University of British Columbia, Faculty of Law

LawFemme

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Centre for Feminist Legal Studies

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In This Issue

THE WOMEN'S COURT OF CANADA ROCKS UBC LAW!

By Kate Bond, Law I & Claire Immega, Law I

On March 9, the Faculty of Law had the good fortune to host the Women's Court of Canada, an organization of "academics, activists and litigators who have undertaken to rewrite Supreme Court of Canada equality judgments in order to challenge conventional thinking about equality." The main event consisted of a panel presentation by four noted legal scholars and activists, all of whom offered criticism of major Supreme Court decisions which have failed in regard to fostering substantive equity in Canada. The four presentations, far-ranging in scope and subject matter, held a number of common threads. One in particular consisted of the panelists' dissatisfaction with the Supreme Court of Canada's resistance to claims of systemic discrimination, and likewise to evidence grounded in adverse effects on particular groups.

> "An interesting moment of silence and exchanged looks ensued, followed by Gwen Brodsky's forthright and eloquently expressed conviction that equality, as the word is used in s. 15, was indeed capable of bearing and sustaining such a meaning."

Diana Majury, of Carleton University, introduced and contextualized the Women's Court of Canada. Denise Réaume, of the University of Toronto, spoke of her frustration with the Court's "disingenuous" decision, in *Kapp*, to return to the test for discrimination set out in *Andrews*, abandoning the "dignity" stage of the inequality analysis. Gwen Brodsky, of Vancouver's Poverty and Human Rights Centre, described two recent Supreme Court decisions, one which gave her cause for hope, the other for discouragement; her presentation in particular underscored the Supreme Court's unwillingness to admit the validity of evidence based on adverse effects.

In light of Pivot Legal Society's recent decision to issue a renewed Charter challenge to laws which effectively criminalize prostitution, we were particularly interested by Professor Janine Benedet's presentation, titled "Does Prostituting Women Make Them Equal?" She characterized past and current challenges to such legislation as targeting, misguidedly, the threat to formal equity which such laws appear to codify—challenges which, for example, characterize prostitution as a non-gendered, commercial transaction. Professor Benedet suggested that a more appropriate treatment of the issue would recognize and frame the argument around the reality that sexism is inherent to the institution of prostitution, and that attacking the legislation on grounds of

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Universal Periodic Review of Canada—Feminist Concerns and Recommendations

By Annabel Webb,

Social Justice Community Scholar, Faculty of Law, UBC
& Co-Founder of Justice for Girls

The Universal Periodic Review (UPR) is a new and unique mechanism, created by the United Nations General Assembly in 2006, which involves a review of the human rights records of all 192 UN Member States once every four years. Under the auspices of the Human Rights Council, the UPR provides each State the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations pursuant to various international human rights treaties. The UPR is a "peer" review process in that each member state prepares questions and recommendations for every other state party. Currently, no other universal mechanism of this kind exists.

In January of this year I attended the United Nations, along with 3 other NGO delegates, in preparation for Canada's first ever Universal Periodic Review. We met with about 35 State parties to assist them in preparing their questions and recommendations to Canada. We raised numerous substantive human rights issues such as homelessness and poverty, violence against girls and women, cuts to civil legal aid, abuse of teenage girl prisoners, lack of universal childcare, lack of pay equity, abuse and exploitation of domestic workers, and more. Justice for Girls was particularly focused on educating state parties about Canada's failure to gender youth policy, continued practice of incarcerating girls in co-ed facilities and allowing cross-gender monitoring, failure to investigate and prosecute violence against Indigenous teenage girls, failure to provide gender specific and transition housing for girls escaping violence and failure to eradicate poverty and homelessness amongst girls.

We also raised an overarching concern about Canada's failure to implement international human rights domestically including the lack of any meaningful follow-up or implementation of recommendations from UN treaty monitoring bodies or special procedures, and the lack of effective domestic legal remedies for some rights violations. We informed state parties of Canada's failure to engage in meaningful consultation with NGO's in the preparation of Canada's national Report to the Human Rights Council (which is expected of all state parties in preparation for their UPR), and pointed to the governments' general disregard and hostility toward NGO input. We also pointed out that UN treaty bodies and experts have become increasingly frustrated with Canada's pattern of ignoring UN recommendations.

Canada's UPR occurred on February 3rd, 2009. Sixty-eight state parties went on the record with comments, concerns and recommendations to Canada. Numerous State parties called on Canada to immediately reverse its opposition to the *UN Declaration on the Rights of Indigenous Peoples* (adopted by an overwhelming majority at the United Nations in 2007) and to respond to the epidemic of violence against Indigenous girls and women. A number of states expressed concern that despite Canada's affluence, poverty and homelessness continues to be a serious and urgent problem. Several recommended that Canada implement a national strategy to eliminate poverty, and better address the problems of homelessness and inadequate housing. Numerous states raised concerns about Canada's approach to violence against girls and women, and in particular, domestic male violence. The Government of Canada must decide to accept or reject UPR recommendations between now and the next meeting of the Human Rights Council in June.

For more information about the UPR and Canada's Review see:

http://www.upr-info.org/

http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

Visiting Scholar Q&A with Erika Rackley

Senior Lecturer, Durham Law School, Durham University

Q: What, if anything, did your visit to UBC Law through the CFLS visiting scholars program contribute to your present research? Did your visit spark inspiration for new directions for your research or new research more broadly?

E.R.: I'm so pleased I finally made it over to UBC. Your list of previous visitors reads as a 'who's who' list of feminist legal scholars - so it's great to join it! I spent my time working on my book - 'Women, Judging and the Judiciary - From Difference to Diversity' - and really appreciated the opportunity to make some serious headway on the opening chapters.

Q: Was the public lecture for the CFLS Lecture Series a positive experience? Did it contribute to your research and/or research networks? If so, how?

E.R.: Yes! I could see the snow-topped mountains out of my corner of my eye as I lectured - so how could it not be? Academically, it was great to talk to an international audience about some of the things I'd been thinking about during my time at CFLS.

Q: What was your favourite part about your visit to UBC Law and/or Vancouver?

E.R.: Academically, it was great to listen to members of the Women's Court of Canada - although the highlight of my trip was snowshoeing on Cypress - fantastic!

Visiting Scholar Q&A with Neil Cobb

Lecturer, Durham Law School, Durham University

Q: What, if anything, did your visit to UBC Law through the CFLS visiting scholars program contribute to your present research? Did your visit spark inspiration for new directions for your research or new research more broadly?

N.C.: My month as a visiting scholar at UBC was fantastically useful, giving me an important opportunity to consolidate some of my ideas on queer legal theory, my particular research focus, and especially my developing interest in the tension between gay rights and demands for religious accommodation: a hot topic right now in the United Kingdom.

I made good use of your excellent library resources – both legal and sociological - to catch up on some of the lesbian and gay studies literature I've never had the chance to read because of the day-to-day demands of teaching and administration back in Durham.

I also enjoyed some valuable discussions with faculty and students over my time on campus. Thanks must go especially to Susan Boyd, Fiona Kelly, Bruce MacDougall, Geoff Rawle, and all the students working at the Centre, for taking time out to chat!

Q: Was the public lecture for the CFLS Lecture Series a positive experience? Did it contribute to your research and/or research networks? If so, how?

N.C.: I thoroughly enjoyed my lecture. The ethical debate over how best to reconcile gay rights and religious interests is something I've wanted to write about for a long time. Preparing the lecture finally gave me the impetus I needed to actually put pen to paper.

Some very useful discussion after the lecture, including valuable feedback about the approach taken to questions of religious accommodation in Canada, has helped focus my arguments. Now I've returned to England, it's time to actually get working on the article!

Q: What was your favourite part about your visit to UBC Law and/or Vancouver?

N.C.: Heavy snow, pelting rain and sunshine all in one day certainly kept me on my toes! So many fantastic experiences in Vancouver: snow-shoeing on Cypress, puttering round Kitsilano (while maxing out my credit card), crossing over to wonderful Bowen Island, plentiful and cheap access to high quality coffee, and so much more!

And at UBC: definitely seeing the Women's Court of Canada, and the opportunity to learn something of First Nations legal studies from a deeply moving lecture delivered by Beverley Jacobs, President of the Native Women's Association of Canada.

The 32nd Annual Women and the Law Dinner

By Megan Alexander, Law II, Incoming Women's Caucus President & Dani Bryant, Law I, Incoming Women's Caucus Vice-President-Internal

Thursday, March 5th, 2009 marked the 32nd Annual Women and the Law Dinner, organized by the UBC Law Women's Caucus. The event, held as an International Women's Day event, took place at the Law Courts Inn and was attended by over 65 women students, faculty, legal scholars, lawyers and judges.

The first Women and the Law dinner was started by Ruth Lea Taylor in 1977 to provide a venue for women in the legal community to celebrate their professional accomplishments and the contributions that they have made towards equality through their work. The dinner also acts as a forum to exchange ideas and support and is a valuable opportunity for students to network with women in the profession.

One of the highlights of the event every year is the tradition for students to give toasts to women who have played a mentoring role or had an impact on their lives. There were many thoughtful toasts made throughout the evening to faculty, students, alumni and practitioners.

This year's keynote speaker was Megan Ellis, QC, who received her LL.B from UBC Law in 1987. Megan specializes in matrimonial and civil sexual assault litigation, often advocating for low-income clients, through her Vancouver firm, Megan Ellis & Company. She has pioneered the efforts of sexual assault survivors to sue for damages and was co-counsel in the first case in Canada to successfully extend the limitation period for survivors of sexual abuse.

Megan spoke about the history of the feminist movement and the progress of women's rights since women gained the right to vote. She emphasized that these rights were achieved because women were not willing accept the status quo and fought against inequality. Megan brought attention to the pernicious state of oppression today and urged dinner attendees to continue to fight oppression and inequality even though it may not be as easily identifiable as in the past. While the state of oppression in some senses may be more elusive than before, there is still much work to be done to end inequality. Megan's speech empowered dinner attendees to reflect on the inequalities in their communities to stand up against the oppression.

Thanks to the executive committee of the UBC Law Women's for organizing such a fantastic event. A wonderful evening was had by all.

Check Out the Feminist Legal Studies & Centre for Feminist Legal Studies Website!

http://faculty.law.ubc.ca/cfls/

Why Burke, Hayek and Other Social Conservatives Should Support Same-Sex Marriage

By Geoff Rawle, Law III

By way of introduction, let me say I came around to this argument while thinking about the reproductive freedom of minorities, such as lesbian and gay, infertile and single people. These folks share a common trait: their sexual partner and reproductive "partner" is often two different people. When a lot of people think of marriage, they think of sex, children and finances. For them, marriage has meant combining sexual, reproductive and economic partnership. I'm going to call that understanding "traditional marriage". So I came into this thinking "traditional marriage" was an institution that made reproduction comparably difficult for people whose sexual or economic partner doesn't overlap with their reproductive partner. This disadvantage is legally imbedded in the tax code, parenting and custody rights, etc. It's in culture through the concepts of monogamy and fidelity.

A lot of the opposition to same-sex marriage has come from so-called "social conservatives". They've opposed change to "traditional marriage". A common argument against social conservatism goes like this: "traditional marriage" is an incoherent concept; marriage has changed so much throughout history that it's just not a static idea; it's capricious to pick an arbitrary definition that excludes homosexuals. That's not the argument I want to make in this piece. I want to accept that "traditional marriage" is coherent and accept some basic tenets of social conservative thought. But I want to show that social conservatism can no longer support marriage as "traditional marriage". Adherence to tenets of social conservative thought actually suggests now is a good time to change the definition of marriage.

I'm interested in a particular kind of social conservative thought: secular social conservatism. I'm not talking about what the biblical texts say or any religious conservatism. I'm interested in conservative thinkers such as Burke and Hayek. Let me review what they have to say about social customs and institutions.

For conservatives such as Burke and Hayek, social customs like marriage are a response to the natural world we live in. They serve as ways to resolve challenges that exist in the lived human experience. Burke articulated the idea that, over time, communities build up practices, customs, traditions that help resolve conflicts and problems that arise. For example, if you're walking into a head on collision, you know to keep to the right (at least in Canada). Customs are built up over time, generation after generation puts wisdom into them interactively, and slowly established social institutions emerge that respond to the range of possible challenges humans face. Hayek posits a theory of collective human wisdom stored in social institutions. This is a sort of Darwinian model of customs: they evolve over many generations to resolve human problems.

The important conclusion to take from this theory is that social institutions reflect physical and psychological realities that are intrinsic to our nature; they are not a reflection of our desires or intentions. And that's how social institutions should be, because generations of collected wisdom is wiser than any self-interested social engineering we can do as individuals on the basis of individual (often self-interested) desires.

What I want to ask is: what happens when the instrinsic physical and psychological realities of our nature change? In such instance, social conservatives shouldn't oppose institutional changes; rather they should embrace them as the evolution of our intrinsic nature. I argue the world has changed in ways that make a strict correspondence between sex, reproduction and economics less necessary. I'm thinking of a few things here, but let's start with one: the wide availability of a variety of contraceptives.

Without contraception, you can see how an institution like marriage that binds sex, reproduction and economics would gain traction. It makes a lot of sense for society and women. Society wants an economic unit to deal with the consequences of sex, namely reproduction. Women have a pressing interest in being assisted while pregnant and caring for their children. An economic union with the father is one possible source of assistance.

What I want to say is: human beings started with a natural order dictated by biological reality, which made marriage as a social institution useful for society and for women as a distinct group. But the availability of contraceptives changed that biological order. Social conservatives say we shouldn't change customs because customs incorporate unknown wisdoms about the human experience. Well, the human experience has changed.

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Visiting Scholar Margaret Davies Visits UBC LAW

Professor Margaret Davies, School of Law, Flinders University, Australia, visited UBC Law Jan. 15-23, 2009.

Marlee G. Kline Essay Prize

"The various intersections between gender, race, class, sexual orientation, and other differentiating characteristics, affect *how* and *when* all women experience sexism."

(Marlee Kline, 1989)

The Centre for Feminist Legal Studies will award a $250 prize to the best essay written by an LL.B. student attending UBC during the 2008-2009 academic year, addressing the themes identified in the side quotation in relation to a topic dealing with law or legal regulation. The prize is offered in the name of Marlee Kline, a feminist U.B.C. law professor who died in November 2001. The essay should be written for a U.B.C. course, seminar, or directed research project and must incorporate feminist research and analysis.

Length: The essay shall be between 4000 and 10,000 words, and shall be typewritten and double-spaced, using 12 point font.
Selection: The submissions will be reviewed by a committee consisting of feminist law professors and students.
Submission: Students should send essay submissions to Professor Susan Boyd, Director of the Centre for Feminist Legal Studies, Faculty of Law, University of British Columbia, 1822 East Mall, Vancouver, B.C. V6T 1Z1. boyd@law.ubc.ca

DEADLINE: May 8, 2009

Social Conservatives & Same-Sex Marriage *continued*

Other changes make traditional marriage less relevant to today's lived experience: prolific divorce, female legal personhood and attachment to the paid workforce, reduction of violence as a source of power, individual economic independence, increased androgyny/weaker correspondence between gender roles and sex, etc.

So it's not that "traditional marriage" is an incoherent concept, it's that "traditional marriage" is based on outdated physical and psychological characteristics of the human experience. Traditional marriage doesn't resolve the human problems that arise in contemporary society. For most people now, sex is more recreational than it is reproductive. The same applies to marriage. Marriage is more about choice, than about reproductive, sexual or economic partnership. Sex happens before marriage, marriage contracts limit economic partnerships, reproduction out of wedlock is common, and no longer carries a stigmatizing taboo.

I'm not challenging the wisdom that when sex and reproduction do go together, economic responsibility should go too. Reproduction should carry economic consequences, but whether or not sex is involved isn't important. My point is: it's no longer necessary to base a primary social institution around sex, reproduction and economics.

What does this have to do with same-sex marriage? Well, if we're going to have marriage at all, it has to have a reason. And if sex and reproduction are removed, then economic partnership is left. And so are intention, commitment and love. It doesn't matter whether you're gay or straight if the purpose of marriage is to bond and form an economic union.

WOMEN'S COURT OF CANADA *continued*

formal inequality is insufficient to address the deeper social problems at work.

During the question and discussion period which followed, I asked whether the panellists were optimistic as to the ability of s. 15 of the *Charter*, as worded, to further the objective of substantive equality. An interesting moment of silence and exchanged looks ensued, followed by Gwen Brodsky's forthright and eloquently expressed conviction that equality, as the word is used in s. 15, was indeed capable of bearing and sustaining such a meaning. Other panelists agreed. In the wake of *Gosselin* and its ilk, it was a heartening moment. And even more importantly—as a study of effects—all of us (including my mom, who came with me) left talking about the *Charter* and its significance to our own lives.

- Kate Bond

After the panel the WCC offered break-out sessions to discuss s.15 cases that WCC members have re-written in greater detail. I attended Professor Réaume's session on *Law v. Canada*. Professor Réaume's reconceptualization of *Law* critiques the SCC's approach to equality, exposing how the *Law* test limits the effectiveness of s.15 in promoting substantive equality.

I found Professor Réaume's careful and thorough dismantling of the logic of the SCC in *Law* particularly fascinating. While my ability to follow the nuance of her analysis was limited by lack of familiarity with the case (we're just about to get to s.15 in Constitutional!), I was struck by how a drastically different outcome can result from beginning from a different point of view. Professor Réaume's analysis of *Law* is incredibly systematic, detailed, and far-reaching – it made sense legally and logically, yet it stands in opposition to the equally systematic and legally sensible analysis in the SCC's *Law* decision.

The WCC decision in *Law* emphasized for me the epistemological problems inherent in who the justices of the SCC are and the way in which they approach equality problems. I left thinking to myself that it is not enough that equality is constitutionalized and legally enshrined in Canada. In order to achieve the values inherent in s.15, Canada (and Canadian judges) must change the way they think about equality. The tension, it seems to me, is this: the Charter may ask us to believe in and seek equality, but until we learn to approach these problems from a position of true acceptance of the value and substance of equality, s.15 will be of limited use. Thankfully, people like the women of the WCC are working to teach us all how to better believe in and seek equality.

- Claire Immega

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