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Aller au sommaire du numéro

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# "Now that we've burned our bras ...": Review of *Justice and Gender*

Margaret E. McCallum

Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge, Mass.: Harvard University Press 1989).

THIS BOOK DEMONSTRATES, among other things, that law is too important to be left to lawyers. Providing a comprehensive investigation of the way in which law shapes and is shaped by changing ideas about gender roles in modern America, this book could not have been written without the wealth of feminist scholarship of the last two decades, particularly work on women's struggles for full rights as citizens, and the impact of the law on women's lives. There is as yet no equivalent book on Canada, although there is a rapidly growing body of the theoretical and empirical work necessary to begin such a project.[1]

Rhode hopes that her book will provide "a better understanding of both the cultural construction of gender and the most promising strategies for cultural change." (1) In choosing to describe her work in this way, Rhode is signalling her intention to move beyond mainstream assumptions about law and its relationship to social change. The traditional vision of the development of law and legal systems denies the historical and cultural contingency of law; in presenting law as the natural and inevitable outcome of past developments, it ignores as well the extent to which law is the product of struggle over power and the means to attain power. In these struggles, victory is not always to the representatives of the dominant class

[1]See the review article and annotated bibliographies by Susan B. Boyd and Elizabeth A. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice," *Canadian Journal of Women and the Law* 2 (1986), 1-52; *Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings*, Resources for Feminist Research (Toronto 1989); interdisciplinary and feminist work in law has been strengthened in Canada by the *Canadian Journal of Women and the Law* and another new journal, the *Canadian Journal of Law and Society*.

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or sex. In certain times and places, women, women workers, and workers can win small victories. But law is not only an arena of struggle: it also defines the terms of the struggle. The shorthand phrase used by some of the critics of the mainstream vision is that law is constitutive of consciousness — in thinking about the world, we think in categories with which we are already familiar. We describe our relationships with others in legal terms — spouse, parent, owner, landlord, tenant, employer, employee, taxpayer — and assume that the rights and obligations arising in these relationships are natural and immutable, rather than created by law and subject to change. And in so doing, we exclude the possibility of alternatives.[2]

Lawyers may be especially susceptible to reducing lived relationships to legal categories, since that is how they make their living. Rhode, Professor of Law and Director of the Institute for Research on Women and Gender at Stanford University, writes primarily for other legally-trained academics, but her book raises important questions for those working in other disciplines as well. Dealing first with her use of the word gender, Rhode points out that some writers now use the word sex when referring to male/female biological differences, while the word gender is applied to culturally-constructed differences. The latter usage drives language purists and biologists mad, but is likely to persist, given that its use establishes that an author is aware of current feminist debates. Although Rhode discusses the meaning and usage of gender, sex and feminism ("any theory or activity on behalf of women's equality" (5)), she does not define equality or justice, except negatively, in criticizing the content given to these abstractions in the jurisprudence on discrimination on the basis of sex.

Rhode's main concern is the debates and dilemmas of contemporary feminism, but she does make use of the available secondary literature to sketch an historical background for most of her subjects. She begins the book with an introductory section entitled "Historical Frameworks" in which she discusses the rise and fall of American feminism in its first century, roughly from 1830 to 1920. Rhode focuses on the suffrage campaign, but also describes the struggle of women to gain admission to the practice of law, and to obtain some control over their property and person within marriage. Taking a Whiggish view of the accomplishments of this period, Rhode observes that these early feminists "helped lay the foundation(s) for a more egalitarian social order." (19, 31) She attributes the disintegration of the first feminist movement in part to its failure to resolve tension between the idea of equality for the sexes and the attempt to expand the range of women's activities and elevate their status so they could better fulfill their special responsibilities as mothers.

Rhode is even more critical of the recent unsuccessful campaign for an Equal Rights Amendment to the American Constitution. Passed in 1972 by Congress, the

[2]For a discussion of the shortcomings of the mainstream vision and a guide to some of its critics, see Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984), 57-125; "Historicism in Legal Scholarship," *Yale Law Journal* 90 (1981), 1017-62.

Amendment died when, ten years later, it had not been ratified by three-quarters of the state legislatures. Rhodes observes that during that decade, the ERA became a symbol for supporters and opponents of changing sexual practices, new social roles for women and men, and feminist politics. Opponents of the ERA waged an effective propaganda battle in which they played on fears of loss of preferential treatment for women, phobias about women participating with men in military training and combat, and concerns about women and men sharing public washrooms. ERA supporters pointed out the factual and legal misrepresentations in this propaganda, but failed to counter the emotional appeal to women in traditional homemaker roles who were grateful that someone was affirming the choices that they liked to think they had made for themselves.

In the 1990s, as right-wing conservatives forcefully promote their ideology of free markets and patriarchal families, it is imperative that feminists begin to integrate the concerns of "maternal" and "equal rights" feminists. As Rhode states in her introduction, feminists have emphasized gender difference in order to reduce its importance, on the liberal individualist theory that one's sex should not constrain one's personal opportunities. But too often, the attempt to eliminate legal distinctions based on sex has left laws which, by taking the male as the norm, effectively exclude women and denigrate women's experience. The focus on individual rights has been useful in helping some women gain access to existing educational, employment and political institutions on the same terms as males. It has not helped in reshaping those institutions to accommodate the needs of those members of the society who are chiefly responsible for the production and care of children. "Formal mandates of similar treatment for individuals similarly situated have failed to confront the social forces underlying women's dissimilar and disadvantaged status." (3)

The alternative Rhode proposes "is not to abandon rights discourse, but to reimagine its content and recognize its limitations. The central strategy is to shift emphasis from gender difference to gender disadvantage." (3) Rhode argues that policy-makers, whether they be judges, administrators or legislators, should concern themselves with eliminating only those sex-based differences that are likely to produce or reinforce sex-based disparities in political power, social status and economic security. (83) Rhode then discusses this proposal in light of recent developments in the law concerning welfare, employment, the formation, maintenance and dissolution of families, sex and violence, reproductive freedom, and the existence of sex-segregated institutions and associations.

Some questionable starting premises underlie Rhode's belief that this reformulation of the discourse will move America closer to the elimination of discrimination based on sex. Rhode assumes that elimination of such discrimination is one of the goals of American society. She also argues that this goal can be achieved in a way that recognizes women's fundamental equality with men, while accommodating their differences, although she offers no theoretical alternative to the prevailing liberal legal ideology which has proven itself unwilling or unable to

redress the economic inequalities that the rhetoric of formal legal equality obscures and denies.Rhode argues that an approach to rights that focuses on disadvantage, not difference, can incorporate the insights but not the liabilities of the dominance paradigm advocated by some feminist legal scholars.[3] Proponents of the dominance paradigm argue that the most fundamental social hierarchy across time and culture is male dominance of females, and that all female-male interactions take place within this hierarchy. For Rhode, this approach can empower women by offering a sense of shared identity and a powerful rationale for common action, but if such female solidarity is developed through adopting a we/they world view, in which men are the enemy, the price is too high. (83)

It is not entirely clear whether Rhode disavows the dominance paradigm on conceptual or strategic grounds. She quite rightly points out that the dominance paradigm cannot capture the complexity of women's experience, in which "gender is mediated by other patterns of inequality involving race, class, age, ethnicity and sexual orientation." (84) But she seems more concerned with being able to present demands for law reform within "frameworks that can command greater consensus than those cast in terms of oppression." (84) "The rhetoric of disadvantage is ... less easily contested and less readily dismissed than the rhetoric of dominance. Disadvantage invites a dialogue about consequences, not motivations; it can speak in terms of statistical facts and frequencies that take account of differences as well as commonalities among women. Such a framework avoids sweeping causal claims about gender hierarchies that in legal settings are often unnecessary and unproductive." (85)

Rhode admits that a disadvantage approach is inadequate in analyzing rape and pornography. Yet in insisting that one can use either the disadvantage or dominance paradigm, depending on the context, she fails to recognize the crucial difference between disadvantage and oppression. The term disadvantage implies that the source of the problem is something innate to the individual, be it female sex organs or the facial features and skin colour of a "visible minority." Use of the term oppression, however, makes it clear that the problem is not with the innate characteristics, but with the way in which others treat individuals with those characteristics.[4] The dominance paradigm is inadequate because of its ahistoricism — it ignores substantial variations in the nature and extent of women's oppression, depending on time, place and the strength of women's resistance — but a disadvantage paradigm ignores too much of women's real experience. Jokes which denigrate women, sexual harassment, rape, the production and consumption of

[3]See Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass. 1987), and Andrea Dworkin, *Pornography: Men Possessing Women* (New York 1981).

[4]In this context, note that the Oxford English Dictionary (Compact Edition, Oxford University Press, 1971) defines oppression as: 1. exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens 2. forcible violation of a woman; rape.

porn, and even the mass killing of female students who are perceived to be feminists are not isolated acts, but part of a continuum of male/female interaction. That such acts exist and in some cases are even defended cannot but affect relationships all along the continuum.

Rhode deals with rape and pornography in a chapter on "Sex and Violence." She does not attempt to describe the current rape provisions in each of the fifty states, nor does she examine in any detail the reform efforts of the '70s and '80s that were intended to reduce the trauma of the trial for the rape victim, and to eliminate some of the special procedural and evidentiary protections available to men accused of rape. Despite the reforms, she notes that in the late 1980s most states still protected husbands from prosecution for raping their wives, and over one-quarter of the states had expanded this marital exemption to include cohabitants;[5] a few of the states even reduced the severity of the charge which could be laid if the rape victim had previously had consensual intercourse with the rapist. Rhode observes that even in states which changed the law to help the victim, the changes have not significantly increased conviction rates or reduced the incidence of rape. She considers appropriate law reforms to be worthwhile, nonetheless, because both the campaign for the reform and the new legal doctrine help to change public perceptions about the nature of rape, and lay the groundwork for further cultural change. And, Rhode concludes, women's vulnerability to the threat of rape will decrease only with cultural changes that decrease the power imbalance between men and women. (251-3)

Given her recognition of the importance of cultural change, Rhode is curiously cautious in her discussion of pornography. The issue is a particularly difficult one for American feminists, imbued as they are with liberal convictions about the paramount value of individual liberty and free speech. The difficulty is compounded by the fact that anti-pornography feminists often find themselves in company with right-wingers who oppose pornography on quite different grounds, and whose proposals for controlling pornography would likely lead to the censorship of educational materials and of severe limitations on the positive portrayals of homosexuality. Feminists who oppose pornography try to distinguish between erotica, premised on equality and mutual respect in sexual relationships, and material which eroticizes male dominance and female degradation.[6] Researchers remain divided on whether there is any causal link between consumption of violent porn and violent behaviour toward women, but it is clear that the pornographers' depictions of women deny the full humanity of those depicted, and by implication,

[5]The husband's protection against prosecution from rape was eliminated in the Canadian Criminal Code in 1982.

[6]That such a distinction is possible is doubted by MacKinnon, Dworkin and others, who argue that in a patriarchal society, sexual pleasure is constructed in terms of male power and female powerlessness. For an elaboration of this view in the context of a discussion of Canadian obscenity law, see Susan G. Cole, *Pornography and the Sex Crisis* (Toronto 1989).

of all women. In discussing how to deal with this reality, Rhode concludes that legal remedies are less useful than self-help approaches such as boycotts, protests, mass-media campaigns, and curriculum materials for public schools. (She does not recommend direct action such as the illegal destruction of porn material and the property of porn purveyors.) And, noting the divisions within the women's movement on what to do about pornography, she wonders if feminists are not being distracted from dealing with "fundamental social and economic sources of subordination" by a "symbolic single-issue crusade." Yet as Rhode recognized in her discussion of rape, women's social and economic subordination cannot be separated, in theory or practice, from sexuality as hierarchy.

The discourse of rights, however formulated, cannot be relied on to resolve the many questions that are brought together in the phrase "reproductive freedom": access to birth control and abortion, the right to refuse sterilization or surgery for the benefit of a fetus, protection from reproductive hazards in the workplace, control over the new reproductive technologies such as artificial insemination, in vitro fertilization, or embryo transfer, and the rights of so-called "surrogate mothers" who agree to have a child for an infertile couple. In the United States, many of these issues have been addressed in terms of freedom of contract or right to privacy, both central tenets of liberal legal ideology. For example, in *Roe v. Wade* (1973), the United States Supreme Court declared that the right to privacy included a woman's right to decide for herself, at least in the first trimester of pregnancy, whether to carry the pregnancy to term. As subsequent decisions permitting restrictions on access to abortion have made clear, an emphasis on privacy rights ignores the extent to public structures create the conditions for exercising any power of private-decision making. Public decisions about medicare funding, maternity leave, and day-care leave little room for freely choosing whether or when to have children. As Rhode recognizes, what is at stake "is not simply individual rights but social roles. Unless women are able to control their childbearing capacity, they can never assume positions of full equality. ...[C]asting abortion issues solely in terms of individual autonomy ... obscure[s] their collective implications, and reaffirm[s] the public-private dichotomy that feminism challenges." (213)

The lacunae that result from rejection of oppression as an analytic or politicizing concept are most obvious in Rhode's chapter on "Competing Perspectives on Family Policy." In the heady hey-day of the Women's Liberation Movement, Ti-Grace Atkinson wrote: "Marriage, if one examines the laws which define it, is as much if not more in the interests of men than slavery was in the interests of the master. And yet, the aims of the Movement are to get rid of the abuses within marriage, equalize the roles, but, for God's sake, keep the institution. How can you equalize the roles when the essential nature of these roles is to be contrasting? Could you maintain slavery if you "equalized" the roles of master-slave to master-master?"[7] Rhode nods in passing at the literature which emphasizes "the dark side of

[7] *Amazon Odyssey* (New York 1974).

domesticity," but she relegates her discussion of domestic violence to another chapter, and does not dissent from what she perceives to be a general consensus that the domestic sphere is "the cornerstone of social life and social progress." (132)

Undoubtedly, without the intimacy and mutual support which many people find in the family circle, life in the workaday world would be harder to bear. As social historians are beginning to document, in the past most members of the working class were able to provide for themselves only if their individual efforts were part of a family survival strategy. In Canada in recent years, the average standard of living measured per family has been maintained only by the dramatic increase in the number of married women who participate in the paid labour force. And in a world in which governments and corporations are ever more domineering and intrusive, the family for many is a welcome refuge of civility and privacy. But what Rhode and others overlook is that if the family is the only institution for fulfilling these important functions, then situating oneself within a traditional nuclear family becomes a matter of necessity, not a choice freely made from among a range of equally viable alternatives.

Rhode points to the weakening of what she calls "the traditional pattern of family life — a permanent marital union between two heterosexual adults" — as demonstrated by the increase in divorce, illegitimacy, open homosexuality, and nonmarital cohabitation, and the concomitant decliner in social disapproval for such conduct. (134) Her solution for this "problem," however, is to put in place legal structures which will replicate the legal form of the heterosexual marriage in nonmarital unions, gay or straight, with appropriate guidelines for distinguishing "casual from committed relationships." (140) Rhode correctly condemns legislation and court decisions denying homosexuals the right to marry as based in homophobia rather than on any valid legal distinction between heterosexual and homosexual couples. But the law could recognize the right of homosexual couples to celebrate their relationship in marriage without extending the rights and obligations of spouses to all couples, regardless of their intentions. Rhode's argument for treating cohabitants as spouses is paternalistic: she wants the state to ensure that on separation, couples deal fairly with each other. "What little empirical evidence is available suggests that cohabitation generally is not the result of a conscious choice. ...some research suggests [that] explicit determinations not to marry often reflect the preference of only the stronger (generally male) partner." (138) In Rhodes' view, leaving rights and obligations to be settled entirely by the couple in contracts dealing with support and property is not a solution to the problem of inequality within the relationship, since couples either do not think about making a contract with each other, or, if they do, the contract favours the partner with the greater bargaining power.

The experience in those Canadian provinces which in the last two decades have provided for enforceable cohabitation agreements for married and unmarried couples suggests that these predictions are accurate. Implementation of Rhode's proposal, however, would further privilege the "traditional" family, and reinforce

the "heterosexual assumption" — the assumption that we are all going to pair up in male/female couples to reproduce and raise children, and that in this pairing, women and children will have the financial support of a male breadwinner. If law reform in this area were going to move us toward a truly egalitarian and equitable society, in which women were able to live full lives independently of family ties to a male breadwinner, then marital status would have to be rejected completely as the basis for establishing property rights, a claim to support, or preferential treatment under income tax laws.[8] Women not able to support themselves because they had spent their time contributing to the success of their partner's career or raising his children should be able to obtain compensation from their partner for loss of earnings and earning potential, on the legal basis of unjust enrichment. And parents of children should have an obligation to support them, regardless of the parents' relationship to each other. As well, more of the costs of child-rearing should be socialized, and workplaces and career paths completely restructured, so that either or both parents can stay at home with young children.

Implementation of policies such as these would cost money; so do current policies, of course, but different people pay. Rhode is critical of court rulings in the United States which permit discrimination against pregnant workers on the ground that such discrimination is not discrimination on the basis of sex, but she is also concerned that legislation providing maternity benefits or giving pregnant women the right to refuse certain kinds of work without loss of pay or seniority might, like some of the protective labour legislation of the early 20th century, "protect" women out of jobs sought by male competitors. (121) Rhode sensibly recommends pressing for the "broadest possible maternal, parental, and medical coverage for all workers" (a demand particularly important in the United States, where medical insurance and unemployment or disability benefits lag far behind those of other industrial nations) as gender-neutral benefits carry the least risk of entrenching stereotypes or of encouraging covert discrimination. (124) But given the likelihood that it will be some time before women and men share equally in caring for young children and elderly dependants, it might be more sensible to fight for "women and children first." As Rhode notes, if the cost of benefit programs did not have to be paid entirely by private employers and their employees, employers might find it easier to accept that women as well as men want both a family and a chance to develop their potential in the paid work force.

In her chapter entitled "Equality in Form and Equality in Fact: Women and Work," Rhode describes the gender imbalances which persist in the work force despite the implementation of anti-discrimination, affirmative action, equal pay and pay equity measures. As in other subject areas, she concludes that these legal

[8]This proposal, too, is partially paternalistic; its implementation, which would cause quite a stir, might help to dispel the erroneous, but widely-held, belief that family law reform legislation provides adequate protection for a woman if her marriage ends in separation or divorce.

remedies are useful but insufficient. Legislation and litigation does create a climate for change, in deterring abuses, validating individual injuries and empowering victims. But Rhode also wants the government to use the considerable power it wields through funding of education, career counselling, and job-training programmes to counteract the sex-role stereotypes that contribute to women's concentration in lower-paid occupations and at the bottom of workplace hierarchies. (200)

With these as with her other recommendations, Rhode does not demonstrate that a focus on disadvantage rather than difference is the way to achieve an equality in which difference can be recognized, valued and accommodated. At the end of each chapter, the reader knows a great deal more about the current inadequacies of the law, but very little about how we got here or where to go next. In part, of course, this bewilderment is due to the intractability of the problems and the complexity of the dilemmas which Rhode has described so well. But Rhode might have been able to provide better direction had she taken theory more seriously. Apart from articulating her use-as-convenient approach to the dominance paradigm, she leaves discussion of theory to her final chapter, entitled "Conclusion: Principles and Priorities." Rhode characterizes American feminism in the 1960s and early 1970s as emphasizing the similarities between the sexes and their entitlement to equal opportunities, in contrast to what she calls the "relational feminism" of the late 1970s and 1980s which sought to validate women's distinctiveness.[9] Relational feminists focus on women's reproductive role and the nurturing qualities associated with it, and reject the "dress for success" feminism that requires assimilation to male cultural norms and career patterns. Rhode criticizes relational feminist theory for its failure, in common with the dominance paradigm, to pay heed to the impact of culture, class, race and ethnicity. As well, she is wary of the readiness with which it can be appropriated in support of social structures that reinforce traditional sex roles and stereotypes. (310-1)

Ultimately, Rhode calls for "theory without Theory: we need fewer universal frameworks and more contextual analysis." (316) At some point, however, the would-be-reformer must move beyond contextual analysis to envision a new future. Rhode suggests that in the future good society, there will not be "wide gender disparities in status, power, and economic security. Nor will it be a society that limits women's reproductive freedom, tolerates substantial poverty, violence and racial injustice, or structures its workplace without regard to family needs." (317) It would be difficult for any one, liberal or conservative, to find fault with this vision — which should push us to ask why it is not yet reality. Without an adequate theoretical understanding of how law can and does function as an instrument of oppression, it is hard to formulate strategies for using law to further feminist goals.

[9]As Rhode uses the term, it covers an eclectic body of work, from Carol Gilligan's research on female moral values (*In A Different Voice: Psychological Theory and Women's Development*, Cambridge, Mass. 1982) to Betty Friedan's analysis of a "new feminist mystique" as confining as the feminine mystique it sought to replace (*The Second Stage*, New York 1981).