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Equality, Human Rights, Women aud the Justice System

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The author discusses various notions of equality which society has held throughout the ages and suggests a more appropriate definition for our times. Whereas Aristotelians advocated treating likes alike, and the nineteenth century introduced the notion of equality before the law, the twentieth century has favoured a more interventionist approach to equality, seeking to reduce discrimination.

Discrimination includes practices which limit an individual's opportunities. Society is not equal. The differences which exist call for different treatment of different people so that they may each attain equality in society. The obstacles in the way of attaining this objective are better understood after an explanation of the broader societal context.

The author discusses society's experiences with the New Puritanism and the New Pluralism. The debates raging in each "Ism" are unhelpful because they ignore the arbitrary disadvantaging of some people.

The legal culture both responds to and creates societal norms. It therefore has a role to play in reducing and eliminating discrimination towards women. The receptiveness of the justice system depends on how the issue is framed. The author argues that feminism should be viewed as a call for openness so that all may participate. This means reducing inequality and improving access to opportunity. It means reversing discrimination.

Women need to bo treated differently in order to relieve past discrimination, and to allow them to fully benefit from, and contribute to, society. This is not reverse discrimination but rather a warranted change in society's point of view. This is the object of measures like employment equity. Thus, in order to achieve societal equality, a better understanding is required of what impediments have existed in the past.

L'auteure se penche sur les diverses conceptions de l'égalité telles que conçues par la société à travers les siècles et suggère une définition plus adaptée au temps présent. Alors que les Aristotéliciens préconisaient un traitement semblable pour les gens semblables et que le dix-neuvième siècle introduisait la notion d'égalité devant la loi, le vingtième siècle, quant à lui, a favorisé une approche plus interventionniste de l'égalité, pour tenter d'atténuer les signes de la discrimination.

La discrimination inclut les pratiques qui limitent les possibilités de l'individu. La société n'est pas égalitaire et donc, les disparités qui y existent doivent nous amener à traiter différemment les personnes différentes de manière à ce que tous puissent jouir de l'égalité. Les obstacles qui nous empêchent d'atteindre cet objeetif peuvent être mieux compris suite à un examen du contexte social plus large.

L'auteure discute des expériences de la société aux prises avec le Nouveau Puritanisme et le Nouveau Pluralisme. Les débats qui font rage dans chaque «isme» ne nous sont d'aucune assistance puisqu'ils ne tiennent pas compte du désavantage arbitraire subi par certaines personnes.

La culture juridique réagit aux normes sociales et les crée. Elle a donc un rôle à jouer afin de diminuer et éliminer la discrimination qui existe envers les femmes. Cependant, la réaction du système judiciaire face à ce débat dépend de la manière dont le problème est posé. Selon l'auteure, le féminisme devrait être vu comme une invitation à l'ouverture de manière à ce que tous puissent participer. Pour ce faire, il est nécessaire de réduire les inégalités et d'améliorer les opportunités. Il faut inverser la discrimination.

Pour combattre la discrimination subie dans le passé et pour leur permettre de bénéficier et de contribuer à la société dans laquelle elles vivent, les femmes doivent être traitées différemment. Ceci n'est pas de la discrimination à l'envers, mais plutôt un changement justifié dans l'attitude de la société. L'équité en matière d'emploi est un exemple patent d'un tel changement. Bref, pour atteindre l'égalité au sein de la société, une meilleure compréhension des contraintes qui ont existé dans le passé est nécessaire.

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No one opposes equality. As a principle of democratized civilization, it is accepted without controversy. It always has been. But its definition and application produce controversy of a fundamental kind, and we find, on closer analysis, that although no one disagrees with the universal right to equality, few principles attract a wider range of visceral debate. We must have a principled approach to this ineffable principle so that even if we cannot in the end attract universal approbation, we can at least develop an approach that has intellectual integrity. To do this requires a sense of history, philosophy, politics, sociology and law. It requires an understanding of what we are as a society.

For over 2,500 years pundits and polemicists have dissected equality. The Aristotelian and Platonic notions of equality, which Aristotle equated with justice, were proportionate and based on the perceived ability to reason. Essentially, Aristotelians were of the view that persons who are equal should have assigned to them equal things. This would create an elite meritocracy based on clear distinctions between noble and commoner, men and women. With the possessive individualists, Hobbes and Locke, we find that equality was equated with liberty; liberty being defined as the power to be free to do what one wants without unreasonable state interference. The capacity to reason was equated with the ownership of property, and equality was still based on this social stratification. Like Aristotle, likes were to be treated alike in similar situations.

In the nineteenth century, we developed the concept of natural equality, the notion that people were equal before the law. Flowing from Rousseau's theories, the equality theories of Arnold, Mill and Bentham, in the nineteenth century, started to invoke the role of the State, and equality came to be seen as a motivating and interventionist concept. The differences between rich and poor were increasingly identified as inequality requiring readjustment. But essentially, equality in liberal ideology was still a kind of formal equality, or, as Dicey explained it, the rule of law required that law be equally imposed and equally administered in the ordinary courts.[1]

Later, with the liberal-democratic theories of equality introduced in the twentieth century, notions of social and economic equality were increasingly invoked, with a concomitant demand for greater state involvement. We developed the theories of equality of opportunity and expected more from the State in promoting it. As we moved towards what Roberto Unger called "post-liberalism" after the Second World War, philosophers like John Rawls called for redistributive justice, based on an approach which caters to the least fortunate and keeps inequalities to a minimum or to a justifiable level.

Differences were to be taken into account and the recognition developed that if people were all treated the same, or equally, inequality could result. As expressed by C.B. Macpherson, ultimately we developed the notion that the minimum acceptable equality was not an equal right to a certain standard of life, or equal results, but an equal right to attain them by one's energies.

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[1]Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965).

Equality over time has had two consistent features. First, it has been equated consistently with theories of liberty and justice. And, second, it has never been considered absolute. Both assist in the development of a social and legal interpretative analysis.

The social development of equality, reinforced by the legal and political environment, mirrors, not surprisingly, the philosophical trends. As long as equality was based on the Aristotelian concept of treating likes alike, we were unable to acknowledge the role differences played in preventing equality. As Anatole France ironically observed, "[T]he majestic equality of the laws [forbids] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[2] The social outcomes of the formalistic, Diceyan approach to equality were the segregation and disproportionate disadvantage of women and minorities.

We used to feel about women as did B.K. Sandwell, the editor of *Saturday Night*, who said in 1938, "The business of women is to keep house and to keep quiet." We used to disenfranchise Asian Americans and Canadians and expropriate their property. We used to segregate Blacks. We used to exclude disabled persons. We used to ignore native people. We no longer believe it is right to do any of these things.

With the 1954 *Brown*[3] decision of the United States Supreme Court and, a generation later, with that court's *Griggs* v. *Duke Power Co.*[4] decision, we came to re-evaluate how equality assessments were to be made. The *Griggs* case, in particular, in developing the theory of systemic discrimination, radically altered social and legal paradigms and boldly opened the door to the dramatic reduction of social inequality and treated equality as synergetic with theories of discrimination.

This leads necessarily to exploring the nature of discrimination, on the premise that the objective of equality is the eradication or reduction of discrimination. We must start with the relationship between prejudice and discrimination.

Prejudice is the holding of pejorative attitudes based on strongly-held views about the appropriate capacities or limits of individuals or the groups of which they are members. Discrimination is the behaviour which may result. Not all discrimination flows from prejudice. It may flow from stereotyping, by which we arbitrarily attribute characteristics to a person because we attribute those characteristics to the group of which he or she is a member, or discrimination may flow from indifference or neglect.

Discrimination in turn generates all three: prejudice, stereotyping, and neglect or indifference, thereby closing the circle. Those who are prejudiced find their views vindicated by the prevalence of discrimination; those who are discriminated against have little opportunity to prove that the assumptions about

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[2]*The Red Lily*, trans. Winifred Stephens (London: John Lane, 1930) at 95.
[3]*Brown* v. *Board of Education*, 347 U.S. 483 (1954).
[4]401 U.S. 424 (1971).

them are wrong. Our discriminatory behaviour thus flows from self-perpetuating and self-justified intellectual baskets into which we place the information we receive. It is therefore systemic discrimination — unjustified unequal impact — we seek to change through state and judicial intervention.

What conclusion flows from these observations? That an intention to discriminate is not the primary issue. By now most of us are sufficiently sophisticated to understand that we ought not to articulate prejudicial views even if we hold them, and further, most probably do not hold them. But there is often an unconscious acceptance of historic patterns and behaviour which, however innocently motivated, result in a discriminatory impact upon individuals in certain groups. We are thus left with a working definition of discrimination which means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's right to the opportunities generally available because of attributed rather than actual characteristics. Equality does not mean treating likes alike; it means knowing what outside action or remedy may be necessary so that people are in fact treated as equals.

In a wider social context, we recognize that there are differences; we recognize that absolute equality is unattainable or may, in fact, in its formal application, by refusing to recognize differences, create inequality; we recognize that some social stratification and disadvantage exist, perhaps even inevitably, because of immutable differences and the structure of our modern industrial economy; we recognize the incremental nature of the process; and we recognize that equality is a flexible, self-adjusting tool. We recognize that equality is both procedural as a social strategy and substantive as an objective which seeks to reduce stratification and disadvantage. Which brings us to the realization that equality is realized in the reduction of inequality, and that inequality is the existence of discrimination. Equality is the antonym for discrimination, and section 15 of the *Charter*[5] is the guaranteed right of everyone to be free from discrimination.

What does this mean for women? First, a more general societal snapshot is required.

In 1972, the year that I was called to the Bar, Margaret Atwood wrote in her classic book *Survival*, "To know ourselves, we must know our own literature ... Literature is not only a mirror; it is also a map."[6] She could as easily have been talking of law. The centrality of law and its institutions cannot be underestimated as either a reflection of or guide to human behaviour within national boundaries.

Permit me to provide the following simplistic answer to the time-honoured question of whether laws create or respond to social norms: they do both. This may seem like laughing at the social ladder while climbing it, but I think there is more truth to this observation than many would admit. Its importance lies in

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[5]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6](Toronto: Anansi, 1972) at 17-18.

being able to decide how to get to the fairest justice system, and whom we can comfortably take as travel companions. If law both confirms and generates norms, as I believe it does, then we can take everyone: the public whose views seek legislated endorsement or statutory inspiration; the politicians from whom the endorsement or leadership is sought; and the lawyers and judges who interpret all of the above.

I start by asserting that we have to stop pretending that the justice system is not about social justice. The public thinks law and justice are one and the same thing, or intimate friends, or at least on speaking terms. If we continue to tolerate the dissonant dichotomy between the public's expectations of the justice system as the deliverer of justice, and an internal passionate defence by those inside that it merely protects process but not results, we risk perpetual mutual frustration. We need not, and cannot, and should not guarantee any particular result, but neither can we pretend that results are irrelevant. We have to start by appreciating the wider culture and its anxieties under whose umbrella the justice system is operating, so that we can better understand the culture and anxieties of the justice system itself. And then, having played the overture, the play's women performers can come on stage and deliver their lines.

I want to start with the wider cultural picture, because I think the country's emotional environment is very much the context for a discussion on justice. Then, with any luck as this lecture continues, the justice system may come into increasing focus, like a Polaroid photograph, and the images should become easier to identify and explain.

I think there were two main dynamics most recently directing the cultural environment in North America, and they were both worrying for different reasons. The first was the New Puritanism, and the second was the New Pluralism. Both profoundly affect our capacity to create ameliorating strategies.

First, the New Puritanism or Fundamentalism. As far as I can tell, the Old Fundamentalism was about religious orthodoxy and the maintenance of clear distinctions between right and wrong, as ecumenically declared.

In their personal firmament, fundamentalists found answers to most of life's tough calls and were spiritually content to resist moral ambiguity. As time went on, as is the case with many who feel they categorically know the difference between right and wrong, there grew a zeal to impose more universally the moral certainty puritanism preached. By the 1950s, after decades of moral pluralism, exhausted and wounded as we were by the horror and enormity of World War II, puritanism as secular morality surfaced as a majority phenomenon. It took the form of Dwight Eisenhower in the United States, Louis St. Laurent in Canada, the suburbs, bungalows, 2.5 children per family, one spouse per marriage, June Cleaver and her son Beaver, a station wagon and a matching dog. The essence of the movement was conformity, and the majority bought in. The "truth" was obvious, compliance was expected, and competitive truths and their adherents were squelched.

McCarthyism flourished in the name of this moral purity, and decent people behaved unforgivably for years. The people who started the movement

were haters. Their followers were naïve or worse. Anyone who resisted was labelled undemocratic, unpatriotic, Communist or Jewish — often interchangeable terms in those days. Careers were ruined, injustices blatantly encouraged or not discouraged, horrendous assumptions tacitly accepted, and all while the continent yawned and stretched and felt proudly unified by the purity of its monolithic and homogenous morality.

Is it any wonder that we had the turbulent 60s? Or the loquacious 70s? Or the amoral 80s? A devastating world war shatters presumed civilities; the victims are humanism and humanity; the need for spiritual catharsis creates a search for purifiers; the purification which starts nobly at Nuremberg, eventually ends ignobly at the House Committee on Un-American Activities in Washington; the purified parents of the 50s create predictably bored progeny in the 60s; and the 60s are spent overreacting to the overpurification and oversimplification of the 50s.

But the purification of the 60s created its own new tyrannical truths — about adults over thirty and whether you could trust them, about respectability, about rules, and about traditions generally. The only thing that the people raised in the 50s and those raised in the 60s had in common was that each group thought that they had a monopoly on the truth.

And that's why we did so much talking in the 70s. We had to try to figure out which value system was better, which side was right. So we discussed the environment, women, minorities, disabled persons, aboriginal people, marriage, religion, children, sex, language and education. We changed some laws and social norms, and started to regroup. We sought refuge in like-minded people, battered as we were by the increasing stridency of the national and local conversations.

We also started to divide. By the time we finished talking to or at each other in the 70s, we had no idea who was right and who was wrong. There were no villains, but there seemed to be a lot of victims, and we were utterly confused.

In the 80s we fervently became one of three things: conservatized, radicalized or self-absorbed. And each side of the triangle mocked the other two, claimed to represent a broad consensus, and expressed frustration with public institutions. We seemed to lose our compass — and our tolerance. We held each other under siege, but we didn't know why we were giving each other ultimatums.

And on top of all of this was imposed a *Charter of Rights and Freedoms*. I am a serious *Charter* fan and I always have been. But I think we have to be aware of what we coincidentally accomplished in bringing in the *Charter* when we did. On top of a cynicism about whether democratically elected political institutions were properly accountable, we imposed unelected, unaccountable jurists to decide whether rights and freedoms that no one understood, but everyone passionately believed in, were being violated. On top of a debate about whether individual rights or collective rights were supreme, we imposed a *Charter* that was ideologically schizophrenic on the subject, and offered as a

tool for brokering the issue the great jurisprudential problem-solving concept found in section 1: "It depends." On top of the public's relief that at last the concept of human rights was now constitutionally entrenched and therefore supreme, we imposed a notwithstanding clause, assuring people that, in their own interests and for their own benefit, governments could suspend their otherwise constitutionally protected rights and freedoms (but not, ironically, their constitutionally protected division of powers). And, on top of a nation increasingly divided over how to unify whatever it was that was holding it together, we imposed a unifying document that seemed to protect everyone's right to stay diverse.

The *Charter*, in short, gave voice to the lines. Somehow, this merger of "Isms" was accompanied by the acquisition of noisy absolutes whose larynx was fear and whose voice was therefore urgently strident. We forgot, it seems, that nothing, not even rights, was absolute, and as a result, we were losing our balance, even as a country.

So people who drew their lines through the debates of the 70s held tough and stayed tough through the 80s, comforted by the notion that the lines had become rights, and that the rights had been enshrined. In short, everyone now began to claim a monopoly not only on truth, but on justice as well. What before could have been labelled an individual's personal and idiosyncratic point of view, was now perceived by that individual as a constitutionally protected personal and idiosyncratic point of view. And when individuals start to perceive that their points of view have constitutional validity, they start to take those views and themselves very seriously. And from there it's only a short leap to intolerance, to the kind of Pavlovian urge to impose your views on others and, more importantly, to exude the fumes of moral absolutism which fundamentalism exhales. In short, we've come full circle back to the puritanism of the 50s, only now there are more truths demanding compliance and competing for primacy. And the voices are louder and more urgently strident.

As for Pluralism, it represents the attempt at peaceful co-existence by disparate groups who by choice or necessity are interdependent. It implies that each group is equal and acknowledges that each group is different. Again, historically, starting with the 50s, we find a burst of immigration adding to the existing collection of ethnic, racial, linguistic and religious groups; the beginning of human rights laws to protect them from discrimination; and a general concern about how to fit everybody in, or more pointedly, whether they would or should fit in even if we could. Many of these minority groups added their voices to those of the reawakened female ones in the 60s, and spent the 70s adding francophones outside Quebec, and disabled and aboriginal people to the discussion. And, by the 80s, as with the New Puritanism, lines had been drawn, sides taken and expectations forcefully articulated.

When the *Charter* was introduced to this "Ism", rights truly became Capitalized, and people started capitalizing on their rights. This "rights" frenzy produced an interesting phenomenon. As groups and the individuals in them spoke with increasing confidence of their rights, bolstered by the *Charter* and inspired by the Supreme Court of Canada, more and more people outside these groups

started asserting their right to be free *from* pluralism. People we used to call "biased" now felt free to raise insensitivity and intolerance to the level of a constitutionally protected right on the same plateau with the rights of minorities, or women, or aboriginal people. We started to think that all rights were created equal, even the right to discriminate.

Not all rights are created equal. Some are more equal than others. There is a difference between disadvantage and inconvenience. We should not be embarrassed to admit that yelling "fire" in a crowded theatre is fundamentally very different from yelling "theatre" in a crowded firehall; or that teaching Holocaust denial is different from teaching about the Holocaust; or that promoting racist ideas is different from promoting race. The harmful impact is different and so, therefore, should be our attention. The issues in each equation are not and should not be of equal weight on the scales of justice. Intellectual pluralism does not and cannot mean the right to expect that racism or sexism will be given the same deference as tolerance.

And yet, this is what the New Pluralism seems to tolerate: a variety of groups and a variety of views about them, all of perceived equal legitimacy and weight.

That is why it is important to appreciate the difference between civil liberties and human rights; otherwise, we will throw ourselves hopelessly into analytical anarchy over which approach applies when, especially under the *Charter*.

Civil liberties represent the theory of individual rights developed by Locke and refined by Mill, whose premise was that all individuals are equal in their right to be free from arbitrary state intervention. Every individual has the same presumptive right as every other individual to individual autonomy, subject only to those limitations which the State can justify as reasonable.

With respect to human rights, on the other hand, we are speaking of individuals in their capacity as members of groups which are disadvantaged for arbitrary reasons. It is about discrimination against individuals based on ascribed characteristics, because a whole group has been stereotyped as having those characteristics. So we treat the individuals in those groups differently to correct the disadvantage only members of those groups face.

The reason why human rights do not treat all individuals the same is because not all individuals have suffered historic generic exclusion because of group membership. Where assumptive barriers have impeded the fairness of the competition for some individuals, these barriers should be removed, even if this means treating some people differently.

The fact is that, unlike the United States, we in Canada were never concerned only with the rights of individuals. Our historical roots also involved a constitutional appreciation that two groups, the French and the English, could remain distinct and unassimilated, and yet theoretically of equal worth and entitlement. That is, unlike the United States, whose individualism promoted assimilation, we in Canada have always conceded that the right to integrate, based on

differences, has as much legal and political integrity as the right to assimilate. A melting pot, if necessary, but not necessarily a melting pot.

So on the one hand, we find different groups trying to integrate their distinctiveness into the mainstream, and on the other hand, we find other groups trying to keep themselves or their distinctiveness out by setting homogenizing terms and conditions at the gate. Just like the Old Pluralism, but multiplied and with louder and more urgently strident voices.

It is this intensity which is new about these "Isms", an intensity borne of an intense fear of change, and an intensity that turned the national conversation into a series of monologues and harangues. Too many people wouldn't listen to anyone else. Too many were locked in old struggles, wearing old scars as uniforms, and using old vocabulary as weapons. Creative imaginations seemed to have failed, and too many minds retreated into familiar compartments and labels. The issue is not about fundamentalism or pluralism, Old or New. It is about whether some people are being arbitrarily disadvantaged.

Which brings me directly to the legal culture.

The legal culture responds to the rest of the culture in which it operates. The system is best promoted by those who believe in its evolving relevance, and least well served by those who suffer the slings and arrows of constructive criticism badly and call it outrageous. Those intellectual baskets that form the shape of the information we receive have to be changed to make room for new and different information. We must be willing to see first and then define, otherwise we will be unable to listen and respond.

When I started practising law in 1972, I was not personally aware that women suffered any particular disadvantage at the hands of their communities or laws. After all, getting from one year to another in school was a matter of getting the marks; getting into law school was a matter of getting your parents to support your professional aspirations; having children and working was simply a matter of not being told you couldn't; and practising litigation was a matter of making a living doing what you used to get put in the corner in kindergarten for doing — talking too much. I knew from the European novels I had read that there was relentless poverty and human despair, but I did not know from those books, or the teachers who taught them to me, that poverty and despair were different for women. I went through law school in the late 60s without hearing the phrase "human rights", and even the social turbulence I watched in the 60s outside the windows of my legal education spoke to liberation of a universal, not a gender specific kind. Except for having been born in Europe after the War, to Jewish refugees who had spent four years in a concentration camp, I would not personally have known the unspeakable cruelty of discrimination. And, if anything, being an immigrant to Canada conditioned me not to think in terms of entitlements based on differences, but in terms of opportunities based on hard work. So I was raised as a person and as a lawyer to develop an intellectual basket which, while conscious at some level that harm could come to those who were different, preferred to receive information in a shape that suggested that those differences could be overcome with effort.

Then I had clients. And from exposure to *their* realities in the early 70s, I learned that you could lose your children if a judge didn't like the way you were raising them, even if your husband wasn't raising them at all; I learned that you could spend a lifetime helping your husband earn a living, then get nothing from that living if you left him for the wrong reasons; I learned that if you got the kids, you rarely got the money you needed to raise them properly; I learned that if you went to work or if you stayed home, someone was going to tell you that it wasn't what women were supposed to do; and I learned that a separated woman's economic security depended on the return and maintenance of her virginity. All this, assuming she could find and pay for a lawyer who would help her, let alone enjoy the right to have her rights examined in the courts. And all of this was practically irrelevant if you were a black, aboriginal, disabled, gay or poor woman to whom the simple issue was often just getting through the day.

I saw almost no child-care for women; unpaid household evening work at the end of underpaid daytime employment, if they had paid jobs; and a widening gap between the new crop of professional women and the ninety-five per cent who were not. None of this may have been the justice system's fault — after all, the general culture has a trickle-down, supply-side impact on the legal one. But it is the justice system to which we turn for a remedy because it is the system our culture promotes as the one we assert rights in.

No one is accusing the justice system or its players of deliberately creating an insensitive environment. The message is, rather, that the justice system, as the designated primary deliverer of justice, is expected to play a leadership role in its equitable distribution. It is no more appropriate for the justice system defensively to deny that it has a role in either the creation or resolution of the problem, than it is for its consumers to lay responsibility for injustice exclusively at its feet. It does no good for the system to pretend that impartiality precludes openness to wider points of view, nor is it fair to characterize the pleas of women or minorities for empathy as special-interest politics.

What women and minorities in fact seek *is* impartiality, a genuine willingness and capacity to listen with an open mind. The answers to many questions depend on how the issue is framed. Being impartial is being open to new frames. Walter Lippmann said that while people may be willing to admit that there are two sides to a question, "they do not believe that there are two sides to what they regard as a 'fact'."[7] All too often what we call a fact is really a judgment. Some people look at the canals of Venice and see rainbows; others see garbage. Knowing what is a question and what is a question of fact is the essence of being open.

Which brings us to feminism. For reasons I can explain, but not understand, the word "feminist" seems to be the grown-up equivalent to saying "Boo!". I had always understood that feminism was that branch of human rights that concentrated on women to ensure that no arbitrary barrier stood between

[7]Ronald Steel, *Walter Lippmann and the American Century* (Boston: Little, Brown, 1980) at 181.

them and their aspirations. That, it strikes me, is not a controversial proposition. So why is the word for it? What is so scary about getting rid of discrimination?

Feminism, for most feminists, means being open. It means reducing disadvantage and reducing inequality, not conferring benefits. It means ensuring access to amenities which would have been available but for the existence of discrimination. It means making the competition fairer.

Changing the rules of the competition may change who gets the rewards, but if the new winners are people who ought to have been among the old ones, the system is not being unfair — it is catching up. And we will know when the competitions are really fair when women and minorities start routinely occupying places they never used to occupy at all, let alone routinely.

Most women think they should have the right to be what and who they want with no arbitrary barrier between them and their aspirations. Like men. That is what feminism means. It is not something people should be shy about calling themselves, or be labelled a biased radical for. Bias lies in not understanding that right, or that the status quo may inhibit it. Whatever we call it, the philosophy of feminism represents the opposite of intolerance, not its tautology. It wants to include rights for everyone by including women.

Adding layers of tolerance is good for everyone, not just women. Preventing tolerance is bad for everyone, especially women.

There has undoubtedly been fantastic progress. In my lifetime, since graduating from law school in 1970 with five other women, I've seen women graduate as half their law school class, three women on the Supreme Court of Canada, one woman federal Minister of Justice who eventually became Prime Minister of Canada, several women broadcasters, dozens of women legislators and senators, hundreds of women academics and artists, and thousands of women in business. We have changed the support, property and custody laws; expanded human rights laws; constitutionalized equality rights; and brought sexual abuse and orientation out of the closet. We have come a long way in twenty years and should feel no small amount of pride and wonder at the distances travelled.

But for every woman in the thousands whose glass ceiling has been melted, shattered or raised, there are women in the millions who think a glass ceiling is just one more household object to polish. There is still a huge gap between what the public thinks has happened to women because several thousand have had the luck, guts, finances, friends, encouragement or supportive partners to break barriers, and what is really happening for the majority of women.

Only the uninformed think the exceptions are the rule. I think we must quickly move from a temptation to judge the general from our successful particular, to a tendency to resist judgmental generalizations, particularly about success.

Too many women are struggling in the shadows cast by the public's fixation with the credentialed, successful women, trying to get some help and des-

perate to understand how so few at the top can take so much attention and interest away from so many nearer the economic bottom.

Most women still earn less than they should, get hired or promoted less than they should, experience or worry about assaults more than they should, and suffer more stress than they should. They may not be women we know personally, but they are out there and they are hurting.

Those women, and especially minority women who suffer double jeopardy, are waiting for equality to hit them, for the rhetoric of equality they can hear to turn into the reality of equality they can live. They expect, and I think they are right to, that those who have been lucky enough to learn how to speak and live equality will use those strengths to articulate and generate the same equality for others. They expect, and expect us to agree, that all women should be fluently equal.

And if, in response, the cry comes that equality for women and minorities promotes reverse discrimination and violates the merit principle, I offer the following thoughts on the subject.

Reverse discrimination is all too often the rallying cry of those who find their formerly exclusive competition opened up to new and numerous contenders, and who therefore turn to the language of rights to justify retaining their former hegemony. There never was and there never will be objective qualifications for any job, because no two people, articles, books or *curriculum vitae* are identical. We can never say "all other things being equal" because they never are.

The word "qualified" in recruitment searches or hiring discussions means more than a degree from an educational institution. It means a largely subjective assessment of collegiality, area of expertise, languages spoken, ideas promoted, interests pursued, families produced, and so on. And essentially it means "Of all these people with a B.A. or M.B.A. or M.D. or LL.B., which one is most likely to fit in best?" And that, of course, depends on the assessor's view of "best", and of the prevailing workplace culture he or she seeks to perpetuate. And that usually means majoritarianism, which usually does not mean women or minorities. Approaches like employment equity acknowledge that most of this behaviour is unconscious, societal and unintended. However, the unintended consequence of the unintended practices is nevertheless the unintended exclusion of otherwise qualified women and minorities. So the object of strategies like employment equity is to reverse discrimination, not to create it.

And far from employment equity threatening the merit principle, the merit principle is exactly what employment equity is trying to introduce. It is a staggeringly insulting assumption to suggest to women and minorities that their increased participation is an invitation to violate the merit principle rather than an attempt to acknowledge it. I would propose, instead, that it may be premature to talk about how women and minorities are destroying the merit principle unless we are satisfied that that is what we have had up until now.

So, how will we know if we have created the tolerance, fairness and equality for women we constitutionally guarantee? When we stop hearing things like: "What do they want?" or "Who does she think she is?" or "Why can't they get their act together?" or "Who's going to take care of her children?" or "Why doesn't she have any children?" or "My wife/colleague/daughter-in-law is perfectly happy with the way things are," or "Do you think they'll want to work for her?" or "Won't she make waves?" or "What will the clients say?" or "What will her husband say?" or "Why doesn't she have a husband?" or "If I made it, anyone can with a little hard work." When we have equality, all these remarks will be gone because we will have come to understand how irrelevant and ungenerous they are. We will no longer be blaming the victim because there will be no more victims, of any gender, race, disability, religion, language, orientation or anything else we should respect and accommodate in people.

And that, as we reach the year 2000, is something we should want to be able to say we helped achieve as we wander towards the millennium in the next Millennium. That we made human rights a priority and spent the rest of our lives growing it and taking pride in the fruits.

I want to close this lecture by dedicating it to the memory of the former Chief Justice of Manitoba, Sam Freedman. Sam Freedman was the first Jewish Chief Justice in Canada, appointed in 1971. He was a humane intellectual, a wise populist, an unpretentious leader and a very funny man. This was a man who never forgot who he was, where he came from and how lucky he was to be who or where he was. He was as good a jurist as this country has ever produced, and one of its best speakers. His heart and brain worked happily together, and the resulting fusion made him one of the fairest, most loved and respected people I have ever met.

Why dedicate this lecture to him? Because he always felt grateful to Canada for the opportunities it gave him. Yet it was a Canada that had kept Jews like him out of law schools, medical schools, the judiciary and even neighbourhoods, during much of his early lifetime. He never complained. And he never compromised. He waited for the doors to open and while he waited he stayed hopeful, confident that he could remain true to his own personal history while devoting his unique identity to his country's future. As a close friend eulogized at his funeral a few days ago, his lifetime commitment was to *both* his Jewish and Canadian communities and it was seamless. It was also magic. His life speaks to making sure the doors stay wide open to people's uniqueness and unique contributions. If we embrace their differences, the different genders and minorities in this country, and allow them pride in their differences, Sam Freedman's life shows us that they, in turn, will make us proud.