Perry, *supra*, note 26 at 222). He also suggests that this seems to be the prevailing view of Canadian common law judges. He quotes former Chief Justice Bora Laskin, who wrote, "We are now able to view it [*stare decisis*] as simply an important element of the judicial process, a necessary consideration which should give pause to any but the most sober conclusion that a previous decision or line of authority is wrong and ought to be changed" (B. Laskin, "The Role and Function of Appellate Courts: the Supreme Court of Canada" (1975) 53 Can. Bar Rev. 469 at 478).

The moral force of the past is no different in this respect than the moral force of fairness, promises, the welfare of the community, or any other familiar moral ground for action.

Third, some philosophers find it tempting to give the independence of the reasons created by past decisions a special *peremptory* character. Fred Schauer, for example, has argued that "[j]ust as an argument from rule gives independent weight to the fact that a result is indicated by that rule, so too does an argument that a result resembles one in the past."[32] From this premise Schauer concludes that "an argument from precedent is a form of argument from authority," by which he means that it provides "exclusionary" or peremptory reasons for a decision in the present.[33] That is, it provides a reason for a decision maker *not* to decide the cases *on the basis of* reasons concerning its merits — a reason which precludes decision on the merits. This inference, however, is mistaken. For the fact that a reason is *distinct* from other reasons does not imply that it is peremptory relative to them. More specifically, although the fact that the moral force of a past decision is independent of its merits implies that the decision can maintain its claim on deliberation even when it is proved erroneous, it does not imply that the precedential force of the past decision precludes decision in the present on the basis of an assessment of the precedent decision's merits. It is a point worth repeating: to say that past decisions generate moral reasons for decisions in the present in some degree independent of the merits of the past decisions is not to commit to any view about how these reasons fare in competition with other practical or moral reasons.

Finally, I should perhaps point out that the independence thesis is in no way committed to Anthony Kronman's extravagant view that we must respect the past *for its own sake*, or that a decision in the past imposes "an immediate claim to our respect simply in virtue of its pastness."[34] While Kronman is properly sceptical of familiar utilitarian arguments for the value of precedent, he radically overstates his case by insisting, in effect, that the past has some simple, intrinsic, and ultimate value.

I have tried to isolate a specific question about the practical and moral nature of precedent for our consideration, a question which is different from those typically addressed in discussions of the doctrine of precedent. The question I wish to address is: *Why* give any practical or moral weight to past decisions? What claim does it have on us and on what can we ground this claim?

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[32]F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) at 182-83.

[33]Schauer follows Joseph Raz on this. See J. Raz, *Practical Reasons and Norms*, 2d ed. (London: Princeton University Press, 1990) at 35-48; *The Authority of Law* (Oxford: Oxford University Press, 1979) c. 1 & 2; *The Morality of Freedom* (Oxford: Oxford University Press, 1986) c. 3; and "Facing Up: A Reply" (1989) 62 S. Cal. L. Rev. 1153 at 1154-79.

[34]Kronman, *supra*, note 7 at 1036-37, 1039 & 1042-43.

C. *Standard Reasons for the Moral Foree of Precedent*

Given the centrality of the past, especially the doctrine of precedent, in legal practice, it is not surprising that lawyers keep a stable of arguments well-fed and ready to run against any challenge. I will briefly discuss three of the most familiar arguments. I will argue that each fails to answer the question I have isolated.

1. Wisdom of the Ages

Blackstone, looking back on his monumental outline of English law, argued that common law claimed our allegiance because it is "fraught with the accumulated wisdom of the ages."[35] Sir Edward Coke, of course, was fond of reminding all critics of the common law that

> we are but of yesterday ... our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined...[36]

The pedigree of this venerable argument notwithstanding, the argument simply fails to answer our question. If its premise that the wisdom of "the most excellent men" in the "successions of ages" is embodied in the law is true, then we probably do have a reason to decide and act as they have decided and acted. *The fact that* they so decided, however, is no part of that reason for following suit. Rather, it is exclusively the justice and wisdom of the course of action which calls us. Its having been so decided is not a reason for *deciding* or *acting*; at most, it is a reason for *believing* that a certain course of action is wise or just. But, then, we cannot appeal to the wisdom of the ages to explain the moral force of *precedent*. Past decisions, on this view, provide us with no reason for present decisions *independent* of the merits of those past decisions.

Contemporary defenses of precedent seldom rely on this Blackstonian argument, however; rather, they tend to rely either on some version of the formal principle, *treat like cases alike*, or on a principle of respect for legitimate expectations or promotion of the reliability of authoritative decisions.[37] Rather

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[35]W. Blackstone, *Commentaries on the Laws of England*, 4 vols (first edition 1765-69, facsimile of first edition Chicago: University of Chicago Press, 1979), vol. 4 at 435.

[36]*Calvin's Case*, 7 Coke's Reports at 36, 77 E.R. (Full Reprint) 377 at 381.

[37]Fred Schauer rests his account largely on a third kind of consideration, promotion of official decision making efficiency and accuracy under law. See Schauer, *supra*, note 12 at 602. I will not develop the argument here, but I believe that, much like the standard arguments I consider, Schauer's argument begs the question of why we should look to the past for this advantage. *Once* we have settled that we must do so, it will be reasonable for us to insist that our practice of precedent be regimented in various ways to insure quality official decision making. At best this latter

than take up all the familiar versions of these arguments, I will consider a few representative arguments.

2. Consistency, Fairness, and Treating Like Cases Alike

It is a home truth in discussions of precedent, and legal reasoning generally, that basic fairness (sometimes "formal justice") requires that we treat like cases alike, which itself is thought to be a requirement of simple consistency of judgment, both synchronic consistency (equality) and diachronic consistency (respect for precedent).[38] This home truth, however, is false. The principle of precedent, as we have seen, requires that *since* cases of a certain type were decided in a particular way in the past, later cases of that same type ought to be decided in the same way. The principle of precedent *biases* practical deliberation towards that past in this respect. The principle of "formal justice" (treat like cases alike), however, does not have this implication.

First, regarded simply as a principle of *consistency*, the injunction to treat like cases alike does not entail the principle of precedent. The injunction requires that *if* two cases are alike in morally relevant respects, than they must be treated in the same way as those morally relevant features require. Then, if one treats two cases differently, *either* one must show that the two are different in relevant respects, *or* one must (upon pain of inconsistency) admit that at least one of the decisions is mistaken. This logical requirement applies to the cases and decisions regarded timelessly, abstracted from the sequence in which they may have been decided. Thus, if one proposes now to treat a case differently from the way one in the past treated a similar case, consistency requires only that one accept *one* of the decisions as a mistake, not that one regard the proposed decision in the present case as the culprit. It does not force one to treat the subsequent case in the same way one treated the first one, any more than it forces one to accept the logical consequence of one's beliefs. (It is always open to one to reject the belief in question.) Consistency, then, does not force on decision makers any bias toward the past.[39]

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question is a question of institutional design, not a question of the underlying moral force of precedent.

[38]Schauer, *ibid.* at 596. The fascination of lawyers and philosphers with the formal justice principle can be traced back to H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard L. Rev. 593 at 623-24; Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 155-57; and C. Perelman, "Concerning Justice" in C. Perelman, *The Idea of Justice and the Problem of Argument*, trans. J. Petrie (London: Routledge, 1963) 1 (this essay was first published in 1945). For critical discussions see K.I. Winston, "On Treating Like Cases Alike" (1974) 62 Cal. L. Rev. 1; D. Lyons, "On Formal Justice" (1973) 58 Cornell L. Rev. 833; P. Westen, "The Empty Idea of Equality" (1982) 95 Harvard L. Rev. 537; and P. Westen, *Speaking of Equality* (Princeton: Princeton University Press, 1990) c. 9.

[39]Micbael Moore argues that "If a case in the past has been decided in a certain way, the ideal of equality [*i.e.*, the injunction to treat like cases alike] constrains a judge in a way he was not con-

One might argue, of course, that since we cannot change the past, once a decision is made, consistency forces us to regard the currently proposed decision as the mistake. However, the premise that we cannot change the past is either irrelevant to the argument for the principle of precedent, or it is false. In either case the argument fails. It is true that we cannot change the past, if what we mean is that we cannot now make it true that case was treated differently in the past. But it is irrelevant. For the issue is what does consistency require of us, and while we cannot make the decision different from what it was, we can treat it as mistaken and treat the case-*type* as it ought to be treated. The premise is false, of course, if what we mean by it is that the past decision puts us on an unalterable course.

The argument I have just given is not likely to satisfy defenders of the "formal justice" principle, for they feel that the principle states a requirement of justice or fairness, not mere consistency.[40] Consistency may be satisfied by such retrospective mistake declarations, they will argue, but fairness and equality demand more. I understand the frustration. It is born of the intuition that there is (at least in some cases) some moral reason for following past decisions. That is the intuition I am working with as well, but the task is to *explain* that intuition. I challenge the explanation in terms of fairness understood as the injunction to treat like cases alike. If we are to take the injunction to state, albeit very abstractly, a substantive principle of fairness, then we still need an argument for a substantive principle that biases present decisions in the direction of past decisions. What principle of fairness, precisely, calls for this bias? None has been offered. Moreover, fairness (and equality) are not to be confused with sameness. There are lots of ways of treating people or cases which are *the same*, but no more *fair* for all that. Fairness, of course, is essentially comparative in a way that, say, desert is not. That is, one can treat people as they deserve without paying attention to how, comparatively, they are treated; one needs only pay

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strained before. The judge must either decide the case in front of him the same way, or articulate a defensible theory of why the differences between the two cases justify different treatment" (M. Moore, "A Natural Law Theory of Interpretation" (1985) 58 S. Cal. L. Rev. 277 at 316). But this is a mistake. His "ideal of equality" has this implication *only on the assumption* that the deliberation is already (properly) biased toward past decisions. In a more recent essay Moore clarifies bis position. He argues that judges are not bound by "equality" to regard past decisions as fixing the criteria of similarity and difference among past and future cases. "*Real equality*," he insists, is given by the best moral theory of the relevant similarities and dissimilarities. Moore, "Precedent, Induction, and Ethical Generalization" in *Precedent in Law*, Goldstein, ed., *supra*, note 20, 183 at 186-87. But this again begs the question I have raised, namely, why must judges direct their atteution to past cases in the first place? Moore's "Natural Law" theory accepts without argument that the past demands our allegiance. But this needs an argument from moral theory.

[40]Schauer, at one point, tries to capture the idea of fairness involved here as follows: "decisions that are not consistent are, for that reason, unfair, unjust, or simply wrong" (Schauer, *supra*, note 12 at 596). But this is surely wrong, unless, as I suggest in this paragraph, we build into consistency a substantive moral principle.

attention to the non-comparative principle of desert and whether each person regarded individually is treated as that principle requires. Fairness (like equality) is essentially comparative, such that judgments of relative treatment within a set of people are an essential component of the judgment of fairness. However, to say fairness or equality require sameness of treatment in some specific respects is not to say that to treat people the same in any respect or other is to treat them fairly or equally. Fairness is *a special kind* of sameness of treatment; there are an indefinite number of ways in which we can treat people the same which are not ways of treating them fairly. But, then, from the fact that past decisions project as it were a way of treating people the same, it does not follow that that is a way of treating them fairly, or that people are treated unfairly if this projection is not followed. Or, rather, it does not follow, unless we are given reason to believe that fairness requires that past decisions for reasons (especially official decisions) be followed, that is, reason to believe that fairness requires that we treat like cases in *that* way.[41]

3. Reliance, Predictability, Stability

We perhaps should look for the argument for fairness beyond the formal considerations of consistency and equality, One such argument appeals to the fact that people tend to *rely* on past decisions, especially official decisions. It is unfair, it is argued, to defeat legitimate expectations generated by past official decisions. Therefore, reasons of fairness require that we treat past decisions as reasons for present decisions.

This argument, however, also begs the question. Ignoring or overturning precedent is unfair because, presumably, people expect that present decisions will conform to precedent, and these expectations are defeated (without warning or compensation, we must add). Of course, expectations can either be reasonable or unreasonable, either legitimate or unfounded. It is unfair to defeat expectations only if they are legitimate. They are legitimate if there are good moral reasons for thinking that decision makers *ought* to follow precedent, or if the decision makers themselves, or the institutional structure within which they work, actively *encourage* such expectations. If the expectations are legitimate in virtue of the fact that there are good reasons to demand as a matter of morality that officials respect precedent, then again the case for fairness *presupposes*, rather than *supplies*, an answer to our main question. Similarly, while expectations may be legitimate if actively encouraged, the encouragement succeeds precisely because people *already accept* that past decisions give reasons for present ones. Moreover, we can ask: why encourage reliance in this way?

[41]For a slightly different line of criticism of the fairness argument see L. Alexander, *supra*, note 18 at 10.

The answer to this question is often made in terms of promoting stability and predictability of official decision making. The idea is that through binding official decisions to precedent we can regiment an indeterminate present and future by anchoring it to a determinate, because determined, past. This argument presupposes that the past is not only determinate, but also that in this determinate form it is publicly accessible. Attending to the past yields predictability of future, on this view, because the past yields *determinate rules* the terms of which most of those governed by them are able to recognize. It may well be true that the past is metaphysically determined, but its normative and practical significance for us frequently is not determined, or if it is, there is still likely to be a great deal of disagreement about what that significance is. The problem is not that it is hard to get a reliable, full picture of the relevant events of the past; the problem is, rather, that what we must take as morally relevant is often open to disagreement.[42]

Let me be clear: I am not advancing the sceptical or relativist argument that there never is any determinate answer to these questions of (moral or normative) relevance of past decisions. I am willing to accept that often there are determinate answers to such questions, at least in the sense that it is appropriate to think that some accounts are mistaken, and some better than others, and perhaps even that there is a best overall account. The problem with the predictability argument is not that it depends on this sort of determinacy, but that it depends on the stronger assumption that people will largely *agree* in their judgments of such matters. To assume that the past can deliver that sort of determinacy is surely extravagant. Hence, despite the metaphysical and possibly even the normative determinacy of the past, it is implausible to think the past can provide an adequate basis for the *predictability* argument to have much force.

To be sure, we can incorporate more stringent conditions into our doctrine of precedent, requiring, for example, that the rules formulated verbally in the public defense of past decisions be taken as fixed;[43] perhaps also that they be understood to provide *peremptory* reasons for deciding in similar ways in future. But this imposes institutional constraints on precedent which the notion of precedent itself does not seem to require, in order to make the past publicly determinate enough to serve the end of predictability. This suggests to me that the predictability of decision making is not a primary reason for thinking that

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[42]Commenting on the practice of historians, Charles Maier observed that "Most persistent historical debates do not finally turn upon evidence omitted, miscited, or newly found, but upon the significance to be accorded the data. Ultimately, historians differ on what is important" (*The Unmasterable Past*, *supra*, note 4 at 13). This is likely to be even more persistently the case when the debate is explicitly over the *normative* or *moral* significance of the past and its implications for individual and collective actions.

[43]In Rupert Cross's apt phrase, it would require not *stare decisis* but *stare rationibus decidendis*. See Cross, *supra*, note 19 at 183 n. 2.

past decisions provide reasons for present decisions, but rather a reason for introducing certain institutional refinements of the practice, once it has been established, that precedent decisions ought to be recognized as normative.

I conclude that standard arguments for the moral force of precedent fail. There is, however, another quarter from which an argument for the moral force of the past can be mounted, one which does not deny or seek artificially to cabin and crib the elusiveness of the past. The motto of this paper is taken from the prophet Isaiah who reports God saying to the people of Israel, "Put me in remembrance, let us argue together ..." (Isaiah 43.26). In my view, it is not the already determined character of the past that renders it fit for our allegiance, but, paradoxically, its very elusiveness. Our past practice bears the shape of our common life, while at the same time forcing us to address together the question just what this shape is, and what it means for our collective and individual actions now and in the future. In short, we are bound *to keep faith with our past* because that is a way of *keeping faith with each other.* In the remainder of this essay I will try to fill out this explanation. I will start with a brief discussion of the place of a sense of the past in individual moral deliberation and then return to the social context.

II. Individual Moral Deliberation and the Past

A. *Moral Deliberation, Imagination, and Regret*

1. The Place of Memory in Practical Reason

Coleridge once said, rather ruefully, that while it might be true that history and experience give us light for our way, this light "is a lantern on the stern, which shines only on the waves behind us."[44] There is much sad truth in this; yet I want to argue that a robust sense of the past is indispensable to individual deliberation about the present or future. This is part of what I mean by "the moral presence of the past."[45]

Aquinas held the view that memory is one of the three necessary components of practical reason, the other two being foresight and understanding of the present.[46] We can take this thought one step further: not only is an historical

[44]Coleridge, *Table Talk*, December 18, 1831, quoted in J. Clive, "The Use of the Past in Victorian England" (1985-1986) 68-69 Salmagundi, 48 at 48.

[45]While I will take as my focus the deliberation of an individual moral agent, I believe that most of what I shall argue can be extended to the case of political or collective deliberation. I will not argue this thesis here.

[46]Aquinas argues that "Memory, understanding, and foresight, as also caution and readiness to learn and the like, are not virtues distinct from prudence; they are, as it were, integral parts or components, inasmuch as they are all requisite for perfect prudence" (*Summa Theologiae*, ed. & trans. by W.D. Hughes (Westminster: Blackfriars, 1969) question 57, article 6, v. 23 at 61).

sense a necessary *component* of practical (or moral) reason alongside the others, it is *presupposed by* them. One's ability to form an adequate conception of the future and of the place of oneself and one's action in it, depends on — or is of a piece with — a rich sense of the moral presence of the past. Memory is the bone and sinew of practical life, without it an agent loses all shape, all capacity to act.[47]

Among the capacities essential to practical reason is the capacity to understand the future and the relationship between one's decisions and actions and the future. To be purposive, one must be capable of projecting one's action into an intelligible future. To be deprived of a future that is now intelligible to one is to have one's present deliberation and action cut off from any meaning. Essential to an intelligible future is an intelligible past. Consider the person suffering amnesia. Typically, she regards her (unrecoverable) past not merely with detached, nostalgic curiosity, but with genuine terror born of disorientation. Her present and future have little meaning for her. Because she has no sense of her self, she is unable to project a self into the future. Her future is not intelligible to her because her past is not accessible to her. Thus, the meaningfulness to an agent of her deliberation, decision, and action in the present depends on a full and real sense of herself continuing through time from her past into her future.

2. Imagination and Regret

Of course, memory is not always agreeable. George Eliot once wrote, "the happiest women, like the happiest nations, have no history."[48] Why happiest? Because regrets and recriminations are the fruit of reflection on the past.[49] However, while regret is, surely, an unpleasant emotion to experience, it plays a central role in responsible moral deliberations.[50]

At the core of moral agency is a cycle of self-reflective projection and retrospective assessment. One imaginatively projects oneself (one's decision and action) into the future *and* one retrospectively assesses one's action. One resolves on patterns of action to achieve one's ends and purposes and through these deliberate actions one's character unfolds. Each of us cares how things turn out because we have a great deal invested in these ends. One's character and sense of identity are at stake. Consequently, from time to time we take a critical look in retrospect at our behaviour and habits.

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[47]I borrow the image from Anne Riophe, "The Politics of Anger" (1986) 1 *Tikkun* 8 at 18.

[48]G. Eliot, *The Mill on the Floss*, ed. by G.S. Haight (Oxford: Clarendon Press, 1980) bk 6, c. 3 at 338.

[49]Blanche Du Bois gives a clue to the puzzle Eliot raises: "Crumble and fade and — regrets — recriminations ... 'If you'd done this, it wouldn't have cost me that.' ..." T. Williams, *Streetcar Named Desire*, scene 9.

[50]I take my cue here from S. Hampshire, *Thought and Action* (Notre Dame: University of Notre Dame Press, 1983) at 240-43.

Moreover, our resolves are always partial and incomplete. Virginia Woolf once said that "one never [fully] realizes an emotion at the time. It expands later; and thus we don't have complete emotions about the present, only about the past."[51] She, of course, exaggerates. But to a degree she is right, and what she says is more true of our actions. Concerning some actions it is only later, long after the event, after reflection, that we understand what we were doing. Our resolutions, choices, and actions on them are incomplete not only in the sense that they need the details to be filled in, but also that they need maturing. Maturing calls for greater knowledge of one's world and deeper knowledge of oneself, of what the story of one's life up to this point comes to. Charles Taylor reminds us that one "need[s] time and many incidents to sort out what is relatively fixed and stable in [one's] character, temperament, and desires from what is variable and changing ..."[52] This self-understanding comes through reflection on one's experience and action over time.[53] Moral deliberation, then, is not simply a matter of setting oneself on a course for the future, it is a matter of fitting one's present and future action into a pattern of action and experience that has some incomplete and maturing meaning.

This is so even when reflection forces one to acknowledge that the pattern of action must be turned acutely in some new direction. The capacity for regret is indispensable here. Not only must one be able to plot out the pattern of actions and consequences in the past and project it into the future, as if one were telling the life of a character in the novel, but one must also be able to see oneself in that past, to see it as one's own story — both the agreeable and the disagreeable episodes. Nietzsche reminds us how difficult this can be: "'I have done that,' says my memory. 'I cannot have done that,' says my pride, and remains inexorable. Eventually — memory yields."[54] Yct, Nietzsche's pessimism notwithstanding, regret's mandate holds one to a standard of integrity and of responsibility to one's past. Thus, moral deliberation depends essentially

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[51]V. Woolf, quoted in M. Warnock, *Memory* (London: Faber & Faber, 1987) at 112.

[52]C. Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989) at 50.

[53] The past only comes back when the present runs so smoothly that it is like the sliding surface of a deep river. Then one sees through the surface to the depths. In those moments I find one of my greatest satisfactions, not that I am thinking of the past; but that it is then that I am living most fully in the present. For the present when backed by the past is a thousand times deeper than the present when it presses so close that you can feel nothing else, when the film on the camera reaches only the eye" (V. Woolf, "A Sketch of the Past" in *Moments of Being*, ed. J. Schulkind (London: Hogarth Press, 1985), quoted in Warnock, *supra*, note 51 at 136).

[54]F. Nietzsche, *Beyond Good and Evil*, trans. W. Kaufmann (New York: Vintage Books, 1966) s. 68 at 80. Kaufmann notes the influence of Nietzsche, and of this passage in particular, on Freud. W. Kaufmann, *Nietzsche: Philosopher, Psychologist, Antichrist*, 4th ed. (Princeton: Princeton University Press, 1974) at 182-83. Freud quotes the passage in "Psychopathology of Everyday Life" in *The Basic Writings of Sigmund Freud*, ed. by A.A. Brill (New York: The Modern Library, 1938) 35 at 103 n. 1.

upon a sense of the past, because moral deliberation is deliberation of agents who care about the integrity and meaningfulness of their actions over time, because they care about who they are as this unfolds over time, and because they want to be involved actively in shaping who they are.

B. The Past and Reasons for Present Action

A second respect in which the past is essential to present individual deliberation arises from the fact that our decisions and commitments in the past create for us present reasons for action. Our lives only take shape in and over time. The self is what it is in virtue of what it is in time. This gives a certain practical bias to past decisions and actions. The shape one's life or self takes over time is given in the mold of one's aims and goals — aims and goals which we judge to be worthy of our commitment.[55] These commitments project one into a structured and meaningful future and provide one with reasons for acting as that future is traversed. I will consider two contexts in which this appears to be true.

1. Voluntary Commitments

Consider, first, commitments voluntarily and intentionally undertaken. One may explicitly promise, or consent, or join an organization, and one may do so because the project or goal or organization is worthy of one's support. Nevertheless, it is important to acknowledge that one has reason to follow through on these commitments in virtue of this act of commitment or exercise of will, not solely in virtue of the merits of the goals or projects involved, but rather in virtue of the fact that those reason-grounded goals play a role in the shaping of one's life. Insofar as those goals give meaning and direction to one life, they provide one with reasons which transcend the reasons or value inherent in the goals which first attracted one to them. This is not to say that rejection or modification of these goals is never appropriate. But it is to say that, from the point of view of an agent, they can be abandoned or substantially modified only for reasons coherent with the overall set of goals that give shape to that agent's self. Thus, these are not only reasons *additional to* those arising from the merits of the goals themselves, they are also *different* in kind from them. They are reasons of a more direct and personal kind.[56]

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[55]On the reason-grounded character of our important aims and goals see *The Morality of Freedom*, *supra*, note 33 at 140-43 & 298-305.

[56]In recent philosophical jargon, they are "agent-relative" reasons. See D. Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984) at 55; A.K. Sen, "Rights and Agency" (1982) 11 Phil. & Pub. Aff. 3.

Let me illustrate the special character of these reasons.[57] On the first anniversary of her mother's death, in a reflective mood and thinking of her mother's example, Jean resolves to support the local fund for the homeless during the next year. A year later, again moved to reflection on the anniversary of her mother's death, Jean realizes with shame that her resolve has entirely slipped her mind. There is an important difference between Jean's assessment of her actions on these two anniversaries. It is not that the needs of the homeless have changed. After her resolve, people may have been in no greater need than before it. Both in the year before the first anniversary of her mother's death and in the year after it, Jean did not contribute and the needs of some people were not met that could have been met. But on the second anniversary of her mother's death, Jean is forced to admit that she *failed.* Her resolution the previous year turned *omission* into *failure.* Her commitment created for her new possibilities of success as well as failure, it created new reasons for her. During the year, Jean had reason to write out a check to the homeless fund, not only because the needs of the homeless were great at that time, but also because this need had a special significance in her life in virtue of her resolve and its meaning to her. Her commitment to this project gave her reason in mid-year to write the check. It was not her exercise of will that created this new reason; it was, rather, the fact that in making her resolve Jean had given a certain determinate shape to her life. The reasons her resolve gave her are rooted in the meaningfulness of living out that life over time. The power of these reasons from the past to shape present and future decisions is drawn from the fundamental demand of personal integrity, a demand which is continuous over time, because the self enjoys integrity only in and over time.

2. Loyalty

The past has signiflcance for us in this way not only through projects and commitments voluntarily and intentionally undertaken, but also through historically evolving relationships, many of which are at most semi-voluntary.[58] Our

[57]I use and modify an example employed by Raz. See *The Morality of Freedom, supra,* note 33 at 385-86.

[58]Wendell Berry in a wonderfully nuanced passage captures the combination of choice, chance, and history that shapes our most important relationships. Andy Catlett, wandering about at loose ends in San Francisco, comes to see that he must return to his life in rural Kentucky. "On the verge of his journey," writes Berry,

> he is thinking about choice and chance, about the disappearance of chance into choice, though choice be as blind as chance. That he is who he is and no one else is the result of a long choosing, chosen and chosen again. He thinks of the long dance of men and women behind him, most of whom he never knew, some he knew, two he yet knows, who, choosing one another, chose him. He thinks of the choices, too, by which he chose himself as he now is. How many choices, how much chance, how mueh error, how much hope have made that place and people that, in turn, made him? He does not know. He knows that some who might have left chose to stay, and that some who did leave

personal histories are not only records of commitments we undertake, but also stories of relationships which take shape, meaning, and value for us over time through shared experiences. This is the theme of Graves's poem, "Two Fusiliers."

> And have we done with War at last?
> Well, we've been lucky devils both,
> And there's no need of pledge or oath
> To bind our lovely friendship fast,
> By firmer stuff
> Close bound enough.
> ....
> Show me the two so closely bound
> As we, by the red bond of blood,
> By friendship, blossoming from mud,[59]
> ...

When human beings live together, Aristotle tells us, it is not like cows sharing a pasture. For us, shared experience yields a common past with a common significance because it engenders, and is further enriched by, common perception and common discourse (*koinonein logon kai dianoias*).[60] The comrades in Graves's poem lived through the events of war together. These shared actions and experiences acquired a common meaning. Through their experiences and actions, and their common reflection on them, something new came into being of which they were both a part, something *intrinsically valuable* to them, to which they both found themselves committed.

Over time, relationships take shape, acquire their own distinctive outlines, meaning, and value. Such relationships generate their own duties of loyalty. Duties of loyalty are justified by appeal to the (agent-relative) value of the relationship to its partners; however, the justification is not instrumental, for the duties are *constitutive* of that relationship.[61] Fulfilling the duties of loyalty in a relationship is a way of being true to the relationship and of keeping faith with the other partners in the relationship by being true to that which has common significance and value for them.

Thus, obligations and responsibilities that arise out of shared history are concrete forms in which we keep faith with each other and with that which we create together. This form of moral causality may still seem mysterious, but it is really no more mysterious than the moral causality of promise making.

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chose to return, and he is one of them. *Those choices have formed in time and place the pattern of a membership that chose him, yet left him free until he should choose it*, which he did once, and now has done again (W. Berry, *Remembering* (San Francisco: North Point Press, 1988) at 60 (emphasis added)).

[59]R. Graves, "Two Fusiliers" in *Fairies and Fusiliers* (New York: Alfred A. Knopf, 1919), 19.

[60]Aristotle, *Eudemian Ethics*, 1244b24-26 and *Nichomachean Ethics*, 1170b11-12.

[61]*The Morality of Freedom*, *supra*, note 33 at 353-57.

Surely, the mystery of self-binding promises is not dispelled by observing that promises generate obligations in virtue of the more general moral principle that promises are to be kept. Indeed, if there is a plausible deep explanation of the binding character of promises, it lies, I believe, not in the utility of the practice, but in the fact that it is one form among others of keeping faith with each other. That is, promissory obligations and obligations arising from a common past, while different in important ways, represent two ways of keeping faith with, and concretely expressing our recognition of, other human beings to whom we are related in significant ways.

III. Communal Obligations, Law, And Precedeut

A. Communal Relations and Obligations of Co-Members

The above analysis of the moral presence of the past in the individual case suggests a line of argument for the social or communal case. The extension of the argument to the case of communal obligations must be done with care. Communal obligations arise out of the complex overlapping and crisscrossing relations among individual members. These relations have a horizontal dimension, relating member to co-member, and a *vertical* dimension, relating the community as a whole (and in particular, those institutions that speak and act for the community) to individual members. The thesis I shall now defend on the basis of the analogy to the argument in the individual case is that we can trace the importance of the moral presence of our past, and of precedent in particular, to the duty to keep faith with each other, in both dimensions of our communal relations.

I begin with the observation that genuine communities are historical communities. They differ from merely notional communities, or accidental aggregates of people, in that their members share a history. Genuine communities take on projects and commitments and develop identities as certain kinds of community directed towards certain ideals and visions — all of this only through their history, the history of the activities and the sufferings, the interactions and the practices of their members. Through their histories the moral substance of genuine communities congeals. If a sense of the past is essential for the moral deliberation of individuals, it is also important to deliberation of communities. If we, in and through the communities we constitute, are to deliberate and act purposively and responsibly *in* time, we must be able to see our common actions as fitting into meaningful patterns and practices *through* time. The hopes, aims, projects, and values we hold as a community take shape through our common deliberation, discourse, and activity over time. We are what we do together.

Our common past is important to us for a further reason: it shapes the obligations and responsibilities that we members have to one another as co-members. Our commitments, not only the commitments of the community regarded collectively, but also individually as members to members, are projections from our common past. The *content* and *scope* of our mutual obligations and responsibilities within a community — *what* exactly we are called upon to *do* and with regard to *whom* — are determined by the history of our interactions and practices and those of the community more generally. We have obligations to others as co-members in virtue of what we as a community are committed to and in virtue of our participation in its practices. The history of these practices is the common point of reference from which we determine what members in this community owe each other. Acknowledging and working to fulfil these obligations is the primary way in which we seek to keep faith with other co-members of the community.

B. The Moral Force of Precedent

We can return now to our primary question: how are we to explain the moral force of precedent in law? It is to be located, I believe, in a duty of loyalty constitutive of both horizontal and vertical relations in the law's community. I have argued that the moral force of the past in the individual case is rooted in the requirements of personal integrity. Something similar is true of communities and members of communities. The integrity of a community is a function of the quality of relationships among co-members and between the community as a whole and its members; that is, it is a function of the quality of horizontal and vertical relationships in the community.

Integrity in a community takes the form of an ideal of equality, not the formal or abstract equality of treating like cases alike, but substantive equality, equality among members in recognition of their co-membership.[62] Arguments rooted in this ideal take the following canonical form:

> *Since* A, a member of Society S, was treated in manner M in circumstances C, then, B, who is also a member of S, ought, in the name of co-membership, to be treated in the same manner.

This substantive notion of equality treats co-membership as an essential component of the argument for equal treatment, and the nature and social meaning of the relationships among members as a focal point of the argument.

In this notion of communal integrity and its expression in a distinctive notion of equality, we can account for the moral force of precedent. Respect for

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[62]I have discussed this ideal of equality in "Equality as Membership" (1990) Rechtsfilosophie & Rechtstheorie 155.

precedent is the form that concern for integrity of this special egalitarian sort takes in historical communities. It is one primary way in which members of such a community dircctly and indirectly keep faith with each other. The typical form of argument from precedent is:

> Since case A was decided (for reasons) in manner M in the past, case B, like A in relevant respects, must also be decided in this manner.

This is a special case of the egalitarian argument I just identified. Past judicial decisions, because they are taken on behalf of the community and because we insist that they be decisions-for-reasons, bind the community as a whole in its vertical relationships, and bind members to members in their horizontal relationships. Past decisions bind in the name of equal treatment *as members* and ultimately in the name of keeping faith with each other. What equality of this sort requires in particular cases — what the rule of a precedent case is — is a function of the moral coherence of the combined commitments of the community as they have been adopted and are carried out over time.

C. Critical History

Precedent, on the account I have sketched, is a way members collectively and individually keep faith with other members of their communities. It is also an invitation to members of a community to argue about what exactly they are committed to as a community. The prophet Isaiah set the motto for this essay: "Put us in remembrance, let us argue together ...", but a sage adds a note of caution: "Shake a sieve, and the rubbish remains; start an argument, and discover a man's faults."[63] We must heed the caution. The account of the moral force of precedent I have defended also suggests some of the limits of the argument from precedent. Being true to one's community and keeping faith with one's fellow members in some cases may call for rejection of the demands of precedent.

My point of departure is Dworkin's account of law as integrity with which my explanation of the moral force of precedent has much in common.[64] For Dworkin, a community's past recorded in its settled law is data calling for theoretical reconstruction and explanation. Our task, as officials or as citizens, he believes, is to determine what our common practice in the past commits us to now and in the future. To determine this we need to interpret that practice, uncover the principles and commitments implicit in its official decisions and actions. In the name of the integrity of our community we must seek an interpretation of our legal practice which, so far as possible, represents it as mani-

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[63]Ecclesiasticus 27.4.

[64]R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) c. 1-3 & 6-7.

festing a coherent conception of justice and fairness. Interpretation requires that we work to show the practice in its best light, to make it the best it can be.

Dworkin readily admits that no interpretation of a complex, historically evolving practice will be able to capture within its four corners all the activities that go on within the practice. The best interpretation is not necessarily the one which captures or fits the largest amount of the data. Even the best interpretative theory of the practice may be forced to regard some parts of the practice, some of its recognized decisions and actions, as "mistakes." They are not, however, *our* mistakes, for which we bear some responsibility. Rather, they are theoretical anomalies, in Dworkin's view, and therein lies the problem. Dworkin's interpretive approach asks us, for the purpose of interpreting the practice, to presuppose that those who engage in the practice *have been acting with integrity*. That is, we must assume that the practice as it presents itself historically is consistent with its underlying principles, that participants have been behaving in a way that is consistent with its underlying commitments, and that the only question is what these commitments are.

There is an ambiguity in the notion of integrity as Dworkin uses it. It is used to evaluate both the behaviour of participants in a practice *taking its principles and commitments as fixed*, and as a more comprehensive evaluation of the coherence of the behaviour in light of the coherence of its ideals or aims. This ambiguity obscures the possibility of what Nietzsche termed "critical history,"[65] which involves simultaneously an *interpretation* and an *indictment* of current and perhaps long-standing behaviour of members of a community, indictment made in terms of the commitments and ideals of that community. This view treats "mistakes" not merely as theoretical anomalies, but as behaviour for which participants at the time, and those who inherit the practice, are accountable.

Dworkinian integrity, we might say, leaves no room for regret; however, regret is an essential component of our sense of the moral presence of our past. As in the individual case, collective memory is not always benign. Our common past can be accusatory. Our past can complicate and threaten, it can invite shame, regret, and remorse. Practical attention to the past is not an exercise in theoretical explanation, but of uncovering the moral significance of that past for our present and future. That past, *all* of it, including the mistakes, is *ours*.

The challenge of critical history, especially to national hypocrisy, is illustrated by a portion of Frederick Douglass' "Fourth of July Oration" of 1852: "What have I, or those I represent to do with your national independence," he demanded of the white elite.

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[65]F. Nietzsche, *On the Advantages and Disadvantages of History For Life*, trans. Peter Preuss (Indianapolis: Hackett Publishing Co., 1980) ss 2-3 at 14-22.

> Are the great principles of political freedom and natural justice, embodied in the Declaration of Independence, extended to us?[66]
>
> The existence of slavery in this country brands your republieanism as a sham, your humanity as a base pretense, and your Christianity as a lie.[67]
>
> This Fourth of July is *yours* not *mine. You* may rejoice, *I* must mourn.[68]

This is *prophetic* memory forcing the nation to take an honest, inclusive look at its past, forcing it to face its hypocrisy. The power of this criticism comes precisely from the fact that the principles it appeals to are historically grounded in the nation. Douglass condemns the practice of slavery not *sub specii aeternitatis*, but from the perspective of the errant nation's own principles, from the principles of humanity, liberty, and community which the national holiday purports to celebrate. His penultimate sentence: "This Fourth of July is *yours* not *mine*" is powerful, precisely because Douglass stands as marginal *within* this community, and not as an outsider to it.

Argument from precedent in a community takes seriously the community's past, as it is represented in the past decisions of its members and officials. Inevitably such arguments form around competing interpretations of the record of legal memory and its implications for the community's present and future actions. But argument from precedent is not sufficient in a community. It must be complemented with a practice of critical history. If members are to take their community's history as normative for their dealings, that community must *own up* to its past, look back at the roads not taken and the suffering it has caused, and hold itself accountable for them. This, to be sure, is no guarantee of the justice of its institutions or righteousness of its policies, but it, joined with arguments from precedent invoking the ideal of equality as membership, guarantees a point of contact for the demands of justice in the concrete political life of a community.

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[66]F. Douglass, "Fourth of July Oration" in *What Country Have I? Political Writings by Black Americans*, H.J. Storing, ed., (New York: St. Martin's Press, 1970) 28 at 32.

[67]*Ibid.* at 31.

[68]*Ibid.* at 36.

Toward the Feminization of Collective Bargaining Law

Gillian Lester*

Canadian collective bargaining law is flawed because it fails to address the concerns of a substantial segment of the work force and overlooks women as a rich source of insight into the dynamics of the bargaining environment. The author begins by exploring the problems inherent in the classical contractualist model, arguing that current collective bargaining law reflects these weaknesses and echoes a morality and ideology which are stereotypically masculine. By analyzing the legal and practical structures of collective bargaining, the author illustrates the ways in which the "morality of the workplace" is manifested differently between men and women. The author then examines the ideological difference between public and private work, discussing how this distinction situates women as subordinate to men and its effects on the unionized workplace. Moving to an analysis of dispute resolution, certification, unfair labour practices and bargaining unit determination, the final part of the article is devoted to suggestions for structural change in collective bargaining law. The author proposes ways in which feminist iusight can be used to replace the current oppositional structure of collective bargaining with more cooperative mechanisms for resolving disputes.

Le droit relatif à la négociation de conventions collectives est déficient en ce qu'il ignore une portion considérable de travailleurs et n'apprécie pas l'importance des perspectives féminines dans la dynamique des négociations. L'auteur dévelope cette thèse en examinant d'abord les faiblesses propres au modèle contractuel classique qu'elle dit se refiéter dans le droit du travail actuel, et qui reproduisent une idéologie et une moralité typiquemment masculine. En analysant les structures légales et pratiques de la négociation de conventions collectives, l'auteur illustre comment la « moralité du contexte de travail » se manifeste différemment chez les hommes et les femmes. L'auteure examine ensuite les différences idéologiques entre le travail public et privé, distinction qui subordonnent les femmes aux hommes, et ses conséquences dans le contexte du travail syndiqué. Elle passe ensuite à une analyse de la résolution de griefs, de l'accréditation, de la détermination de l'unité de négociation et des pratiques interdites afin de suggérer des changements d'ordre structurel au droit de la négociation de conventions collectives. L'auteur propose des mécanismes qui permettraient l'adoption de perspectives féminines afin de remplacer le modèle contradictoire de la négociation, tel qu'il existe présentemment, par une structure coopérative de résolution des conflits.

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Synopsis

* * *

Introduction

Collective bargaining law, though laudable in its aspiration of fostering autonomy among workers in relation to their employers and the state, is flawed. It is flawed in part because it fails adequately to address the concerns of a substantial segment of the Canadian workforce.[1] It is also flawed because it overlooks a rich source of insight into the dynamics of organization and relationship in the bargaining environment. This source is women.

In this article, I suggest that because collective bargaining is formulated within a classical contractualist understanding of human interaction, its premises are incompatible with an alternative worldview emerging in the writings of feminist scholars. I begin by proposing that two elements of classical contrac-

[1]The Canadian workforce is 43% female. Seasonally adjusted figure as of December 1989: Statistics Canada, *The Labour Force* (Ottawa: Minister of Supply and Services Canada, January 1990) B-3.

tualism, its morality[2] and its ideology,[3] are fundamentally at odds with this alternative vision. Contractualism presumes a form of social relationship which is intrinsically oppositional, and which draws sharp distinctions between public and private life. Critics of collective bargaining have argued that the system betrays its contractualist foundations, or more specifically, that it replicates the very errors of contractualism that it was designed to defeat. I take this argument further, and propose that to the extent that collective bargaining does echo the failures of contractualism, it also echoes a morality and ideology which are stereotypically masculine.

In order to illustrate my thesis, I examine the legal and practical structures of collective bargaining. I investigate, for example, what I will call "workplace morality," focusing on the ways in which that morality is manifested differently between men and women. In addition, I draw upon the types of work women perform and the nature of their participation in unions to illustrate how the ideological distinction between public and private, which situates women as subordinate to men, is reflected in the structure of the unionized workplace. In the final part of this article, I explore four aspects of collective bargaining — dispute resolution, certification, unfair labour practices, and bargaining unit determination. I suggest ways in which feminist insights can inform changes to replace the current approach with a less oppositional conception of collective bargaining.

I. Theory of Contract

The common law of employment is based on classical notions of contract: the employee bargains freely with the employer to determine the terms of an exchange of labour for remuneration. This private relationship is insensitive to inequalities between the parties and, for this reason, the common law has often produced inequitable outcomes between frequently wealthy employers and less powerful employees. Collective bargaining law developed as a response to this and other inadequacies in the common law of employment. Nevertheless, for most Canadians, the common law is still the primary institution governing the employment relationship, supplemented by statutorily imposed standards such as minimum wage requirements, restrictions on the duration of the work week, and maternity provisions. Even where collective bargaining law applies, the

[2]When I use the word "morality" in this article, I am not using it in the sense of human virtue or ethics. Rather, I use it to describe one's perception of self in relation to other persons and things.

[3]I use the word "ideology" to describe the ideas which characterize a social or political system. I argue in this article that collective bargaining is an example of a social/political system shaped by a particular ideology. Morality and ideology, as I refer to them, are closely related concepts. The morality of individuals gives rise to their social ideology. In a hierarchical society, the prevailing ideology is likely to reflect the morality of the dominant class of persons.

essential relationship between the parties is still one of contract, albeit in modified form.

The contractualist model infusing the common law of employment hails market ordering as the path to individual and social freedom. Freedom in economic arrangements is seen not only as an efficient means of structuring a capitalist society, but also, and more importantly, as an ideology unto itself. Milton Friedman describes it as such: economic freedom constitutes freedom of action *per se*, and also is an indispensible instrument in achieving political freedom, that is, freedom of the market from state intervention.[4] The contract envisaged by proponents of private market exchange is between equally powerful, consenting parties who have adequate information to make a reasoned choice.[5] Critics of contractualism, most notably in the legal realist tradition, have argued that classical notions of contract flowed from a modern myth that freedom was embodied in capitalist ideology.[6] The myth, however, led to a perversion of the original ideal of freedom, and has come to permit legal coercion through contract law under the pretense of maximizing freedom.[7] This is so, it is argued, because the state exercises the prerogative to enforce or not to enforce a contract, based on paternalistic notions of what constitutes "freedom." Therefore the contract itself, supposedly the centrepiece of the private law regime and thus free from public constraint, becomes tantamount to a regulatory system. The determination of "freedom" ultimately is reduced to a judicial assessment of the appropriate exercise and distribution of power in the market.[8]

A. Morality

Contractualism is based on the presumption that all persons share a common understanding of the moral individual. I believe this understanding of morality is stereotypically masculine.[9] A "masculine" conception of self infuses traditional notions of contract with a corresponding bias. Freedom of contract presumes a shared understanding that the liberty to pursue individual interests is an essential aspect of freedom.[10] This morality runs deep in contemporary

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[4]M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 8.

[5]J.M. Feinman, "The Significance of Contract Theory" (1990) 58 U. Cin. L. Rev. 1283 at 1286.

[6]For a comprehensive review of the contributions of the legal realists to the criticism of classical theory of contract, see J.W. Singer, "Legal Realism Now" (1988) 76 Cal. L. Rev. 465 at 482-95.

[7]*Ibid.* at 495. See also, P. Gabel & J. Feinman, "Contract Law as Ideology" in D. Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982) 172 at 176.

[8]Singer, *ibid.* at 486.

[9]When I use the term "masculine," I do not mean that all men necessarily have only masculine qualities or that women cannot be masculine. I refer to the common social understanding, or the archetype, of what is appropriately masculine, *i.e.*, the manner in which boys and men are taught to think and bebave.

[10]R.A. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981) at 90. The modern liberal conception of freedom of contract is generally thought to find its genesis in

contractualist discourse. Even those who distance themselves from an unapologetic defence of self-interest reveal this bias. For example, Charles Fried's reaction to the individual liberty argument put forth by Friedman is to eschew self-interest as the moral basis of one's obligation to keep a promise. Rather, he argues, the obligation stems from respect for trust and the autonomy of others. Ultimately, though, Fried's response is anchored to the presumption that this regime is a necessary harness for men and women in what otherwise would be a "jungle of unrestrained self-interest."[11] Anthony Kronman seeks to modify the Hobbesian state of nature (the unregulated state, which is a "war of every man against every man") by incorporating into it the necessary ingredients of cooperation and mutualism in relations of exchange.[12] Nevertheless, the state of nature remains an inherently risky place where all contracting parties must provide for their own protection and maximize their own ends.[13] For both Fried and Kronman, whose work I have set out as examples of broader, more flexible approaches to contractarian thinking, the independent, atomistic individual is still the primary unit in social relations.

Contractarian thinking, as I discussed earlier, has met with spirited criticism. Among the critics are communitarians, who challenge the doctrine for its failure to recognize community as relational, contextual, and conducive to coercive, interdependent exchanges.[14] Communitarians raise important arguments which question the legitimacy of the free market model. Indeed, feminist and communitarian sympathies are often closely aligned in their shared challenge to the liberal presumption that individualism is the path to self-fulfillment. However, while feminists may glean considerable insight from communitarian scholarship, there nevertheless are significant distinctions to be made between the two families of discourse.

The work of several feminists is helpful in examining the difference between communitarian and feminist conceptions of the self. It has been argued,

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the treatises of Thomas Hobbes and John Locke. See T. Hobbes, *Leviathan* (1651) ed. by M. Oakeshot (Oxford: Basil Blackwell, 1960) and J. Locke, *Two Treatises of Government* (1690), ed. by P. Laslett (Cambridge: Cambridge University Press, 1967).

[11]C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981) at 14.

[12]A.T. Kronman, "Contract Law and the State of Nature" (1985) 1 J. L. Econ. & Org. 5.

[13]*Ibid.* I should note that one of the ways in which Kronman suggests individuals can reduce their risks is through union with another, *i.e.*, by "taking steps to increase the likelihood that eacb will see his own self-interest as being internally connected to the welfare of the other" (*supra* at 20). However, in the end, he affirms that the state of nature is inescapable: even union "is likely to result in the internal replication of those same conflicts it was intended to overcome" (*supra* at 30).

[14]R.W. Gordon, "Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law" [1985] Wisconsin L. Rev. 565.

for example, that communitarianism is dangerous because it threatens to deny the legitimacy of difference.[15] Iris Marion Young suggests that "the desire for mutual understanding and reciprocity underlying the ideal of community is similar to the desire for identification that underlies racial and ethnic chauvinism."[16] Donna Greschner rejects the determinism she sees as inherent in communitarianism.[17] She contends that

> [f]or the vast majority of women, remaining true to the traditions of their birth communities (or even voluntary communities such as universities, let alone professions such as law) would mean they would never be feminists. To paraphrase Simone de Beauvoir, one is not born but rather becomes a feminist. If the communitarian conception of self is that we are completely constituted by our communities, that we cannot escape the traditions into which we are born, that all we can do is continue the narratives and practices, then that conception is anti-feminist.[18]

Greschner, however, does not deny that community and connection are fundamental constituents of the self. Rather, she describes the negotiation of one's identity as a process involving the constant rejection of old connections and forging of new ones.[19] This position, it seems, occupies a space somewhere between liberalism and communitarianism. Yet it would be simplistic to characterize such a position as merely hybrid and without any distinguishing insight. Jennifer Nedelsky ventures to formulate her feminist vision of the self as simultaneously autonomous and inseparable from the dense weave of social context.[20] She uses the term, "finding one's own law," to describe the process of achieving personal autonomy. Her notion of autonomy is distinct from liberal autonomy. She suggests that "[t]he idea of 'finding' one's own law is true to the belief that even what is truly one's own law is shaped by the society in which one lives and the relationships that are part of one's life."[21]

Robin West is bolder than most feminists in that she freely attributes divergent conceptions of self to nature.[22] West distinguishes between the cultural

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[15]See, *e.g.*, I.M. Young, "The Ideal of Community and the Politics of Difference" in L.J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990) 300 and S. Williams, "Feminism's Search for the Feminine: Essentialism, Utopianism, and Community" (1990) 75 Cornell L. Rev. 700 at 708.

[16]Young, *ibid.* at 311.

[17]D. Greschner, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero" in A. Hutchinson & L. Green, eds, *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) 119.

[18]*Ibid.* at 135.

[19]*Ibid.* at 138.

[20]J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale J. L. & Fem. 7.

[21]*Ibid.* at 10.

[22]R. West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1.

feminist,[23] and communitarian notions of connection between self and community. She contends that while communitarians *aspire* to connectedness, cultural feminists believe women already possess it. In West's view, connection for communitarians is a device for achieving self-fulfillment, while for cultural feminists, it is an expression of their true selves.[24] West interprets the communitarian quest for love and intimacy in societal relations as a reaction against men's fundamental, existential state of being: individuation, or the feeling of separation between self and other.

West is criticized by some feminists for her reliance on biology. Her position is threatening to them because she makes the essentialist claim that women are inherently and materially different from men. She sees women as "essentially connected" to the rest of humanity through the processes of pregnancy, childbirth and lactation; this material connection replicates itself "existentially, through moral and practical life."[25] Most North American feminist legal theorists are wary of essentialist claims, fearing that an emphasis on difference serves only to encourage law's tendency to objectify, and thus to perpetuate the domination, disadvantage and disempowerment of women.[26] In addition, essentialism has been criticized on the grounds that highlighting gender as the basis for women's oppression results in the de-emphasis of differences in experience

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[23]*Ibid.* West's "cultural" feminism is mainstream feminism, and it is this I often mean when I use the generic term, "feminist." Carol Gilligan, discussed below, is cited as typical of cultural feminists (*supra* at I4). In contrast, West refers to Andrea Dworkin and Catharine MacKinnon as "radical" feminists who prize "individuation" and view intimacy as a form of collaboration with patriarchy (*supra* at 43). Individuation, however, is not to be confused with liberal autonomy: individuation "is the right *to be* the sort of person who might have and then pursue one's own ends," while liberal autonomy is simply "one's right to pursue one's own ends." Radical feminism's individuation precedes autonomy (*supra* at 42).

[24]Quaere, however, whether the following assertion by Michael Sandel represents a communitarian vision that surpasses mere aspirational thinking:

> And insofar as our constitutive self-understandings comprehend a wider subject than the individual alone, whether a family or a tribe or a city or class or nation or people, to this extent they define a community in a constitutive sense. And what marks such a community is not merely a spirit of benevolence, or the prevalence of communitarian values, or even certain 'shared final ends' alone, but a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of persons is reduced if never finally dissolved (M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 172-73).

Perhaps West would (I think somewhat tenuously) characterize his acknowledgement of shared final ends, or more likely, his concession that the opacity of persons may never finally be dissolved, as evidence that his experience of connectedness will never be more than aspirational.

[25]West, *supra*, note 23 at 3. This view is shared by many French feminists; for a collection of French feminist thought in this area, see C. Duchen, ed., *French Connections: Voices From the Women's Movement in France* (Amherst: University of Massachussetts Press, 1987), in particular, Annie LeClerc's essay, "Woman's Word," *supra*, 58.

[26]See, for example, A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. I373 at 1376.

among women,[27] and misstates the constraints of gender as a problem which is uniquely women's, rather than one shared by both men and women.[28]

While it may be dangerous to rely on determinism rather than socialization in theorizing about morality, it would appear to me to be more dangerous still to construct a rigid dichotomy between the two. If the self is recognized as the product of an interaction between social organization, biology and the physical environment, gender difference must be seen as something more complex than merely a manifestation of determinism or socialization alone.[29] I do think that the essentialist/anti-essentialist debate is collateral, in many respects, to the central project of social change shared by all feminists.

Nevertheless, I tread cautiously when using the terms "masculine" and "feminine" to characterize differing moralities and ideologies. In using these terms, I speak of socially recognized archetypes. It would be inimical to my thesis to convey that I believe these archetypes preclude social change. I do, however, as I explain further below, accept as a premise that traditional social institutions privilege archetypically masculine over feminine rituals and conventions.

I suggest that archetypically masculine assumptions regarding what constitutes the individual, and what constitutes rationality, inform traditional notions of contract and as such make the regime of contract one which typically fails for women. The model contracting person is impartial and can remove himself from his context in order to assess his situation. Many feminist philosophers urge us to recognize that the universality of efficiency, consistency and self-interest is a fictional notion.[30] This fiction ignores traits such as affectivity, passion and desire, often associated with the private world of women, in the creation of social policy and justice.

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[27]See, for example, A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581; M. Minow, "The Supreme Court, 1986 Term — Forward: Justice Engendered" (1987) 101 Harvard L. Rev. 10 at 34-37; and Z. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988) at 38.

[28]K.T. Bartlett, "Feminist Legal Methods" (1990) 103 Harvard L. Rev. 829 at 876; J. Flax, "Post-Modernism and Gender Relations in Feminist Theory" (1987) 12 Signs 621 at 629.

[29]For a rich discussion on this subject, see A. Jaggar, *Feminist Politics and Human Nature* (Brighton: Harvester, 1983).

[30]See, for example, J. Grimshaw, *Philosophy and Feminist Thinking* (Minneapolis: University of Minnesota Press, 1986) at 195-204; M. Minow & E. Spelman, "Passion for Justice" (1988) 10 Cardozo L. Rev. 37; R. Poole, "Morality, Masculinity and the Market" (1985) 39 Rad. Phil. 1 at 22; and I.M. Young, "Impartiality and the Civic Public," in S. Benhabib & D. Cornell eds, *Feminism as Critique: Essays on the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 56 at 58.

Some feminists maintain that women take a different approach than men to solving problems and resolving disputes.[31] Mary Joe Frug examined this hypothesis in the contract context.[32] In a particularly illustrative example, she describes a standard form contract case in which a court enforced the obligation of a woman who signed a bill of lading without reading the fine print.[33] The footnotes to the judgment reveal that the woman testified she signed the contract hastily because the men who delivered her goods were cold and tired and in a hurry to leave. Her actions were thus shaped by what could be called a typically female personality trait — a concern and sympathy for the discomfort of the workers. Frug analyzes the case in terms of relations of power:

> it reveals that traditional contract doctrine, by treating the parties as if they had an adversarial relationship, implicitly rejects the more cooperative way in which many women have traditionally experienced power and knowledge. The major form of power available to most women, given the kind of work they have done, has been the power to nurture and share. ... [T]he court's rhetoric of freedom of choice in *Allied* is simply another way of exercising power.[34]

Katharine Bartlett avoids posing feminine "contextualized" reasoning as the polar opposite of abstract male thinking.[35] Instead, she uses the term "feminist practical reasoning" to describe a mental process in which the problem solver considers factors beyond the minimum required to reach an answer, yet also sees rationality and abstraction as legitimate and essential tools in solving the problem. Thus the feminist practical reasoner will recognize the diversity in human experience, state her moral assumptions and political partiality, and seek to integrate her emotive and intellectual faculties. I think this approach is particularly well-suited to the present enterprise. It supports the idea that, while it may be dangerous to overstate the role of nature in distinguishing men and women, "feminine methods" can foster a brand of justice which is more integrated, responsive to diversity, and ideally, accessible to men as well as women.[36]

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[31]By now, a reference to the work of Carol Gilligan has become almost rhetorical in feminist writing. Gilligan presented a moral dilemma to children and asked them to solve it. On the basis of their differing responses, she concluded that girls and women tend to solve moral dilemmas by exploring their connection to others and relations of care within the community, while boys and men tend to rely on abstract notions of individual justice. C. Gilligan, *In A Different Voice* (Cambridge: Harvard University Press, 1982).

[32]M.J. Frug, "Re-Reading Contracts: A Feminist Analysis of A Contracts Casebook" (1985) 34 Am. U. L. Rev. 1065. For another feminist treatment of contract doctrine, see C. Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L.J. 997.

[33]*Allied Van Lines Inc.* v. *Bratton*, 351 So.2d 344 (Fla., 1977), discussed in Frug, *ibid.* at 1125-34.

[34]Frug, *ibid.* at 1133-34.

[35]Bartlett, *supra*, note 28 at 854-58.

[36]In this vein, see also Drucilla Cornell's treatment of difference in an article where she states that "[w]ithout in any way denying how deeply imprinted our gender identity is, it is still possible to change, and, more specifically, for men to change by allowing themselves to 'accept' the fem-

B. Ideology

The ideology of the classical liberal paradigm is as masculine as its morality. Freedom of contract depends on voluntary choice by parties entering into relations of exchange. Choice is a difficult, multi-faceted concept which incorporates wealth, endowment, power, and opportunity. Critics of classical liberalism have analyzed the complexity of choice, and suggested that many factors operate to constrain the choices of an individual or a social class. For example, the legal realist holds that by refusing to intervene in private contractual relations, the state in fact makes a normative decision.[37] Specifically, the state decides that there is justice in the pre-existing distribution of wealth, be it in the form of property or natural attributes. Marxists have argued that the separation of capital and labour is fundamentally coercive, and as such, represents a regime of constrained or illusory choices.[38]

If constrained choices operate to undermine freedom of contract, then for women, that freedom is tenuous indeed. In many ways, society traditionally has restricted the choices available to women because they are women. The concept of choice or consent is complicated because the true voluntariness of a decision depends on the extent to which social factors influence one's subjective experience. Jody Freeman's discussion of consent in the context of prostitution captures its complexity:

> Consent is structural and changeable. Interpreting what consent means in a given situation is partly objective, and partly subjective. ... So when one consents, one is both responding to and creating the meaning of the term at a particular time in a particular context. A woman's past experience, her socialized self-image, her fears and expectations about sexuality — all of these things are in play when she says yes, no or remains silent.[39]

Thus a woman's conception of herself, immersed in a dynamic milieu of relationship and responsibility, may be manifested in an ambiguous and shifting set of prerogatives. More concretely, a woman's "choice" of a particular occupation or the decisions she makes once a member of the labour force may be influenced by her belief that other options are not available or appropriate.

What has come to be known as the public/private distinction further contributes to the constraints on women's choices. Contractualist ideology emphasizes and seeks to preserve a distinction between the public (government regu-

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inine in themselves" (D. Cornell, "The Doubly-Prized World: Myth, Allegory and the Feminine" (1990) 75 Cornell L. Rev 644 at 673).

[37]Singer, *supra*, note 6 at 482.

[38]See, for example, C.B. MacPherson, "Elegant Tombstones: A Note on Friedman's Freedom" in C.B. MacPherson, *Democratic Theory* (Oxford: Clarendon Press, 1973) 143.

[39]J. Freeman, "The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists and the (Im)possibility of Consent" (1989-90) 5 Berkeley Women's L.J. 75 at 97-98.

lation) and the private (market freedom).[40] Both realist and Marxist critics identify this division as central to the flaw in contractualist thinking.[41] Similarly, most feminists adopt a modified (and in the case of essentialists, sometimes misused) version of the public/private critique to explain the subordination of women. However, an important distinction must be made between feminist and other notions of the the public/private split. While others see the distinction as being between governmental or political regulation and the private market, feminists see it as being between the private family regime and the public market.[42]

Since well before the industrial revolution, women have been tied primarily to familial tasks, tasks related to reproduction and to the maintenance of an environment conducive to sustaining men's lives. Simone de Beauvoir, in her classic text, *The Second Sex*, spoke of the effect of woman's situation in the home on her self-esteem, and its role in shaping a subordinate, even parasitic status for women.[43] The *ideology* of dependency has led, in Carole Pateman's words, to the regime of the "sexual contract."[44] Pateman views social contract theory as incomplete because our society adopts a patriarchal conception of sexual difference in which women are subordinate to men. In this conception of society, only men own property in their person (and they also own women). However, ownership of one's own person is the primary precondition to being a subject of the original contract. Therefore, women are not "individuals" for the purposes of the social contract (but are instead the object of the contract).[45] The work a woman performs in the home is "labour power appropriated by her husband,"[46] thus, in Pateman's view, her function becomes tantamount to slavery.

This "domestic economy" persists despite our contemporary recognition of its oppressive effects upon women, because it serves the indispensible role of

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[40]However, the locus and determinants of the dividing linc betweeu public and private are subject to some debate. See R. Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U. T. Fac. L. Rev. 248 at 252-54.

[41]See Singer, *supra*, note 6, for his discussion of both realists and Marxists; D. Kennedy, "The Stages of the Decline of the Public/Private Distiuction" (1982) 130 U. Penn. L. Rev. 1349; K.E. Klare, "The Public/Private Distinction in Labor Law" (1982) 130 U. Penn. L. Rev. 1358.

[42]See, for example, K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985); and F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harvard L. Rev. 1497. It has been argued that the manipulability of the distinction has been used to create barriers to feminism. See Dalton, *supra*, note 32; and J. Fudgc, "The Public/Private Distinction: The Possibilities of and Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 487-88.

[43]S. de Beauvior, *The Second Sex* (New York: Knopf, 1952) at 511.

[44]"The (sexual) contract is the vehicle through which men transform their natural right over women into the security of civil patriarchal right" (C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) at 6).

[45]*Ibid.*

[46]*Ibid.*, at 133, citing C. Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (Amherst: University of Massachusetts Press, 1984).

supporting the public sphere as we know it.[47] The domain of women, that of undervalued labour in the private sphere, is the natural corollary to the public, wage-earning sphere of men. The nature of familial organization, in which women are perceived as vulnerable, and are held responsible for secondary or supplementary tasks, has gained ideological status. Thus it is reinforced and duplicated in other settings. Later in this paper, I will argue that this has currency in the labour setting.

II. Collective Bargaining

A. The Goals of Collective Bargaining

Collective bargaining law seeks to correct for injustices within the common law of employment. It enables workers to form a collective for the purposes of bargaining with the employer. Where a majority agrees to it, the workers will select a union to act as an agent in representing their interests. The system assumes that employees as a group will have greater power than they would individually in dealing with the wealthier, more powerful employer. Equally important, it seeks to preserve for workers a sense of autonomy or self-governance in determining the conditions of their working lives. The state regulates collective bargaining through federal and provincial legislation. In Canada, the *Canada Labour Code* and analogous provincial statutes serve this role. Broadly speaking, these pieces of legislation contain protections against the coercion and restraint by employers of workers seeking to organize a union, and ensure that the parties deal with one another in good faith. The economic "levers," or manifestations of power in collective bargaining, are the strike and the lockout. Where the employees cannot bear the terms of an agreement, they may, within legislatively controlled limits, refuse to work, or "strike." Likewise, the employer may stage a "lockout," or refuse to employ the union members (and hire replacement workers) under legislatively controlled circumstances. Empirical evidence suggests that collective bargaining has been successful in improving the economic condition of workers. Freeman and Medoff's[48] examination of the influence of unions on the economics of the labour market led them to conclude that unionism is a powerful force in reducing wage inequalities.[49] They based their conclusion on three phenomena associated with unionization. First, union activities reduce inequalities within firms by operating on a philosophy of distributive justice, by replacing managerial discretion with equitable rules, and by promoting worker solidarity and organizational unity. For example, the

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[47]N. Redclift, "The Contested Domain: Gender, Accumulation and the Labour Process" in N. Redclift & E. Mingione, eds, *Beyond Employment: Household, Gender and Subsistence* (Oxford: Basil Blackwell, 1985) 92.

[48]R. Freeman & J. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

[49]*Ibid.*, c. 5 at 78-93.

wage in a unionized setting is more likely to attach to a given job than to a particular individual. Second, unions exert sufficient pressure on the market to standardize wages across industries. Individual differences between workers, such as education, have less of an impact on earning in a unionized environment.[50] Third, unionism reduces the wage disparity between white collar and blue collar workers.

The principal challenge to their findings is that by increasing wages in the organized sector, the number of jobs in that sector correspondingly decreases. The displaced workers go to the non-organized sector, resulting in a decrease in wages for all non-unionized workers. Freeman and Medoff meet this argument by comparing the gains to be had in the organized sector with the losses in the non-organized sector. They conclude that the net effect is a reduction in wage inequality. Thus from a utilitarian perspective, collective bargaining is economically beneficial.

Collective bargaining, however, is more than merely a means to redress inequality of bargaining power. It is also a vehicle for individual self-fulfillment because the workplace is the locus of what for most people is their primary social contribution. Flanders[51] warns against viewing the collective agreement as merely an employment contract serving multiple parties. He argues that collective bargaining differs from bargaining for employment contracts in the marketplace in three ways. First, collective bargaining gives rise to a body of procedural rules which regulate the continuing functioning of the labour market. Second, it is highly political in character, thus justifying its description as "a diplomatic use of power."[52] More specifically, it imposes the "rule of law" on employment relationships, such that workers are no longer at the mercy of the market. Both parties have an interest in more than just the exchange of labour for capital. They also mutually desire to establish and maintain continuity in relations, a desire for self-government which manifests itself in the institution of collective bargaining. Third, negotiation in collective bargaining goes beyond the resolution of economic conflict. Rather, it is fundamentally about power: the power to shape the conditions and the values informing managerial decision-making. Central to this is a clash between the values of efficiency and worker security.[53]

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[50]Freeman and Medoff acknowledge that equality may favour unionism rather than unionism producing equality. That is, workers who are similar to one another may feel more community with one another and therefore be more likely to organize.

[51]A. Flanders, "The Nature of Collective Bargaining" in A. Flanders, ed., *Collective Bargaining: Selected Readings* (Middlesex: Penguin, 1969) 11.

[52]*Ibid.* at 17.

[53]*Ibid.* at 30-31. Note the contrast between this thinking and the argument of Freeman and Medoff that these two values are not mutually exclusive.

Power is a theme common to all theoretical accounts of collective bargaining. Dubin characterizes the manifestations of power in a somewhat less benign light than does Flanders. Dubin argues that power is exercised primarily through the conscious and deliberate use of force. He describes the union's use of the strike, slowdown and jamming of the grievance procedure, and the management's use of the lockout, arbitrary re-interpretation of the collective agreement, and harsh grievance decisions, as the arsenal of weapons available to parties engaging in industrial combat. Conflict and disorder are the lifeblood of industrial justice. Collective bargaining law, by institutionalizing this use of force, tempers it. It provokes management to respect industry-wide standards and has a stabilizing influence on the human relations in the industrial sector. Although Dubin assures us that "each conflict-created disorder is inevitably succeeded by a reestablished [*sic*] order,"[54] and that "collective bargaining tends to produce self-limiting boundaries that distinguish permissible from subversive industrial disorder," the use or threat to use force, albeit tempered, is still the animating essence of the institution.

B. Critiques of Collective Bargaining

The promise of "industrial democracy" accompanying the introduction of collective bargaining to North America nearly a half-century ago has long since lost its lustre.[55] The dissolution of these hopes inspired one commentator to lament that contemporary American labour law is "an elegant tombstone for a dying institution."[56] The presumptive model of self-interest remains a pervasive force in the collective bargaining environment.[57] Even so, the system has failed to secure autonomy for individual workers, both in its inability to foster their full participation in making decisions that affect their working lives, and in terms of the quality of participation that has been attained.

Critics of collective bargaining have focused the problem in a number of ways. Although different diagnoses of collective bargaining's failure to correct for the flaws of the free market derive different suggestions for reformulating the system, they do not, by and large, include calls to abandon collective bargaining. In the pages to follow, I will discuss ideas of selected critics, followed

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[54]R. Dubin, "Constructive Aspects of Industrial Conflict" in A. Kornhauser, R. Dubin & A. Ross, eds, *Industrial Conflict* (New York: McGraw-Hill, 1954) 37 at 45.

[55]It should be noted that for many, the form in which collective bargaining law was introduced failed to meet their aspirations for radical change. Nevertheless, it can be fairly stated that most perceived the new laws as a positive move in the direction of industrial democracy. See K.E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62 Minnesota L. Rev. 265 at 290.

[56]P. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA" (1983) 96 Harvard L. Rev. 1769 at 1769.

[57]See B. Langille & P. Macklem, "Beyond Belief: Lahour Law's Duty to Bargain" (1988) 13 Queen's L.J. 62 at 74-75.

by an exploration of concerns unique to women in the current bargaining regime. Later I will seek to incorporate feminist arguments into existing criticisms of collective bargaining.

Paul Weiler asserts that the primary flaw in American collective bargaining lies, not in the prevailance of free contract values, but rather, in the degree of contractual freedom permitted at various stages of the bargaining process.[58] On one hand, the parties are given too much freedom at the initial contract stage. In the U.S., the hands-off approach of the National Labor Relations Board during the events leading to the signing of a first agreement has a traumatizing effect on fledgling unions struggling to secure some collective voice for workers. At this threshold stage, a union is particularly vulnerable to damaged morale and attrition. Allowing the employer to engage freely in resistance tactics is contrary to the intention of collective bargaining legislation.[59]

On the other hand, Weiler argues, the workers are given too little freedom in their permissible use of economic weapons during the term of an agreement. More specifically, free bargaining with the strike as a weapon, as opposed to interest arbitration by a labour tribunal, is an essential ingredient of the negotiation process. It is the primary weapon available to the workers in exercising control in shaping an agreement responsive to the particular requirements of their situation. The strike is seen as the "litmus test for distinguishing the regime of collective bargaining from that of individual employment relations."[60] Even though strikes are allowed, the terms regulating their use are unduly restrictive. For example, it is inequitable that employers can hire replacement workers during a strike but employees cannot enlist support from unionized workers in companies carrying on business with the struck employer.[61] In sum, Weiler sees contractual freedom within collective bargaining as a good thing, one which promotes the autonomy of the worker *vis à vis* the employer. His criticism focuses largely on the *balance* of that freedom in the current American bargaining regime. Reform, for Weiler, will come from shifting rather than increasing the existing constraints imposed by collective bargaining law on contractual freedom.

While advocating greater contractual freedom in collective bargaining, Weiler also identifies an emerging trend among workers to eschew the formality and legalism of "business unionism."[62] He argues that the large bureaucratic union has come to resemble the employer with which it does battle; the worker

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[58]P. Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation" (1984) 98 Harvard L. Rev. 351.

[59]*Ibid.* at 357-63. It should be noted that in Canada, this problem is not as significant: see J. Rose & G. Chaison, "New Measures of Union Organizing Effectiveness" (1990) 29 Ind. Rel. 457.

[60]Weiler, *ibid.* at 365.

[61]*Ibid.* at 387-94.

[62]P. Weiler, *Governing the Workplace* (Cambridge: Harvard University Press, 1990) ch. 5.

feels silenced and alienated by the very institution created to give him a voice. Weiler calls for a move to "enterprise unionism," a less centralized, more co-operative scheme in which workers have a higher degree of responsibility for decisions affecting the operation of the workplace.[63] The dilemma, for Weiler, is how to reconcile the continued need for big-union muscle to back organizing and mount strikes with this new vision of enterprise unionism.[64]

"Critical" labour law scholarship has also scrutinized collective bargaining. Karl Klare's scheme for labour law reform is rooted in the ambition that the institutions of industrial governance can act as the catalyst for broad-based participatory democracy.[65] Self-realization, individual autonomy, and interpersonal connection are, in his view, the hallmarks of this approach. Klare concentrates his criticisms of the existing American collective bargaining regime on its misguided notion of a dichotomy between market freedom and regulation. Traditional notions of market freedom wrongly juxtapose state regulation and efficiency as if they were mutually exclusive. Assessing the merits of the free market is reduced to a trade-off between efficiency and the intervention necessary to secure basic guarantees of social justice. Klare reconstitutes and relies on the contributions of the legal realists, who exposed the fallacy of the "unregulated" free market. The realists reformulated the question in the debate from *whether* to regulate, to *what form* the regulation, inevitable in any market regime, should take.[66] Klare wishes to restrain contractualism more than does Weiler. In Klare's opinion, the judicial use of formal contractual analysis is a primary culprit of the systematic "deradicalization" of the progressive intentions of the American collective bargaining statute, the *Wagner Act*.[67] While the U.S. Supreme Court facilitated free choice and private ordering between the parties by rearranging their relative bargaining power, it failed to address the substantive content of the bargains struck.[68] Klare seeks to mobilize a "reconstruction of the market" at all levels of the employment relationship. He thinks comprehensive substantive and procedural restrictions on freedom of contract are a necessary means to enhancing employment democracy. He shares with Weiler a desire to facilitate the opportunity for workers and fledgling unions to organize and establish a first contract by legislative means. He also advocates measures to abolish managerial prerogative and the doctrine of reserve rights, through disclosure and a redefinition of "the basic social understanding of prop-

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[63]*Ibid.* at 189.

[64]*Ibid.* at 223.

[65]K.E. Klare, "Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform" (1989) 38 Catholic U. L. Rev. 1.

[66]*Ibid.* at 13-18. See also the earlier discussion in this paper of the legal realists *supra*, notes 6-8 & 37 and accompanying text.

[67]*Supra*, note 55 at 292-93. The *Wagner Act* is another name for the *National Labour Relations Act*, 29 U.S.C. §§151-169 (1988) [hereinafter NLRA].

[68]*Ibid.* at 309.

erty."[69] Other goals are employee participation in management, retaining elements of adversarialism while fostering greater co-operation,[70] and a broad-based statutory imposition of minimum standards in the conditions of employment.

A third critic of collective bargaining, David Beatty, takes a somewhat different tack.[71] For Beatty, the collective bargaining regime is ineffective, first because it replicates and institutionalizes the inequities of the common law, and second, because it generates injustices of its own. Pivotal in Beatty's argument is the notion that the "democratic" tenet of majoritarianism, fundamental to collective bargaining, is actually a principal barrier to workplace justice. He counters the utilitarian defence of collective bargaining by pointing to the vast number of workers denied the benefits of the system. The reasons for their exclusion, be they statutory, locational (*i.e.*, both in terms of industry and geography), or as a result of the "displacement" Freeman and Medoff spoke of (whereby every gain for the unionized produces a corresponding loss for the non-unionized), are devoid of morality. Rather, they are the same social constructs, stemming at the basest level from inherited endowments, that generate distributional inequities in a regime of free contractualism. The losers in this scheme are those who are already disadvantaged: at a broad level, those in sectors without the strength of organization to unionize, and at a more local level, those in a workplace who have the least seniority (the young, the ethnic, and the female). He explains:

> It is a system in which the well-to-do prosper at the expense of the weak; the haves take from the have-nots; better paid workers gain at the expense of the more poorly paid, the organized at the expense of the unorganized, the employed at the expense of the unemployed. Whatever the final definition of industrial justice, a scheme of employment regulation which settles its wins and losses in such a manner cannot be considered distributively just. It is plainly not fair. It is not the way we commonly teach sisters to treat each other and their brothers.[72]

To the extent, Beatty continues, that utilitarian justifications are advanced, they fail because the "losers" in this scheme cannot fairly be said to have consented to their position in the heirarchy of entitlements.

Beatty also attacks claims that value inheres in the process of collective bargaining itself. Advocates analogize the process to democracy because of its

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[69]*Supra*, note 65 at 52.

[70]K.E. Klare, "The Labor-Management Co-operation Debate: A Workplace Democracy Perspective" (1988) 23 Harvard C.R.-C.L. L. Rev. 39 at 77.

[71]See, *e.g.*, D. Beatty, "Shop Talk: Conversations About the Constitutionality of our Labour Law" (1989) 27 Osgoode Hall L.J. 381; *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen's University Press, 1987); and "Ideology, Politics and Unionism" in K. Swinton & K. Swan, eds, *Studies in Labour Law* (Toronto: Butterworths, 1983) 298.

[72]"Ideology, Politics and Unionism," *ibid.* at 315.

electoral mechanisms.[73] Furthermore, the process of allowing each individual to participate in the determination of matters affecting the conditions of her life is said to enhance individual justice. Beatty replies by asserting that where participation is not universal, there can be no true democracy. He re-iterates his position that there is no justice in the arbitrary allocation of personal endowments, and adds that the tyranny of the majority determines individual justice. His vision of a just regime of industrial democracy places the system on a political, as well as market plane.[74] Specifically, Beatty envisages the "constitutionalization" of collective bargaining, whether via a Bill of Rights for employed people, or the *Canadian Charter of Rights and Freedoms*,[75] as the natural route to the democratization of and achievement of justice in labour markets.

C. *Women and Collective Bargaining*

The critiques of collective bargaining I outlined above analyze collective bargaining from a variety of perspectives. Although each offers insight into why collective bargaining has failed to correct the inadequacies of the market, none addresses those failures as they pertain uniquely to women. As I discussed earlier, the free market is blind to the moral and ideological gender divisions in our society. Ironically, collective bargaining, despite its mandate to correct for the failings of the market, fails in the same ways as the free market in achieving social justice for women. A fuller discussion of the barriers women face will be useful in assessing whether existing suggestions for reform of collective bargaining can incorporate the concerns of women.

1. Morality Revisited

The moral framework of collective bargaining is based on masculine social stereotypes. It is premised on the notion that the employer and the employees are engaged in combat. The system provides the rules for combat, and the parties have access to the "weapons" that will assist them: the strike and the lockout. Even the language of bargaining, the influence of which is not to be underestimated, invokes images of the passion and struggle of a clash of powers.[76]

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[73]This claim can be found in the arguments presented by both Flanders, *supra*, note 51, and Dubin, *supra*, note 54.

[74]This echoes the observation of Flanders in deseribing the difficulties in defining collective bargaining as a path to social justice based solely on a market model: "[w]hen, however, one goes out from the alternative premise that what is known as collective bargaining is primarily a *political* institution because of the two features already mentioned — that it is a rule-making process and involves a power relationship between organizations — no logical difficulties obstruct definition" (*supra*, note 51 at 19).

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

[76]This is particularly unsettling if one accepts (as I do) the arguments of Lakoff and Johnson that metaphors in all aspects of life and discourse shape our experience of the world. See G. Lakoff

Terms such as "hard bargaining" and "bull sessions" create in the mind's eye the spectacle of angry embattled adversaries. According to some feminists, this combative conception of conflict resolution is incompatible with the moral worldview of women. Womens' conceptions of power, as discussed earlier, evolved within the private sphere, where the rituals and conventions of social interaction differ from those of the public sphere. This, cultural feminists have theorized, has led women to take a different approach to solving problems and resolving disputes. From this point of view, it is not surprising that women are less willing than men to resort to strike action in resolving industrial disputes.[77] I hope to illustrate, by way of the following examples, how I perceive women's approach to shop floor conduct to be different than traditional approaches.

Charlene Gannage spent two years studying the operation of a union and the interaction among workers in a small Toronto garment factory.[78] Part of her study involved a comparison of the manner in which the primarily male "operators" and primarily female "finishers" distributed work among themselves.[79] The men developed a system of rules for determining work assignments. They set out guidelines and elected a shop chairman and committee to implement the guidelines. The women, on the other hand, developed an informal, *ad hoc* arrangement based on the honour system. For example, if a worker had taken on light assignments one day, she was expected to volunteer for heavier assignments the next day. Where individual antagonisms arose, the shop floor workers themselves bore the responsibility of mediating the conflict, rather than calling in the male shop chairman to resolve it. Only if the dispute could not be resolved internally would the shop chairman be called.

The behaviour of the women was consistent with an alternative conception of how to divide the burdens and benefits of the shop floor, and how best to minimize personal tensions among themselves.[80] First, the women chose an honour- over rule-based system, and in doing so, opted for a more internalized, less rigid form of organization, based on principles of trust. Second, the women

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& M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980). On the power of language in particular in shaping our construction of reality, see K. Busby, "The Maleness of Legal Language" (1988) Man. L.J. 191; and R. West, "Communities, Texts and Law: Reflections on the Law and Literature Movement" (1988/89) 1 Yale J.L. & Hum. 129.

[77]N. Charles, "Women in Trade Unions" in Feminist Review, ed., *Waged Work: A Reader* (London: Virago, 1986) 160 at 174-75.

[78]C. Gannage, *Double Day, Double Bind: Women Garment Workers* (Toronto: The Women's Press, 1986).

[79]*Ibid.* at 151-58.

[80]I should note here that this was not Gannage's interpretation — she attributed the "disorganization" and "dependence" on the shop steward to the ideology of the gender division of labour (*ibid.* at 173), which I discuss below.

chose horizontal rather than hierarchical forms of governance and dispute resolution. These choices require a greater degree of involvement in one another's lives, as well as sensitivity to, and personal responsibility for, each other's stresses and conflicts.

A second notable feature among the women was their sensitivity to the double workday of women co-workers. Hanne Petersen made some astute observations about the "morality of the workplace" in her recent study of unionized women in the Swedish public sector.[81] She found that both management and union colleagues felt a sense of responsibility for employees struggling to balance wage with non-wage (domestic) labour. Petersen observed the development of an "informal law of the workplace," in which employees took into account the competing demands in each others' lives. It was characterized by an ethos of "non-intervention" of work into private life, manifested in a vigilant effort among workers to protect one another from the possibility of employment responsibilities infringing on private/family time. It was characterized by a "norm of consideration, [which] presupposes certain conditions among employees, namely, 'responsibility,' trust and abstention from abuse; a certain 'cautiousness,' and 'watchfulness' when making use of the liberty of action provided by it."[82] For example, this norm would contemplate a woman's taking an extra workload where her colleague required relief due to a domestic obligations such as a sick child.[83]

A third revealing set of observations about this alternative "morality of the workplace" is illustrated by the organizing drives of the all-women Harvard Union of Clerical and Technical Workers and Women Workers (HUCTW) in 1988,[84] and Local 34 (also clerical and technical workers) of the Federation of University Employees at Yale University in 1981.[85] The unions used a variety of alternative techniques, and set for themselves non-traditional goals. These campaigns, unlike most, placed secondary emphasis on pay and benefits, focusing instead on worker empowerment, participation and self-representation. One HUCTW organizer described the message to the employees as being, "you are as smart and capable of handling these problems certainly as anyone in manage-

[81]H. Petersen, "Perspectives of Women on Work and Law" (1989) 17 Int. J. Soc. L. 327.

[82]*Ibid.* at 340.

[83]This sensitivity to each others' dual lives has been cited elsewhere as serving a greater role than merely mutual protection and support. Rather than being seen as "trivial" domestic concerns, the shared ethos among women of the centrality of the family translate into heightened solidarity and the facilitation of organization through kin. See M. di Leonardo, "Women's Work, Work Culture, and Consciousness" (1985) 11 Fem. Stud. 491 at 494.

[84]See M.D. Kandel, "Finding a Voice Through the Union: The Harvard Union of Clerical and Technical Workers and Women Workers" (1989) 12 Harvard Women's L.J. 260.

[85]See M. Ladd-Taylor, "Women Workers and the Yale Strike" (1985) 11 Fem. Stud. 465.

ment currently, and you ought to be involved in those processes."[86] The unions attracted members through personal contacts ("we organized one employee at a time"[87]) rather than through leaflets, so that each employee could express her concerns to the union representatives.[88] Leadership roles were played down, in order to foster confidence and participation among "rank and file" workers. In addition, the themes and slogans of the campaign focused on attitudes or fears women tend to share regarding trade unions. For example, a major theme was the notion of "a community of co-workers" rather than opportunities for individual gain.[89]

Both campaigns also addressed another hurdle. Because many traditionally female jobs (for example, secretarial and clerical jobs) involve close personal interaction with management, an identification with and loyalty towards management often develops.[90] Both drives contemplated the possibility of fear among workers that the union would jeopardize personal relationships and positive identification with management. Interestingly, the two drives used different tactics in this regard. The HUCTW assured workers that unionization was not incompatible with good employer/employee relations and discouraged anti-employer sentiment (as one slogan put it, "It's not anti-Harvard to be pro-union").[91] The Yale union, on the other hand, sought to debunk management's paternalistic claim to be interested in protecting the workers from union harassment.[92] Both campaigns, however, shared the overarching strategy of promoting personal empowerment and women's "gaining control of their lives."[93]

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[86]*Supra*, note 84 at 272. One Canadian study, however, suggests that women may seek traditional rather than non-traditional goals through the union: P. Andiappan, R. CaHaneo & D. Stasiulis, "Attitudes of Female Union Members Towards Their Union: Result of a Survey of Nurses and Clerks in a Canadian City" (1984) University of Windsor Faculty of Business Administration Working Paper No. 84-001. Two things must be noted, though. In the study, the term "non-traditional" referred to benefits and working conditions specifically desirable to women, such as child care, maternity benefits and flexible hours. In the HUCTW campaign, benefits and flexibility fit within the "traditional" category. Furthermore, the authors of this study emphasized that the data were gathered during the 1982 recession, when workers in general were concerned with high inflation and unemployment.

[87]Kandel, *ibid.* at 265.

[88]Yale's Local 34 used a "bottom-up" structure, such that small groups of workers all across campus discussed any decision before it was made. This allowed women who previously had never found themselves in leadership positions to run meetings, speak before large groups, and present grievances to their supervisors. See *supra*, note 85 at 470.

[89]The upshot of this was that some women who otherwise might not have had a particular interest in the union developed an interest out of a sense of obligation to their co-workers. For example, one worker was quoted as saying, "If younger workers are going to be concerned about my issues, it would be unfair if I wasn't concerned about theirs" (*supra*, note 84 at 274).

[90]*Ibid.* at 269-70, esp. 269 n. 56; *supra*, note 85 at 467. See also V. Schultz, "Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument" (1990) 103 Harvard L. Rev. 1749 at 1828-29.

[91]Kandel, *ibid.* at 269.

[92]*Supra*, note 85 at 470.

[93]*Ibid.* at 471.

2. Ideology Revisited

Earlier in the paper I touched upon the ideological force of the public/private distinction. More specifically, I focused on the ideology of the family, and the resulting social construction of male and female participation in society.[94] This social construction of gender is replicated in the labour setting, in two primary ways: there is a devaluation of women's labour power in the wage-earning sector, and the political organization of industrial society is structured in a way which inhibits women's participation.

With respect to the devaluation of women's labour power, I will identify two theories of how this phenomenon emerges. The first emphasizes the construction of gender outside of, or prior to, women's entry into the labour market. Women's traditional work in the private, domestic sphere has come to be perceived as unstimulating, unchallenging, repetitive, isolated and low in prestige. The work is unpaid, and its relationship to the financial rewards of the family is indirect. It cannot be exchanged on the market, and as such, is considered to be of little value. The impact of the unfavourable social perception of home-centred work on women's self-valuation has been described by Armstrong and Armstrong:

> Although the labours of love may often appear superior to those performed merely for a wage, the labours of love may in our society be debilitating. Care and love often mean submission to others, submission that is not often reciprocated. For women in the home, labours of love usually mean work without pay, work done for others and in response to others.[95]

The subjective or internalized devaluation of women's traditional work has put women into a vulnerable position upon entering the labour market. They may feel that their work is supplementary or secondary to the primary means of family support. Moreover, because work for any pay will always be financially worth more than housework, the thresholds of what women will accept in bargaining for compensation traditionally have been lower than those for men.

Vicki Schultz challenges the notion that women choose stereotypically female or female-dominated occupations, either because of socialization before they enter the labour market, or because of their heavier family obligations.[96]

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[94]Although this familial ideology is the starting point of many gender-based theories of social construction, some scholars have taken a "deconstructionist" approach, in which the division of labour in the family is one among several coexistent and equally influential elements of the social concept of gender. For a discussion of this, see V. Beechey, "Rethinking the Definition of Work: Gender and Work" in J. Jenson, E. Hagen & C. Reddy, eds, *Feminization of the Labor Force: Paradoxes and Promises* (New York: Oxford University Press, 1988) 44 at 57-58.

[95]P. Armstrong & H. Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work*, rev'd ed. (Toronto: McLelland & Stewart, 1984) at 188.

[96]Schultz, *supra*, note 90 at 1817-20.

Rather, Schultz contends that women's work aspirations and preferences are shaped by their experiences after they enter the labour market. This "new structuralist" tack posits that "employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs."[97]

In either scenario, the result is that women not only tend to perform lower-paying jobs, but they also are paid less than men to do the same or equivalent work.[98] While pay equity has been implemented in Ontario to remedy gender-based wage imbalances,[99] it attempts merely to equalize the discrepancies created within the system. It does not address how the discrepancies are socially created and systemically reinforced within collective bargaining.[100]

This bias manifests itself not only in the wage gap, but also in other aspects of working life. There has been much study of the influence of capitalist ideology on the labour process, postulating among other things the phenomenon of labour market segmentation. The theory of labour market segmentation posits that group status (sex, race, educational background) is a critical determinant of one's working conditions, promotional opportunities, wages, and industrial sector.[101] Men dominate the primary sector, which requires more stability and skill, and promises higher wages and job ladders. Women, minorities and youths dominate the secondary sector, characterized by less stable and less skilled work, low wages, high turnover, and few job ladders. Segmentation, it is suggested, was encouraged by early labour monopoly capitalists. By breaking jobs down into discrete, simplified, specialized tasks ("deskilling"), management was able to increase productivity, reduce costs, increase hierarchy and management control, and reduce worker independence.[102]

Feminist writers have criticized much of the literature on labour market segmentation because of its underlying gender neutrality. They argue that deskilling has a distinctly (and overlooked) gendered dimension to it, *i.e.*, forms

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[97]*Ibid.* at 1816.

[98]It would seem that this hypothesis is borne out in Canadian earnings statistics: the average female employment income (regardless of unionization) in the most recent figures was 66 percent of the male average (Statistics Canada, *Women and the Labour Force*, 1990 (1985 figures)). The gap is about 10 percent lower among unionized workers, but only 31 percent of women (as opposed to 39 percent of men) are unionized. See P. Kumar & D. Cowan, "Gender Differences in Union Membership Status: The Role of Labour Market Segmentation," *Queen's Papers in Industrial Relations* (Kingston: School of Industrial Relations, Queen's University, 1989).

[99]*Pay Equity Act*, S.O. 1987, c. 34.

[100]See C. Cuneo, *Pay Equity: The Labour-Feminist Challenge* (Toronto: Oxford University Press, 1990) at 149-50.

[101]M. Reich, D. Gordon & R. Edwards, "A Theory of Labor Market Segmentation" (1973) 63 Am. Econ. Rev. 359.

[102]*Ibid.* See also, H. Braverman, *Labour and Monopoly Capital: The Degradation of Work in the Twentieth Century* (New York: Monthly Review Press, 1974).

of control differ depending on whether the workers are male or female.[103] Furthermore, the analysis works more effectively in the male-dominated manufacturing sector than in the female-dominated service sector.[104] Many occupations typically filled with women, such as teaching and nursing, cannot accurately be described as fitting within the secondary workforce — yet the pay may be low and the work, though complex and high in responsibility, may not be defined as skilled.[105] Secondly, and related to the previous point, the definition of "skill" may be ideologically influenced. What counts as training, and what is considered skill may have as much to do with gender as it does objective qualifications and knowledge.[106] In these analyses, the ideology of patriarchy, rather than capitalism, is responsible for the dual labour market.

The empirical reality of women's participation in the workforce is consistent with the above hypothesis. Women are employed primarily in the service sector, particularly in "caring" jobs and paid domestic or domestic type labour.[107] Furthermore, women dominate the part-time labour force,[108] which tends to perform low skilled, low paying jobs with little job security, few benefits and minimal opportunities for advancement.[109] A recent study revealed that employers with special needs, such as a flexible workforce and longer operational periods, were more likely to create part-time positions if the workers were women than if they were men. For men in comparable situations, employers were more likely to create temporary contracts or short-time work, and use overtime.[110] The characteristics of female labour markets has prompted the observation that "women's work in the labour force does not promote the development of aggressive, independent, competitive, self-directing people."[111]

The ideology of collective bargaining also operates to exclude women by encouraging a particular political environment within the union. Political power

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[103]J. Wajcman, "Patriarchy, Technology and Conceptions of Skill" (1991) 18 Work & Occupations 29. See also Beechey, *supra*, note 94 at 48, citing a 1983 study by Game & Pringle, and N. Sokoloff, "What's Happening to Women's Employment: Issues for Women's Labor Struggles in the 1980s-1990s" in C. Bose, R. Feldberg & N. Sokoloff, eds, *Hidden Aspects of Women's Work* (New York: Praeger, 1987) 14 at 17.

[104]During 1989, an average of 57 percent of the service sector and 80 percent of clerical workers were female: Statistics Canada, *supra*, note 1 at C-24. More specifically, women dominate the secretarial, clerical, teller and cashier, food services, nursing, elementary teaching, janitorial, and textiles occupations.

[105]Beechey, *supra*, note 94 at 49.

[106]*Ibid.*, and Wajcman, *supra*, note 103.

[107]Beechey, *ibid.* Among uniomized women, more than half are in the serviee sector.

[108]During 1989, an average of 72 percent of part-time workers in Canada were women: Statistics Canada *supra*, note 1 at C-27.

[109]Commission of Inquiry Into Part-Time Work, *Part-Time Work in Canada* (Ottawa: Labour Canada and Minister of Supply and Services Canada, 1983) (Joan Wallace, Commissioner) at 34.

[110]Beechey, *supra*, note 94 at 50.

[111]M. Barrett, *Women's Oppression Today* (London: Verso, 1980) c. 5. at 191.

within unions typically rests with men.[112] Indeed, men were the first to organize, and from their earliest days, trade unions operated in a way which excluded women.[113] There are several arguments why women have failed to participate and acquire leadership posts within unions, or even to become members of unions. First, women have more constraints on their time. Union meetings often take place in the evenings, outside of regular work hours. For women with family obligations, finding the time and physical resources to attend meetings and engage in organizational activities is difficult at best. This may be compounded by pressure from their husbands or partners to avoid union activities.[114] As one commentator succinctly puts it, "women 'negotiate' an ambiguous identity strung between two received 'worlds': the male world of wage labour, and the female world of home and family."[115] A recent study reveals, however, that women's priorizing of family commitments is not synonymous with lack of interest in the benefits of unionization.[116]

In addition, women's work in the shop is perceived as having a lower value than that of men. As I mentioned earlier, women tend to work in lower paying jobs, and on less "significant" aspects of production *vis à vis* the finished product. Consequently, women may feel less "identification with the finished product" because of their role in working on bits and pieces of garments after design and prior to assemblage. Gannage describes women who felt that the marginal-

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[112]A study within Canadian unions revealed a strong correlation between gender and union status. Women tended to fill the positions of secretary, secretary-treasurer or treasurer more often than men, while the reverse was true for the position of president. Furthermore, almost 75 percent of women in union posts reached them by acclamation, appointment, or elections where there was no male opposition. See G. Chaison & P. Andiappan, "Profiles of Local Union Officers: Females and Males" (1987) 26 Ind. Rel. 281.

[113]Barrett, *supra*, note 111. Barrett cites Karl Marx as endorsing a sexist vision of collective organization: he is reported to have encouraged male workers to organize in order to resist the dilution of the workforce with women and children. See also H. Hartmann, "Capitalism, Patriarchy and Job Segregation by Sex" in Z.R. Eisenstein, ed., *Capitalist Patriarchy and the Case for Socialist Feminism* (New York: Monthly Review Press, 1979) 206.

[114]A recent study found these family-related constraints to be more significant deterrents to achieving high union status than lack of personal confidence. See G. Chaison & P. Andiappan, "An Analysis of the Barriers to Women Becoming Local Union Officers" (1989) 10 J. Lab. Res. 148. See also the corroborating data of D. Cornfield, H. Cavalcanti Filho & B. Chun, "Household, Work, and Labor Activism" (1990) 17 Work & Occupations 131, which revealed an inverse correlation between household responsibilities in women and union activism. Regarding family constraints and participatiou in general, see Gannage, *supra*, note 78 at 179; A. Pollert, "Women, Geuder Relations and Wage Labour" in E. Gamarnikow, D. Morgan & D. Taylorson, eds, *Gender, Class & Work* (Aldershot: Gower, 1985) 96; and D. Gallagher, "Getting Organizcd in the Canadian Labour Congress" in M. Fitzgerald, C. Guberman & M. Wolfe, eds, *Still Ain't Satisfied: Canadian Feminism Today* (Toronto: The Women's Press, 1982) 152 at 160.

[115]S. Cunnison, "Participation in Local Union Organisation: School Meals Staff: A Case Study" in Gamarnikow, Morgan & Taylorson, *ibid.* at 77.

[116]This was one conclusion of a study of American women and unionization: T. Moore, "Are Women Workers 'Hard to Organize'?" (1986) 13 Work & Occupations 97.

ity of their work and their lower pay resulted in the union's having little interest in fighting for their concerns. Furthermore, they felt that their contributions to union activities would be considered superfluous.[117]

A third problem is that sexist stereotypes function to discourage women from entering or remaining within the political fray. (I use the word "stereotypes" deliberately, because researchers in this area have been emphatic in stressing that women's "apolitical" stance has nothing to do with biology. That is, women are not inherently predisposed to be passive or apathetic). Men are encouraged more strongly than women to enter into the forum of union politics.[118] Those women who do enter often leave because of harassment or patronizing treatment by male co-workers and union officials. For example, women report pressures to vote with the men, rather than showing their "bias" by taking "pro-women" stances on particular issues.[119] Finally, the negative connotations associated with ambition in women may inhibit their desire to seek power within the union.[120]

Finally, I think that the male domination of union leadership produces a political climate which most women find inaccessible. The formality of bargaining may be alien and incomprehensible to women who have been in the workforce for a shorter time than men, and who have had little exposure to the mechanics of the system.[121] The *culture* of the trade union comprises a verbal

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[117]*Supra*, note 78 at 176. Collateral to this point, from a Canadian study comparing union leaders' perceptions of the concerns of women in unions with the women members' actual reported concerns, is the finding that male union leaders do not recognize this as a barrier to women's participation, while female union leaders do. See S. Hameed & J. Sen, "Perceived Barriers to Unionization of Women: A Survey of Canadian Union Leaders" in *Proceedings of the 23d Annual Meeting of the Canadian Industrial Relations Association* (Winnipeg: University of Manitoba, May 29-31, 1986) 125.

[118]S. Ledwith, F. Colgan, P. Joyce & M. Hayes, "The Making of Women Trade Union Leaders" (1990) 21 Ind. Rel. J. 112 at 113. See also J. White, *Women and Unions*, Prepared for the Canadian Advisory Council on the Status of Women (Ottawa: Minister of Supply and Services Canada, 1980) at 29-31; G. Lowe, "Problems and Issues in the Unionization of Female Workers: Some Reflections on the Case of Canadian Bank Employees" in N. Hersom & D. Smith, eds, *Proceedings and Papers From a Workshop Held at the University of British Columbia to Evaluate Strategic Research Needs in Women and the Canadian Labour Force* (Ottawa: Minister of Supply and Services Canada, 1982) 307 at 314; and J. Sen, "Towards a Theory of Unionization of Women" in H. Jain, ed., *Emerging Trends in Canadian Industrial Relations: Proceedings of the 24th Annual Meeting of the Canadian Industrial Relations Association* (Hamilton: McMaster University, 1987) at 637.

[119]T. Colling & L. Dickens, "Bargaining for Equality" (1990) 29 Equal Opportunity Rev. 22 at 23.

[120]This point brings to mind my own experience when I first joined a union at the age of 19. I consulted an older female co-worker, who had been a union member for many years, to learn how I might gain a better understanding of the workings of the union. She pulled me aside and informed me, in hushed tones, that only "militant lesbians" attended union meetings.

[121]Pollert, *supra*, note 114 at 96.

currency, a rhetoric — spoken and unspoken assumptions about protocol. All of these are part of a community from which women are tacitly excluded. This problem plays itself out in the attitudes of male union members to the female participants. In a study of the General and Municipal Workers' Union in England, male union members were interviewed about the women's contributions to internal union organization.[122] When women's issues were at stake, male union leaders often held special meetings, inviting only women to attend. They did so because they and other men in the union complained about the "unruliness" of women at meetings, and their lack of understanding of procedural formalities. Women who have tried to become active in union affairs report being ruled "out of order" or not being able to get their concerns put on the agenda at meetings,[123] or feeling that they had to work particularly hard in the union to prove themselves to be competent.[124] The result is that women feel silenced and lack confidence, which perpetuates "a vicious circle of non-involvement"[125] in the union.

Much of this discussion may beg the question, "Why don't women organize their own unions?" The answer is complicated for several reasons. First, not all of the reasons I discussed above related specifically to difficulties women confront due to sexist attitudes within mixed-gender unions. Women face the barrier of family commitments regardless of the demography of their union.[126] In addition, within a mixed-gender union, the factors inhibiting involvement would certainly also act to inhibit a movement to "break off" into a separate female union. Furthermore, non-unionized women have experienced tremendous difficulty in getting organized in largely female sectors of the workforce, the paradigmatic example being the banking sector. A study by Kumar and Cowan showed that this correlated with women's occupations and industries of employment, rather than gender *per se*.[127] For instance, in the banking industry, management has taken a very strong stance against unions and used a variety of tactics to preclude organizing activity.[128] However, as we have seen, gender

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[122]*Supra*, note 115.

[123]*Ibid.*

[124]*Supra*, note 77 at 186.

[125]Pollert, *supra*, note 114 at 106.

[126]And as noted at *supra*, note 114, Chaisson and Andiappan found this to be the most significant factor preventing women from gaining access to official posts in Canadian unions. See also Cornfield, Filho & Chun, *supra*, note 114.

[127]Kumar & Cowan, *supra*, note 98.

[128]For a full discussion of these tactics, which include interrogation and intimidation of employees, no solicitation rules, litigation based on legal loopholes in order to frustrate certification, disciplinary measures, pre-certification polling of employees to sway pro-union sentiment, and employee transfers, see E.J.S. Lennon, "Organizing the Unorganized: Unionization in the Chartered Banks of Canada" (1980) 18 Osgoode Hall L.J. 177; S. Muthuchidambaram, "Settlement of First Collective Agreement" (1980) 35 Rel. Ind. 387 at 390; and E. Beckett, "Unions and Bank Workers: Will the Twain Ever Meet?" Paper Prepared for the Women's Bureau, Labour Canada

and occupational segregation are intimately connected.[129] It is noteworthy that empirical evidence refutes any implication that women have less desire to organize than men.[130]

Let us return now to the academic criticisms of collective bargaining I presented earlier, and discuss how they might assist in addressing the ideological barriers that women face. Problems of gender exacerbate some of the tensions identified by these scholars. For example, both Klare and Weiler speak of the folly in denying the inevitability of conflict between labour and management. They recommend enhanced co-operation as a complement, rather than substitute for adversarial bargaining, the latter being the central lever of labour power.[131] The foregoing discussion illustrates that women, though not incapable of mastering conflict, tend to place particular value on exhausting co-operative methods of problem-solving before resorting to active confontation. Accepting the inevitability, indeed, necessity of some adversarialism in the labour-management relationship, the task of reform presents a dual challenge in responding to women workers. Reforms seeking to encourage the entry of women into the milieu of labour management relations should facilitate, not only the integration of more co-operative methods of participation, but also the modification of traditional bargaining structures to accomodate the constraints within women's lives.

Klare envisions a more politicized workforce.[132] But his enduring commitment to democratic forms in industrial governance makes sense only if one has faith in the justice of such arrangements. For the reasons I have outlined above, women feel alienated by, and remain excluded from, the democratic processes within union operations. Democracy, at least for women in mixed-gender unions, does not guarantee participation, though Klare is hopeful that the creation of more democratic employment structures will be informed by feminist consciousness.[133] He also speaks optimistically of the potential for minimum standards legislation to remedy the shortcomings of collective bargaining. In this regard, I believe that Klare's formulations for reconstruction may provide

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(Ottawa: Labour Canada and Minister of Supply and Services Canada, 1984) at 8. Furthermore, as I will discuss below, early labour board jurisprudence on bargaining unit determination in banks worked to the banks' favour.

[129]*Supra*, notes 101-109 and accompanying text.

[130]Studies by P. Marachak, cited in White, *supra*, note 118 at 30 (Canadian); and Moore, *supra*, note 116 at 106 (American) both found unorganized women to be *more* interested in becoming unionized than their male counterparts.

[131]K.E. Klare, *supra*, note 70 at 39; Weiler, *supra*, note 62 at 225-26.

[132]*Supra*, notes 61-65 & 70 and accompanying text.

[133]*Supra*, note 70 at 47.

answers to some of women's difficulties.[134] Nevertheless, the task before us is to devise ways to modify the structure of collective bargaining itself. In this way we can preserve the ideals of women workers' autonomy and self-governance (rather than turning solely to state intervention) while at the same time correcting for systemic gender bias.

Beatty does address the shortcomings of industrial democracy. I believe his assessment of women's situation would be that the subordination of women as we see it in the market is replicated in the union. The dominance of men is reinforced through majoritarian union politics, and women are the unwilling losers.[135] I find these arguments compelling and readily see their applicability to the reality of women's experiences in the collective bargaining setting. However, Beatty's solution to these inequities, a Bill of Rights for employed persons, or greater access to *Charter* remedies, should be approached with qualified optimism.

It is possible that the failures of the market, to the extent that they replicate themselves in collective bargaining, will again replicate themselves in the constitutional sphere. Chief Justice Dickson recognized this hazard in his majority judgment in *Slaight Communications Ltd.* v. *Davidson.*[136]

The constitutionalization of free market inequalities may occur on both substantive and procedural levels. Substantively, the *Charter* embraces liberal notions of individual rights. Judith Fudge cautions that rights discourse may abstract problems to a level removed from reality. Fudge argues that *Charter* jurisprudence, by and large, has been blind to the separation of public and private.[137] To the extent the public/private split is at the root of women's oppression, *Charter* jurisprudence has failed to correct for that oppression. Fudge analyzed *Charter* litigation in several areas of law, including labour, and found that the courts have tended to construe equality in a formal and narrow sense.[138] Formal equality does not take into account the full history and context of gender discrimination, a step necessary to ameliorating the subordination of women.

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[134]He specifically notes, in reference to women, that the elimination of the effects of labour market segmentation will require statutory intervention to reduce the work week, establish benefits for part-time workers, and improve childcare provisions. *Supra*, note 65 at 55.

[135]For a more detailed account of this position, see *supra*, notes 67-70 and accompanying text.

[136]The Chief Justice stated that "[t]he courts must be ... concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general" (*Slaight Communications Inc.* v. *Davidson* [1989] 1 S.C.R. 1038 at 1052, 59 D.L.R. (4th) 416). This decision is exceptional, however, among constitutional cases in the labour field. Patrick Macklem interprets this as being consistent with a recent ambivalence in the Supreme Court regarding the role of the contractualist ideal and its intrinsic individualism. See P. Macklem, "Developments In Employment Law: The 1988-89 Term" (1990) 1 Sup. Ct. L. Rev. (2d) 405.

[137]Fudge, *supra*, note 42 at 493.

[138]*Ibid.* at 489-509 & 530.

Thus legislation which formally treats men and women the same may have a disparate impact on women.

Fudge noted an exceptional case, *Action Travail des Femmes* v. *C.N.R.*[139] in which the Supreme Court of Canada affirmed the need to address systemic discrimination by implementing affirmative hiring programs in the workplace. Fudge warned, however, that we must be cautious not to read *Action Travail* as signalling a new judicial approach to equality.[140] The decision was merely a validation of the decision of an expert human rights tribunal (which the court quoted directly in the judgment), well versed in dealing with complex issues of equality. By contrast, Fudge argued, a challenge to s. 15 of the *Charter* would require the court independently to assess the scope of equality and strike down legislation if it saw fit.[141]

More recent judgments reviewing the decisions of human rights tribunals have followed the lead of *Action Travail* in promoting gender equality in the employment realm. The Supreme Court has ruled that both sexual harassment[142] and discrimination based on pregnancy[143] are forms of sex discrimination, which the employer has a responsibility to prevent.[144] Nevertheless, the Supreme Court has yet to address employment-related gender discrimination in the context of a challenge under s. 15 of the *Charter*.[145] However, even if rights adjudication

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[139]*Action Travail des Femmes* v. *C.N.R.*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193 [hereinafter *Action Travail* cited to S.C.R.].

[140]Fudge, *supra*, note 42 at 501.

[141]*Ibid.*

[142]"When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power" (*Janzen and Govereau* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284, 59 D.L.R. 4th 352, (Dickson C.J.)).

[143]"Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant" (*Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1242, 59 D.L.R. (4th) 321, (Dickson C.J.) (overruling *Bliss* v. *Attorney General of Canada*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 which held the opposite)).

[144]Though not in the context of sex discrimination, the Supreme Court has also held that an employer cannot justify discrimination on the basis of a "bona fide occupational qualification" (which bas been a successful defence to discrimination on the basis of pregnancy: *Mack* v. *Marivtsan et al.*, [1989] 89 C.L.L.C. para. 17,004 (S.H.R.B.I.)) where there is indirect discrimination due to an adverse effect of a condition of employment. There is a duty on the employer, short of undue hardship, to accomodate the adversely affected employee or group: *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool et al.*, [1990] 2 S.C.R. 489, 6 W.W.R. 193. The Supreme Court also granted leave recently in a similar case from the British Columbia Court of Appeal in which the question is raised whether there is also a duty to accomodate on the union: *Renaud* v. *Board of School Trustees, District No. 23 (Central Okanagan) et. al.*, leave to appeal granted [1990] S.C.C. Bull. 1760.

[145]There is, however, an application in the Supreme Court of Canada for leave to appeal the decision of the Ontario Court of Appeal in *Re Tomen et al. and Federation of Women Teachers' Associations of Ontario et al.* (1989), 70 O.R. (2d) 48, 61 D.L.R. (4th) 565 in which a s. 15 argument was raised. The appellants are challenging a law which requires teachers to join certain unions based, in part, on their gender. The Ontario Court of Appeal dismissed the appeal without consid-

can further the interests of gender equality, it may not provide a complete solution. The assumption that legislators will respond to rights adjudication by implementing systemic reforms in employment law has been characterized as suffering strains of romanticism.[146]

Procedurally, using the *Charter* or *Canadian Bill of Rights*[147] may alter the relationship of the worker to the employer and to the state by making it legalistic, formal and ultimately, inaccessible. There may be reason to question the belief that the courts, complete with complex and formalistic procedures, adversarial norms, and costly, delayed proceedings, will be any more amenable to meaningful participation by women than the institution of collective bargaining itself.

In thinking about the merits of turning to rights as a solution to gender inequality, work in the area of race and legal reform might be helpful. Kimberlé Williams Crenshaw writes about the dilemma American Blacks face in evaluating the utility of liberal-based civil rights discourse in their struggle.[148] While the legitimation of a meritocratic free market has helped to co-opt Blacks through formal equality and reinforce the belief that they are socially inferior, rights discourse has also been the means by which Blacks have made their most important gains in American society. Crenshaw thinks the solution is the "pragmatic use of liberal ideology" in a way that preserves rights but transcends the oppositional dynamic in which Blacks are cast as subordinate.[149] Feminists, as well, may reap qualified benefits through human rights adjudication. While there is reason to remain wary of classical liberalism as an answer to feminist concerns, I agree with Crenshaw that "rights-talk" need not be wholly antithetical to progress towards equality and, in the labour milieu, more balanced participation.[150]

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ering the s. 15 argument on the ground that the impugned legislation was private and thus outside the scope of the *Charter*.

[146]Paul Weiler makes this point in cautioning against what he calls the romantic liberalism of David Beatty and others. See P. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labor and Employment Law" (1990) 40 U.T.L.J. 117 at 141.

[147]*Canadian Bill of Rights*, R.S.C. 1985, Appendix III.

[148]K.W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harvard L. Rev. 1331 at 1370.

[149]*Ibid.* at 1385-86.

[150]This echoes themes in the now-classic formulation by Duncan Kennedy of the "fundamental contradiction." Kennedy speaks of the inescapable tension, a pervasive theme in liberalism, between individual freedom and collective coercion:

> The very structures against which we rebel are necessarily within as well as outside of us. We are implicated in what we would transform, and it in us. This critical insight is not compatible with that sense of the purity of one's intention which seems often to have animated the enterprise of remaking the social world. None of this renders political practice impossible, or even problematic: we can overcome oppression without having overcome the fundamental contradiction, and do something against it. But it

III. Toward Structural Change: Selected Aspects of Collective Bargaining Law and Possibilities for Reform

I stated in the Introduction that although there are problems with current Canadian collective bargaining law, I endorse its aspiration, which is to enhance the participation of workers in determining the conditions that affect their lives. The question now is this: how can we preserve collective bargaining law while working to eliminate the processes which reinforce the social construction of gender? Statutory minimum standards, such as pay equity and anti-discrimination legislation, while salutory, operate "from the outside in." In other words, they attempt to remedy problems that arise, in part, from a defective process, but the process itself remains the same. In changing the process, we need to find ways to enhance opportunites for women to become involved in union activites, to voice their concerns, and to have those concerns met. In this Part of the paper, I will make several suggestions for reform within the framework of collective bargaining itself.

I mentioned earlier that collective bargaining legislation encourages a combative approach to dispute resolution. The strike and lockout (or threats of either) remain the prime arsenal in forcing agreement. Indeed, the right to strike is a primary, perhaps the primary, lever of worker power under collective bargaining law. At the same time, alternative methods of problem solving may better fit the sensibilities and encourage the participation of many workers, such as women, who fail to see strikes as the optimal path to dispute resolution.[151] This creates a paradox. Power, as traditionally conceptualized in the collective bargaining relationship, sits opposed to the full participation collective bargaining seeks to encourage. Despite this apparent dilemma, I think there is room for reconciliation of these competing concerns through the implementation of programs to facilitate greater co-operation between union and management. While not eliminating the strike and lockout as instruments of last resort, such programs might reduce the incentives of parties to make use of them.

Commentators have suggested an alternative model of collective bargaining which would seek to increase employee morale and productivity by replacing negative tactics with an atmosphere of accomodation, co-operation, trust, and respect.[152] Currently, collective bargaiming statutes throughout Canada not only provide mechanisms for conciliation or mediation, but also usually require exhaustion of these procedures before the parties are legally permitted

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does mean proceeding on the basis of faith and hope in humanity, without the assurance of reason (D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205 at 212-13).

[151]See, *supra*, notes 58-61 and accompanying text.

[152]D. Yoder & P.D. Staudohar, "Rethinking the Role of Collective Bargaining" (1983) 34 Labor L.J. 311 at 314.

to strike or lockout.[153] However, these mechanisms constitute only one aspect of co-operative union-management relations. The sort of scheme I am referring to is far broader reaching. It would involve consultation between organized labour and mangagement in decisions affecting control of the enterprise.[154]

There is an extensive body of literature exploring this idea, to which my treatment here cannot do justice. However, for the purposes of illustration, I will sketch briefly how such a scheme might operate. An effective mechanism for enhancing co-operation at this level would be to create committees or teams, comprised of union and management representatives. These committees would meet on a scheduled basis to discuss issues arising in the maintenance of the collective agreement. As such, they would serve a troubleshooting function, as well as providing an educative role by broadening each party's awareness of the other's concerns. If successfully implemented, this type of network would cultivate a sense of common mission between management and labour, thereby reducing the mistrust that traditionally divides the two cultures.

Empirical and comparative research suggests that the success of such programs requires a significant commitment in principle and resources by both parties. The most effective joint labour-management teams are those having frequent (*e.g.*, weekly) meetings and which make decisions of some weight, rather than merely engaging in discussion or making recommendations.[155] Another effective technique is to give union members a "right of consultation" in decision-making at the plant and enterprise levels.[156] Evidence suggests that there is less resort to strike action where co-operative or horizontal rather than hierarchical union-management structures exist.[157] For one thing, union repre-

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[153]See, specifically, *Canada Labour Code*, R.S.C. 1985, c. L-2, ss 71 & 89; *Labour Relations Code*, S.A. 1988 c. L-1.2, ss 62 & 71-72; *Labour Code*, R.S.B.C. 1979, c. 212, as am., ss 137.3 & 81-82; *Labour Relations Act*, R.S.M. 1987, c. L-10, ss 67, 95 & 94; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss 36 & 91; *Labour Relations Act, 1977*, S.N. 1977, c. 64, ss 79 & 94; *Trade Union Act*, R.S.N.S. 1989, c. 475, ss 35 & 45; *Labour Relations Act*, R.S.O. 1980, c. 228, ss 16 & 72(2); *Labour Act*, R.S.P.E.I. 1988, c. L-1, ss 24 & 40(3); *Labour Code*, R.S.Q. c. C-27, ss 54 & 58, *Trade Union Act*, R.S.S. 1978, c. T-17, s. 22.

[154]For more comprehensive discussions of these principles, see D. Drache & H. Glasbeek, "The New Fordism in Canada: Capital's Offensive, Labour's Opportunity" (1989) 27 Osgoode Hall L.J. 517; K. Stone, "The Future of Collective Bargaining: A Review Essay" (1989) 58 U. Cin. L. Rev. 477; K. Stone, "Labor and Corporate Structure: Changing Conceptions and Emerging Possibilities" (1988) 55 U. Chi. L. Rev. 73; K.W. Wedderburn (Lord), "Trust, Corporation and the Worker" (1985) 23 Osgoode Hall L.J. 203; Weiler, *supra*, note 62, ch. 5.

[155]W. Cooke, "Factors Influencing the Effect of Joint Union-Management Programs on Employee-Supervisor Relations" (1990) 43 Ind. & Lab. Rel. Rev. 587.

[156]This type of system has met with considerable success in Sweden: for a description, see C. Summers, "Patterns of Dispute Resolution: Lessons From Four Countries" (1991) 12 Comp. Lab. L.J. 165 at 167-69.

[157]See *ibid.* at 168 and B. Levesque, "Cooperation et Syndicalisme: Le Cas des Relations du Travail dans les Caisses Populaires Desjardins" (1991) 46 Rel. Ind. 13.

sentatives can put the issue of greater decision-making power on the bargaining table. Better still, collective bargaining statutes could be amended to require or give unions the option of creating, by way of vote, horizontal management teams or rights of consultation. Though the strike may remain the ultimate challenge to employer control, with these more immediate levers of power in the hands of the union, the strike would become a less desirable alternative.

I am optimistic that the enhanced employee participation fostered by these methods would help transcend gender boundaries. The parties' working jointly and equally towards common goals such as harmonious relations and the success of the enterprise would instil a less oppositional atmosphere. The contextualized mode of problem-solving advocated by feminist scholars, examined earlier in this article, is fundamental to the present discussion. A collective bargaining scheme incorporating co-operative structures may well be conducive to a version of Bartlett's "feminist practical reasoning."[158] The parties would benefit by recognizing and confronting one another's divergences of interest, stating their assumptions and partialities, and seeking an empathetic understanding of each other's position. Such an atmosphere, according to the preceding analysis, would be less alienating to women and possibly other excluded groups of workers. Accordingly, employee participation would increase, and worker-management relations would take place under more harmonious conditions. The result would serve the interests of both parties and both genders.

To clarify further, I do not suggest simply that the parties should "be nice" to each other so that women will be more interested in participating. There is justified fear that such an approach could serve to cloak worker co-optation in a deceptive facade of co-operation. Although I maintain the belief that co-operative schemes will reduce the traditional combativeness of the bargaining relationship, this need not be synonymous with a reduction of union power. Rather, the notion of union-management co-operation envisages the replacement of one type of labour power by another. Power through the use of the strike and lockout weapons of economic force is at least partially replaced by power through the sharing of economic decision-making control.

Characterized in this light, co-operative schemes involve a radical shift in workplace proprieties. They require a modification of the prevailing understanding of management control as vested in ownership.[159] It may be that justice in employment requires a reconceptualization of the prerogatives of management and the social meaning of property. Patrick Macklem, for example, envisages a "relativist" conception of status and property in the employment milieu,

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[158]Bartlett, *supra*, note 28 and accompanying text.

[159]This understanding, popularly known as "reserve management rights," gives management, as owner (or agent thereof) of the enterprise, the right to make management decisions and use its property as it sees fit unless it has specifically bargained those rigbts away.

such that the rights attaching to managerial status and property are fluid and must be justified according to their context and purpose.[160]

In addition to facilitating positive change in the overall bargaining milieu, I would expect the structures put in place by these schemes also to be conducive to more direct measures for promoting workplace equality. In Canada, the only programs currently directed specifically at promoting equality are administered by umbrella groups hoping to increase general awareness. For example, the B.C. Federation of Labour set up a Women's Committee, which has recommended that employer monies be allocated to funding women's attendance at conferences devoted to enhancing women's participation, that women's committees be set up in unions throughout the province, that union meetings be scheduled during worktime or lunch hours, and that affirmative action be taken to place women in leadership positions in labour organizations across the country.[161] Some European countries, on the other hand, have attempted through legislation to implement such measures.[162] In Sweden, this has given rise to "equality committees," set up at the option of unions across the country, which lobby for and monitor the implementation of equality policies.[163] However, the formation of these committees, because it is optional, has met with some resistance.[164] A union may choose not to create such committees, and if it does, may pay lip service to their recommendations. Management, in turn, may reject any equality-enhancing proposals that the union does bring to the bargaining table. In light of early signs of success emanating from joint worker-management participation schemes generally, it may be fruitful to explore similar proposals for instituting equality-enhancing measures. Joint management-labour teams could be mandated, not only for the task of management, but also for the more specialized task of implementing equality measures.

The subject of equality within unions leads me to a second suggestion for legal reform, this one aimed at trade unions themselves. Collective bargaining statutes are relatively non-interventionist with respect to the constitution of trade unions. A minority of jurisdictions bar the certification of a union if it dis-

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[160]P. Macklem, "Property, Status and Workplace Organizing" (1990) 40 U.T.L.J. 74 at 96.

[161]See Women's Rights Committee, "Policy Statement on Eliminating Barriers to Women's Union Activities," *Summary of Proceedings of the B.C. Federation of Labour Annual Convention* (30 Nov. – 4 Dec. 1987) 142.

[162]See A. Cook, "Collective Bargaining as a Strategy for Achieving Equal Opportunity and Equal Pay: Sweden and West Germany" in R. Steinberg Ratner, ed., *Equal Employment Policy for Women: Strategies for Implementation in the United States, Canada and Western Europe* (Philadelphia: Temple University Press, 1980) 53.

[163]*Ibid.* at 69. The initiatives of these committees include on-the-job training of women in expert technical work, and men in typing, introduction of a shorter working week and flextime for both sexes, enhanced paternity leave provisions, and rotating chairmanships and group participation in policy planning and office committees.

[164]*Ibid.* at 70.

criminates on grounds of discrimination prohibited by human rights codes and the *Charter*.[165] Even these measures, however, would encounter enforcement obstacles. The worker who feels discriminated against but neverthless is eager to unionize faces a dilemma as to how to vote. The worker who wishes to defeat certification on the grounds of discrimination also faces a dilemma as to whether to make unrepresented submissions to the labour board, bear the costs of representation, or form a potentially uncomfortable alliance with the employer against the union. Finally, the employer wishing to defeat certification on this ground may not have access to evidence to support the claim. Perhaps it is no surprise that I can find no cases where certification was denied because of sex discrimination.

A more effective way to promote equality within unions would be to guarantee positive as well as negative rights. It could be required that affirmative equality guarantees be established as a precondition of certification. The most obvious strategy, already adopted voluntarily by some unions,[166] is to require that a certain number of seats be reserved for women in the union. There might be a requirement, for example, that there be proportional representation by gender in executive positions.

A third area where I see possibilities for equality-enhancing reform is "unfair labour practices." Collective bargaining statutes across Canada contain rules designed to prevent employers from interfering with union organizing activity. Accordingly, an employer cannot discriminate against, intimidate, threaten or otherwise discipline any person because of his or her participation in trade union activities.[167] However, these protections are tragically diluted by the limitations placed on how and when the employer's premises may be used for organizing activities. It lies wholly within the discretion of the employer to give a union access to its premises.[168] In addition, the employer is entitled to

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[165]B.C. *Labour Code*, s. 50; N.S. *Trade Union Act*, s. 24(15); Ont. *Labour Relations Act*, s. 13 and P.E.I. *Labour Act*, s. 14.

[166]See "Union Reserved Seats — Creating a Space for Women" (1990) 79 Labour Research 7; "Equality for Women in Trade Unions" (1990) 31 Equal Opportunities Rev. 18.

[167]*Canada Labour Code*, s. 94; Alberta *Labour Relations Code*, s. 146; B.C. *Labour Code*, s. 3; Manitoba *Labour Relations Act*, s. 6; N.B. *Industrial Relations Act*, s. 6; Newfoundland *Labour Relations Act*, s. 25; N.S. *Trade Union Act*, s. 51; Ont. *Labour Relations Act*, s. 66; P.E.I. *Labour Act*, s. 9; Quebec *Labour Code*, s. 14; Saskatchewan *Trade Union Act*, s. 11.

[168]As an example of the potential consequences of this rule, in *R.* v. *Labelle* (1965) 1 O.R. 321, 48 D.L.R. (2d) 37 (C.A.) union organizers were held liable in trespass for entering, for the purpose of lawful union organizing, property for which the employer held a land use permit. Exceptions, however, may be made where geographical constraints make it impossible or impracticable for the union to gain access to the employees without entering the employer's premises. See *Cadillac Fairview Corporation Ltd.* v. *Retail, Wholesale and Department Store Union et al.* (1989) 71 O.R. (2d) 206, 64 D.L.R. (4th) 267 (C.A.) [hereinafter *Cadillac Fairview*] (employer located in shopping mall); and *TNL Construction Ltd.* v. *Canadian Iron, Steel and Industrial Workers Union,*

prohibit union activites during working hours. Labour boards have upheld employer rules strictly limiting union activities to before or after the workday[169] and further, have withdrawn unfair labour practices protections where activities have occured during the working day.[170] Furthermore, despite the fact there is nothing in labour relations statutes to prohibit union activities during break and lunch periods at work, *Cominco*[171] has been taken as authority that the employer can also regulate the conduct of employees during this time and discipline those who overstep the bounds of permissible break-time organizing. These decisions reflect a policy of balancing the workers' rights to undertake trade union activities against the employer's right to run an efficient business.[172] Clearly implicit in this policy is deference to the concept of reserve management rights, discussed earlier.

However, in addition, by allowing employers to prohibit union activities during working hours and restrict them during non-working hours, the law puts those who are unable to attend meetings before and after work at a disadvantage. Because women tend to have the least flexibility outside working hours due to family obligations, these provisions have a disparate impact on women. As a first suggestion for reform in this area, collective bargaining laws could oblige the employer to provide the workers with some minimum monthly period of working time for organizing activities. Certainly, collective bargaining legislation is designed to maximize the freedom of the parties to strike the terms of their own agreement, but in the context in which it operates — a regime where

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Local 1 (1989) 90 C.L.L.C. para. 16,026 (B.C.I.R.C.) (employer operation at remote mining site accessible only by helicopter).

[169]See *Cadillac Fairview, ibid.*; *International Chinese Restaurant* [1977] O.L.R.B. Rep. 681; *Adams Mine, Cliffs of Canada Ltd.* [1982] O.L.R.B. Rep. 1767 [hereinafter *Adams Mine*]; *Ottawa-Carleton Regional Transit Commission* [1985]. But see *Re Michelin Tires (Canada) Ltd. and United Rubber, Cork, Linoleum and Plastic Workers of America, et al.* (1979), 35 N.S.R. (2d) 104, 107 D.L.R. (3d) 661 (C.A.), in which the Board arguably permitted an employer to prevent organizing activities outside the workday as well. The Board, although it issued a cease and desist order against the employer for extending a no-solicitation rule to periods outside working hours, held that it was not empowered under the Nova Scotia Act to order the employer to send a letter to employees explaining the effect of the cease and desist order.

[170]See *Union of Bank Employees, Local 2104 (C.L.C.)* v. *Canadian Imperial Bank of Commerce*, (1985) 85 C.L.L.C. para. 16,021; *Consolidated Fastfrate*, [1980] O.L.R.B. Rep. 418 at 421, and *Adams Mine, ibid.* However, it has been held on more than one occasion that employees' wearing union pins while working is not solicitation and thus ordering their removal constitutes an unfair labour practice by the employer: *Quan* v. *Canada (Treasury Board)*, [1990] 2 F.C. 191, 107 N.R. 147 (C.A.); *Union of Bank Emplyees (B.C. and Yukon), Local 2100* v. *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches*, (1979) 80 C.L.L.C. para. 16,001 (C.L.R.B.); *United Steelworkers of America* v. *Rosco Metal Products Ltd.*, (1964) 64 C.L.L.C. para. 16,303 (O.L.R.B.).

[171]*Cominco Ltd.* v. *Canadian Association of Industrial Mechanical and Allied Workers, Locals 23, 24, 25, 26 and 27 and United Steelworkers, Locals 480, 651, 8320, 9705 and 9672*, [1981] 3 Can. L.R.B.R. 499 (B.C.L.R.B.).

[172]*Consolidated Fastfrate Ltd., supra*, note 170.

both parties benefit from stable collective employee representation — it seems reasonable that management be required to bear some of the costs of securing fair and adequate representation. At a minimum, the legislation could compel one or both parties to provide child-care facilities or expenses for union meetings taking place outside working hours.

A fourth area meriting discussion is bargaining unit determination. Bargaining unit determination has been emphatically described as a determination of "the essential power relation in industrial relations" and "nearly everything of consequence."[173] Labour relations boards generally have unfettered discretion to determine the appropriate bargaining unit.[174] There is a multitude of competing considerations in determining bargaining unit size.[175] The larger the bargaining unit, the more powerful its bargaining position relative to the employer. However, the interests of marginalized groups within the unit are likely to be sacrificed in favour of a strong and unified collective voice. Where bargaining units are small and decentralized, on the other hand, they may be less powerful, but can more faithfully represent the unique interests of their constituents. Furthermore, they are easier to organize because of the ease of communication and harmony of interests possible within a small cohesive group. However, another disadvantage of small units is that the achievement of industrial stability may be more difficult. Where fragmented units represent workers in interdependent segments of one industrial sector, a strike by one bargaining unit may disrupt the entire industry.

I see this as particularly pertinent to women's situation, where personal contacts and a sense of support from the immediate community are more important than pressure from a large group in encouraging union membership.[176] However, the smaller unit suffers pitfalls beyond lack of bargaining power. For example, the high turnover of employees in female-dominated fields may make it difficult to maintain continuity and coherence within small units. It has also been suggested that, in smaller units, closer personal relations are likely to

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[173]J. Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws'" [1990] Wisconsin L. Rev. 1 at 121.

[174]See, respectively, *Canada Labour Code*, s. 27; Alberta *Labour Relations Code*, s. 32; B.C. *Labour Code*, s. 42; Manitoba *Labour Relations Act*, s. 45(1); N.B. *Industrial Relations Act*, s. 13(1); Newfoundland *Labour Relations Act*, s. 37(1); N.S. *Trade Union Act*, s. 24(4); Ont. *Labour Relations Act*, s. 6; P.E.I. *Labour Act*, s. 12; Saskatchewan *Trade Union Act*, s. 5(a). In Quebec, however, the Labour Commissioner is restricted to requests by the parties and the specifics of applications made (Quebec *Labour Code*, s. 28).

[175]The B.C. Labour Board reviewed them in *Insurance Corporation of British Columbia* v. *Canadian Union of Public Employees et al.*, [1974] 1 Can. L.R.B.R. 403 (B.C.L.R.B.). There is also a substantial body of literature on the subject. Two discussions I found useful are in B. Langille, "The Michelin Amendment in Context," (1981) 6 Dalhousie L.J. 523 and P. Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 151-78.

[176]Lowe, *supra*, note 118 at 331-32.

develop between employees and supervisors and serve as a deterrent to organization.[177] Regarding the latter point, however, it might equally be argued that the closely knit community composing a small bargaining unit could support resistance and liberation as easily as acquiescence and accomodation.[178]

The poignancy of the dilemma is illustrated in the history of unionization failures in female-dominated occupations, such as bank and clerical workers in Canada. In the mid-1970's the female office employees of the Canadian Imperial Bank of Commerce campaigned vigorously, led by the Service, Office and Retail Workers Union of Canada (S.O.R.W.U.C.), a feminist union, for branch-by-branch bargaining units.[179] They saw this strategy as a foil for their fiercely anti-union employer and the barriers to organizing the 2,000 branches dispersed across Canada. After a history of labour board resistance to branch-based units,[180] the bank workers rejoiced at the pathbreaking decision of the Canada Labour Board that individual branches were more appropriate units for representing their "communities of interest."[181] It was not long, however, before a whole new set of difficulties emerged with the decentralized units. Union leaders faced onerous organizational and financial burdens in having to negotiate for each branch individually. Furthermore, the banks were intransigent in their refusal to accomodate the union's request to negotiate a single master agreement. One year after the celebrated Labour Board ruling, S.O.R.W.U.C., unable to meet the demands on its resources, had its bank certifications cancelled. Similar difficulties defeated the attempt of Eaton's department store clerks, once certified in 14 bargaining units spread across 6 Ontario stores, to bargain effectively with the employer.[182] The pointed refusal of the employer to negotiate a master agreement or even to meet with more than one bargaining unit at a time resulted in frustration, expense, delays and, ultimately, the decertification of the union. These tactics were legal, and indeed, found to be consistent with a legitimate employer policy to engage in "hard bargaining."[183]

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[177]See Lennon, *supra*, note 128 at 226.

[178]See R. Austin, "Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress" (1988) 41 Stan. L. Rev. 1 at 29-35.

[179]My sources for this discussion, where the campaign was analyzed at greater length, are Lennon, *supra*, note 128; and Weiler, *supra*, note 175 at 15-20.

[180]*Kitimat, Terrace and District General Workers Union Local No. 1538 CLC* v. *Bank of Nova Scotia, Kitimat* (1959) 59 C.L.L.C. para. 18,152 (C.L.R.B.); *Syndicat National des Employés de la Banque Canadienne Nationale* v. *La Banque Canadienne National*, (1967) 67 C.L.L.C. para. 16,010 (C.L.R.B.).

[181]*Service, Office and Retail Workers Union of Canada* v. *Canadian Imperial Bank of Commerce* [1977] 2 Can. L.R.B.R. 99 (C.L.R.B.).

[182]See A. Forrest, "Organizing Eaton's: Do the Old Laws Still Work?" (1988) 8 Windsor Y.B. Access Just. 190.

[183]*Retail, Wholesale and Department Store Union* v. *T. Eaton Company Ltd. et al.*, (1984) 84 C.L.L.C. para. 16,026 (O.L.R.B.).

The Canada Labour Board later retreated from its endorsement of branch-specific bargaining units, adopting instead the concept of "clusters" of establishments on the basis of geographical area. The policy of labour boards across Canada appears generally to be to avoid fragmentation in favour of large centralized units able to bring enough economic pressure to bear on the employer to have some impact. The Ontario Board, on the other hand, has recently favoured regimes of smaller units in some sectors,[184] expressing concern about difficulties the union might otherwise have in reconciling competing interests,[185] and the broader impact this may have on the viability of the bargaining relationship.[186]

We return, then, to the original dilemma, which labour boards evidently have been unable to resolve in a consistent manner. One way to deal with the tension described above could be to occupy some middle ground between strictly independent local bargaining units and a single broad-based unit. For example, a labour board might certify small units to facilitate the fledgling stages of organization but then allow some form of enlargement later.[187] Although such practice might ultimately result in some compromise of the interests and autonomy of individual units, it is arguably a justifiable *quid pro quo* for the achievement of certification. A variety of techniques, such as amalgamation,[188] certification of trade union councils,[189] "sweeping in"[190] and decentralization of unions[191] have been explored elsewhere and, though not without their own difficulties, merit further investigation.

Conclusions

In this article I have argued from a feminist perspective that collective bargaining fails to create justice, equality, participation and autonomy, both among workers and between workers and employers. I advocate applying feminist methods in the context of workplace conduct and organization because I am optimistic of their transformative potential for both men and women in the

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[184]For example, among trust company workers *National Trust*, [1988] O.L.R.B. Rep. 168.

[185]*Kidd Creek Mines Ltd.*, [1984] O.L.R.B. Rep. 481 at 495.

[186]*Adams Furniture Co. Limited*, [1975] O.L.R.B. Rep. 491 at 493.

[187]The B.C. Board discussed the advantages of this approach in *Woodward Stores (Vancouver) Ltd.* v. *Graphic Arts International Union, Local 210 and Bakery and Confectionary Workers International Union of America, Local 468*, [1975] 1 Can. L.R.B.R. 114 (B.C.L.R.B.); see also *The Original Dutch Pannekeok House Ltd. and the Frying Dutchman Restaurants Ltd.* v. *Hotel, Restaurant & Culinary Employees Union and Bartenders Union, Local 40* (1978), [1979] 1 Can. L.R.B.R. 212 (B.C.L.R.B.).

[188]A. Forrest, "Bargaining Units and Bargaining Power" (1986) 41 Rel. Ind. 840 at 849.

[189]Weiler, *supra*, note 175 at 165-68.

[190]Langille, *supra*, note 175.

[191]Weiler, *supra*, note 62 at 222-23.

labour law setting.[192] I do not want, however, to be over-simplistic in my criticism of the combative nature of traditional collective bargaining. While a de-emphasis of opposition may serve to increase the participation and empowerment of women within the collective bargaining setting, it would be unrealistic to believe that it could be dispensed with entirely in the current regime or perhaps in any regime. Indeed, an absolute elimination of opposition between workers and employers would be regressive. It would be a bittersweet victory indeed if workers seeking to reduce conflict in their relations with the employer paid the price of presumed consent to their own domination.

Part of the goal of feminism is to find ways for women to challenge traditional power structures. This is, intrinsically, an exercise in opposition. But while conflict may be necessary to social change, I think there is also room for evolution of the methodologies employed. If opposition breeds opposition, then conversely, methods more conducive to mutual support, sense of community, and co-operative participation may assist in altering the tenor of the workplace as a whole.

I believe in the potential of collective bargaining among other forms of employment regulation to help build this new working environment and permit employees to play a meaningful role in shaping the conditions of their working lives. Many of the system's flaws are rooted much more deeply, in the foundational ideological premises of our society. The task of reformulating such ideology is immense. It would be naive to presume that modifications to collective bargaining law are the panacea for this greater ailment. Nevertheless, I have made some suggestions for reform within the current bargaining framework in the hope that they can serve as examples of initial steps towards transformation.

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[192]Nancy Ehrenreich similarly argues that legal measures against sexual harassment based on feminist prineiples will help "reveal to men the narrow confiues of their own gender identities, thus enabling them to see that feminist reforms (ultimately) offer benefits to both sexes" (N.S. Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law" (1990) 99 Yale L.J. 1177 at 1230).