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**Relationship, Particularity, and Change:  
Reflections on *R. v. Morgentaler*  
and Feminist Approaches to Liberty**

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The judgments in *R. v. Morgentaler* are taken as the point of departure for a discussion of some of the insights that feminist legal theories can bring to aid in resolving paradoxes in contemporary liberal rights discourse. In particular, the author draws on the recurrent themes of relationship, particularity and change in feminist writings to present a rearticulation of the liberty interest under s. 7 of the *Charter* as it applies to the issue of reproductive self-determination. Noting the central role that the judicial articulation of rights plays in reinforcing existing distributions of wealth and power, the author also argues that a reconception of rights must be accompanied by the transformation of the structures that define and enforce them.

L'arrêt *R. c. Morgentaler* sert de tremplin à une réflexion portant sur certaines idées développées par la littérature juridique féministe qui pourraient contribuer à éliminer les contradictions qu'on retrouve dans le courant de pensée libéral. Plus précisément, l'auteure s'inspire de certains thèmes importants de la littérature féministe, soit la nécessité de protéger l'individu dans ses rapports avec les autres et de respecter également les particularités et l'évolution des relations entre personnes; ainsi, l'auteure propose une réinterprétation du droit à la liberté consacré par l'article 7 de la *Charte*, qui inclut la liberté de reproduction. L'auteure met en lumière l'importance de l'interprétation judiciaire qui est donnée aux droits consacrés par la *Charte*, en ce qu'elle tend à renforcer la répartition actuelle de la richesse et du pouvoir social. Dans cette perspective, l'auteure affirme qu'une redéfinition de ces droits doit s'accompagner d'un remodelage des institutions qui les définissent et les font respecter.

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#### Introduction

This essay uses the Supreme Court of Canada's decision in *R. v. Morgentaler*<sup>1</sup> and the claim for reproductive self-determination<sup>2</sup> which underlies it as an

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<sup>1</sup>[1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.].

<sup>2</sup>The issue in *Morgentaler* was access to abortion. By describing the claim as reproductive self-determination I do not mean to equate the two. The latter, broader term would extend to sterilization abuse, infant mortality, access to reproductive technology, pre-natal health care, and a host of other issues. The white middle class and western bias implicit in the equation of reproductive rights and abortion rights is described by Caroline Ramazanoglu in *Feminism and the Contradictions of Oppression* (New York: Routledge, 1989). In this essay I am using the abortion issue as it is treated in *Morgentaler* because it seems to set up a conflict between women's lives and fetal life which cannot be solved within the traditional rights framework. In fact it is the abstraction of abortion rights from the context of women's many and diverse lives and from the institutions and myths that control reproduction and parenting, that allows abortion to appear as if it is about a struggle between rapacious self-interest and helpless embryos. I use the terms reproductive self-determination and reproductive control not in any exhaustive sense, but because I think they most accurately describe what is going on when a woman tries to decide whether or not to end a pregnancy. In another context, the terms could also describe what is going on when women struggle

occasion to discuss the ways in which feminist theory can change our conception of rights. The current critique of rights has exposed the central role that the judicial articulation of rights plays in reinforcing existing distributions of wealth and power. The problem is both institutional and conceptual. The courts as institutions exercise power which is unaccountable and cannot be legitimized within a democratic framework. Furthermore, attempts to develop normative constraints on judicial power founder on the indeterminacy of language and the subjectivity of moral claims. Finally, rights, in particular liberty rights, are conceived in terms of providing a radical separation between individual and community which leaves socially and economically disadvantaged groups unable to claim state support as a prerequisite for meaningful rights.

This essay begins with the conceptual strand of the critique. It looks to feminist theorizing as the source of different notions about relationship and community. It also explores the ways in which the decontextualized and individualist focus of rights discourse might be transformed to reflect these alternative notions. Equality rights speak most directly to the experience that the official and unofficial institutions that control women's lives are largely male. What I suggest in this paper is that if we are seeking to confront the fundamental arrangements within which we live our lives, then a challenge to the gendered structure of social relations which uses the language of rights should extend to liberty rights. It is in terms of liberty that the legal culture comes closest to addressing the structure and nature of state power. Liberty evokes a specific image of individual relations within community and with the state. Feminist theorizing challenges that image on epistemological as well as political grounds.

This paper takes as its starting point the claim in *Morgentaler* for reproductive self-determination because it illuminates sharply the conceptual dilemma underlying constitutional liberty claims and places it in the Canadian constitutional context. In the first part of the paper I outline that dilemma in terms of what Richard Bernstein calls the opposition between objectivism and relativism,<sup>3</sup> namely the conviction that our only alternatives are either an unsupportable claim that there is an objective basis on which to ground a hierarchy of rights, or an intolerable and inexorable slide into moral relativism. In the second part of the paper, I relate the terms of that opposition to a similar division within feminist theory. In the third part, I examine in greater detail feminist discussions

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for adequate health care and economic security for their families. As Ramazanoglu writes, quoting J. Lewis:

The argument that abortion is not the same issue for all women does not, however, mean that the control of abortion does not affect all women ... "[A]bortion is part of a much larger ideological struggle in which the meanings of family, motherhood and young women's sexuality are contested" (*supra* at 160).

<sup>3</sup>See R. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* (Philadelphia: University of Pennsylvania, 1983).

of a revised notion of the self, moral reasoning and the implications for theories of liberty. I focus on the themes of relationship, particularity and change in feminist theorizing, and I suggest that the underlying premises of feminist discourse and the feminist political agenda provide a basis for working out and moving beyond the despair engendered by the paradoxes of liberal rights discourse. In the fourth part I sketch the contours of an argument under s. 7 of the *Canadian Charter of Rights and Freedoms*<sup>4</sup> for reproductive control that incorporates that alternative vision. I discuss the problem of conflict and difference inherent in any individual rights claim and examine how one feminist approach to creating room for difference within community can be worked into the two part structure of s. 7. This approach focuses on the political efficacy of groups within communities and within our larger social structures. Finally, I suggest that the conceptual strand of rights critique must be intertwined with the institutional strand, that a reconception of rights must be accompanied by the transformation of the structures that define and enforce them. Unless courts are recognized as part of a state structure which reproduces the patriarchal ordering of social life, the legalization of politics through the expansion of rights discourse will inevitably reinforce rather than challenge that order.

### I. *Morgentaler* and Liberty as Privacy

In his book *Beyond Objectivism and Relativism*, Richard Bernstein describes the seemingly eternal dialectic within Western philosophy between claims of the objectivist that "there is or must be some permanent, ahistorical matrix or framework to which we can ultimately appeal in determining the nature of rationality, knowledge, truth, reality, goodness, or rightness," and the challenge of the relativist that "there is no substantive overarching framework or single metalanguage by which we can rationally adjudicate or univocally evaluate competing claims of alternative paradigms."<sup>5</sup> Within contemporary legal scholarship, the same dialogue takes place between the varieties of fundamental rights theorists who posit an objectively ascertainable foundation for evaluating rights claims either in conventional morality or irreducible human values,<sup>6</sup> and, at the other end of the spectrum, Critical Legal Studies scholars who view rights discourse as part of a larger struggle for political power.<sup>7</sup> Although any interpretive disagreement calls into question the possibility of evaluative criteria, the divergence becomes sharpest when dealing with open

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<sup>4</sup>Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>5</sup>*Supra*, note 3 at 8.

<sup>6</sup>This characterization of the debate within legal theory is based on the discussion in P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship" (1981) 90 *Yale L.J.* 1063.

<sup>7</sup>See P. Gabel's discussion of the contribution of Critical Legal Studies to the critique of rights in P. Gabel & D. Kennedy, "Roll Over Beethoven" (1984) 36 *Stan. L. Rev.* 1.

textured constitutional provisions. Thus, the claim in *Morgentaler* that the values of liberty and security of the person in s. 7 of the *Charter* provide women with a right to reproductive self-determination, invites a court to confront directly what Bernstein calls "the Cartesian Anxiety" or the inevitable progression towards a "grand and seductive Either/Or," namely,

*Either* there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos.<sup>8</sup>

For the most part the judges in *Morgentaler* evade that confrontation. The case concerns the prosecution of three doctors who set up a clinic which provided abortion services for women who had not obtained approval from a therapeutic abortion committee at an accredited or approved hospital in accordance with s. 251 of the *Criminal Code*.<sup>9</sup> Section 251 criminalized abortion except in the limited circumstance of committee approval. The accused raised the constitutional rights of women in defence to the charges. A majority of the Supreme Court, consisting of five judges writing three separate opinions, struck down the *Criminal Code* provisions as a fundamentally unjust violation of women's s. 7 rights. Two groups of two, Dickson C.J. with whom Lamer J. agreed, and Beetz J. with whom Estey J. agreed, based their conclusions on women's s. 7 right to security of the person. The fifth judge, Wilson J., while agreeing that women's security interests were seriously constrained by s. 251, also based her decision on women's s. 7 right to liberty, thus delineating a broader and fuller right. Wilson J. and the other two groups in the majority also differed in their treatment of fundamental justice. The two groups of two limited their considerations to the procedural aspect of fundamental justice, leaving for another day the question of whether a procedurally irreproachable constraint on access to abortion would nevertheless violate the substantive aspect of fundamental justice. Again, Wilson J. felt that a fuller examination of the issue was required, that the question "what is meant by the right to liberty in the abortion context?"<sup>10</sup> required looking at both the procedural and substantive aspects of fundamental justice. The difference between Wilson J.'s approach and that of the other judges in the majority not only affects the scope of the protection the Court is willing to articulate, but also the range of images of women that are projected by the judgments.

The reliance on a security rather than liberty interest by the two groups of two lends a physical certainty to the shape and limits of the right protected. It is coextensive with women's bodies, with their physical and emotional security. While in Dickson C.J.'s judgment the boundaries of that territory are generously

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<sup>8</sup>*Supra*, note 3 at 18.

<sup>9</sup>R.S.C. 1970, c. C-34. Now R.S.C. 1985, c. C-46, s. 287 [hereinafter *Criminal Code*].

<sup>10</sup>*Supra*, note 1 at 163.

described, they are on one level literally sensible, and on another, comfortably accord with cultural constructions of women as passively enmeshed in the biological and emotional imperatives of their bodies. Women are persons who have things done to them. The reference in the following passage to “priorities and aspirations” is there not because women should be allowed to control and develop their priorities, for instance to struggle for adequate health care and economic security as an aspect of reproductive self-determination, but because to interfere with women’s priorities is to interfere with their bodies. He writes:

Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman’s bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of security of the person.<sup>11</sup>

Dickson C.J.’s reliance on the procedural aspect of fundamental justice is equally cautious, holding the interpretive dilemma at bay by channeling the discussion into the familiar area of judicially developed standards of procedural fairness. He focuses on the unwieldy apparatus of the specially constituted hospital committees which often created delays for women seeking abortions and which severely curtailed the practical availability of abortion to many women, especially those outside of urban areas. Again, the decision is important in that it ultimately sweeps away that apparatus altogether. But the message about women is not that their reproductive lives should not be managed and controlled by others, but that the management should be more efficient, more attentive to the bodily stresses that flow from legislative inefficiencies.

Beetz J.’s decision also avoids controversy by delineating an even narrower and more physically grounded security interest. For him, a pregnancy that is a danger to women’s health is a medical problem for which women should have reasonable access to medical care. That is the extent of the constitutional security interest offended by the administrative structure in s. 251. Psychological trauma is a factor to the extent that it aggravates the health risk.<sup>12</sup> Likewise, Beetz J. focuses on the procedural improprieties of s. 251, although at one point he suggests that a claim founded on a liberty right might place substantive limits on Parliament’s power to regulate abortion in the early stages of pregnancy.<sup>13</sup>

Only Wilson J., concurring in result, explores the contours of a liberty argument that would give some measure of substantive protection to women seeking control of their reproductive lives. In so doing, she allows for images of women as acting as well as acted upon. Thus her task is much more difficult

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<sup>11</sup>*Ibid.* at 56-57.

<sup>12</sup>*Ibid.* at 104.

<sup>13</sup>*Ibid.* at 112-13.

than that of her colleagues. She is asking the law to articulate its substantive commitments in a way that gives a fuller account of women's lives. This requires an exploration both of what that account is, and of whether it can be inserted into the existing framework of rights discourse. Wilson J. attempts to do both these things. The result is a decision which is unique in its willingness to ground itself in women's experiences. At the same time, however, the decision only partially succeeds in reconciling a responsiveness to women's particularity with the abstract calculations of rights discourse. Although she does not use the language of privacy, Wilson J.'s analysis of the content of liberty draws heavily on the classical vision of rights embedded in American privacy jurisprudence. More importantly, her discussion illustrates how the contemporary quest for an objective foundation for rights claims threatens to collapse into nihilism.

While Wilson J. defines the central issue as whether women have decisional autonomy with regard to their reproductive lives, she does not hesitate to place this question in the larger framework of political theory and of a particular vision of the Canadian community. In doing so she uses the rhetoric and philosophical categories of classical liberalism, but in a way that struggles to take account of the inadequacy of that vision as a description of social relations. She writes:

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. ... Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.<sup>14</sup>

The starting point in this description of the *Charter* is an acknowledgement of the interconnectedness of life within community. However the proposed mediating principle for those relationships is a conception of rights which entails exclusion: the right to be separate, private, and unhampered. While Wilson J. may have set out to articulate a relational theory of rights, the fence metaphor presupposes an opposition between individual and community, between subjective freedom and objectively determinable constraints, between a private sphere of unlimited choice and a public sphere of obligation.

From the recurrent references to human dignity in judicial interpretations of the *Charter* as well as the centrality of individual choice in the enumeration of protected rights and freedoms, Wilson J. infers that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance."<sup>15</sup> This is supported by Wilson J.'s own decision in *R. v. Jones*<sup>16</sup> and

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<sup>14</sup>*Ibid.* at 164.

<sup>15</sup>*Ibid.* at 166.

<sup>16</sup>[1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569 [hereinafter *Jones* cited to S.C.R.].

by the American cases dealing with procreative and family rights. From this she reasons that a woman's decision to terminate her pregnancy is constitutionally protected, that, to use her earlier language, there is a fence around that decision which the state cannot pass over unless it does so in accordance with the principles of fundamental justice. The property metaphor is appropriate. Wilson J. is drawing on the separate spheres analysis of liberal theories of rights which in the writings of John Locke saw private property as the vehicle of human happiness and freedom, thereby engendering a language of rights that talks of boundaries, trespass or invasion, closed doors, and the sanctity of the home or bedroom.<sup>17</sup> However, Wilson J.'s elaboration of the nature of the protected decision uses an altogether different imagery, once again revealing a struggle to shift our understanding of social relations. Rather than inviolability, she speaks of connection and interaction. Rather than an opposition between individual and community, she posits an interdependence that is primary and self-defining. She writes:

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person. ... It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.<sup>18</sup>

The notion of autonomy in this passage is radically opposed to the view of social interaction and human happiness presumed by the fence and property language of the previous passage. Wilson J. appears to be introducing a "self in context" that requires a different account of political theory than the abstracted self which presumes the necessity of boundary for definition and for the pursuit of happiness. However, I would suggest the framework into which she ultimately tries to fit this transformed understanding defeats her. The category of "decisions of fundamental personal importance" simply becomes another fortress of individual sovereignty, another occasion for a Lockean claim of self-ownership. The contradiction between the relational nature of those decisions and a conceptual framework that sees relations as definitionally opposed to autonomy has yet to be worked out.

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<sup>17</sup>The "rhetorical, even mythical power of the identification of property with freedom" in political theory and American constitutional rights discourse is described by Jennifer Nedelsky in "Reconceiving Autonomy: Sources, Thoughts and Possibilities" in A. Hutchinson & L. Green, eds, *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) 219 at 237.

<sup>18</sup>*Supra*, note 1 at 171.



The next stage of analysis under s. 7 requires the claimant to show that the core s. 7 interest was violated in a manner that offends the principles of fundamental justice in either their substantive or procedural aspect. Here Wilson J. again parts company with the rest of the Court and finds that the *Criminal Code* constraints on access to abortion offend the substantive protection afforded conscientious freedom in s. 2(a) of the *Charter* because the abortion decision is "essentially a moral decision ... I do not think there is or can be any dispute about that."<sup>19</sup> She concludes:

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. ... Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity."<sup>20</sup>

The claim that the abortion decision is clearly a decision involving moral and ethical choice is similar to the claim in the first part of her analysis that the abortion decision is one of fundamental personal importance. In that part however, Wilson J. offers as justification a description of feminine subjectivity in terms of the self-defining nature of social interaction which diverges from classical liberal conceptions of an abstract self unencumbered by connection or history. Although we are left questioning whether she has successfully resolved the collision between that account of the self and traditional rights analysis, it seems that she has embarked upon an attempt to at least make the existing framework more responsive to the needs of that alternative self. In the second part of her analysis the ambivalence and the struggle to transform our understanding of social relations seems to have disappeared. Instead we find ourselves locked in the more familiar contradictions of Bernstein's "Cartesian Anxiety." The description of abortion as clearly moral and therefore inviolable raises more questions than it answers. While it is undeniable that abortion has been portrayed in popular and academic discourse as involving competing moral claims, this does not explain why one view of that controversy is entitled to protection over another. In order to avoid the slide into relativism that this seems to signal, Wilson J., rather than turning to a different understanding of the self as she did in the first section, turns instead to a universal prohibition against treating others as a means to an end. In doing so, she appears to subscribe implicitly to the model of the Kantian transcendental ego and to the Kantian thesis that there is an objective foundation for moral claims. The test of moral claims articulated

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<sup>19</sup>*Ibid.* at 175-76.

<sup>20</sup>*Ibid.* at 179.

by Kant is a rational test, uniformly accessible to all those who can reason. It asks whether an act is in accordance with a maxim we could wish were universally applicable. Thus moral law is not grounded in desire or individual conceptions of the good, which are too indeterminate and changeable to be reliable, nor in divine commandments which may not be universally accessible. Rather, it is grounded in practical reason, from which we can derive principles that are universal and internally consistent. This presumes a human self that can transcend the determinate and the empirical, and act freely and autonomously. Within the Kantian vision, human freedom and the moral law, accessible through reason, conveniently converge. "[A] free will and a will subject to moral laws are one and the same."<sup>21</sup> However, as Bernstein points out, the rigorous distinctions that Kant drew between is/ought, desire/reason, and subject/object were almost immediately challenged and undermined.<sup>22</sup> The universality and logical consistency of reason were shown to be insupportable, opening the door once more to nihilism. Wilson J.'s ultimate reliance on a universal principle of morality to explain the inviolability of certain personal choices illustrates that dilemma. The Kantian maxim which she proposes as the foundation for her decision, that human beings should never be treated as means to achieve others' ends, can, without any rational inconsistency, be replaced by an alternative maxim proposed by Alasdair MacIntyre, namely, "Let everyone except me be treated as a means."<sup>23</sup> Thus, her objectivist assertion of rational principle threatens to unravel into relativism, her account based on "essential humanity" threatens to dissolve into a cacophony of individual accounts of the experience of humanity.

I do not mean to suggest by this analysis that Wilson J. has embraced the model of the Kantian transcendental ego. Her vision of community and of the self clearly seeks to move in the opposite direction, and her use of Kantian language does not displace the primary commitment to arrive at a decision that responds to the felt and lived lives of Canadian women. Rather, I think Wilson J.'s judgment reveals two levels of contradiction. The first is ontological. The self defined by connection is directly at odds with the self defined by boundary that underlies the traditional framework of rights discourse. Thus Wilson J. struggles against a hostile language and set of categories in trying to respond to the needs and vision of that alternative self. The second contradiction is inherent in the framework itself. Even if one accepts the categories of self and other, individual and community, the assertion of the transparent authority of reason as a justification and explanation of where the boundaries between those categories lie is readily contested. Wilson J.'s judgment is an uneasy weaving together of these contradictory threads of analysis.

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<sup>21</sup>I. Kant, *Fundamental Principles of the Metaphysics of Morals*, trans. T.K. Abbott (New York: Bobbs-Merrill, 1949) at 64.

<sup>22</sup>*Supra*, note 3 at 13-14.

<sup>23</sup>A. MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame: University of Notre Dame Press, 1984) at 46.

## II. Feminism's Cartesian Anxiety

The debate within moral theory between the notion of an objectively and rationally ascertainable moral law and the relativist critique of objectivity and reason, and within legal theory between the notion of a set of neutral criteria for adjudicating rights claims and the irrationalist critique of neutrality, is reproduced within feminist discourse in the divergence between cultural feminism and radical feminism. The cultural/radical debate is only one of many possible examples of what seem like insurmountable barriers to forging alliances between the different perspectives and groups that constitute feminism. Women's perspectives, grounded in the particularity of historical experiences of racial and cultural oppression, of discrimination on the basis of sexual orientation, age and language, have produced a multitude of visions of social and sexual relations. The diversity by itself renders the possibility of a feminist critique of male oppression and a category of "woman's experience" problematic. The divide between radical and cultural feminism, although located within the narrow and comparatively homogenous experience of white western middle class feminists, focuses directly on the question of whether it is possible to ground politics in experience without reifying difference. In this section of the paper, I briefly set out the terms of the cultural/radical divide in a way which mirrors Bernstein's divide between objectivism and relativism. In the following section, I hope to illustrate how the divide itself contains the possibility of making difference the centrepiece of relationship rather than its nemesis.

Cultural feminism identifies women's difference from men and celebrates it. At the heart of cultural feminism lies what Robin West calls the connection thesis. Rather than the unencumbered, transcendental self of the liberal tradition's separation thesis, which West characterizes as essentially masculinist in its outlook, feminist writers such as Carol Gilligan,<sup>24</sup> Adrienne Rich<sup>25</sup> and Nel Noddings<sup>26</sup> posit a self that is situated and relational, that views identity and moral choice as a function of particular relationships and changing, contingent responsibilities. The connection thesis of cultural feminism challenges our assumptions about value in every area of life. West describes its transformative power:

Women's art, women's craft, women's narrative capacity, women's critical eye, women's ways of knowing, and women's heart, are all, for the cultural feminist, redefined as things to celebrate. Quilting, cultural feminism insists, is not just something women do; it is art, and should be recognized as such. Integrative

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<sup>24</sup>See C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

<sup>25</sup>See A. Rich, *On Lies, Secrets, and Silence: Selected Prose, 1966-1978* (New York: Norton, 1979).

<sup>26</sup>See N. Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984).

knowledge is not a confused and failed attempt to come to grips with the elementary rules of deductive logic; it is a way of knowledge and should be recognized as such. Women's distinctive aesthetic sense is as valid as men's. Most vital, however, for cultural feminism is the claim that intimacy is not just something women *do*, it is something human beings *ought* to do. Intimacy is a source of value, not a private hobby. It is morality, not habit.<sup>27</sup>

Cultural feminists, like fundamental rights theorists, seek to ground theory in an irreducible human quality, here care and connection rather than separation and autonomy. By so doing, however, they run the risk of institutionalizing women's biology and social role. Thus radical feminists such as Ann Scales warn that "just as Gilligan's work has the potential to inspire us in historic ways, it could also become the Uncle Tom's Cabin of our century."<sup>28</sup> In the same vein, Seyla Benhabib and Drucilla Cornell describe the coercion implicit in the connection thesis' vision of the self:

Precisely because to be a biological female has always been interpreted in gendered terms as dictating a certain psychosexual and cultural identity, the individual woman has always been "situated" in a world of roles, expectations and social fantasies. Indeed, her individuality has been sacrificed to the "constitutive definitions" of her identity as member of a family, as someone's daughter, someone's wife and someone's mother. The feminine subjects have disappeared behind their social and communal persona. If unencumbered males have difficulties in recognizing those social relations constitutive of their ego identity, situated females often find it impossible to recognize their true selves amidst the constitutive roles that attach to their persons.<sup>29</sup>

Radical feminism views the celebration of feminine subjectivity as the "voice of the victim speaking without consciousness."<sup>30</sup> Women's reproductive potential is not the paradigmatic experience of connectedness but rather the occasion for women's oppression. Thus Catharine MacKinnon writes:

[W]hen we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way. ... It makes a lot of sense that women should claim our identity in relationships because we have not been allowed to have a social identity on our own terms.<sup>31</sup>

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<sup>27</sup>R. West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1 at 18.

<sup>28</sup>A. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373 at 1381.

<sup>29</sup>S. Benhabib & D. Cornell, "Introduction: Beyond the Politics of Gender" in S. Benhabib & D. Cornell, eds, *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 1 at 12.

<sup>30</sup>E.C. Dubois *et al.*, "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buffalo L. Rev. 11 at 27.

<sup>31</sup>*Ibid.* at 27.

The radical feminist analyses questions of rights and moral choice in terms of power. Women's different voice cannot be heard or even imagined, until the gendered structure of social inequality is transformed and women are empowered, are "given access to everything men have always kept for themselves whether we do with it what they have done with it, or not."<sup>32</sup> From this standpoint, the claims of legal reasoning to rationality, objectivity, and neutrality are exposed as an instrumental exercise of male power. The radical critique brings strategic clarity to the feminist political agenda. The seemingly insoluble sameness/difference debate within equality theory is avoided. Instead the focus is on whether an institution, legal rule or set of attitudes promotes or reinforces women's subordination.<sup>33</sup> However, by exposing the gender sub text of social interaction and legal doctrine, and by indicting the very notion of objectivity and impartiality as male constructs, radical feminism also reintroduces the despair and powerlessness that attend nihilism and radical skepticism:

The problem is not just an intellectual one, nor is it restricted to parochial disputes about the meaning and scope of rationality. At issue are some of the most perplexing questions concerning human beings: what we are, what we can know, what norms ought to bind us, what are the grounds for hope.<sup>34</sup>

### III. Feminism: Rethinking Liberty

In contrasting the contributions of cultural and radical feminists one can easily get caught in a disheartening feminist replay of the Cartesian anxiety. One is forced to choose between cultural feminism's cage of certainty and the annihilating view of all human relations as power struggles. Undoing that cycle requires a sort of mental jumping of one's traces, a shift away from the assumption that the linkages which produce coalitions and alliances must be grounded in a common theoretical starting point, in this case a transcendent notion of sisterhood or of the feminist perspective. Where does this jump or shift go? I think it takes one toward the assumption that the alliances themselves which emerge from particular social and historical struggles, for example the struggle for reproductive control, provide the framework for developing a notion of relationship that promotes and encourages difference rather than perceiving difference either as an obstacle to solidarity or as the "natural" basis for social hierarchy. The imagery of conversation and dialogue for such a framework has been suggested. However, all too often the image conveys a comfortable pluralism and common language which masks the struggle underlying whose voice has legitimacy and gets heard in our constitutional and political conversations. We need an image that retains the reality of conflict and struggle that characterizes these

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<sup>32</sup>*Ibid.* at 28.

<sup>33</sup>This approach to equality is elaborated in C. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979) at 101-41.

<sup>34</sup>Bernstein, *supra*, note 3 at 4.

conversations, that communicates the partiality of any resolution or agreement, and that continually turns our attention to the margins of our communities. Only then will the vicious circle described by Bernstein and reenacted in the debates within feminism unwind into an ever widening spiral.

In this section of the paper, I suggest that one can find the rough outlines of such a spiral in the recurrent themes of relationship, particularity, and change in certain feminist writers. The writers I have chosen are Carol Gilligan, Ann Scales, Jean Elshtain and Iris Marion Young. I have focused on them not because their insights are exclusive or singular, but because they use the inadequacy of our present discourse about rights and obligations as a point of departure and because the resonances between them suggest ways to bridge their positioning on different sides of the cultural/radical divide. Gilligan's work concerns the internal process of moral decision making and self-development. Scales responds to Gilligan's claims about that process and relates her critique of Gilligan to the epistemological assumptions that underlie legal reasoning. Elshtain and Young address the external process of social relationship, which in liberal legal discourse takes place in the culturally central language of rights, specifically rights of privacy and liberty. By linking the insights gained in reconceiving the internal process to the insights gained in the debate surrounding the external process, the possibility of a very different vision of community emerges. I present this section of the paper as a conversation in motion, an occasion for my own thoughts to interact with those of others in a way that affords a glimpse of how the speculations of feminist theorists might change the sometimes intractable and narrow language of constitutional discourse as well as change the ideal of social relations on which the discourse is founded.

#### A. *Gilligan: Beyond the Ethic of Care?*

The connection thesis of cultural feminism is to a great extent inspired and affirmed by Carol Gilligan's book *In a Different Voice*.<sup>35</sup> An elaboration of the feminist perspective within political, moral or legal theory more often than not begins with what Gilligan calls an ethic of care as opposed to the dominant ethic of justice and rights. I suggest that this is a simplification which obscures the radical potential of Gilligan's work, although admittedly, Gilligan herself is elusive on this point. Although she is careful to reject any definitive correlation between the two modes of reasoning, care and justice, and sexuality, she describes her project as the expansion of our "understanding of human development by using the group left out in the construction of theory to call attention to what is missing in its account."<sup>36</sup> She then proceeds to develop a theory based on women's accounts of their experiences which is very different from tradi-

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<sup>35</sup>*Supra*, note 24.

<sup>36</sup>*Ibid.* at 4.

tional theories which, as it turns out, have been based largely on men's experiences. She finds that within this alternative construct, moral dilemmas arise

from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.<sup>37</sup>

For Gilligan, a "morality of rights differs from the morality of responsibility in its emphasis on separation rather than connection, in its consideration of the individual rather than the relationship as primary."<sup>38</sup> While Gilligan's elaboration of the morality of responsibility speaks eloquently to women whose socially prescribed tasks and self-definitions have centred on the sustaining of relationships, she for the most part seems to view her project as corrective of an imbalance rather than transformative.

The suggestion that Gilligan simply wants to tack on a distinctively woman-based alternative to masculinist theories of moral reasoning is reinforced by the Amy/Jake stories in the first study, which set up an opposition between Amy's relational, context expanding approach and Jake's abstract rights balancing approach. This is compounded by cross-disciplinary uses of Gilligan which equate Amy-style reasoning with a feminist perspective.<sup>39</sup> Thus in the field of legal scholarship, the values of equity are given new life alongside the values of equality,<sup>40</sup> mediation is proposed as the feminist alternative to adversarial resolution of disputes,<sup>41</sup> responsibility rather than rights is suggested as an organizing principle of family law.<sup>42</sup> However, in her final chapters, the complexities as well as the ambivalences of Gilligan's project emerge. She talks of the integration of a rights perspective, insofar as it focuses on the self as part of the network of care, into the overall perspective of care and responsibility. The difference in Amy's and Jake's styles becomes the occasion for learning that judgment must be "attuned to the psychological and social consequences of action, to the reality of people's lives in an historical world."<sup>43</sup> Although this

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<sup>37</sup>*Ibid.* at 19.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.* at 156.

<sup>40</sup>See C. Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 1 Berkeley Women's L.J. 39.

<sup>41</sup>*Ibid.* As if to illustrate the dangers of presuming that a strategy founded on the care ethic will be good for women, mediation has come under increasing attack by feminists because it proceeds on the assumption that men and women bargain from roughly equal positions of power and because it further privatizes women's experiences of violence. See L.G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harvard Women's L.J. 57 and M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 U.T. Fac. L. Rev. 162.

<sup>42</sup>See K.T. Bartlett, "Re-Expressing Parenthood" (1988) 98 Yale L.J. 293.

<sup>43</sup>*Supra*, note 24 at 167.

realization is obscured from Jake because of his assumption that his view of reason is universal and all-inclusive, and painfully clear to Amy because of her exclusion from the discourse of rights, it characterizes maturity for both male and female participants in the studies. "For both sexes the existence of two contexts for moral decision makes judgment by definition contextually relative and leads to a new understanding of responsibility and choice."<sup>44</sup>

The framework for this new understanding remains obscure. It would seem to follow, however, that because the ontological and epistemological premises of the ethic of care focus on the constitutive nature of difference, it is on those premises and within that approach that different perspectives can flourish and develop. This transformative possibility is glimpsed in Gilligan's description of the potential impact of developing a language for women in which they can describe their adult experience:

My own work in that direction indicates that the inclusion of women's experience brings to developmental understanding a new perspective on relationships that changes the basic constructs of interpretation. The concept of identity expands to include the experience of interconnection. The moral domain is similarly enlarged by the inclusion of responsibility and care in relationships. And the underlying epistemology correspondingly shifts from the Greek ideal of knowledge as a correspondence between mind and form to the Biblical conception of knowing as a process of human relationship.<sup>45</sup>

### *B. Scales: Concrete Universality and the Role of Difference*

While the ambivalences in Gilligan's theory have often been glossed over by a simple equation of women or of a feminist perspective with the ethic of care, the radical feminist's characterization of her theory as dangerous can be viewed not only as a rejection of that equation but as an identification of the critical need to confront and work out the ambivalences. The crisis is a political as well as philosophical one, for as Benhabib and Cornell point out, the connection thesis contains the blueprint for a woman's oppression as well as the basis of her claim for respect.<sup>46</sup> Ann Scales responds to that critical need. She builds on Gilligan's work while rejecting Gilligan's purportedly incorporationist

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<sup>44</sup>*Ibid.* at 166.

<sup>45</sup>*Ibid.* at 173. Gilligan clearly conceives of her theory as transformative in a later discussion with Carrie Menkel-Meadow. In describing what she thinks is meant by including both voices in moral discourse, she states:

I do not think it implies a simple addition, a kind of separate-but-equal thing or an androgynous solution. I think it implies a transformation in thinking. ... We are into a new game whose parameters have not been spelled out, whose values are not very well known. We are at the beginning of a process of inquiry, in which the methods themselves will have to be re-examined because the old methods are from the old game (Dubois *et al.*, *supra*, note 30 at 44-45).

<sup>46</sup>*Supra*, note 29.



agenda. In Scales' view, Gilligan's studies provide the "empirical evidence for what feminist theory has already postulated: A male point of view focuses narrowly on autonomy, on the separation between self and others."<sup>47</sup> That fundamental split between self and the rest of the world gives rise to an account of existence in which the "other" is negativized and devalued, in which the very idea of self as well as the superstructure of our social institutions, is premised on the domination of the "other." For that reason, Scales argues, the relational ontology of feminist theory cannot simply be grafted onto the male self/other or oppositional ontology. The two approaches are incompatible, requiring us to make a choice not between male and female domination but rather between "a compulsion to control reality" by separating and classifying it into existential categories and "a commitment to restrain hegemony" by acknowledging and celebrating difference and the "varieties of existence."<sup>48</sup> Thus to the abstract universality of traditional legal reasoning, Scales posits concrete universalism. She explains the shift as follows:

Feminism rejects "abstract universality in favor of "concrete universality." The former conjures differences — it elevates some to dispositive principles and defines others out of existence — and makes maleness the norm. The latter reinterprets differences in three crucial ways. First, concrete universalism takes differences to be constitutive of the universal itself. Second, it sees differences as systematically related to each other, and to other relations, such as exploited and exploiter. Third, it regards differences as emergent, as always changing.<sup>49</sup>

Thus the way out of the cage of cultural feminism's supposed reification of feminine virtue is not to reject Gilligan's insights nor simply to reverse the power relations between the sexes. Instead Scales suggests, and I would argue that this is at least implicit in Gilligan, that we rethink the central role that difference plays in our relations to each other, in the distribution of power, and in our sense of who we are. Because women's difference from men has been the occasion of the use of difference, in a way that crosses over race and class lines, to legitimate inequality and oppression, it is in women's voices that we can expect to find the clearest articulation of a theoretical and practical alternative. This transformative possibility is described, albeit ambivalently, in Gilligan's final chapters as "a new perspective on relationships that changes the basic constructs of interpretation."<sup>50</sup> If Gilligan is to be faulted, it is for limiting the discussion of difference within styles of moral reasoning to male/female difference rather than breaking out of the seemingly ironclad classification of experience into binary oppositions to arrive at a notion of gender itself as a spectrum of differences as well as the location where the many differences that justify the complex hierarchies of our social relations intersect. Indeed, Gilligan's subjects defy

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<sup>47</sup>*Supra*, note 28 at 1382.

<sup>48</sup>*Ibid.* at 1385.

<sup>49</sup>*Ibid.* at 1388.

<sup>50</sup>*Supra*, note 24 at 173.

simple categorization. Gilligan herself noted that the black women in her study were speaking in their own distinctive voices in a way that came closest to integrating the two perspectives.<sup>51</sup> Thus it is not enough to reject the devaluation of the feminine side of the formal oppositions that characterize traditional moral reasoning. To the extent that cultural feminism leaves the oppositions themselves in place, it leaves us trapped between meagre alternatives and silences the voices that lie in between and beyond. Rather, one has to devise a framework within which all those voices flourish. This is the approach made possible by concrete universality and implicitly by the epistemological and ontological premises of the connection thesis.

### C. *Elshtain: Parenting and the Interactive Public*

Much the same sort of dialectic between an essentialist account of the ideological struggle between feminist and masculinist perspectives and an account that transforms the terms of the struggle altogether can be seen in Elshtain's reconstruction of the public/private distinction. Elshtain's work focuses on the external processes of social relationship rather than on the internal process of self-definition through relationship. In doing so, she introduces a notion of an interactive relationship between public and private that presumes a fundamental shift in epistemology akin to that presumed by Gilligan's thesis that judgment is contextual. However, she at the same time seems to fall back on the sanctification of a narrowly conceived and particularly conservative notion of the family which parallels cultural feminism's reification of feminine virtue. Her discussion is important nevertheless for its insights into a vision of privacy grounded in connection and inclusion rather than separation and alienation.

Elshtain, like Scales, takes as a starting point a relational rather than oppositional ethic founded on two presumptions:

First, human beings have a need to live with and among others in relations of concrete particularity, in space, extending over and through time. If we are deprived of such relations we are damaged and distorted in body and spirit. My second presumption is that human beings, and here the evidence stretches from prehistory through the present, experience an imperative — Freud termed it an epistemic instinct — to discover, to understand, and to create meaning. That drive, too can be damaged and deflected and to the extent that it is we become less fully human.<sup>52</sup>

She then distinguishes between feminists who reject the claims of history as a "litany of debasement" and theorists who would reify tradition and history as "a sanctuary from the present."<sup>53</sup> She seeks to do neither but rather to create mean-

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<sup>51</sup>*Ibid.* at 77. Gilligan also points out the class bias in her studies (*supra* at 76).

<sup>52</sup>J. Elshtain, *Public Man, Private Woman: Women In Social and Political Thought* (Princeton: Princeton University Press, 1981) at 318.

<sup>53</sup>*Ibid.* at 319.

ing out of historical experience. For her, recurrent moral notions are a language through which different generations conduct a conversation across history about alternative visions of social life. The necessary subjects of this conversation are at the very least sexual relationships and the protection of life, without which the continuance of social life would be impossible. However, these human imperatives simply describe an area of discussion rather than serve as the foundation for a society built around self-interest. In addition, the ongoing task of moral re-evaluation is subject to

the reality of limiting conditions; one must recognize that we are not thoroughly untrammelled in our imaginings, though we may self-indulgently entertain the view that we are. In this way one not only opens up the possibility for, but accepts the irrevocability of conflict, given our diverse assessments of the moral imperatives embodied in ideas of ways of life.<sup>54</sup>

Elshtain then addresses her reconstructive ideal of the private world of parenting as the locus of meaning and self-understanding as well as of historical and social relations. It remains distinct from the public not because of a natural or necessary division of institutions nor to sustain and serve the public sphere, but because parenting is the basis of language and of the individual capacity for attachment, and thus of the possibility of social existence. She goes on to then construct a particular ideal of family which endeavours to reproduce the traditional middle class family structure without reproducing the terms of patriarchy. The cultural insularity of Elshtain's solution reveals what Michèle Barrett and Mary McIntosh describe as the "power of essentialist — and highly naturalistic — views of the family" and the "strength and tenacity of the ideology of familialism in our culture."<sup>55</sup> However, by Elshtain's own terms, her familial ideal is provisional. What is important is her notion of the interaction between public and private. Having proposed the parenting relation as a basis on which to imagine a "way of life," she observes that the task of providing trust and security to children is impossible unless men and women experience trust and security in their sexual and social relations. Thus she argues for a notion of political community that is inclusive, that recognizes "authentic instances of citizenship"<sup>56</sup> in the stories of women, children, the sick, the disadvantaged as well as those told by the privileged. The private remains meaningful insofar as it is descriptive of the experience of intimacy and care. However, the ideological basis of the use of the private as a way of removing areas of experience from what counts as politics is exposed.

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<sup>54</sup>*Ibid.* at 320.

<sup>55</sup>M. Barrett & M. McIntosh, *The Anti-Social Family* (London: Verso Editions/NLB, 1982) at 39. In addition, Barrett and McIntosh chronicle the anti-social impacts of the family in Western industrial society which are borne almost exclusively by women (*supra* at 43-80).

<sup>56</sup>*Supra*, note 52 at 347.

#### D. Young: *The Heterogeneous Public*

Iris Marion Young avoids the essentialism contained in Elshtain's reification of a culturally specific experience of family relations.<sup>57</sup> At the same time, she further develops what she calls the ideal of the heterogeneous public and, like Scales, challenges the ideological content of liberal categories and of an epistemology that presumes that human experience can be definitively explained by reference to those categories. Thus it is not the distinction between public and private that she finds problematic. Rather, it is the correlation with a dichotomy between reason and desire, universal and particular, such that those institutions and experiences that are private in the sense of affective or particular, are excluded, are denied relevance or public meaning. Instead the public should connote accessibility and expression.

Young draws on Habermas' theory of communicative ethics as a starting point for a conception of politics and of normative reason which is not predicated on an opposition between reason and desire. Rather, discussion of practical morality is in terms of the particular needs and experiences of the conversants. Reason does not mean universality or logical consistency but rather giving reasons, articulating one's experience, and a willingness to listen. However, Young rejects any commitment to the notion of impartiality or of the transcendental subject implicit in Habermas' model. By so doing, she incorporates the social reality of conflict and struggle into the conversational framework:

Precisely because there is no impartial point of view in which a subject stands detached and dispassionate to assess all perspectives, to arrive at an objective and complete understanding of an issue or experience, all perspectives and participants must contribute to its discussion. Thus dialogic reason ought to imply reason as contextualized, where answers are the outcome of a plurality of perspectives that cannot be reduced to unity. In discussion speakers need not abandon their particular perspective nor bracket their motives and feelings.<sup>58</sup>

Thus politics, like Elshtain's vision of morality, is a dialogue or conversation. However, it is a conversation in a constant state of transition, which pushes at the boundaries of language and experience. Its subject is "the moral value or human desirability of an institution or practice whose decisions affect a large number of people."<sup>59</sup> Because language and meaning are constructed on the particularity of experience, such experience must be given the force of relevance in order to achieve Young's emancipatory politics. She writes:

The feminist slogan "the personal is political" does not deny a distinction between public and private, but it does deny a social division between public and private spheres, with different kinds of institutions, activities and human attributes. Two

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<sup>57</sup>I.M. Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" in Benhabib & Cornell, eds, *supra*, note 29 at 57.

<sup>58</sup>*Ibid.* at 69.

<sup>59</sup>*Ibid.* at 73.

principles follow from this slogan: (a) no social institutions or practices should be excluded a priori as being the proper subject for public discussion and expression; and (b) no persons, actions or aspects of a person's life should be forced into privacy.<sup>60</sup>

Gilligan, Scales, Elshtain and Young in a sense have embarked on the task of imagining a different political and moral geography, one that glimpses vast areas of possibility. While the language and instruments of discovery must necessarily be those fashioned for the stratified world built on the separation thesis, new methodologies as well as new understandings arise. The efforts to expand context by Gilligan's female subjects, the postulation of concrete universality by Scales, and the conversational model of reasoning which acknowledges the incommensurability of differences suggested by Elshtain and Young create resonances among their work. While these writers can be portrayed as occupying different sides of the cultural/radical divide, each of them grounds her theorizing in the notions of relationship, particularity, and change. In this sense, they are not solitary visionaries setting out to conquer unknown continents. Rather, these different voices are engaged in a collaborative enterprise and it is from the resonances as well as the divergences that kaleidoscopic configurations emerge and sometimes re-emerge. The configurations cannot add up to a resolution that eliminates difference. The focus on particularity requires a resolution that celebrates difference. However, this does not preclude working out particular resolutions within particular concrete struggles. One of those configurations takes the form of the effort to design legal theories premised on a notion of human flourishing in terms of connection and attachment rather than separation and autonomy. This is most evident in the area of equality theory<sup>61</sup> where there has been a discernible shift from formalism and abstraction to contextuality, and from an individualist to a group perspective. The same attempt, however, has not been made to rethink liberty. Indeed, because liberty seems to be primarily

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<sup>60</sup>*Ibid.* at 74.

<sup>61</sup>See, e.g., the L.E.A.F. factum in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, which asked the Court to look at the "social history of disempowerment" in assessing an equality claim rather than a rule of rational consistency which ignores history and institutionalized bias (*supra* at para. 49ff). For a discussion of the transformative possibilities of a relational approach to equality rights, see N.C. Sheppard, "A Way of Strength: Caring and Relations of Equality" (Paper delivered at University of Victoria Faculty of Law, March 7, 1990) [unpublished]. Sheppard explains the significance of caring for notions of equality as follows:

Caring describes a way of acting towards others. By definition, it involves relationships. Caring focuses on the nature of human relations. This is an important point of departure since my equality analysis focuses on *relations* of inequality and equality (*supra* at 13-14).

And later she writes:

What does caring involve? I think it is useful to delineate two aspects of caring. The first aspect involves caring for the past, for what we already are, for our identity, culture, personality, diversity, earth. Caring in this sense entails preserving. The second aspect involves commitment to and the fostering of development, growth, and change in individuals and groups" (*supra* at 19).

about individual sovereignty rather than community, its reconstruction lies at the heart of what Bernstein would describe as the need to move beyond objectivism and relativism and what Benhabib calls "a politics of empowerment that extends both rights and entitlement while creating friendship and solidarity."<sup>62</sup>

#### IV. A Revised Notion of Liberty and Section 7

In this section of the paper I seek to link the themes of relationship, particularity and change that characterize feminist projects to Canadian constitutional rights discourse. I begin with a notion of liberty that I feel is responsive to the vision of social relations and the self that I hear in so many feminist voices. I then sketch out the ways in which Canadian constitutional values can be enlarged upon to reflect a similar vision of social prosperity. Finally, I begin to explore how such an alternative does and does not change rights discourse. While Elshtain's and Young's interactive private and heterogeneous public flows naturally from a situated vision of the self, to attach rights to that self without addressing institutional reform leaves intact a contradictory conception of courts as neutral arbiters of conflicting values. This latter point is further developed in the next section of the essay. To the extent that we retain a notion of liberty as the pursuit of individual happiness, the claims of feminism are reduced to a naive assertion that "if we talk about it, we will reach an agreement that will make us all happy." However, there is no room within that assertion for the connection Scales and Young make between the universalizing aspect of social compacts or rule-making, and disempowerment. As Scales and Young point out, the claims of neutrality and universality deny experience, and therefore deny the voices of countless others a place within social and political life, leaving room only for the politics of paternalism rather than the politics of empathy and empowerment. The idea that one can devise a set of neutral rules to ensure inclusion, that one can abstract procedures from the substantive conditions within which they operate, or that one can map the boundary line between individual and state, is incoherent once one concedes the contingency and fluidity of social interactions and needs. Fairness is a function of history, of shifting relations of power and resources. A conversation about fairness or due process in a courtroom or committee room is a struggle about the shape of those relations. Likewise, a conversation about a right to abortion as an aspect of liberty is ultimately a conversation about the way in which social and political power intersects with sexual relations between men and women and with parental roles so as to distort and skew any communal redefinition and restructuring of the mythologies and institutions that control reproduction and child rearing.

I propose to start, therefore, with a notion of liberty as a process of relationship through which one's consciousness of one's own particular history,

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<sup>62</sup>S. Benhabib, *Critique, Norm and Utopia* (New York: Columbia University Press, 1986) at 352.

needs, capacity for agency and identity is clarified, recognized and evolves.<sup>63</sup> By describing liberty as a relational process which evolves over a particular time and within a particular cultural and social location, I mean to incorporate the elements of change and concreteness that characterize feminist discussions and as well to make room for different images and experiences of liberty. In addition, the notion of self-recognition within relationship connotes the dependence on social interaction of any one individual or group's experience of self or identity. Skonaganleh:rà articulates the social dimension of identity as follows, in her conversation about aboriginal women and feminism:

The "others" [feminists who view equality as founded on the "sameness" of human experience] have to start to think differently and they have to look in their own mirror, at their own selves, and their own baggage that they're carrying and where that came from. They should not look at a universal sisterhood, so much as we should be looking at creating a situation where all people of many colours can peacefully exist. I agree that we all have certain goals that we want out of life, one of which is peace in all of our relationships. However, we cannot have peace in our relationships if we don't have peace inside ourselves. We can't have peace inside ourselves if there is no credence or credibility given to the way that we define ourselves.<sup>64</sup>

It is this sense of strength through an interdependence that does not deny difference rather than freedom through non-interference that I think lies at the core of an alternative conception of liberty. Finally, the centrality of consciousness refers to what Jennifer Nedelsky calls the "subjective element of autonomy."<sup>65</sup> Nedelsky conceives of autonomy as primarily a capacity but gives several reasons why feeling is an "inseparable component":

First, I think the capacity does not exist without the feeling. Second, I think the feeling is our best guide to understanding the structure of those relationships which make autonomy possible. Third, focusing on the feelings of autonomy defines as authoritative the voices of those whose autonomy is at issue.<sup>66</sup>

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<sup>63</sup>Jennifer Nedelsky reconceives autonomy from a feminist standpoint in the following terms: "I have already mentioned the (problematic) notion of self-determination. I think comprehension, confidence, dignity, efficacy, respect, and some degree of peace and security from oppressive power are probably also components" (*supra*, note 17 at 224). I would favour terms that more clearly signify the interdependence of human existence and the fact that the subjective experience of the self as autonomous or self-determining only ever occurs through a multitude of concrete relationships with others. However, Nedelsky goes on to make the point that it is relationships not isolation that enable us to experience autonomy and suggests that child rearing, not property, is the "most promising model, symbol, or metaphor for autonomy" (*supra* at 225). In the ensuing discussion, I similarly suggest that insofar as reproductive decisions involve women in considerations of their responsibilities within a network of ongoing and changing relationships, they lie at the core of a relational notion of liberty. See *infra*, note 86 and accompanying text.

<sup>64</sup>Ossenontion & Skonaganleh:rà, "Our World" (1989) 10:2 & 3 Canadian Woman Studies 7 at 15.

<sup>65</sup>*Supra*, note 17 at 240.

<sup>66</sup>*Ibid.* at 239.

The conception of liberty proposed above, without further elaboration, hardly represents a radical departure. The focus on self-realization fully harmonizes with the liberal framework of the *Charter* and in particular with the recurrent references by the Supreme Court to human worth and dignity as its central organizing principle. For instance, in *R. v. Big M Drug Mart*, Dickson C.J. states: "Freedom must surely be founded in respect for the inherent dignity and inviolable rights of the human person,"<sup>67</sup> and in *R. v. Oakes* he identifies as a principle "essential to a free and democratic society ... respect for the inherent dignity of the human person."<sup>68</sup> However, while such statements can serve to emphasize the *Charter's* indebtedness to the individualist focus of liberalism and classical legal consciousness, it is in the counter theme of community that one finds a potential responsiveness to the premises of feminist theorizing. The vision of the individual person within Canadian constitutional discourse often presumes the social and communal aspect of self-determination and fulfillment. Justice Rand saw rights of individuals as "the primary conditions of their community life within a social order."<sup>69</sup> Chief Justice Laskin spoke of "the relativity of rights involving advertence to social purpose as well as to personal advantage."<sup>70</sup> Justice Wilson has stated that a *Charter* right "postulates the interrelation of individuals in society."<sup>71</sup> More important, however, is the explicit acknowledgement of community values in Canadian constitutional history.<sup>72</sup> The particular compromises of Canadian federalism have often stemmed from a deference to community although these are more often than not the hierarch-

<sup>67</sup>[1985] 1 S.C.R. 295 at 336, 18 D.L.R. (4th) 321.

<sup>68</sup>[1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].

<sup>69</sup>*Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, 4 D.L.R. 641 at 670.

<sup>70</sup>*Harrison v. Carswell*, [1975] 2 S.C.R. 95, 62 D.L.R. (3d) 68 at 75 (dissenting opinion). Robin Eliot has also singled out the collectivist emphasis of Chief Justice Laskin's liberalism which saw civil liberties as one of many social interests. See R. Eliot, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front" (1987) 12 *Queen's L.J.* 277 at 284-85. Eliot describes the recurrence of the same emphasis more generally as follows:

Canada's legal culture also reflects the influence of collectivist thinking. The overriding theme of the *Constitution Act, 1867* is the provision of "peace, order and good government" rather than the protection of "life, liberty and the pursuit of happiness", and when the power of government is limited, it is not to protect individuals but groups. Prior to 1982, the question for us had always been, not *whether* government could abrogate individual rights and freedoms, but *which* order of government, federal or provincial, could do so. On those rare occasions on which it had been suggested that neither order of government could do so, the rationale given tended to focus, not on the value of these rights and freedoms to individuals, but on their value to the parliamentary system of government (*supra* at 284).

<sup>71</sup>*Operation Dismantle v. R.*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at 516.

<sup>72</sup>Several commentators have singled out the theme of community in Canadian constitutional history. For a fuller discussion than I have given here, see Eliot, *supra*, note 70 at 282-83, P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 *U.B.C. L. Rev.* 87 at 132-37, and P. Macklem, "Constitutional Ideologies" (1988) 20 *Ottawa L. Rev.* 117 at 123-29 & 138-42.



ical communities and traditional elites of the conservative vision. While the formal structure of the *Constitution Act, 1867*<sup>73</sup> favours a strong unitary state, social and political pressures have created and maintained an enlarged and durable role for intermediate structures which give voice to the priorities of regional interests and which survives today in the *Charter's* s. 33 override.<sup>74</sup> The debate over the Meech Lake Accord of 1987<sup>75</sup> has for the most part stayed within the dominant vision of what the significant communities in Canada are. However, it has also been the site for a struggle to realign the traditional axis of Canadian constitutional exchanges, federal-provincial relations, to include different communities and voices in that exchange, namely First Nations and women. In addition, the *Constitution Act, 1867*, although without any safeguards for individuals, protects the two founding cultures by providing for French and English language rights<sup>76</sup> as well as certain denominational educational rights.<sup>77</sup> Those protections are reinforced and to some extent enlarged in the *Charter*<sup>78</sup> which also introduces an interpretive principle directed at preserving and enhancing multiculturalism.<sup>79</sup> The First Nations communities are recognised as such in s. 91(24) of the *Constitution Act, 1867* which gives jurisdiction over "Indians and Indian Lands" to the federal level of government. The history of federal policy, however, has been the history of "the social violence of legal disabilities and administrative oppression."<sup>80</sup> Whether the recognition and affirmation of "exist-

<sup>73</sup>(U.K.), 30 & 31 Vict. c. 3 [hereinafter *Constitution Act, 1867*].

<sup>74</sup>S. 33 permits both the federal Parliament and the provincial legislatures to declare that legislation shall operate notwithstanding ss 2 and 7-15 of the *Charter*. The override has to be renewed every five years. The sections in the *Charter* which protect group rights in language and education cannot be overridden.

<sup>75</sup>The Accord failed to obtain unanimous approval from all the provincial legislatures within the three year time limit set out in s. 39(2) of Part V of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982 c. 11 [hereinafter *Constitution Act, 1982*]. This was in part due to last minute procedural delays created by Elijah Harper, the Manitoba Legislative Assembly's only aboriginal member, who held up the Accord because it "would prevent aboriginal people from becoming 'equal partners' in the Constitution. ... 'We are kept on the outside looking in,' ... What we're fighting for is democracy. We have been excluded in this country for many years" (G. York, "Rescue of Deal is Impossible, Manitoba says," *The [Toronto] Globe & Mail* (22 June 1990) A4).

<sup>76</sup>S. 133 protects both languages in the courts and legislatures of Quebec and the federal government.

<sup>77</sup>S. 93 protects rights and privileges with respect to denominational schooling in existence at the time of Confederation or entrance into the Canadian union.

<sup>78</sup>Ss 16-19 protect and expand existing language rights. S. 23 provides for minority educational language rights in French and English where numbers warrant.

<sup>79</sup>S. 27 of the *Charter* states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

<sup>80</sup>G. Manuel & M. Posluns, "The Fourth World" in R. Fisher & K. Coates, eds, *Out of the Back-ground: Readings on Canadian Native History* (Toronto: Copp Clark Pitman, 1988). See also R. Bartlett, "Parallels in Aboriginal Land Policy in Canada and South Africa" (1988) 4 C.N.L.R. 1.

ing aboriginal and treaty rights" in s. 35(1) of the *Constitution Act, 1982*<sup>81</sup> will further legitimate the use of difference to subordinate rather than strengthen First Nations communities remains to be seen.<sup>82</sup> Although the central themes of the *Charter* are derived from the liberal vision, a new notion of community defined by need and a shared history of disempowerment is introduced in the enumeration of the prohibited grounds of discrimination in s. 15(1), and the provisions allowing affirmative action programs to remedy the effects of discrimination in s. 15(2), and to counteract social and economic disadvantage in s. 6(4). The positive view of the state which flows from the collectivist tradition underlies s. 1 which allows reasonable limits on *Charter* rights where important collective goals are at stake, and s. 36 of the *Constitution Act, 1982* which commits all levels of government to promoting equal opportunities, reducing economic disparities, and "providing essential public services of reasonable quality." The counter theme of community carries over into judicial interpretation of *Charter* guarantees. Dickson, C.J.'s list of quintessentially democratic principles in *Oakes* includes "respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."<sup>83</sup> It is in Wilson J.'s decisions, however, that one encounters the greatest ambivalence. It would be hard to find a clearer statement of the classical liberal equation of freedom with exclusion, boundaries, and individual sovereignty than her metaphorical description in *Morgentaler* of rights as fences<sup>84</sup> and in her statement in *Jones* that, "[c]ollectivity necessarily circumscribes individuality and the more complex and sophisticated the collective structures become, the greater the threat to individual liberty in the sense protected by s. 7."<sup>85</sup> However, in *Jones*, when talking about the rights of parents to educate their children as an aspect of s. 7 liberty, a notion of self-realization that is dependent on social relationship is suggested in the following passage:

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<sup>81</sup>S. 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>82</sup>The recent decision by the Supreme Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at 410-17, which requires that s. 35 be interpreted from the perspective of the aboriginal claimant rather than of the government regulator and that any conservation measures that affect aboriginal rights must be developed in consultation with the affected group, would seem to represent a shift away from the paternalism of past policy. However, the case must be seen against the background of other recent decisions which have consistently undermined the cultural survival and integrity of First Nations communities. See e.g. *R. v. Dick*, [1985] 2 S.C.R. 309, 23 D.L.R. (4th) 33, and *Jack and Charlie v. R.*, [1985] 2 S.C.R. 332, 21 D.L.R. (4th) 641. See also M.E. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 Can. Hum. Rts. Y.B. 3, in which Turpel develops the view that the constitutional rights paradigm is antithetical to the cultural values of aboriginal peoples.

<sup>83</sup>*Supra*, note 68 at 136.

<sup>84</sup>*Supra*, note 1 at 164.

<sup>85</sup>*Supra*, note 16 at 319.

The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. The right to educate his children is one facet of this larger concept.<sup>86</sup>

The idea of parenting presented in this passage can be construed as one of dominion within the home and control and ownership of children. Indeed parental rights claims simply assert the family, more often than not the male-headed family, rather than the individual as marking out the boundary of a separate sphere of freedom.<sup>87</sup> But the parenting claim in *Jones* can also be seen, as by Elshtain, as a social activity which links the individual with community and through which both develop. This becomes clearer when Wilson J. goes on to describe the interest as a right to raise one's children in accordance with one's conscientious beliefs. The community dimension of religious and conscientious beliefs manifested itself in this case in the community of adherents the Reverend Jones had created. The occasion of the litigation was his refusal to obtain certification for the school he ran for the children of the community. Unfortunately, the extent to which the parental claim was a paternal claim and the community instituted a patriarchal regime was not raised. As with individuals, communities do not set boundaries around fortresses of exclusion based on common experience; rather, they contain intersections of different layers of experience.<sup>88</sup> However, if we view the "right to educate his children"<sup>89</sup> in terms of the Reverend Jones' effort to build social institutions which speak to his community's needs and values, then his parental relationship becomes the basis of his commitment to other members in his community. His children are not claimed as property but are the link to others by which he defines himself and his contributions to the community. Finally, in *Morgentaler*, Wilson J.'s description of the abortion decision as a "decision that deeply reflects the way a woman thinks about herself and her relationship to others and to society at large"<sup>90</sup> places individual choice in the social context of women's actual lives.

I would suggest, therefore, that a relational vision of the human person and of the individual sense of self provides a basis for a claim for reproductive control as a s. 7 liberty interest that resonates not only with the theme of community in Canadian constitutional discourse, but also with the psychological and phil-

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<sup>86</sup>*Ibid.*

<sup>87</sup>For an historical account of the evolution of the male-headed family as the repository of freedom and value, see E. Zaretsky, *Capitalism, the Family, & Personal Life* (New York: Harper & Row, 1976).

<sup>88</sup>See discussion *infra*, note 117 and accompanying text. It is interesting that similar interests that might have been left to be subsumed under parental autonomy in s. 7, have been formally articulated as group rights in s. 23 of the *Charter's* protection for minority educational rights which ensures public funding for primary and secondary instruction in the language of the French or English minority where numbers warrant.

<sup>89</sup>*Supra*, note 16 at 319.

<sup>90</sup>*Supra*, note 1 at 171.

osophical premises of much feminist writing. In addition, if one listens to women's voices, one finds that women's decisions about reproductive control are not only decisions about pregnancy<sup>91</sup> but are also decisions about relationships with a child, the other parent, and with one's community. They do not reflect the assumed bifurcation of interests, woman versus fetus, of constitutional rights discourse. Rather, women appear to be engaged in a discourse about accommodating a wide range of interests, including their own and that of a potential child, to the particular circumstances of their lives in a way that acknowledges the singular and radical dependency of fetal life on their bodies as well as the socially mandated dependency of children on mothering by women. To this effect, one of Gilligan's subjects describes her concerns in trying to decide whether or not to obtain an abortion:

I think you have to think about the people who are involved, including yourself. You have responsibilities to yourself. And to make a right — whatever that is — decision in this depends on your knowledge and awareness of the responsibilities that you have and whether you can survive with a child and what it will do to your relationship with the father or how it will affect him emotionally.<sup>92</sup>

And later, another subject who has ceased to define herself in terms of other's needs but sees her own needs as situated within a particular reality involving others states:

The decision has got to be, first of all, something that the woman can live with, a decision that the woman can live with, one way or another, or at least try to live with, and it must be based on where she is at and other significant people in her life are at.<sup>93</sup>

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<sup>91</sup>I do not intend to downplay the physical and emotional security issues raised by pregnancy. For women, those aspects of a claim for reproductive self-determination would remain even in a world in which the social relations of reproduction have been restructured to eliminate gender based inequalities. Because of the intimate, physical invasiveness of coerced pregnancy, this is one area where the imagery of the body could appropriately be substituted for the more traditional imagery of property to connote the material basis, in the bodies of individuals, for the social interrelations that we call the body politic. The potential of such a "body-based justification" for privacy rights and for a "cruel and unusual punishment" limit on the exercise of state power is explored by K. Thomas, "Corpus Juris Sexualis: The Eighth Amendment and 'Sodomy Statutes'" [unpublished draft, February 1988]. However, his analysis leaves the notion of rights as limits and of the definitional opposition between individual and community intact. Women's experience of physical violence within their homes and on the street requires an imagery that acknowledges the vulnerability and dependency of both our bodies and our rights as well as their concreteness and integrity. Jennifer Nedelsky explores a less fortress-like body based imagery in "Law, Boundaries, and the Bounded Self" (1990) 30 *Representations* 162. Rather than presuming that our skin marks a wall between ourselves and the world that is "hard, clear, and defensible against invasion" (*supra* at 179), she focuses on skin as permeable and as connecting us to the world through a network of sensations (*supra* at 178-79).

<sup>92</sup>Quoted in Gilligan, *supra*, note 24 at 78.

<sup>93</sup>Quoted in Gilligan, *ibid.* at 96.

Thus, if liberty and the core notion of agency are seen as a relational process which includes both oneself and others, reproductive and parenting choices give rise to a paradigmatic liberty interest.

The criticism is that this simply adds up to a substitution of inviolable rights of personality, albeit a relational notion of personality, for inviolable rights of property — the recurrent complaint about *Roe v. Wade*<sup>94</sup> — thereby leaving the traditional vision of liberty and of individual relations with the state intact. Rather than erecting a fence around the private fortress of individual freedom, liberty rights now provide a fence around the private fortress of intimate, personal relationships. Ultimately this is unavoidable if one stays within an institutional structure that mirrors the liberal structure of the state. As long as we have courts which are conceived as neutral and impartial arbiters of conflicting interests in accordance with rational, universally accessible principles, rather than as part of a state structure which itself represents distinct interests, rights adjudication will presume a definitional conflict between individual freedom and community. Alison Jaggar makes this point in her discussion of conceptions of the state and the politics of liberal feminism. Because liberal feminists accept the view that the state is the only socially inclusive form of association based on the consent of its members,

[they] take it for granted that the state is the proper and indeed the only legitimate authority for enforcing justice in general and women's rights in particular. They see the state as the neutral arbiter of conflicting social interests, whose task is to protect individual rights and so to defend against the tyranny of any individual or group.<sup>95</sup>

In the next section of this essay, I suggest that any reconception of rights must include a reconstruction of the institutions which articulate and enforce rights in a way that takes account of the interests favoured by existing structures. However, even within those structures, the shift to a theory of liberty that starts from the premise of a situated self expands the possibilities of understanding and of mediating conflicts in a way that is responsive to social and historical conditions of oppression. Furthermore, the contextualization of women's claims is subversive of the central dichotomies of liberal rights discourse. The theory

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<sup>94</sup>410 U.S. 113 (1973). Blackmun J., for the majority, found that legislation that criminalizes abortion violates the right to privacy protected by the due process clause of the Fourteenth Amendment. In "The Male Ideology of Privacy: A Feminist Perspective on Abortion" (1983) 17 *Radical America* 23 at 33 [hereinafter "The Male Ideology of Privacy"] Catharine MacKinnon writes that the privacy doctrine articulated in *Roe v. Wade* reinforces the public/private split which is at once an ideological division that lies about women's shared experience and mystifies the unity among the spheres of women's violation, and a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it. It keeps some men out of the bedrooms of other men.

<sup>95</sup>A. Jaggar, *Feminist Politics and Human Nature* (Totawa, N.J.: Rowman & Allanheld, 1983) at 200.

of freedom, social happiness and the state which rests on the dualisms of public/private, objectivity/subjectivity, and process/substance begins to unravel in the face of women's accounts of the concrete particulars of their experiences of disempowerment.

The shift to a relational vision of the human self parallels the shift between what Seyla Benhabib calls the standpoints of the generalized and concrete other.<sup>96</sup> The traditional liberal values of individual dignity and respect, which underlie the focus of s. 7 liberty on personal integrity and self-determination, are embodied in the standpoint of the generalized other. Benhabib points out that the incoherence of that standpoint lies not in the respect it accords others, but rather in the assumption that respect has to be based on our sameness or interchangeability. To the extent that moral judgment requires one to step into the shoes of others, one has to understand others in terms of their particular needs, goals, and as well, the historical, cultural, social and economic matrices within which they live their lives. Benhabib calls this the standpoint of the concrete other. A relational ontology directs one's focus at those contextual elements of self-definition. In terms of constitutional doctrine, the change in focus is pivotal in giving liberty a positive colouration, and by implication, the state a more positive role. If human prosperity and growth is viewed in terms of the ability to forge, maintain and determine one's particular relations in a particular social context, then the withdrawal or absence of state support in an area of constitutionally protected decision making raises a constitutional issue. In addition, the involvement of the state in shaping and reinforcing established patterns of private power becomes more difficult to deny once one concedes that the legal rules and doctrine devised by judicial lawmakers are historically and contingently based rather than rationally derived from immutable principles.

The American cases dealing with abortion-funding and the aftermath of the *Morgentaler* decision in Canada provide two illustrations of my point. In *Harris v McRae*<sup>97</sup> the United States Supreme Court found that a federally funded program to subsidize medically necessary services which denied funds to indigent women for medically necessary abortions with limited exceptions for threats to maternal life, rape and incest, did not unduly burden or interfere with a woman's constitutionally protected freedom to decide whether or not to terminate her pregnancy. The Court wrote:

The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions but rather of her indigency.<sup>98</sup>

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<sup>96</sup>The relevance of Benhabib's analysis to the problems of relating across difference and mediating between conflicting claims of community is explored in N. Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo L. Rev. 325 at 360-63. See also Shepard's discussion of Benhabib, *supra*, note 61 at 24-25.

<sup>97</sup>448 U.S. 297 (1980) [hereinafter *Harris*].

<sup>98</sup>*Ibid.* at 316.

This is separate spheres reasoning at its most extreme. Women are presumed to be able to make meaningful choices within the sphere of personal private freedom so long as we fence out the state.<sup>99</sup> The earlier case of *Maher v. Roe*<sup>100</sup> is even more surprising. There the Court found that the withdrawal of funding for abortions in combination with full funding for childbirth likewise did not impinge on the privacy rights of women. According to the Court, unequal subsidization of abortion in order to encourage childbirth placed no obstacles in the path of access to abortions and therefore passed constitutional scrutiny. If, however, one shifts to the standpoint of the concrete other, from which personal choice and self-understanding take place through and by interactions with a particular set of social conditions, then the manifest attempts in *Harris* and *Maher* to manipulate those conditions, to rearrange the social and economic environment of impoverished women so as to channel and constrain their reproductive choices, directly affects those choices.

The aftermath of *Morgentaler* in Canada tells much the same story. While the decision struck down, at least temporarily, the oppressive structures set up under the *Criminal Code*, it did not thereby empower women to determine the shape of their reproductive lives. Indeed, the removal of the highly visible apparatus of the official state has thrown into sharper relief the less visible but nevertheless equally effective structures of private power which, with the complicity of the state, continue to manage and define women's reproductive choices. As Moira McConnell has pointed out, *Morgentaler* simply transferred control over women's reproductive lives from state sanctioned hospital committees to the medical profession. McConnell writes:

Now physicians may, if they choose to, provide abortion services in a "free market." In terms of gains for women, while this may mean that more services will become available, to a large extent the constraints on availability will remain the

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<sup>99</sup>MacKinnon uses the abortion funding cases as the basis of a powerful indictment of the gender bias implicit in the notion of privacy. In "The Male Ideology of Privacy," *supra*, note 94 at 32-34, she writes:

Privacy conceived as a right from public intervention and disclosure is the conceptual *opposite* of the relief *McRae* sought for welfare women. State intervention would have provided a choice these women did *not* have in private. ... The way the law of privacy restricts intrusions into intimacy also bars change in control over that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect. ... I think it is not coincidence that the very place (the body), the very relations (heterosexual), the very activities (intercourse and reproduction), and the very feelings (intimate) that feminism has found central to the subjection of women form the core of privacy law's coverage. In this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor, preserved the central institutions whereby women are *deprived* of identity, autonomy, control, and self-definition, and protected the primary activities through which male supremacy is expressed and enforced.

<sup>100</sup>432 U.S. 464 (1977) [hereinafter *Maher*].

same — that is, the real access will still be governed by local morality and funding decisions.<sup>101</sup>

Unlike the impugned legislative decisions in *Harris* and *Maher*, the decisions of individual doctors in Canada are far removed from any traditional notion of state action. Yet to deny that the state is implicated in a continued pattern of limited and difficult access to abortion services is to deny the state's privileging of a particular constituency, here a medical elite, in shaping community. The state not only acquiesces in its control of abortion services, but also in its control, in a more general sense, of how we define medical needs. The re-entry of the state into the "free" market of abortion with the now defunct Bill C-43<sup>102</sup> would have simply formalized and rendered visible state management of women's reproductive lives in conjunction with the medical establishment. The refusal of some doctors to perform abortions in anticipation of being subject to criminal prosecutions under the new provisions, and the Justice Ministry's attempted reassurance that provincial Attorneys General would never use their prosecutorial discretion so unwisely, has further exposed the informal linkages that underpin the official facade of regulation.<sup>103</sup> The women whose lives are caught and twisted in the spin of legislative, judicial, administrative, and private medical decisions are nowhere heard.<sup>104</sup> Again, a shift to the standpoint of

<sup>101</sup>M. McConnell, "Abortion and Human Rights: An Important Canadian Decision" (1989) 38 *Intl. & Comp. L.Q.* 905 at 912.

<sup>102</sup>Bill C-43, *An Act Respecting Abortion*, 2d. Sess., 34th Parl., 1989-90. The Bill would have recriminalized abortion except where it "is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened" (*supra* s. 1). The Bill defined health as including "for greater certainty, physical, mental and psychological health ..." (*supra*).

Bill C-43 was defeated in Senate on 31 January 1991 by a tied vote. See G. York, "Senators Kill Abortion Bill with Tied Vote" *The [Toronto] Globe & Mail* (1 February 1991) A1.

<sup>103</sup>C. McLaren, "MDs and the New Abortion Law" *The [Toronto] Globe & Mail* (16 June 1990) D2:

Ottawa insists that doctors' fears are exaggerated because they misunderstand the law. It will be "very difficult" to lay charges or win any convictions against doctors under the wording of Bill C-43, John Maddigan, an aide to Mrs. Campbell, said this week.

The law requires that doctors "form an opinion" about a woman's state of health, Mr. Maddigan said. He said it is unlikely that any provincial Attorney-General would permit an individual to lay a frivolous charge against a doctor, because the onus is on that person to prove that no such opinion had been formed.

<sup>104</sup>N. Pulling, "Doctors' Commitment Shaken by Abortion Law" *The [Toronto] Globe & Mail* (2 July 1990) A5:

Four doctors who perform abortions at the Algoma West Academy of Medicine in Sault Ste. Marie, Ont., announced last week they will not take any new patients, leaving Northern Ontario without abortion services. The hospital is now recommending its patients go to Toronto or northern Michigan. ...

In the months during which Bill C-43 was debated, women's groups reported an increase in calls about abortion from women who were distressed because they were under the impression the proposed law was already in effect. Some groups have linked the death of a woman who died on June 11, 1990 in an attempt to induce an abortion with a coathanger to Bill C-43. See K. Bolan, "Toronto



Benhabib's concrete other brings into the story about rights the story about the social conditions under which women struggle to shape their lives, rather than simply portraying it as a story about a notional woman who has no social context of significance other than her interactions with formal and positive expressions of state power.

Chantal Daigle's story further exposes the embeddedness of state power in the way in which private relationships are imagined and ordered. Daigle sought to exercise her post-*Morgentaler* reproductive freedom on July 4th, 1989 by making an appointment for an abortion in Sherbrooke, Quebec. She had become pregnant in the context of a relationship with her companion at the time, Jean-Guy Tremblay, but had later changed her mind because of his increasingly abusive behaviour. Three days after Daigle made the appointment, Tremblay obtained a provisional injunction from the Quebec Superior Court preventing her from going through with it. Upon the expiry of that injunction, Tremblay obtained an interlocutory injunction which was upheld by the Quebec Court of Appeal.<sup>105</sup> As Tremblay successfully pursued his claim through the court system, Daigle's pregnancy advanced, limiting her choice of abortion procedures and reducing her chances of a safe abortion. The Supreme Court of Canada, to its credit, responded swiftly and unambiguously on August 8th by unanimously overturning the injunction from the Bench on the day of the hearing. It did so even though it was revealed in the course of the hearing that Daigle had obtained an abortion, thereby rendering the issue of the injunction moot. As the Court explained in its reasons, delivered later, it continued the hearing "so that the situation of women in the position in which Ms. Daigle found herself could be clarified."<sup>106</sup>

The ordeal Daigle was put through as the injunction wended its way through the courts far exceeded anything described in the *Morgentaler* case as crossing the boundary of fundamental justice. In this regard, Daigle argued that "an injunction — which can only be realized through the initiative of a third party and through a court procedure — is at least as arbitrary, unpredictable and time-consuming vis-a-vis a woman's exercise of her rights as the law struck down in *Morgentaler (No.2)*."<sup>107</sup> She also argued that "granting the foetus the right to life from the moment of conception sets up a potential conflict with the rights of women to personal dignity, bodily integrity and autonomy expressed in *Morgentaler (No.2)* and leads to an inevitable clash with the rights of a

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woman's death blamed on abortion bill," *The Vancouver Sun* (19 June 1990) B1, and T. Appleby, "Botched abortion attempt kills Toronto woman, 20" *The [Toronto] Globe and Mail* (13 June 1990) A10.

<sup>105</sup>*Tremblay v. Daigle*, [1989] R.J.Q. 1980 (S.C.), aff'd [1989] R.J.Q. 1735, 23 Q.A.C. 241, rev'd [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Daigle* cited to D.L.R.].

<sup>106</sup>*Ibid.* at 648.

<sup>107</sup>*Ibid.* at 647.

woman who seeks an abortion."<sup>108</sup> The legal arguments put forward by Daigle on the basis of *Morgentaler*, were an attempt to translate into the language of constitutional discourse, her simple observation in her affidavit that "Jean-Guy Tremblay has no reason or interest in the present case except in order to maintain his hold on me."<sup>109</sup> From where Daigle stood, it was quite clear that Tremblay was using the courts and the claim of a lawful basis for fetal and paternal rights to control her. *Morgentaler* held out the promise that such a deployment of public power would not be tolerated.

In resolving the case, the Court neatly avoids the issue of the connection between state power and male private power. It concedes that it is often difficult to distinguish the claim that fetal rights and father's rights do not exist at law from the claim that such rights would violate women's rights.<sup>110</sup> However, it proceeds to do so, asserting the logical priority of the question of whether the rights exist at all to the question of what effect they have on women.<sup>111</sup> Furthermore it treats Tremblay's claim as raising issues largely of statutory interpretation.<sup>112</sup> The lived reality for women drops out of the picture. In the background of this analytic move stands the formal distinction between public and private articulated in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery*.<sup>113</sup> In *Dolphin Delivery*, the Court found that the *Charter* does not apply to private litigation divorced completely from any connection with government, and that a court order cannot be viewed as providing the necessary element of such a connection.<sup>114</sup> To the extent that the rights asserted by Tremblay are based on private law interests, after *Dolphin Delivery* it is questionable whether a person in Daigle's position has any recourse to constitutional protections.<sup>115</sup> By finding first that there is no basis for fetal or paternal rights in the *Civil Code of Lower Canada* or at common law, the Court does not have to deal

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<sup>108</sup>*Ibid.*

<sup>109</sup>*Ibid.* at 637.

<sup>110</sup>*Ibid.* at 647.

<sup>111</sup>*Ibid.* at 648.

<sup>112</sup>For an insightful analysis of the Court's approach in *Daigle* see D. Greschner, "Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle*" (1990) 35 McGill L.J. 633.

<sup>113</sup>[1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to D.L.R.].

<sup>114</sup>*Ibid.* at 196.

<sup>115</sup>*Dolphin Delivery* is fairly clear on the point that a claim based on common law rights or entitlements would not be subject to the *Charter*, although there seems to be a bewildering inconsistency between its unqualified statement that there can be "no doubt" that the *Charter* does apply to the common law (*ibid.* at 190) and its holding that a court order based on a common law claim in a dispute between private parties is not subject to the *Charter* (*supra* at 196). Legislative activity is suggested as providing the clearest instance of the requisite government action (*supra* at 198). Whether this constitutionalizes the entire body of the law governing private relations in Quebec because of its codification, has not been definitively settled. See R. Tassé, "Application of the Canadian Charter of Rights and Freedoms" in G. Beaudoin & E. Ratushney, eds, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 65 at 94 for the view that constitutionalization of Quebec private relations does not necessarily flow from *Dolphin Delivery*.

with the question of whether *Morgentaler* applies. Daigle's perception that the law and the courts are being used by Tremblay to manage and control her reproductive life becomes invisible. In addition, nothing in the judgment prevents future legislative action to create fetal or paternal rights. In this way the case is very like the majority decisions of Dickson C.J. and Beetz J. in *Morgentaler*. From the perspective of the interests represented by Daigle, it is as if the Court were saying that the interests represented by Tremblay have failed to articulate their control of women with sufficient clarity either in the Quebec *Charter of Human Rights and Freedoms*,<sup>116</sup> the *Civil Code of Lower Canada* or the judicial development of private rights. No doubt confronted with a clear legislative articulation of fetal or paternal rights, the courts would find it harder to evade the issue; s. 7 of the *Charter* would be clearly implicated by the state action of the legislature. However, one may ask why the linkage between the state and Tremblay so clearly perceived and stated by Daigle is so invisible to the Court? Once again, a shift to the standpoint of the concrete other would dissolve the formal distinction articulated in *Dolphin Delivery* between Daigle's *Morgentaler* right to bodily integrity and Tremblay's flagrant attempts to control her through the language of fetal interests.

## V. Conflict and Difference

The criticism that one has simply substituted an inviolable sphere of private personality rights for an inviolable sphere of private property rights is warranted, however, to the extent that it focuses on the inevitability of conflict between the range of viewpoints that make up our communities and on the pressures for conformity and integration with dominant voices that flow from a theory founded on the situated self. It is at this juncture that the premise of a common set of priorities which underlies the imagery of conversation and dialogue becomes problematic. If one is going to make one's starting point the celebration of difference rather than the presumption of sameness, one has to have a way of responding to conflict that does not silence difference. Some feminists have tried to resolve the dilemma of oppression within community by resorting to values of inclusion and political efficacy. In this section of the essay, I sketch out that response and similar commitments within Canadian constitutional law. However, I suggest that any such reconstructive critique must distinguish itself from similar proceduralist theories within liberalism, and must be accompanied by a democratization of the judicial institution, not simply in terms of its representativeness, but also in terms of the hierarchical ordering of perspectives within the adjudicative process. Otherwise, the public/private distinction, which has begun to unravel through the inclusion in rights discourse of a contextualized account of the experiences of oppression, is rewoven into the process

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<sup>116</sup>R.S.Q. c. C-12.

through our expectation of obtaining a neutral resolution or a "right answer" from the courts.

The problems generated by conflicting viewpoints become particularly important in the feminist critique of communitarianism. Benhabib in particular takes the communitarians to task, for while they likewise start with a self that is constituted of rather than threatened by attachments to others and community, they at times seem to advocate an integrationist solution to the problem of individual relations with community.<sup>117</sup> The total identity of self with community underlies authoritarianism and social conformism as well as romantic and utopian visions of community. Benhabib points out that in addition, the history of women's struggle for liberation has been a struggle to resist the identity of self with social role.<sup>118</sup> As an alternative she refers to the strand of communitarian theory that advocates a participatory rather than integrationist solution to individual relations with community. This solution sees the problem of modern society as one of political efficacy rather than one of loss of solidarity and belonging.<sup>119</sup> I would add that it also provides the basis for a different conception of power, not "the power one holds by virtue of inequality," but rather the "ability to move, to have an effect on another person, to elicit a response from others and to respond to them."<sup>120</sup> A principle of full and meaningful participation by persons conceived as relational rather than transcendental subjects in the argumentative process through which norms are continually revised, presents a framework for dealing with conflict. As Young points out, it is because one rejects the possibility of the impartiality of any one perspective, that one has to include all perspectives in dialogue.<sup>121</sup> Benhabib suggests the same resolution in the course of her discussion of the similarities between Rawls and Habermas:

Unless discourse ethics is interpreted as a participatory democratic process on the part of all those affected, concerned, or influenced by the adoption of a contested norm, it can only be viewed as one more universalizability theorem in the tradition of neo-Kantian ethics operating with the myth of a general interest transparent to all rational minds.<sup>122</sup>

Benhabib acknowledges that this approach, although a theory about procedure, presumes a substantive commitment to a principle of participation.<sup>123</sup> However, she differs from other similar procedural theories by leaving such pre-

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<sup>117</sup>S. Benhabib, "Autonomy, Modernity, and Community: An Exchange between Communitarianism and Critical Social Theory" (Delivered at the 1987 Annual Meeting of the American Political Science Association) [unpublished]. In analysing communitarian theory, Benhabib singles out the work of Michael Sandel, Michael Walzer, Charles Taylor, and Alasdair MacIntyre.

<sup>118</sup>*Ibid.* See also Benhabib & Cornell, *supra*, note 29.

<sup>119</sup>Benhabib, *ibid.*

<sup>120</sup>C. Gilligan in Dubois *et al.*, *supra*, note 30 at 48.

<sup>121</sup>*Supra*, note 57.

<sup>122</sup>*Supra*, note 62 at 315.

<sup>123</sup>*Supra*, note 117 at 8.

sumptions about the boundaries of permissible discourse themselves open to challenge and debate rather than insisting on their logical priority as issues of justice. This implies an acceptance of social struggle as the location where the parameters of discourse are determined, tested, and redetermined, as well as an acceptance of the loss of moral certainty. Furthermore, the parameters of discourse remain provisional because our understanding is historically grounded and can only ever be partial, and because, as Gilligan describes the insight that comes with moral maturity,<sup>124</sup> judgment is contextual.

Both Young and Nitya Duclos similarly develop a framework for the interaction of groups that takes account of their ability to participate in concrete terms in defining themselves and in creating the structures within which they live. Young describes the politics within which groups positively assert their difference without implying deviance, exclusion or subordination as the politics of difference. In her view, such a politics engenders

a conception in which groups do not stand in relation of inside and outside. That groups define themselves as different does not mean that they have nothing in common. Groups themselves, moreover, are not unities; every group has group differences cutting across it. Difference here does not mean opposition and exclusivity, but particularity, specificity, and the impossibility of reducing either social process or individual subjectivity to unity.<sup>125</sup>

The effect of groups taking power over their own self-definitions is to relativize the dominant culture, revealing it as "Anglo, European, Protestant, masculine, straight"<sup>126</sup> as well as to provide a standpoint from which to ask which norms are "humanly valuable, and which reinforce the power and privilege of the groups whose experience they reflect."<sup>127</sup> By the same token, groups themselves are not "unities" but rather are intersections of difference. For example, assertions of the inviolability of the family as a community often present the family as ahistorical and disconnected from the stratification of social life, deflecting attention from its gendered structure.<sup>128</sup> Likewise, assertions of cultural inviolability can obstruct an inquiry into the historical experiences of different classes of members within the larger cultural group. Duclos discusses this latter issue in the context of the cultural autonomy claims of First Nations in determining band membership and interventions by First Nations women seeking a resolution that addresses both sexist membership rules and cultural integrity. She suggests:

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<sup>124</sup>*Supra*, note 24.

<sup>125</sup>I.M. Young, "Difference and Policy: Some Reflections in the Context of New Social Movements" (1987) 56 U. Cin. L. Rev. 535 at 545.

<sup>126</sup>*Ibid.* at 541.

<sup>127</sup>*Ibid.* at 542.

<sup>128</sup>For a discussion of the use of the term community to depoliticize and obscure gendered relations within the family, see M.J. Mossman, "Individualism and Community: Family as a Mediating Concept" in Hutchinson & Green, eds, *supra*, note 17, 205.

A decision that does not speak to them [First Nations women and their children], one that is not grounded in an appreciation of their moral identity, is a decision which sacrifices real people to abstractions. This is not to say that the intervenors should automatically win, nor that courts should always identify the most oppressed group in a case and simply accede to its arguments. It is only to say that such groups should no longer be passed over, as has happened often. Rather, they should become the litmus test by which any new rule is judged.<sup>129</sup>

Young and Duclos echo Benhabib's emphasis on political efficacy and participation. Young looks outward at the larger structures that organize our lives. She sees participation and inclusion "in all of society's institutions and social positions, and especially those most highly valued,"<sup>130</sup> as the meaning of equality flowing from current social struggles by women, Blacks, immigrant cultures, aboriginal peoples, gay men and lesbians, old people, the disabled and other marginalized groups. Duclos looks inward at the structures which internally organize the lives within those groups. She writes:

Implying, as I do, that a rule which effectively disadvantages women when advocated by a group in whose management and direction women do not fully participate is suspect on sex equality grounds, suggests that I consider a minimum procedural condition of participation to be a cross-cultural sex equality constant. In the face of the evidence that sexism permeates all cultures, and that there are always disputes within a culture about what that culture is or should become, I believe that some such condition is necessary for a workable (feminist) pluralist state.<sup>131</sup>

The two part structure of s. 7 lends itself to such a solution insofar as the principle of full participation in social life is a principle of fundamental justice within the Canadian community and under the Canadian constitution. In other words, in constructing a claim for reproductive rights, I would suggest an elaboration of liberty under the first part of s. 7 in terms of the individual claimant's right to determine relationships such as parenting which lie at the heart of individual and collective processes of self-understanding through others. This claim views liberty as founded on connection rather than separation. Nevertheless it retains the standpoint of the generalized other to the extent that it is a claim about the nature of community with which others will disagree and which cannot embrace all of the diverse forms of communal interconnections and relationships. The second stage of the analysis requires a link between the deprivation of liberty and the violation of a principle of justice. I suggest that the principle of participation and political efficacy speaks most directly to the particular historical and social circumstances of women's reproductive lives. In other words, individuals and groups will disagree on how our communities should be constructed and envisioned. However, women's historical experience of the use of

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<sup>129</sup>*Supra*, note 96 at 379.

<sup>130</sup>*Supra*, note 125 at 550.

<sup>131</sup>*Supra*, note 96 at 380 n. 217.

reproductive roles to entrench and legitimate social and economic disadvantage undermines their participation in the ongoing process of communal redefinition.

To a certain extent, Wilson J. addresses this point in *Morgentaler* when she suggests that for women self-determination is a struggle for inclusion in society, rather than exclusion of the state, and on terms that reject definition on the basis of a special role or biology.<sup>132</sup> She goes on to suggest that control of the decision to reproduce or not reproduce is integral to women's struggle to gain entry into a man's world on a footing of equality. What I would propose is that these sorts of considerations would more properly flow from the second part of s. 7.<sup>133</sup>

Similarly, Dickson C.J.'s view in *Morgentaler* that it is procedurally unfair to create a defence to a criminal charge without taking account of the emotional and financial burdens imposed on the accused in trying to make out that defence, can be read as addressing the substantive barriers to women's full participation in social life from the perspective of the concrete other. In particular, Dickson C.J. alluded to the long distances women have to travel, the delays, and the uncertainty of outcome when dealing with the decentralized system of committee approval under the *Criminal Code* sections controlling access to abortion. While Dickson C.J. asserted that those burdens are the result of state action in the form of an unwieldy and inefficient administrative structure, that it is "the law itself"<sup>134</sup> that skews the process, his analysis took into account the complexities of the context in which the law operates — the geographic and demographic factors, the strains on personal resources, the inequalities in public resources, and the psychological and physical stress associated with a decision in which time is crucial. This is a notion of fairness that is substantive, not in the sense that it mandates a particular outcome, but in the sense that it considers the actual and material conditions of participation in process. In addition, it presupposes an entirely different notion of state action and of the role of rights. Rights in this scheme are about the intersection of state power with the social conditions of inequality rather than about the boundary between state power and those conditions. Indeed, the boundary begins to dissolve into the detailed exposition of the actual barriers to access.

Patrick Monahan has linked a similar theory of judicial review based on participation and the integrity of democratic principles to the two strands of the collectivist tradition, Tory and socialist, in Canadian political culture.<sup>135</sup> In his

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<sup>132</sup>*Supra*, note 1 at 172.

<sup>133</sup>An "equality before the law" argument was made under the principles of fundamental justice in *R. v. Cornell*, [1988] 1 S.C.R. 461, 40 C.C.C. (3d) 385 [hereinafter cited to S.C.R.], but rejected by Le Dain J. because he viewed it as an attempt to get around the delay in proclaiming s. 15 of the *Charter* (*supra* at 477-78).

<sup>134</sup>*Supra*, note 1 at 71.

<sup>135</sup>Monahan, *supra*, note 72.

view, while Canada in general shares the liberal ideology of the United States with its emphasis on individualist values, Canada must develop a constitutional theory which is responsive to the unique preoccupations of Canadian history and culture, and in particular to the different, more benign view of the state which flows from the collectivist vision. In addition, in a way that is reminiscent of Benhabib, Monahan relates the values of democratic participation to the values of community:

On the procedural theory, communities are not mere aggregations of private interests. The rightholder is identified, in an important if not exclusive sense, by his membership in a community. Democratic debate and dialogue is valued not because it will necessarily yield right answers to issues of political morality, but at least partly because it is a necessary feature of a community developing its own identity.<sup>136</sup>

While this view of participation as the mediating principle in communal life may have little to do with the elitist and hierarchical communities that have dominated Canadian politics and history, it nevertheless provides a bridge between that history and the commitments both to group perspectives and to liberalism in the *Charter*.

Monahan acknowledges his debt to John Hart Ely's "participation-oriented representation-reinforcing" model of judicial review,<sup>137</sup> but claims to avoid the incoherence of Ely's distinction between substantive considerations and procedural values. In Monahan's scheme, substantive determinations would inevitably be involved in judicial decision making under the *Charter*. He answers the concerns about arbitrary and unaccountable judicial power by arguing that there is a fundamental difference between instructing a court to attend to the democratic integrity of decisionmaking processes rather than to the rightness of the decisions that issue from those processes. However, by placing his theory within the existing process/substance debate, he is perpetuating an opposition that will ultimately be subversive of his claim of legitimating judicial intervention. The textual emphasis in the *Charter* on collectivist values and on the equality of individuals within groups and society, requires a resolution that goes beyond the proceduralist theories of liberalism in much the way that the commitment to the situated vision of the self and to empowerment within feminism requires a resolution that challenges the inevitability of the opposition between the individual and community. The process/substance dichotomy is an attempt to protect against the individual preferences and partial understandings of judges. By tailoring judicial intervention to matters of process, the hope is that judges will not be privileged actors in the articulation of our substantive commitments. However, critics of Ely's theory point out that the dichotomy cannot be successfully

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<sup>136</sup>*Ibid.* at 140.

<sup>137</sup>*Ibid.* at 138. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).



maintained. As Brest has written, "most instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort."<sup>138</sup> His observations have a parallel in the feminist critique of abstract universality — that it inevitably is founded on particularity and cloaks the experiential aspect of understanding. Monahan implicitly reinstates those formal dichotomies as an answer to the anti-democratic nature of judicial power.

The premises of feminism render incoherent the use of the process/substance dichotomy as protection against the individual and class preferences of others. The fact that substantive values underlie the structures that control our social relations is the starting point of the complex conversations of legal discourse, not its nemesis.<sup>139</sup> The judicial structure is no exception. Thus the first step must be to redesign judicial institutions so that they reflect in concrete terms the contingency and partiality of judicial articulations of the law. I do not intend in this paper to embark on such a project. Instead, I limit myself to a few observations about relationships within the courtroom as a beginning for the larger project of reconstruction.

If one rejects the use of process and formalism to constrain judicial power, then the concern becomes ensuring that the socio-structural relations between judges, claimants, defendants, intervenors, and witnesses, and the links between process and power in the courtroom become a part of the judicial discussion about rights. By socio-structural relations I mean each person's location within an historically and socially contingent vision of what our interests and priorities as a community are and of how life in that community is experienced. At first glance, this assertion does not seem inconsistent with legal practices. Lawyers are adept at using procedural challenges to achieve substantive outcomes. However, the ethos of professionalism, in combination with legal liberalism's commitment to judicial neutrality, usually preclude extending courtroom deliberations to an examination of how the court's own placement within a specific cultural, historical, gendered and class-determined perspective interacts with the

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<sup>138</sup>P. Brest, "The Substance of Process" (1981) 42 Ohio St. L.J. 131 at 131.

<sup>139</sup>Nedelsky makes a related point when she singles out for criticism the reduction of the concept of autonomy to matters of process and, as well, the attempts to found constitutional theory on values of democracy and participation. She uses the example of a legislative regime designed to involve parents in educational decisions concerning their handicapped children. In most school districts, observance of the procedures for parental involvement was perfunctory and meaningless. Parents found themselves in a relationship that fostered subordination and powerlessness. In the one school district where parents' experience of the scheme was positive, success was a function of many different factors including a commitment to parental input by school officials, a generally held view that disagreement can be constructive and creative, an effort by officials to redress the power imbalance stemming from parents' comparative lack of resources and information, a recognition that an ongoing relationship must be sustained between parents, school and child, and a long history within the community of citizen involvement (*supra*, note 17 at 243-52).

other viewpoints involved. Such a focus would be considered inappropriate, if not actually in contempt. It remains separated from the courtroom's traditional focus on the particular dispute, relegated to the sphere of critical scholarship.<sup>140</sup> Studies for institutional reform usually articulate any problems in terms of patronage in the appointment and selection process and look to better procedures as a solution. While this is important, it again looks to process and reason to restore fairness and as well promises neutrality.<sup>141</sup> Even calls for a diversified bench to incorporate more and varied perspectives ultimately hide the substantive issue behind a procedural solution.<sup>142</sup> A meaningful reform in feminist terms would have to address the privileging of the ideological content of the judges' perspectives. To do so would not simply change the limits on what is relevant to or permissible in rights discourse. It would also realign the relationships between the participants in the courtroom. The relationships would remain hierarchical in the sense that the judge alone can wield state power to ultimately enforce one view of the dispute rather than another. However, the effect of doing so would no longer be presented as an impartial resolution in accordance with rational principles, leaving other views outside the law as well as outside reason. Strategies would not be directed at convincing judges that their rationality can accommodate, through analogy and synthesis, the petitioner's claims. Rather they would proceed on the basis that there are different rationalities from which to view the dispute, and that the judge's rationality is neither neutral nor superior. To the extent that this represents a fundamental change in litigants' expectations of adjudication, the pressure on judges to couch their decisions in the language of abstract universality would radically diminish. The task of adjudication would require the skills of listening, empathy and imagination, rather than deductive reasoning. Where different socio-structural locations create a divide between participants which cannot be bridged by a sympathy which is based on sameness and self-recognition, the collective dimension of the dispute would be central to its resolution. For example, in a dispute over marital property or child custody between members of a heterosexual couple, the overlap between gender

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<sup>140</sup>See, e.g., C. Boyle & S. Rowley, "Sexual Assault and Family Violence: Reflections on Bias" in S. Mahoney & K. Martin, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 312.

<sup>141</sup>See, e.g., Canadian Bar Association, *The Appointment of Judges in Canada* (Ottawa: Canadian Bar Association, 1985), and Canadian Association of Law Teachers, *Judicial Selection in Canada: Discussion Papers and Reports* (Toronto: Canadian Association of Law Teachers, 1987).

<sup>142</sup>Again, with regard to gender bias, I do not mean to suggest that it is not important to appoint more women judges. Rather, my suggestion is that having more women judges will not go far enough. The percentage of federally appointed women judges ranges from a high of 10.7% in British Columbia to a low of 0% in the Northwest Territories, the Yukon and Prince Edward Island (Manitoba Association of Women and the Law, *Gender Equality in the Courts* (Winnipeg: Manitoba Association of Women and the Law, 1988) at 25). The Manitoba Report recognizes the problem of the ideological stance of the judiciary and goes on to address the problem of judicial attitudes in its analysis of family law decisions and personal injury awards (*supra* at 40-161). See also B. Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

and hierarchy within family and economic relations would provide the framework for discussion, and the intersection of gender and power within the courtroom or settlement process the preliminary issue. Intersections of race, class, ethnicity and the experiences of other social groups would be subject to the same examination. Judges would be required to be reasonable in Young's sense of "giving reasons."<sup>143</sup> However, judging would also entail "episodes of undecidability, self-judgment, and uncertainty ... acknowledging the imperative of admitting mistakes and recognizing ignorance."<sup>144</sup>

In summary, I would suggest that reproductive choices are fundamental to self-understanding and that such choices lie at the heart of a notion of liberty that views the individual as part of a multiplicity of attachments and relationships. Secondly, in shifting viewpoint from a generalized claim about individual relationships within community to a concrete claim about the situation of women under the second part of s. 7, I would suggest that legislation that criminalizes abortion reinforces the substantive and structural barriers to women's full participation in Canadian social and political life and to their ability to effectively share in the privileges and responsibilities of that life. As our attention has been directed to other components of the legal system as a source of fundamental justice,<sup>145</sup> I would argue that the principle of full participation for women flows from the *Charter's* commitment to sexual equality in s. 15(1),<sup>146</sup> the recognition of group disadvantage based on sex as a social fact and constitutional harm in s. 15(2),<sup>147</sup> the guarantee of rights equally to male and

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<sup>143</sup>*Supra*, note 57.

<sup>144</sup>Turpel, *supra*, note 82 at 45. Turpel is writing in the context of the cultural differences that divide First Nations cultures and white culture. In the passage I have quoted from, she writes that if we are to recognize autonomous or incommensurable communities within a single state, then we will be forced

to question the cultural legitimacy and authority of the judiciary as an institution competent to choose between and among varying cultural images. For a judge, a situation of cultural difference should be and must be a situation of *not* knowing which direction to go, a situation involving choices about reasoning which may not be defensible or acceptable. It involves episodes of undecidability, self-judgment, and uncertainty. It would involve acknowledging the imperative of admitting mistakes and recognizing ignorance (*supra*).

<sup>145</sup>See *Reference re S. 94(2) of Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 503, 24 D.L.R. (4th) 536.

<sup>146</sup>S. 15(1) states:

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

<sup>147</sup>S. 15(2) states:

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

female persons in s. 28,<sup>148</sup> and the mandate given to all levels of government in s. 36(1)(a) of the *Constitution Act, 1982* to promote equal opportunity.<sup>149</sup> Finally, I would suggest that any reconception of rights in accordance with feminist premises would have to be accompanied by a reorganization of the relationships within the courtroom as well as a reconception of what judges do and how they do it.

## Conclusion

In this essay I have attempted to outline the ways in which liberty can be reconceived to accord with some of the psychological and philosophical premises of feminist writings. Because the language of liberty rights is the language in which Western culture discusses theories of the state, such a reconception entails a different view of the state, one in which state power is the mediator and facilitator of rights rather than antithetical to freedom. Rights are no longer abstractly defined spheres of non-interference but rather are contingent on situation and relationship. The individualist stance in the sense of individual agency in determining relations and attachment is preserved. However, the shift in the view of the self as embedded in social relations rather than abstract and unencumbered, demands that particular and "private" experiences of disempowerment within the inviolable spheres of classical legal consciousness and at the hands of private power, be given relevance in the determination of rights. Furthermore, the inevitability of conflict between individual and collective priorities can be resolved in terms of enhancing the political efficacy of individuals and groups within community. Thus the language of rights becomes the language of democratic interrelationships rather than the language of separation and boundaries. Because the discourse about rights is contextualized, democratic interrelationships must be conceived of as provisional and in substantive rather than procedural terms. The resort to proceduralist theories to preserve fairness and neutrality is incoherent once the political content of liberal epistemologies is exposed. In addition, judicial structures must be transformed to reflect the contingency and partiality of the judicial perspective.

S. 7 of the *Charter*, as well as the collectivist themes of Canadian constitutional discourse generally, can be claimed by women and expanded upon in furtherance of such an analysis. The two part structure of s. 7 provides a frame-

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<sup>148</sup>S. 28 states: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

<sup>149</sup>S. 36(1)(a) states:

Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to (a) promoting equal opportunities for the well-being of Canadians ...

work for a discussion of a revised notion of liberty under the first part, and of the link between the deprivation of that interest and the disempowerment of individuals within community life in the second part. Thus a claim for reproductive control is a claim to determine one's relations to specific others, to children, to parents, and to a specific community, as an aspect of liberty. Furthermore, to constrain self-determination in this regard is to exclude women from full political, social, and economic participation within a society that is structured around the male experience of reproduction. The commitment to equal participation recurs throughout the Canadian constitutional framework, and thus is a principle of fundamental justice central to the Canadian community.

One may ask why not start with equality. One can answer on two levels. On a theoretical level, reproductive rights are at least in part about women's self-determination and about protecting the individual's capacity for growth through determining one's social dimension and one's relationships. On a practical level, it may be easier both to make out the equality claim and to rebut the reasonableness of the limit on rights under s. 1 once one has fully articulated the nature of women's interest in reproductive control. More importantly, however, a re-examination of liberty provides the starting point for developing a feminist theory of the state, thereby giving transformative power to the feminist vision and restoring hope to a discourse that seems trapped between an insupportable claim to objectivity and the despair of nihilism.

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