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A Generation of Human Rights: Looking Back to the Future

Abstract

The author traces the development of human rights in North America since the Second World War, and examines the socio-political environment in which these developments took place. In examining what appears to be an existing backlash against the earlier vigorous pursuit of rights for disadvantaged groups, the author distinguishes between civil liberties and human rights, and focuses on how a preoccupation with civil liberties is impeding the ability to promote human rights. She concludes by discussing the evolution of human rights for women this generation, and observes that while there have been significant gains, especially numerically, there has also been increasing resistance to further fundamental change.

Keywords

Human rights--History; North America

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BARBARA BETCHERMAN MEMORIAL LECTURE

A GENERATION OF HUMAN RIGHTS: LOOKING BACK TO THE FUTURE©

BY JUSTICE ROSALIE SILBERMAN ABELLA*

The author traces the development of human rights in North America since the Second World War, and examines the socio-political environment in which these developments took place. In examining what appears to be an existing backlash against the earlier vigorous pursuit of rights for disadvantaged groups, the author distinguishes between civil liberties and human rights, and focuses on how a preoccupation with civil liberties is impeding the ability to promote human rights. She concludes by discussing the evolution of human rights for women this generation, and observes that while there have been significant gains, especially numerically, there has also been increasing resistance to further fundamental change.

L'auteure trace le développement des droits de l'homme en Amérique du Nord depuis la Deuxième Guerre mondiale, et examine l'atmosphère socio-politique dans laquelle ces développements ont eu lieu. En examinant ce qui parait être un choc en retour contre ce que fut, au début, la poursuite vigoureuse des droits en faveur des groupes désavantagés, l'auteure démontre comment la préoccupation des droits libertaires civiques fait obstacle à la capacité de la promotion des droits de l'Homme. Elle conclut par une discussion sur l'évolution des droits de l'Homme pour les femmes de cette génération, et remarque que, bien qu'il y ait des gains substantiels réalisés, surtout de point de vue numérique, il existe également une résistance croissante à tout changement fondamental.

Barbara Betcherman, the incandescent woman for whom this lecture series is named, graduated from this law school almost twenty-five years ago. She burst onto the public scene just in time to help navigate, motivate, and explicate the most energetic rights revision for women in centuries. Looking ahead from her perch as a leader of the rights parade, the future seemed inexorably welcoming; looking back from the present, the rights parade ended a lot sooner than the marchers hoped, a casualty of thinning crowds and unpopular floats.

Last winter, an article appeared in the Sunday *New York Times Magazine* by Leon Higginbotham Jr.,[1] an African-American with a

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* Justice of the Court of Appeal for Ontario, Canada. This is the Ninth Barbara Betcherman Memorial Lecture, presented at Osgoode Hall Law School of York University on October 7, 1998.

[1] A.L. Higginbotham Jr., "Breaking Thurgood Marshall's Promise" *The New York Times Magazine* (18 January 1998) 28.

distinguished forty-five year career as a lawyer, judge, and professor. He wrote about how proud he felt fifty years ago watching Thurgood Marshall argue before the United States Supreme Court, successfully as it turned out, for the right of African-Americans to be admitted to an all-White law school.[2] Less than half a century later, the judicial beneficence of this ruling had turned into the sclerotic jurisprudence that ended affirmative action measures in Texas and California law schools.[3] The result was that out of a total of 736 first year law students at Berkeley and the University of Texas, only 5 were Blacks.[4] Higginbotham cites these statistics as introductory to the poignant ending of his opening paragraph: "I sometimes feel as if I am watching justice die."[5]

In 1990, when the United Nations held its first review of progress since the end of the UN Decade for Women in 1985, it concluded: "The entrenched resistance to women's advancement and the reduction of resources available for change that has accompanied the world economic situation in the late 1980s have meant that there has been a loss of impetus and even stagnation in some areas where more progress would have been expected."[6]

Why has the concept of human rights appeared to move from its early confident primacy in the justice picture, to the current defensive margins of the canvas? What happened to the enthusiastic, gender-collaborative, media-supported, unabashedly idealistic and legislatively-endorsed human rights initiatives of the 1970s, those struggles to change the law of the family, to get more women into the work force, to close the wage gap, to end occupational segregation, to increase child care, and to facilitate the balance between work and family responsibilities? Today, the wage gaps remain sturdily in place; occupational segregation survives intact; child care, nowhere endorsed as a universally desirable public policy, gets debated as if it were about maternal responsibilities

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[2] See *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

[3] In Texas, see *Hopwood* v. *Texas*, 78 F.3d 932, *request for rehearing en banc denied*, 84 F.3d 720 (5th Cir. 1996). In California, see *Coalition for Economic Equity* v. *Wilson*, 110 F.3d 1431 (9th Cir. 1997), *amended and superseded on denial of rehearing*, 122 F.3d 629 (9th Cir. 1997), *amended on denial of rehearing, as amended, stay denied*, 122 F.3d 718 (9th Cir. 1997), *stay denied*, 118 S. Ct. 17 (1997), *cert. denied*, 118 S.Ct. 397 (1997), *on remand*.

[4] Higginbotham, *supra* note 1 at 28.

[5] *Ibid.*

[6] *Recommendations and Conclusions Arising from the First Review and Appraisal of the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women to the Year 2000*, UN ESCOR, 1st Sess., Annex, Agenda Item 4, UN Doc. E/RES/1990/15 (1990) 26 at 27.

and not about children's entitlement; and the work/family discussion has captured the public's attention but not its interest. Anyone who believed passionately in human rights, for women or anyone else, was, in the 1970s, called a moderate. Today, those same views are called radical.

In 1972, at the National Conference on the Law in Ottawa, then Prime Minister Pierre Trudeau committed this generation "to seek a society which emphasizes human dignity in all its manifestations."[7] That is the purpose of human rights, and that is the movie Barbara's generation thought they had parts in. But somewhere along the way, the projector was turned off. Obviously, somebody didn't like the plot.

No one opposes equality or human rights. But their definition and application produce controversy of a fundamental kind. The reasons for the remedial resistance are undoubtedly complex, but worth exploring nonetheless to try to unplug the attitudes clogging the arteries of progress—a progress we thought only a generation ago was unstoppable.

I think there are two main dynamics directing the cultural environment in North America today, and they are both worrying for different reasons. The first is the New Puritanism and the second is the New Pluralism. Both profoundly affect our capacity to create ameliorating strategies and each offers explanations for strategic delays.

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

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[7] The Rt. Hon. P.E. Trudeau, "Remarks by the Prime Minister to the Opening Session" (National Conference on the Law, National Arts Centre, 1 February 1972) [official translation, unpublished, archived at the National Library of Canada].

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 naive 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 homogeneous morality.

Is it any wonder we had the turbulent sixties? Or the loquacious seventies? Or the amoral eighties? Or the indifferent nineties? 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 that starts nobly at Nuremberg eventually ends ignobly at the House Committee on Un-American Activities in Washington; the purified parents of the fifties create predictably bored progeny in the sixties; and a decade in the sixties is spent overreacting to the overpurification and oversimplification of the fifties.

But the purification of the sixties 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 people raised in the fifties and those raised in the sixties had in common was that each group thought they had a monopoly on truth.

And that's why we did so much talking in the seventies. 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, sex, sexual orientation, religion, children, 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 seventies, 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 eighties, we fervently became one of three things: conservatized, radicalized, or self-centred. And each side of the triangle mocked the other two, claimed to represent a broad consensus, and expressed cranky frustration with public institutions. We lost our

compass—and our tolerance. We held each other under siege, but we didn't know why we were giving ultimatums to each other.

And on top of all of this was imposed a *Charter of Rights and Freedoms*.[8] I am a serious *Charter* fan and I always have been. But I think we have to be aware of what we coincidentally did by 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 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 divided 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 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.

So people who drew their lines through the debates of the seventies held tough and stayed tough through the eighties, comforted by the notion that the lines had become rights, and that the rights had been enshrined. Everyone, in short, began to claim a monopoly now not only on truth, but on justice as well. The *Charter*, in short, gave voice to the lines.

What could before 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. 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—the kind of Pavlovian urge to impose your views on others and, more importantly, to exude the fumes of moral absolutism, which fundamentalism exhales. We were forgetting, it seems, that nothing, not even rights, is absolute, and as a result we were losing our balance. So by the nineties we came full circle, back to the puritanism of the fifties, only now there were

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[8] *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 [hereinafter *Charter*].

more truths demanding compliance and competing for primacy. And the voices were louder and more urgently strident.

What about the New Pluralism? In the fifties, it began with a burst of immigration adding to the existing collection of ethnic, racial, linguistic, and religious groups; the beginning of human rights laws to protect those groups 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 sixties, and spent the seventies bringing to the discussion table, among others, Francophones outside Quebec, and disabled and Aboriginal people. And, by the eighties, like 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 are created equal, even the right to discriminate.

But 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 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. 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 seemed to tolerate: a variety of groups and a variety of views about them, all of perceived equal legitimacy and weight. In the zeal to interpret equality as abolishing all distinctions by treating everyone and everything the same way, we forgot that equality sometimes means taking differences very much into account.

So, by the nineties, on the one hand we found different groups trying to integrate their distinctiveness into the mainstream, and on the other hand we found other groups trying to keep them, 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.

We became too "them and us" about too many things and we forgot how to listen. Too many people were claiming a monopoly on truth and insisting on imposing their truths on everyone else. We lost too much of our spirit of generosity and empathy, and grew far too judgemental. We were in danger of losing the ability to disagree with civility, and relied far too much on malicious monologues instead of constructive criticism. We started replacing discussions with harangues, debates with ridicule, and disagreement with sarcasm. We became almost indifferent to compassion.

Part of the problem—a big part—was in how we were allowing the premises behind civil liberties to checkmate the moves that human rights wanted to make. There is a fundamental difference between the rights we protect with civil liberties and those we promote with human rights, but because it is a difference almost never articulated and even more rarely explained, we have allowed the individualism of civil liberties to trump the group realities of human rights.

We have to start at the beginning of the story. The human rights story in North America, like many of our legal stories here, started in England. The rampant religious, feudal, and monarchical repression in 17th century England inspired new political philosophies like those of Hobbes, Locke, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments. These were the theories of civil liberties that came to dominate the rights discussion for the next three hundred years. They were also the theories that journeyed across the Atlantic Ocean and found themselves firmly planted in American soil. Watered by colonial discontent and the persuasive polemics of pamphleteers like Adams, Paine, and Jefferson, the roots took permanent hold in the American Revolution and blossomed into the language of the *Declaration of Independence*.[9] The words confirmed that every "man" enjoyed the right to life, liberty and the pursuit of happiness and that government existed only to bring about the best conditions for the preservation of those rights. Thus was born the essence of social justice for Americans—the belief that each individual, independent of every other individual and of government, was free to pursue his version of happiness in his own way. It was an atomized and atomizing political philosophy, and it venerated the individual over the community. It was the right of every American to

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[9] (U.S.C.S. 1776).

have the same right as every other American to be free from government intervention. To be equal was to have this same right. No differences.

Thomas Jefferson's rhetoric in the *Declaration of Independence* was noble and inspiring. But in offering an equal right to be free from government, it thereby introduced egalitarian language to an unequal society, since these resoundingly noble rights were available neither to women nor to the slaves many of the framers of the *Declaration of Independence* owned. This illusion of equality soon became what a respected British historian designated as "the most vital and magnetic forces in American life—a source of constantly renewed hope and repeatedly embittered disappointment."[10]

Regardless, however, of the historical realities, it is nonetheless the case that the individualism at the core of the political philosophy of rights articulated in the American constitution—ascribing equal civil, political, and legal rights to every individual *regardless* of differences—became America's most significant international export and the exclusive rights barometer for countries in the Western world. It was formal equality, it was Diceyan, it ignored group identities and realities, and, indeed, regarded collective interests as subversive of true rights. Concern for the rights of the individual monopolized the remedial endeavours of the pursuers of justice all over the world.

It was not until 1945 that we came to the realization that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind—namely, the rights of individuals in different *groups* to retain their different identities without fear of the loss of life, liberty or the pursuit of happiness—what we have come to understand true equality means. In our evolutionary relationship with rights theories, the drama of socio-economic disparities during the Depression coaxed Western governments into a newly activist and redistributive role, which the public came to see as a necessary and reasonable limit on the historic right to be free from government intervention.

But it was the Second World War that jolted us permanently from our complacent belief that the only way to protect rights was to keep government at a distance and to protect each individual individually. What jolted us was the horrifying spectacle of group destruction, a spectacle so far removed from what we thought were the limits of rights violations in civilized societies, that we found our entire vocabulary and remedial arsenal inadequate. We started talking about

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[10] J.R. Pole, *The Pursuit of Equality in American History*, 1st ed. (Berkeley: University of California Press, 1978) at 14.

crimes against humanity, genocide, and international enforcement mechanisms. We transcended civil rights with human rights, and shifted focus from the civil libertarian remedies for individual harm to a search for human rights remedies for collective harm. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of, but *because* of their differences, and started to formulate ways to protect the rights of the group.

We had, in short, come to see the brutal role of discrimination. It was a word we had never used, and could never use, when a concept like civil rights prevailed, a concept that permitted no differences. So we invented the term "human rights" to confront discrimination. We clothed governments with the authority to devise remedies to prevent arbitrary harm based on race or religion or gender or ethnicity, and we respected government's new right to treat us differently to redress the abuses our differences attracted. We saw how the neutral purpose of civil libertarian individual rights had an unequal impact on the opportunities of many individuals, and eventually we saw that all the goodwill in the world could not protect us from our own prejudices and stereotypes, or from restrictively designing systems and institutions accordingly. So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played, and extended the prospect of full socio-economic participation to women, non-Whites, Aboriginal people, persons with disabilities, and those with different sexual preferences. And, most significantly, we offered this full participation and accommodation based on and notwithstanding group differences.

Civil liberties gave us the universal right to be equally free from an intrusive state, regardless of group identity; human rights gave us the universal right to be equally free from discrimination based on group identity. Human rights took over where civil liberties left off, but both became crucial rights visions.

It was as if we had awoken from a three hundred year sleep, looked around us, realized how limited our rights vision had become, and, with stunning energy and enthusiasm, acknowledged more rights and remedies in one generation than we had in all the centuries since the Glorious Revolution in England in 1688-1689. In the United States, a new rights approach based on difference and group diversity was reflected in *Brown* v. *Board of Education*[11] banning school segregation;

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[11] 347 U.S. 483 (1954).

in Title VII of the *Civil Rights Act*[12] banning discrimination; and in President Johnson's Executive Orders mandating affirmative action.[13] In Canada, bilingualism, multiculturalism, human rights commissions at both government levels, and the promulgation of an inclusive *Charter of Rights and Freedoms* were the policy reflections of this new anti-discrimination human rights approach we had come to embrace.

Having decided halfway through this century to endorse a commitment to diversity as integral to our understanding of rights and justice and community, why do we now appear to be abandoning that commitment as the century closes?

The underlying concept of human rights—that no arbitrary barrier should be allowed to stand between a person and his or her aspirations—is not, it seems to me, a refutable proposition. One would not have expected that the pursuit of the elimination of discrimination, the heart of social justice, could ever trigger serious rebuttal. What, after all, is the argument against equality? Inequality? Yet controversy swirls intensely all around the diversity stage, and in creating so much protection for social pluralism, we have also created a backlash.

Having witnessed the dazzling success of so many individuals in so many of the groups we had previously excluded, we seem to have concluded that the battle with discrimination has been won and that we can, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted, and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades to demonstrate gay and lesbian pride; having constructed hundreds of ramps for persons with disabilities; and having invited Aboriginal people to participate in constitutional discussions that we had started to protect other distinct cultures, many were no longer persuaded that the diversity theory of rights was still relevant, and sought to return to the simpler rights theory in which everyone was treated the same. We became nostalgic for the conformity of the civil liberties approach, and frightened by the way human rights had dramatically altered every institution in society, from the family to the legislature.

And this, I think, is at the heart of why we are marginalizing human rights, because unlike civil liberties, which rearrange no social relationships and only protect our political ones, human rights are a direct assault on the *status quo*. They are inherently about change—in

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12 Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C.S. §§ 2000e *et seq.*).

13 Exec. Order No. 11,246, 30 Fed Reg. 12,319 (1965), [1965] WL 7913 (Pres.).

how we treat each other, not just in how government treats each of us. And so in North America, we tend to yearn for the rights that are less expensive, less confusing, and less frightening. The intellectual baskets into which we place information once again take the shape of civil rights, and we end by dismissively calling a differences-based approach reverse discrimination, or political correctness, or an insult to the goodwill of the majority and to the talents of minorities, or a violation of the merit principle. Personal aspirations, we are now convinced, will be realized by those who deserve them, and no one qualified will be turned away. Civil rights trump human rights. Social and economic Darwinism trump social and economic reality.

The fact is that, unlike the United States, we in Canada were never concerned only with the rights of individuals. Our historical roots 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. 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.

In Canada, we constitutionally guaranteed human rights in 1985 through section 15, the equality section of the *Charter*. Thirteen years later, it has gone from being the newest kid on the constitutional block to being called the neighbourhood bully. In less than a generation, this remedy for discrimination has been seen to be sufficiently powerful that people struggle urgently to find a remedy *from* equality. How ironic that "equality-seeker" has become a pejorative term, denoting someone whose claim to fairness is a menace to the nation's economy and psyche. The very people for whom equality was introduced—history's victims of discrimination—find themselves suddenly accused of being the *victimizers*. Equality, introduced to guarantee the equal right of tolerance, has itself produced an intolerance the likes of which I have not seen in the almost thirty years since I graduated from law school.

Somehow we have let those who have enough say, "enough is enough," and to set the agenda while accusing everyone else of having an "agenda," and leaving thousands wondering where the equality they were promised is, and why so many people who already have it think the rest of the country doesn't need it.

The reality is this: there are still built-in headwinds for those who are different, who are thwarted in their conscious choices by stereotypes unconsciously assigned, and who cannot be expected to understand why the evolutionary knowledge we came to call human rights has suffered

such swift Orwellian obliteration. We have forgotten the courage that our outrage after the Second World War gave us to expand our understanding and generosity, and have, I fear, been lulled into a false sense of complacency by the formidable human rights successes that resulted from that post-war courage.

We know from history that all rights, especially in their infancy, are fragile and need nurturing. Democratic communities need their civil liberties rigorously protected, but unless they also protect their human rights, they do a disservice to justice. Of course we need the right to vote and think and speak freely, but no less do we need the right to eat and work and aspire freely. Before we relinquish the lessons of history to those who fear its transforming vision, before we allow the civil libertarian spirit to hold us in exclusive thrall, and before we are lured into intellectual lassitude by the successes of the lucky and the tenacious, we need to remember the rights lesson of the Second World War: the enormity of its intolerance shocked us into a new understanding of diversity; we should need no more shocks to retain that understanding.

This brings me to the human rights of women. Until 1968, when the new *Divorce Act* gave men the right to claim support from their wives,[14] nothing had been done that affected the perceptions of men and women of their rights and obligations. Nothing had significantly encroached on the traditions eulogized in 1847 by Tennyson in his poem *The Princess*. As he put it:

> Man for the field, and woman for the hearth:
> Man for the sword, and for the needle she:
> Man with the head, and woman with the heart:
> Man to command, and woman to obey;
> All else confusion.[15]

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 because I had never personally experienced any. For me, 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 were relentless

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[14] S.C. 1967-68, c. 24, ss. 10-12.

[15] A.L. Tennyson, *The Princess and Maud* (London: MacMillan, 1889) at 100.

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 sixties without hearing the phrase "human rights;" even the social turbulence I watched in the sixties outside the windows of my legal education spoke to liberation of a universal, not a gender-specific kind. Except for my 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 of 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 who, while conscious at some level that harm could come to those who were different, preferred to think that those differences could be overcome with effort.

Then I had clients and learned my most instructive lesson: our own personal, fortuitously fortunate realities are not necessarily reality. From exposure to my *clients'* realities in the early seventies, 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 of this assuming she could find and pay for a lawyer who would help her have the opportunity to have her rights examined in the courts. And all of this practically irrelevant if you were a Black, Aboriginal, disabled, gay, elderly, or a poor woman to whom the simple issue was often just getting through the day.

Then, when thanks to the courageous generosity typical of then Attorney-General Roy McMurtry, I was appointed at the age of twenty-nine, to the Family Court bench in 1976, seven months pregnant with our second son Zachary, I saw that there was one court where those who were poor were expected to go, and one for those who were not; I saw children being removed from homes because their mothers were dating the wrong man; I saw girls being removed from homes because their fathers, who were not being removed because it would disrupt the family, had sexually assaulted them; and I saw criminal assaults being

handled in family rather than criminal court because the victims were only wives, not strangers, and the object was to persuade, not punish.

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 95 per cent of women who were not.

Then it all seemed to explode, thanks largely to the determination of women—and men—to blast away at the inequities in the early and mid-seventies. As a result of these efforts in the mid-seventies, we saw a veritable tidal wave of reform, particularly in family law, where the gender disparities were the starkest. Consider: We went from separate property to equal property to pensions as property. We went from *dum casta* clauses,[16] to causal connections, to clean-break theories and, finally, to *Moge* v. *Moge*.[17] We went from women upon marriage having to quit the paid labour force, to the overwhelming majority of mothers being *in* the paid labour force.[18] We went from no divorce, to over a third of Canadian families divorcing,[19] to the new phenomenon in the United States of the possibility of children divorcing their parents.[20] We went from premarital virgins, to accessible birth control, to the sexual revolution, to surrogacy and reproductive technology. We abolished the unity between husband and wife,[21] introduced the constructive trust,[22] extended it to common law relationships,[23] defined common law relationships as spousal

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16 From the Latin *dum sola et casta vixerit* (while she lives single and chaste); a means of limiting the husband's responsibility to support his wife.

17 [1992] 3 S.C.R. 813. For useful discussions of the evolution of spousal support law, see C.J. Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8 Can. J. Fam. L. 95; and C. Sheppard "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1995) 12 Can. J. Fam. L. 283.

18 M. Eichler, *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) at 35-36.

19 C.J. Richardson, "Divorce and Remarriage" in M. Baker, ed., *Families: Changing Trends in Canada*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1995) 215 at 228-30.

20 See, for example, *Gregory K.* v. *Ralph K.*, No. C192-5127, [1992] WL 551488 (Fla. Cir. Ct.) (July 20, 1992).

21 See *Family Law Reform Act, 1978*, S.O. 1978 c. 2, s. 65.

22 See *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436.

23 See *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834.

relationships,[24] and may have extended spousal relationships to same-sex couples.[25]

We moved from children being given to the least blameworthy spouse[26] to children being given to the better parent.[27] We gave children lawyers to speak for them,[28] and we gave them the possibility of being given to both parents jointly.[29] We went from the "tender years" doctrine[30] to the "best interests" principle. We gave children access to the criminal courts to prevent their sexual exploitation from people they had trusted, and we stopped caring whether their parents were legitimate.[31]

The seventies demanded equality for women, the eighties gave them some, and the nineties started to blame social upheavals on the roles we gave women in the seventies and the eighties. We acknowledged that raising children was important, being a mother was important, being a father was important, making a living was important, and equality and the economy were beginning to demand that every adult in the family be responsible for every responsibility in the family. This made the confusion of genders and confusion of roles incredibly confusing.

Just how profoundly we appear to have jolted the *status quo* is painfully apparent in the insults and epithets we too often hear instead of analysis. Name-calling, in my view, is no substitute for thinking. It is hardly constructive to suggest, for example, that every decision that favours a woman reflects a feminist bias, any more than it is helpful to suggest that every time a man is successful it is reflective of male chauvinism. It takes no courage to accuse someone of political correctness or special interest politics. And what is a "special interest"

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[24] See *Family Law Act, 1986*, S.O. 1986, c. 4, s. 29.

[25] See *Rosenberg* v. *Canada (A.G.)* (1998), 38 O.R. (3d) 577 (C.A.); and *M.* v. *H.* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.) (appeal heard and reserved by the Supreme Court of Canada, 18 March 1998).

[26] See, for example, *Talsky* v. *Talsky*, [1976] 2 S.C.R. 292, rev'g [1973] 3 O.R. 827 (C.A.).

[27] See *Children's Law Reform Amendment Act, 1982*, S.O. 1982, c. 20.

[28] See, for example, *Wakaluk* v. *Wakaluk* (1976), 25 R.F.L. 19 (Sask. C.A.); and *Re: W* (1980), 27 O.R. (2d) 314 (Fam. Ct.).

[29] See, for example, Madam Justice Wilson's dissent in *Kruger* v. *Kruger* (1979), 25 O.R. (2d) 673 (C.A.); and *Baker* v. *Baker* (1979), 23 O.R. (2d) 391 (C.A.).

[30] See *Bell* v. *Bell*, [1955] O.W.N. 341 at 344 (C.A.).

[31] See *Children's Law Reform Act, 1977*, S.O. 1977, c. 41, ss. 1, 18-24.

group anyway if not just a shorthand way of presumptively dismissing some group's arguably legitimate concerns?

This brings us to feminism. We read about poststructural feminists, political feminists, different-voice feminists, careerist feminists, liberal feminists, eco-feminists, personal development feminists, and New Age feminists. But we also read about Camille Paglia, who refuses to set foot in the feminist cathedral and sneeringly disdains its catechism.

Women seem to have gone from worrying in the seventies about whether feminists could help achieve economic, social, and political equality, to worrying in the nineties about whether they could do all that and still wear lipstick. Yesterday's query: Can you be a thinking woman and not be a feminist? Today's query: Can you be a thinking feminist and still have plastic surgery?

Or so it seems from reading the popular press. I think it's fair to say that feminists have lost the public relations war and won the public's ingratitude. Articles about women's issues, when they do appear, tend to be about how young women feel no need for feminism, how the women's movement has unfairly appropriated domestic violence, how women get custody too often, how women lie in sexual assault cases, or how women have waged a gender war and the battlefield is littered with wounded children and husbands.

And then there are all those revealing comments one hears at the nation's dinner tables: "Why can't they get their act together?;" "Who does she think she is?;" "My wife/colleague/daughter-in-law is perfectly happy with the way things are;" "Do you think they'll want to work for her?;" "Won't she make waves?;" "What will the clients say?;" "What will her husband say?;" "Why doesn't she have a husband?;" "No wonder she doesn't have a husband;" "If I made it, anyone can with a little hard work;" "She's gone too far too fast;" or "She would never have gotten there if she weren't a woman."

For reasons I can explain but do not understand, the word *feminist* seems to be the grown-up equivalent to saying "Boo!," the Poltergeist of modern discourse. I had always understood that feminism was that branch of human rights that concentrated on women to ensure that no arbitrary barrier stood between them and their aspirations. It means adding women to where they had not been before; it does not mean kicking out the former occupants. It means ensuring access to amenities that would, or should, have been available but for the existence of discrimination. It means making the competition fairer. That, it strikes me, is not a controversial proposition. So why is the

name for it? What is so scary about getting rid of discrimination against women?

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. It seems to me to 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.

Making the competition fairer may change the composition of who gets the rewards, but if some of the new people getting rewards are people who ought to have been among the old ones, the system is not being unfair, it is catching up.

The philosophy of human rights represents an attempt to add layers of tolerance. It is a philosophy that is the opposite of intolerance, not its tautology. It wants to expand rights for everyone by *including* women and minorities. Adding layers of tolerance is good for everyone, not just women and minorities. Preventing tolerance is bad for everyone, *especially* women and minorities. It is not, in my view, a bias to understand the systemic discrimination of women and minorities; it might be a bias not to. Neutrality is not compromised by treating some social differences differently; ignoring them might be.

There has undoubtedly been remarkable progress this generation. 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; two women become federal ministers of justice, one of them briefly becoming prime minister; a woman as clerk of the Privy Council; many women journalists; dozens of women legislators and senators; hundreds of women academics and artists; and thousands of women in business and the public service. 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. There are many more fathers committed to spending time as fathers; many more husbands committed to spending time as partners; and many more men committed to spending time as mentors. We have come a long way in this generation and should feel no small amount of pride and wonder at the distances traveled.

But for every woman in the thousands whose glass ceiling has been melted, shattered, or raised, there are women in the millions who see a glass ceiling as 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 them.

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 desperate to understand how so few at the top can take so much attention away from so many nearer the economic middle and bottom. Most women still earn less than they should, get hired or promoted less than they should, have less child care than they should, experience or worry about assaults more than they should, and endure more stress than they should. The only thing they have more of than men is poverty. They may not be women we know personally, but they are out there and they are hurting.

Those women, and especially minority, disabled, elderly and Aboriginal women who suffer double jeopardy, are waiting for human rights to hit them, for the rhetoric of equality they can hear to turn into the reality of equality they can live. They expect that men and women 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 they are constitutionally right to expect, that both of this country's official genders should be fluently equal.

I remain tenaciously optimistic that the generosity of a generation ago will recover from the sclerosis it is experiencing as the century closes. And I remain so because I have confidence that a sense of justice is so firmly embedded in our best sense of who we are and what we want to be as a country, that not for long will it be permitted to languish behind less tolerant policy priorities. This generation has witnessed dramatic social reforms. Perhaps this rest period was inevitable. But so too is the next generation's reawakened conscience, assisted, I expect, by many of you now in law school who will carry into your future that same passion for justice that fuelled Barbara Betcherman's vision.

And so, at last, to Barbara Betcherman. I have met many extraordinary people in my life, but I have never met anyone quite like Barbara. She was a true original. Brilliant, beautiful, funny, irreverent, loyal, loving, fearless, and passionate. She was on the cutting edge and she was way ahead of it. She never did anything except exceptionally. She was top of her class at Osgoode, managed the Book Cellar Bookstore, articled with the Morand Commission on Public Brutality, helped found the Toronto Rape Crisis Centre, directed the research at the Canadian Broadcasting Corporation's Ombudsman program, practised law, worked as a federal prosecutor, married an outstanding

young criminal lawyer, and wrote her first novel, all before she was thirty.

That was the age at which she decided to become a full-time writer. Having satisfied herself and the rest of us that she could master law, she moved into her next life as a novelist which, it won't surprise you to learn, she also mastered. I'll never forget reading her first book, *Suspicions*,[32] and being utterly swept away by her talent. She had made up her mind to write a bestseller and she did, first time up. Over half a million copies printed, a three-book contract from Putnam, and a six-figure advance. The book was a thriller—smart, fast-paced, unusually literate, and infused with spirited determination. Just like Barbara.

She moved to Guadalajara to live the writer's life. Her hips were crushed in a devastating car accident on a hot, deserted road in Mexico, leaving her without medical attention for hours. She, however, refused to be crushed by what would overwhelm most people. She came back to Canada briefly to restore her body, her mind being tenaciously unharmed by the trauma, then moved to a wonderful little house on the beach in Malibu near Alice's Restaurant, where she reconstructed her life as a novelist and scriptwriter, dazzling her new friends as she had her old ones with that magic personality.

Fifteen years ago, she was struck by a car in front of her home on the Pacific Coast Highway. This year would have been her fiftieth birthday. Losing her passionate commitment left a shocking void, and the pain left us breathless. It was inconceivable that this force of nature could ever be stopped, could ever be made to loosen her grip on the spirit of our times.

Well, she wasn't stopped. Her contribution goes on and on, through the memory of her relentless acuity, through the memory of her irresistible audacity, and through the memory of one of the most devastatingly mischievous senses of humour ever to hit the women's movement.

She came by it all honestly. The remarkable parents she revered are the living answer to the question: What made Barbara Betcherman the charismatically brave humanist she was? Her mother, Lita-Rose, got her Ph.D. in history in her forties, wrote ground-breaking history books, was the first director of the Ontario Women's Directorate, and is one of this country's premier labour arbitrators. Her father, Irving, got his Ph.D. in engineering in his twenties, ran a successful steel business until he decided, in his fifties, to follow his daughter's example and get a law degree from this law school. How often she talked abut how important

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[32] See B. Betcherman, *Suspicions* (New York: Putnam, 1980).

they were to her, how much she admired their generosity, wisdom, and tolerance, and how much she loved the gentleness of their strong character. All four of the Betcherman children—Barbara and the three wonderful brothers she adored—cherished their parents and each other, and relished the intellectual and emotional richness of their marvellous home.

Yesterday was the Betchermans' fifty-second wedding anniversary. This lecture is my present to them, along with my love and gratitude for a generation of friendship.

I am deeply grateful to them for the honour of linking me publicly with their magnificent family, and I thank them particularly for permitting me to pay tribute to one of this generation's most remarkable women, their daughter, the indomitable and the inimitable Barbara Betcherman.