

Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change

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Introduction: Gender and Legal Aid Services

Legal institutions have always strongly resisted change, and they remain under suspicion of deeply entrenched and insidious gender bias, hard to identify and even harder to eradicate.¹

Evatt J's assertion about the hidden nature of gender bias focuses attention on legal institutions generally, and the difficulties in identifying and eradicating gender bias in the context of law. Her assertion challenges us to re-examine accepted legal practices and institutions to expose bias which has been so deeply entrenched that it has become invisible. Such a challenge is particularly interesting in relation to legal aid services, now an accepted feature of legal institutions in both Canada and Australia. In such a context, the question is whether, and in what ways, gender is a factor in current arrangements for legal aid services. In addition, we may ask whether and how gender impacts on the achievement of equality objectives for men and women in the context of legal aid services in both countries.

The primary purpose of this paper is to explore Evatt J's challenging assertion about gender² bias in relation to my ongoing research about legal aid services in Canada. Assuming that gender bias is deeply entrenched in legal aid practices and institutions in Canada, what kinds of research approaches can most usefully be adopted to both identify and seek to eradicate gender bias? Such a question appears to be essentially methodological and may thus appear to be neutral and objective. By contrast, Evatt J's assertion suggests that the process of investigation — the ways in which questions are posed — may be critical to the choice of solutions available; and that even methodological questions may challenge law's traditional claims to neutrality, objectivity and impartiality, claims epitomised in the traditional metaphor of

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1 Evatt, J, "Foreword" in Graycar, R and Morgan, J, *The Hidden Gender of Law* (1990) at v.

2 In this paper, I have adopted the word "gender" rather than "sex", a choice which has generally been adopted by gender bias task forces investigating law and legal processes both in Canada and in the United States. See also Rhode, D L, *Justice and Gender: Sex Discrimination and the Law* (1989) at 5.

justice: the blindfolded woman holding the scales of justice. In such a context, an assessment of gender bias as a possible factor in legal aid services implicitly challenges the validity of law's claim to impartial justice for men and women.

As Evatt suggested, the tasks of identifying and eradicating gender bias in law and legal processes are difficult because of the "hidden"³ nature of such bias and because of resistance on the part of legal institutions. In this context, two related legal developments in Canada have encouraged ongoing challenges to law's traditional claims to ungendered justice. One is the impact of feminist critiques of law and legal processes, critiques which have reformulated ways of asking questions about gendered societal experiences and explored connections between law and such experiences. The other related development is the increasing acceptance in Canadian courts of a concept of equality which takes account of more substantive, rather than merely formal, ideas about equality goals. Thus, this assessment of the impact of gender bias on current arrangements for legal aid services is an important part of the overall task of assessing gender bias in legal institutions in Canada.⁴ Moreover, because of the continuing connections between Canada and Australia in the development of legal aid services over the past two decades, such an assessment may have significance for ongoing research about legal aid services in Australia as well.

This paper explores a framework for posing research questions about gender bias and legal aid services. It first identifies some conceptual themes of feminist analyses of law and legal processes and then outlines feminist concepts of gender equality and the ways in which some of these ideas have been incorporated in the decisions of Canadian courts in recent years. These themes provide the conceptual framework for examining the significance of gender bias in relation to two aspects of current arrangements for legal aid services. One is the issue of "coverage" and the impact of a scheme of categorical entitlement to legal aid services on objectives of (gender) equality for such services. The second issue, addressed more briefly, focuses on who provides legal aid services to men and women recipients. In relation to both issues, the paper tries to identify the kinds of research questions which might further our understanding of gender bias in legal aid services and our efforts to eradicate it.

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- 3 As Evatt J observed, "[The analysis] brings to light a society permeated by gender bias, a society in which women's role, women's work, and women's contribution are not given their full value and which has failed to protect women from male violence and oppression. *The message is that the legal system incorporates this bias and helps to perpetuate it.*" (emphasis added). Above n1 at v.
 - 4 The idea of gender bias in legal institutions has been addressed recently by Task Forces in both the United States and Canada. For a review of the American work, see Wikler, N J, "Identifying and Correcting Judicial Gender Bias" and Schafran, L H, "The Success of the American Program", both in Martin, S and Mahoney, K, (eds) *Equality and Judicial Neutrality* (1987). In Canada, the Canadian Bar Association has created a gender bias task force, as have a number of judicial and legal professional associations; see, eg, Law Society of Upper Canada, *Transitions* (1990); and Brockman, J and Chunn, D, (eds) *Investigating Gender Bias in Law: Socio-Legal Perspectives* (1993).

In exploring the research agenda about gender bias and legal aid services, it also seems important to try to "re-vision" more imaginatively our ideas of "access" and "justice", and the role of legal aid services in accomplishing gender equality objectives in such a context. Thus, the paper also presents some alternative research approaches which would transform current legal aid arrangements by re-visioning gender equality objectives for legal aid services.

Feminist Analyses and Ideas about Equality

Feminist analyses, both in law and in the context of other disciplines, represent a broad range of theoretical perspectives⁵ and differing, and sometimes controversial, points of view.⁶ For purposes of this paper, however, there are a number of features which are common to most feminist analyses and which can be usefully adopted as a way of assessing the issue of gender bias in legal aid services. In particular, this paper identifies three such features which are particularly relevant to an assessment of the impact of gender in the context of legal aid services: neutrality and the legal status quo; the law's division between public and private; and an experience-based methodology.

Neutrality and the status quo

There is a tendency in traditional legal scholarship to view the status quo as unbiased or neutral. This is the logical place for feminist analysis to begin — as an explicit challenge to the notion of bias, as contrasted with the concepts of perspective and position. Feminist legal theory can demonstrate that what *is* is *not* neutral. What *is* is as 'biased' as that which challenges it, and ... there can be no refuge in the status quo.⁷

As suggested by this quotation, one of the central features of feminist analyses of law is a critical perspective which challenges the neutrality of the status quo. According to this analysis, our current legal arrangements have resulted from choices about values and norms appropriate to defined (or assumed) objectives for the legal system. Thus, feminist analyses attempt to reveal the underlying rationales for existing choices in the legal system, undermining claims to neutrality and challenging the inevitability of the status quo; in doing so, feminist analyses strive to create the possibility of alternatives which take (more) account of the gendered experiences of men and women, both in the legal system and in other societal roles. In doing so, feminist analyses suggest that "what was accepted as natural is made strange"

5 For an overview of Canadian feminist writing see Boyd, S and Sheehy, E, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 *CJWL* 1; in the USA, see Scales, A, "Towards a Feminist Jurisprudence" (1981) 56 *Ind LJ* 375.

6 Differences may result from different ideological starting points or from differing conceptions of the role of law and its usefulness as an instrument for social change. In Canada, see Boyd, S and Sheehy, E, above n5; and Sheehy, E and Boyd, S, "Feminist Perspectives on Canadian Law: An Annotated Bibliography of Interdisciplinary Writings" (1989) 17 *Resources for Feminist Res.*

7 Fineman, M A, and Thomadsen, N S, (eds) *At the Boundaries of Law: Feminism and Legal Theory* (1991) at xiii. See also Fineman, M A, "Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship" (1990) 42 *Fla LR* 25.

because of the "realisation that beneath the accepted order of life lie hidden [and gendered] power relations".⁸

The idea of hidden power relations, especially hidden and gendered power relations, has attracted special concern in feminist legal theory. Carol Smart has suggested, for example, that the "very core of law — the means by which law is differentiated from other forms of knowledge — is gendered",⁹ a view which accepts law as essentially a social construction and one which must inevitably reflect the dominant views of society. While such a viewpoint reinforces feminists' claims about the absence of neutrality and impartiality in law, it also provides a difficult problem for those who wish to use law to achieve societal change. For if law is itself a representation of dominant societal interests, it may be relatively powerless to transform society; instead, as Martha Fineman has suggested, "while law can be used to highlight the social and political aspects it reflects, it is more a mirror than a catalyst when it comes to effecting enduring social change".¹⁰

The relationship between feminist analyses about the law's claim to neutrality and, on the other hand, feminist perspectives about the usefulness of law in achieving social change in the interests of women is a complex one. For some feminist theorists, the relationship is one which suggests a need to focus less on "formal" judicial decision-making and more on the role of law in administrative decision-making;¹¹ while for others, it suggests a need to combine legal and political activity to accomplish desired changes.¹² This diversity of perspectives and strategic approaches also underlines the evolutionary nature of feminist analyses, a feature which results from feminism's fundamental commitment to continual questioning about apparently neutral arrangements which create distinctions in the experiences of men and women.¹³ For purposes of this paper, it is equally important to note the diversity of perspectives within current feminist analyses, as well as these common concerns about law's claims to neutrality and the legitimacy of the status quo.

8 O'Donovan, K, *Sexual Divisions in Law* (1985) at 59. See also Scales, A C, "The Emergence of Feminist Jurisprudence: An Essay" (1985-86) 95 *Yale LJ* 1373.

An excellent overview of the impact of feminist analysis on a number of different academic disciplines (not including law) in Canada is found in *Knowledge Reconsidered: A Feminist Overview* (1984). For recent analyses of feminist legal theory, see Devlin, R, ed, *Feminist Legal Theory* (1991).

9 Smart, S, *Feminism and the Power of Law* (1989) at 20. See also Smart, "Feminism and Law: Some Problems of Analysis and Strategy" (1986) 14 *Int'l J Soc L* 109. For a different approach, see Dahl, T S, "Taking Women as a Starting Point: Building Women's Law" (1986), 14 *Int'l J Soc L* 239; and Dahl, T S, *Women's Law: An Introduction to Feminist Jurisprudence* (1988).

10 Fineman and Thomadsen, above n7 at xiv.

11 See, eg, Carol Smart's suggestion that: "It is important to recognize the power that accrues to law through its claim to truth, but law is both more and less than this in practice." Above n9 at 22. See also Dahl, above n9.

12 For example, Fineman and Thomadsen, above n7.

13 See Wishik, H R, "To Question Everything: The Inquiries of Feminist Jurisprudence" (1985) 1 *Berkeley Women's LJ* 64.

The law's division between public and private

There is a correspondence between sexual divisions and the disjunction of public and private. The partition of persons into two categories, female and male, is based on biology and the seemingly natural, [even though] ideas about the natural vary from age to age ... So it is with ideas concerning the divergence of public and private. The boundary between spheres regulated by law and the unregulated shifts over time and in accordance with cultural, economic and legal factors.¹⁴

The division between "public" and "private" spheres has been traced to early ideas of legal philosophy,¹⁵ but its importance in current legal theory derives from the "doctrine of separate spheres" enunciated by late nineteenth century courts in response to women's claims to participate in public life along with men. In relation to political rights such as voting¹⁶ and standing for public office,¹⁷ and in relation to professional activities such as becoming lawyers,¹⁸ such claims challenged the male exclusivity of the public sphere. The law's response to women's claims to participate with men in the public sphere was well defined in the colourful language of Justice Barker in his decision denying Myra Bradwell's petition to be admitted as a barrister in Illinois in 1873:

... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman... The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹⁹

In so constructing separate spheres of activity for men and women, the law both regulated and reinforced existing ideas about appropriate roles for men and women.

The law's division of public and private spheres displayed a number of important features. One was the absence of equality in terms of the importance of each sphere: the public sphere in which men participated was regarded as superior to the private and domestic sphere of the family.²⁰ In addition to this inequality of spheres, there was also inequality in access to

14 O'Donovan, above n8 at 59.

15 See O'Donovan, above n8 at 21-57.

16 *United States v Anthony*, 24 Fed Cas 829 (1873).

17 *Reference re Meaning of the Word 'Persons' in s 24 of the BNA Act* [1928] SCR 276; *Edwards v AG for Canada* [1930] AC 124.

18 *In re French* (1905) 37 NBR 359; *In re French* [1912] 1 DLR 80; and *Langstaff v Bar of Quebec* (1915) 25 Que KB 11.

19 *Bradwell v Illinois*, 83 US (16 Wall) 130 (1873). The views expressed by the court were not unlike those generally accepted by society at the time. Even John Stuart Mill, who was well-known for his progressive views about the rights of women, considered that equal rights to education, political life, and the professions could be granted only to single women without the responsibilities of family. See Okin, S M, *Women in Western Political Thought* (1979) at 197 ff.

20 See Teitelbaum, L, "The Legal History of the Family" (1987) 85 *Mich LR* 1052, a review of Grossberg, M, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985). See also Chused, R, "Gendered Space" (1990) 42 *Fla LR* 125.

each because men always moved between spheres while women remained only in the private; thus, domestic activity in the private sphere was "mediated to the public sphere by men who move[d] between both [while] women ha[d] a place only in the private sphere",²¹ an arrangement which reinforced differential (gendered) power relationships. Moreover, women's success in gaining relatively more access to the public sphere in the twentieth century may merely confirm that the boundaries of the spheres have shifted; in the legal profession, for example, there is some evidence that women occupy a different status than men, suggesting the existence now of "separate spheres" *within* the profession.²²

The idea of shifting boundaries between the public and the private is an important one. As Frances Olsen has demonstrated, the public/private division has masked policy choices about legal intervention and non-intervention, reflecting and reinforcing social, political and economic power relationships. In her view, it is necessary to transcend these boundaries, thereby "increasing the options available to each individual, and more importantly, allowing the human personality to break out of the present dichotomised system".²³ Thus, an important feature of feminist analyses is the need to be alert to divisions between public and private, and the ways in which such divisions may be used to justify different levels or kinds of legal intervention in relation to spheres of activity associated with men and women. As has been suggested, moreover, "the conclusion is that reforms which do not confront the division between private and public will fail"²⁴ in terms of achieving substantive gender equality.

An experience-based methodology

In addition to challenging neutrality and the status quo as well as the law's division of public and private, feminist analyses eschew the idea of abstract, universal norms in favour of contextualised and experience-based methods of reasoning. In relation to the idea of the "reasonable person" standard in tort law, for example, Ann Scales has explained why it is important to take account of gendered experiences:

Some lawyers cling to the "reasonable person" standard. It is comforting; it signifies the universal rule of law. It pretends that we are all just folks. That, however, is exactly the standard's flaw. In pretending that we are all essentially the same, it ignores the real experiential differences between men

21 O'Donovan, above n8 at 3-4, quoting from Smith, D, "Women, the Family and Corporate Capitalism" in Stephenson, M, (ed) *Women in Canada* (1974) at 6.

22 See, eg, the data on the relative positions of male and female lawyers in the same cohorts in *Transitions* (1991). For further analysis, see Mossman, "'Invisible' Constraints on Lawyering and Leadership: The Case of Women Lawyers" (1988) 20 *Ottawa LR* 567; and Menkel-Meadow, C, "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession" (1986) 24 *Osgoode Hall LJ* 897.

23 Olsen, F, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv LR* 1497 at 1578. See also Olsen, "The Myth of State Intervention in the Family" (1985) 18 *J L Reform* 835; Olsen, "The Politics of Family Law" (1984) 2 *Law and Inequality* 1; Rifkin, J, "Toward a Theory of Law and Patriarchy" (1980), 3 *Harv Women's LJ* 83; and Elshain, J B, *Public Man, Private Woman* (1981).

24 O'Donovan, above n8 at 159.

and women. The standard thereby perpetuates the male norm underlying the reasonable person standard and fails, yet again, to take violence against women seriously.²⁵

Similarly, Martha Fineman has reiterated the necessity of doing feminist theory "as an exercise in the concrete, both by focusing on a specific area of law and by using empirical information and stories of specific lives";²⁶ and Catharine MacKinnon has identified feminist methodology as one of "consciousness-raising" about women's experiences from the perspectives of their own lives.²⁷

Among feminist scholars, the issue of whether a specific feminist methodology exists is one about which there is continuing debate. At the same time, there is general agreement that the focus on the concrete experiences of women, and the meanings which may be ascribed by women to such experiences, has altered research styles and shifted the focus from quantitative to more qualitative inquiries. In the context of research about sexual harassment, for example, it has been suggested that qualitative methods which are grounded in contextualised meanings may be more useful than merely quantitative studies:

The distinction between [traditional] and feminist research is ... found at the epistemological and methodological levels — what is to be taken as warrantable knowledge and one's stance towards the practice of research. If warrantable knowledge includes the subjective, ... then our research must reflect such feminist methodological principles as reflexivity, empathy and continued attempts to raise the consciousness of those who are the victims of sexual harassment's malignant effects ...²⁸

In addition to an emphasis on women's concrete experiences, such a methodological approach offers an opportunity to take into account the differences among women's experiences.

In addition to race, class, and sexual preference, factors such as age, physical characteristics (including "handicaps" and "beauty" or lack thereof), religion, marital status, the level of male identification, ... birth order, motherhood, grandmotherhood, intelligence, rural or urban existence, responsiveness to change or ability to accept ambivalence in one's personal life or in society, sources of income (self, spouse or state), degree of poverty or wealth, and substance dependency, among others, shape how individual women experience the world.²⁹

25 Scales, A, "Feminists in the Field of Time" (1990) 42 *Fla LR* 95 at 105.

26 Fineman, above n7 at 28. Fineman notes that such an emphasis on concrete experience "has had rather honourable nonfeminist adherents, including Robert Merton, Clifford Geertz and James Boyd White." *Ibid.* See Merton, "On Sociological Theories of the Middle Range" in *On Theoretical Sociology: Five Essays, Old and New* (1967); Geertz, "Thick Description: Toward an Interpretive Theory of Culture" in *The Interpretation of Cultures* (1973); and White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52 *Univ Chi LR* 684.

27 MacKinnon, C, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 *Signs* 515; and "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635.

28 Brockman, J and Phillippe, D, "The Task Force Approach to Studying Gender Bias in the Courts: A Consideration of Feminist Methods and Perspectives" (1991) 16 *Atlantis* (#2) 32 at 44.

In such a context, a research methodology which is committed to taking account of women's concrete experiences must recognise differences among women as well as between women and men, a feature of feminist analyses which makes universal norms or standards both elusive and inappropriate. In other words, "theory that arises from the circumstances in which women find themselves is destined to contain paradoxes",³⁰ paradoxes which demonstrate both the inapplicability of traditional (male) legal standards to all women, as well as the need to examine the context for women in their quite different circumstances.

Gender equality: feminist theory and the courts

The inadequacies in modern equal protection analysis are not unique to cases involving gender. However, the particular difficulties that emerge in sex discrimination contexts stem in part from courts' attachment to paradigms developed for other objectives... Significant progress toward gender equality will require ... substantial changes in our legal paradigms and social priorities.³¹

An assessment of gender bias in the legal aid context must take account of the influence of evolving ideas about gender equality. Significant contributions to ideas about equality have been made by feminist legal theory, and by recent judicial decisions in Canada which have focused on equality in the context of sections 15 and 28 of the Charter.³² Both feminist theorists and the courts have engaged in a search for new paradigms and priorities in their efforts to (re)define equality objectives in the context of gender issues. At the same time, the concept of equality has proved to be somewhat elusive and even, as has been suggested recently, merely an illusion.³³

Feminist theories of equality have been dominated for a number of years by concepts of sameness and difference in relation to men and women. For some theorists, women's claims to benefits and advantages enjoyed by men depend on assertions that they are similarly situated to men (at least in all

29 Fineman, above n7 ("Challenging Law ...") at 40.

30 Id at 43. Smart has recently argued as well that feminist theory has developed from early analyses which suggested that law is "sexist" to later theories that law is "male"; she argued, however, that it would be preferable to reconceptualise these ideas in terms of law as "gendered":

The revised understanding of law as gendered rather than as sexist or male has led to a modified form of enquiry. Instead of asking how law can transcend gender, the more fruitful question has become, how does gender work in law and how does law work to produce gender? What is important about these enquiries is that they have abandoned the goal of gender neutrality. Moreover law is now redefined away from being that system which can impose gender neutrality towards being one of the systems (discourses) that is productive not only of gender difference, but quite specific forms of polarised difference...

Smart, C, "The Woman in Legal Discourse" (Unpublished paper, 1991) at 7.

31 Rhode, above n2 at 82.

32 These sections of the Canadian Charter of Rights and Freedoms include the guarantees of equality and non-discrimination on the grounds of sex; s15 includes protection on other grounds as well. For detailed analysis, see Bayefsky, A and Eberts, M, (eds) *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985).

33 Fineman, M, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991). Fineman's book addressed divorce reform specifically, but her concerns about using equality concepts in legal claims on behalf of women also have more general significance.

relevant respects);³⁴ while for others, such claims depend on assertions of differences between women and men, differences such as the possibility of pregnancy which mandate special rules to take account of inherently different needs.³⁵ As has been recognised, the problem of an approach to equality which focuses on *either* sameness *or* difference is that they *both* reinforce men as the standard to which women are compared; thus, whether women are regarded as the same as men, or different from them, the standard for comparison is men.

Partly to overcome the dilemma inherent in such a sameness/difference approach to equality, Catharine MacKinnon has proposed a theory of equality which focuses on dominance rather than difference. According to MacKinnon, "an equality question is a question of the distribution of power, ... specifically of male supremacy and female subordination".³⁶ This approach to equality is critical of current societal arrangements, many of which cannot be challenged by the sameness/difference approach because only women (and not women and men) are affected by them; according to MacKinnon:

The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. Its task is not to formulate abstract standards that will produce determinate outcomes in particular cases... It proposes to expose that which women have had little choice but to be confined to, in order to change it.³⁷

Such an approach to equality is less traditional than that of sameness and difference; for this reason, Wendy Williams has suggested that MacKinnon's approach may be "too nakedly substantive and political to be acceptable to a judiciary deeply invested in viewing itself as neutral and non-interventionist" and that for judges, "the idea of equality is necessarily one of equivalence" and the task one of "comparing men and women".³⁸

Such a critique highlights the ways in which conceptions of equality are closely linked to the kinds of societal changes which are being sought, and the extent to which gender inequality is understood as a matter of systemic discrimination. In her analysis of equality, Deborah Rhode has also noted the limits of an approach based on ideas of dominance and submission, both because they do not sufficiently capture the nuances of inequality among men and women in differing contexts and also because such a formulation is generally less well-known to legal discourse. By contrast, she has argued for an approach which takes account of disadvantage:

34 In the context of sex equality litigation in the 1970s and 1980s in the United States, see Williams, W, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" (1982) 7 *Women's Rts LR* 182; and "American Equality Jurisprudence" in Martin and Mahoney, (eds) above n4 at 115.

35 See Wolgast, E, *Equality and the Rights of Women* (1980) who argued for equal rights and also for special rights for women; the latter were particularly directed to arrangements for pregnancy and breast-feeding. See also Scale, A, "Towards a Feminist Jurisprudence" above n5.

36 MacKinnon, C, "Difference and Dominance: On Sex Discrimination" in *Feminism Unmodified* (1987) at 40.

37 *Ibid.*

38 Williams, W, "American Equality Jurisprudence" above n34 at 122.

Disadvantage invites a dialogue about consequences, not motivations; it can speak in terms of statistical facts and frequencies that take account of differences as well as commonalities among women. Such a framework avoids sweeping causal claims about gender hierarchies that in legal settings are often unnecessary and unproductive. There is less conceptual commitment to identifying agents of oppression, and less risk of understating women's opportunities for social influence and social change. As a strategy for enlisting support among men as well as women, disadvantage has some clear advantages. Its rhetoric is less likely to deflect attention from the fact of inequality and the social initiatives necessary to address it.³⁹

She has explored the idea of equality as disadvantage in the context of a number of current issues for women in the United States and concluded that such an approach is more useful than either the sameness/difference approach or the dominance approach. As she has stated, "the central question in discrimination cases should not be whether gender is relevant, but how to make it less so".⁴⁰

This trend away from abstract equality concepts to more instrumental approaches has also been evident in the work of some Canadian feminist theorists. In relation to interpreting the Charter, for example, Kathleen Lahey has suggested the adoption of a theory of inequality, an approach which would "require judges to ask whether the rule or practice that is being challenged contributes to the actual inequality of women ...".⁴¹ This approach is similar to Diana Majury's suggestion that "it is in women's interest to refuse to subscribe to, or commit themselves to, any single meaning of equality ... [but rather] to learn to use the equality discourse on behalf of women in ... many ... diverse situations".⁴² Such a suggestion underlines the primary commitment of feminist theorists to the goals they are seeking for women, rather than to abstract conceptions of equality, an approach which clearly demonstrates feminists' commitments to contextualised experiences and to challenging the status quo. Significantly, the approaches used by courts in interpreting the Charter have also shown some acceptance of these more challenging conceptions of equality.

Prior to the Charter, equality issues in Canada were generally considered in relation to human rights legislation, enacted in the provinces as well as by the federal government. Thus, even after the proclamation of section 15 of the

39 Rhode, above n2 at 85. Rhode did not suggest that disadvantage should be adopted as an exclusive paradigm for equality analysis; and she noted that "for some theoretical, political and legal purposes, dominance remains a crucial organizing principle; one does not, for example, speak of rape or pornography as questions of disadvantage". She did, however, assert a need to take account of context in using equality paradigms and to focus on when and why to adopt different ones. In her view:

"The choice of formulation is less important than the conceptual commitment that both imply. Underlying each approach is a sensitivity to patterns of inequality that conventional legal traditions have failed to address." *Ibid.*

40 Rhode, above n2 at 318.

41 Lahey, K, "Feminist Theories of (In)Equality" in Martin and Mahoney, (eds) above n4, 71 at 83.

42 Majury, D, "Strategizing In Equality" in Fineman and Thomadsen, (eds) above n7, 320 at 336.

Charter in 1985, issues of gender equality have continued to be litigated under human rights legislation as well as in relation to the Charter's guarantees. In the context of gender equality and legal aid services, there are two aspects of these decisions which are of particular importance.

One is the acceptance of an approach to equality which takes account of substantive outcomes rather than merely formal equality. In decisions of the Supreme Court of Canada about the systemic nature of pregnancy discrimination (*Brooks v Canada Safeway Ltd*)⁴³ and the context of sexual harassment of women in employment (*Janzen v Platy Enterprises Ltd*),⁴⁴ the court accepted concepts of equality and discrimination which took account of gendered societal arrangements and the ways in which they created disadvantages for women. Similarly, the idea of systemic inequality was recognised in *Action Travail des Femmes v CNR*⁴⁵ a claim which was designed to challenge gendered societal expectations about work for women and men. More recently, the Supreme Court of Canada took into account differences in women's experiences of violence in intimate relationships, fashioning a self-defence remedy for a woman accused in *R v Lavallee*, having regard to her different perceptions of "imminent" harm by contrast with traditional formulations about self-defence in criminal law.⁴⁶ All of these developments arguably demonstrate that Canadian courts (and tribunals) have increasingly taken (some) account of the impact of gendered experiences in their equality analyses, whether or not they have been interpreting the Charter, human rights legislation or other legal principles. In this way, there is evidence of support for interpretations of equality which go beyond formal equality guarantees and which take account of a need for more substantive remedies to achieve gender equality.

The other significant judicial development in equality doctrine was the acceptance on the part of the Supreme Court of Canada of a definition of equality which embraced more than the sameness/difference concept embedded in the traditional "similarly situated" test. In *Andrews v Law Society of British Columbia*,⁴⁷ the court concluded that the legislative requirement of Canadian citizenship for admission to the legal profession violated section 15 of the Charter. Focusing on the link in section 15 between equality guarantees and the discrimination clause, McIntyre J concluded that equality must be defined by reference to discrimination. Moreover, he purposefully adopted a definition of discrimination which focused on the idea of disadvantage:

... a distinction, whether intentional or not ... which has the effect of imposing burdens, obligations, or disadvantages on [an] individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.⁴⁸

43 (1989) 59 DLR (4th) 321.

44 *Id* at 352.

45 (1987) 76 NR 161.

46 See *R v Lavallee* (1990) 108 NR 321.

47 [1989] 1 SCR 143.

48 *Andrews* above n47 at 174-175.

Similarly, Wilson J referred to the s15 guarantee as designed to protect a "discrete and insular minority" or a group which is "relatively powerless politically",⁴⁹ language which also emphasised the idea of disadvantage rather than merely notions of sameness and difference.

The court's choice of language about equality as disadvantage in *Andrews* now arguably confines both federal and provincial legislative choices about entitlement to legal aid services in Canada generally.⁵⁰ Such an analysis depends on a comparison of poor litigants with those who have access to wealth, an unlisted ground of discrimination in s15. For purposes of gender equality issues in legal aid services, however, the sex equality guarantee of s15 is explicit, clearly mandating delivery of legal aid services in ways which do not discriminate between men and women. Moreover, in light of the interpretation of s15 in the *Andrews* decision, it is necessary to consider arrangements for legal aid services in terms of disadvantages for women, and not merely whether women are similarly situated in relation to men with respect to such services. Thus, whether or not section 15 mandates legal aid services for indigent persons generally, the equality guarantee explicitly confirms that legal aid services which are made available must be provided to men and women without discrimination; and that the concept of discrimination must take account of women as a disadvantaged group in society, rather than focusing (only) on whether women are similarly situated with men.

On this basis, judicial recognition of equality in terms of outcome or result (rather than merely formal equality) and the use of disadvantage in determining issues of discrimination (rather than sameness and difference using a male standard) define the parameters for assessing gender equality in relation to legal aid services. Moreover, the convergence of ideas of equality which take account of gendered disadvantages in both feminist theories of equality and the definitions adopted by courts creates a context for assessing gender equality in legal aid services in terms of substantive outcomes or results. The next section of this paper uses these ideas to explore issues in the current arrangements for legal aid services in Canada, and the research approaches which seem necessary to assess Evatt J's assertions about gender bias in legal practices and institutions.

Gender Bias and Existing Legal Aid Services in Canada

Categorical entitlement is a major feature of legal aid schemes in Canada. In addition, most provincial legal aid schemes also distinguish between legal services which are mandatory for financially eligible clients and those which may be provided to such clients in the discretion of legal aid administrators.⁵¹

49 *Id* n47 at 152.

50 See Mossman, "Civil Legal Aid Services in Canada: Policy Options" (1990) at 57 ff. See also *R v Robinson* (1989), 63 DLR (4th) 289 (Alta CA); *R v Turpin* [1989] 2 SCR 1296; *Reference re Workers' Compensation Act, 1983 (Nfld)* [1989] 1 SCR 922; and *Hebb v The Queen* (1989) 89 NSR (2d) 137. For an excellent analysis of *Robinson*, see Schneiderman, D and Graydon, C, "An Appeal to Justice: Publicly Funded Appeals and *R v Robinson*; *R v Dolejs*" (1990) 28 *Alta LR* 873.

On the surface, such a scheme appears gender neutral in terms of legislative choices about the eligibility of applicants and categories of entitlement. From the perspective of feminist analyses, however, legal categories which define rights and obligations may frequently conceal hidden (and gendered) bias:

Legal practitioners have always known that people's lives did not readily fit into legal categories, but this has not often been reflected in a legal system which fragments its treatment of people's problems into categories... For women, these artificial classifications are especially problematic since women have played no part in defining those categories. It is because of this exclusion of women from traditional legal scholarship that taking women's lives as a starting point for any legal analysis requires a fundamental rethinking of those categories.⁵²

As this assertion suggests, feminist analyses have consistently challenged the neutrality of legal categories, either because women were not involved in defining categories (and their interests may not therefore have been considered in the defining process) or because their interests may have been regarded as less important (because of the impact of differential power relationships among men and women). The quotation also suggests that there is a need to revise categories, a suggestion which explicitly demands a research methodology which takes account of women's experiences, and which also implicitly challenges the inevitability of status quo arrangements for providing legal aid services. On this basis, it is helpful to explore this idea of categorical entitlement to legal aid services, using the conceptual framework outlined above, in order to assess Evatt J's claim about gender bias in the context of legal aid services.

51 For example, the *Legal Aid Act* RSO 1990, c L-9 provides that a legal aid certificate "shall be issued to a person entitled thereto" in relation to proceedings specified in s12 of the Act. By contrast, s13 provides that a certificate "may be issued" in the discretion of the area director for other kinds of court proceedings and matters involving administrative tribunals. As well, s14 provides that a certificate may be issued to a person for appellate proceedings, subject to the approval of the area legal aid committee. Section 15 specifies certain proceedings for which no certificate may be issued. Note also that s17 provides for a determination of the financial eligibility of an applicant for legal aid; s17(4) authorises the area director to issue a certificate on the basis of a report about financial eligibility from a welfare officer and "only where in the opinion of the area director the issue of a certificate is justified".

52 Graycar and Morgan, *The Hidden Gender of Law* above n1 at 3. The authors provided a number of examples of the ways in which legal categories obscure or undermine women's experiences of reality. In particular, they cited Susan Stefan's critique of the law's definition of "reproductive rights":

"Rape and child custody are not usually included in the concept of reproductive rights. This is because the law has a curiously truncated view of these rights. A continuum we take for granted in 'real' life — sexual intercourse, pregnancy, birth and raising children — is artificially and significantly divided by law. Often, the concept of reproductive freedom is applied only to decisions made post-conception and pre-birth. After that, legal questions around the right to keep the child are referred to under the rubric of 'family law'."

See Stefan, "Whose Egg is it Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women" (1989) 13 *Nova LR* 405 at 407-408.

Gender neutrality and the status quo

From the perspective of feminist analyses, the first research question involves the language used in legal aid statutes: do all the statutes in Canada express entitlement to legal aid services in terms of gender neutral language ("persons") or do some use gender specific language ("men" or "women")? To the extent that statutes define eligibility for legal aid services according to gender, they would raise initial questions about gender bias, questions which would need to be investigated in terms of substantive, not merely formal, equality goals.⁵³ Yet, the fact that most of the language in Canadian legal aid statutes is gender neutral does not foreclose the issue of gender bias. As was suggested in the context of proposals for eliminating sexism in research:

Language shapes as well as reflects our thinking. Research cannot be non-sexist unless it uses non-sexist language. However, biases in research may exist even if the language employed is non-sexist. Appropriate language is therefore *a necessary, although not sufficient*, condition for conducting unbiased research.⁵⁴

Thus, an assessment of the statutory language used to define entitlement to legal aid services is a first step, but only a first step, in research about gender bias and legal aid services.

In addition to gender neutral language, research about legal aid services must assess whether a scheme of categorical entitlement achieves gender equality objectives in practice. One way of testing this more substantive factor is to assess the results of a scheme of categorical entitlement in terms of the proportion of men and women who qualify for legal aid services each year. Such an approach suggests that evidence that men qualify for legal aid services more often than women should raise questions about the substantive "neutrality"⁵⁵ of statutory language about legal aid entitlement. Interestingly, there is some disparity in different provincial legal aid schemes in Canada with respect to the proportion of men and women who are entitled to such services. For example, in provinces where legal aid services are routinely available in criminal law matters, but much less frequently in family law matters, there is evidence that a disproportionate number of men qualify for legal aid services.⁵⁶ In this way, gender neutral language may, in fact, "mask"

53 Decisions of the Supreme Court of Canada in recent years have clearly enunciated ideas of substantive, and not merely, formal equality; see above nn43-49 and accompanying text. What remains less clear is how gender specific language which confers benefits on women, and not on men (gender specific language) is to be accommodated to theoretical ideas about equality; the interpretation of s15(2) of the Charter is one aspect of this problem. For an earlier analysis of the ideas of formal and substantive equality, and the use of gender neutral and gender specific language, see Eberts, M, "Sex and Equality Rights" in Bayefsky and Eberts, (eds) above n32 at 183.

54 Eichler, M and Lapointe, J, "On the Treatment of the Sexes in Research" (1985) at 15 (emphasis added). See also Eichler, M, *Nonsexist Research Methods: A Practical Guide* (1988).

55 For an overview of research from a feminist perspective, and especially ideas about research in relation to hidden gender bias, see Smith, L, "What is Feminist Legal Research?" in Tomm, W, (ed) *The Effects of Feminist Approaches on Research Methodologies* (1988) 71.

56 For some details about the limited availability of legal aid services in civil law matters, see DPA Group Inc *Evaluation of Saskatchewan Legal Aid* (1988); and DPA Group Inc

hidden and gendered preferences for providing legal aid services which are more frequently required by men.

Research about gender bias and legal aid services thus needs to take account of the actual rates of usage of legal aid services by men and by women. In doing so, it may also be important to document not only the different proportions overall, but also within categories of legal aid schemes; such differences may be quite important in identifying the kinds of legal problems for which men and women may seek legal aid assistance. Moreover, in those schemes which distinguish mandatory services from those which are discretionary, it may be critical to document any differences in the rates of eligible men and women. Especially in the context of scarce legal aid resources, persons whose legal aid needs fall within mandated service categories will likely receive services, while those whose services lie within discretionary categories will not. In this way, the categories define preferences for legal aid services which may not be gender neutral in terms of equal access by men and women.

Such research about the impact of categories of entitlement for legal aid services clearly exposes choices which have been made about priorities for legal aid services, demonstrating that "what *is* is as 'biased' as that which challenges it".⁵⁷ This approach is, moreover, consistent with that of numerous scholars of legal aid services who have tried to show how choices about legal aid arrangements are political as well as legal decisions. Richard Abel has suggested, for example, that serious research about legal aid must take account of its "inherently political nature".⁵⁸ Abel's view is thus consistent with the approach of feminist analyses which seek to reveal the existence of choices in defining categorical entitlement to legal aid services, and particularly the hidden and gendered nature of such choices.⁵⁹

Evaluation of Legal Aid in New Brunswick (1986).

More recently, the report of the Family Law Tariff Sub-Committee of the Legal Aid Committee concluded (among other matters) that "the legal aid budget [in Ontario] is unequally distributed and favours men's legal problems, primarily criminal, over women's legal problems, primarily matrimonial." See *Legal Aid Bulletin* (No 76, June 1992).

⁵⁷ Fineman and Thomadsen, above n7.

⁵⁸ Abel, R, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985) 32 *UCLALR* 474 at 476.

For differing analyses of the relation between legal aid and political choices, see Hazard, G Jr, "Legal Problems Peculiar to the Poor" (1970) 26 *J Social Issues* 47; Cashman, P, (ed) *Research and the Delivery of Legal Services* (1981); Zander, M, *Legal Services for the Community* (1978); Cappelletti, Gordley and Johnson, Jr, *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (1975); Menkel-Meadow, C, "Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's" (1984) 22 *Osgoode Hall LJ* 29; and Hoehne, D, *Legal Aid in Canada* (1989).

⁵⁹ Abel has suggested that groups which struggle with oppression may turn to "legal instrumentalities", stating that some of the first legal aid programs came about as a means of overcoming the exploitation of women. Yet, even though there are similarities in the approach of legal aid scholars and that of feminist analyses, there are also serious flaws in the work of traditional legal aid scholars from a gender perspective. See also, Johnson, E, "The Justice System of the Future: Four Scenarios for the Twenty-First Century" in Cappelletti, M, (ed) *Access to Justice and the Welfare State* (1981) 183 at 197; as quoted in Abel, id at 496. For a different analysis, see MacDonald, G, "The Contribution of Social Science Method to Uncovering Sexism in Law" (1991).

Yet, when research identifies differences for men and women with respect to the impact of "neutral" categories of entitlement to legal aid services, the important question is how such differences can be explained. One approach, for example, might consider whether there are differences in the ways in which men and women use legal services for problem-solving generally, and the role of legal aid for men and women within the legal system overall. Thus, if legal aid systems are designed according to the pattern of legal services offered to paying clients,⁶⁰ and if men and women participate in different ways in the use of law for problem-solving,⁶¹ the gendered nature of legal aid services may need to be understood as part of the larger problem of gendered law and legal services. Such a conclusion does not detract from the need to alter existing legal aid arrangements, but it does require an integrated approach to legal services generally in order to design effective strategies for achieving gender equality goals for legal aid services.

Beyond the identification of differences in the patterns of use of legal services generally on the part of men and women, there is also a need to ask questions about differential needs for legal aid services by men and women. Thus, while a differential use of legal services in the context of paying clients might be explained by the relative wealth of men in Canada by comparison with women,⁶² such an explanation does not justify differential use of legal aid services by women; in the latter context, women's greater likelihood of poverty, relative to men, arguably means that women should utilise legal aid services more often than men. In this context, women's disproportionately low rate of use of legal aid services must take account of women's greater likelihood of poverty, relative to men, but must also seek other explanations for this apparent contradiction in terms of gendered needs for legal aid services.⁶³

60 It is at least arguable that initial efforts to provide legal aid services in Canada assumed that equality for poor clients required that they have access to the same services which were available to those who could afford to pay; the test adopted was that of the "reasonable client of modest means". For a more detailed analysis, see Mossman, "Legal Aid in Canada" (Unpublished paper, 1983); Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (1973); and *Report of the Task Force on Legal Aid* (1974). These latter reports illustrated the ways in which providing legal aid services changed and challenged prevailing ideas about the legal needs of poor clients.

61 There is some evidence that legal services are utilised more frequently by men than by women. In their 1979 study, McKie and Reed concluded that women did not use the civil courts as frequently as men, suggesting that the underrepresentation of women in the courts might be the result of "their less than full participation, as a class of persons, in mainstream activities in this society". See McKie C, and Reed, P, *Women in the Civil Courts* (1979) at 20-21. In the context of the criminal courts, women are also represented significantly less often than men; for details, see Adelberg, E, *A Forgotten Minority: Women in Conflict with the Law* (1985), updated statistics.

Clear information about the percentage of women litigants before administrative tribunals is currently more difficult to assess or not available. See Mossman, "Shoulder to Shoulder: Gender and Access to Justice" (1991) 10 *Windsor YB Access Just* 351 at n26.

62 The issue of women's poverty, relative to men, is addressed below. For an interesting discussion about women's economic status, see *Report of the Royal Commission on the Status of Women in Canada* (1970). For a recent assessment of the Commission's recommendations, see Abner, E, Mossman, M J and Pickett, E, "'A Matter of Simple Justice': Assessing the Report of the Royal Commission on the Status of Women in Canada" (1990) 22 *Ottawa LR* 573.

These research approaches are all informed by feminist concerns for questioning the neutrality of existing categories of entitlement and willingness to challenge the status quo. In the legal aid context, however, the issue of gender bias must confront specifically the significance of the priority accorded to legal aid for criminal matters by all the legal aid schemes in Canada. This issue must necessarily be addressed in the context of the public/private dichotomy and the feminist critique of it.

Legal aid in criminal and civil law matters: public and private

Existing research about legal aid services in Canada has demonstrated some priority for legal aid services in criminal matters,⁶⁴ particularly in the context of diminishing governmental resources. Although there are some provincial statutes which define criminal legal aid services within the group of mandatory services,⁶⁵ the priority for legal aid in criminal matters has not resulted from this statutory preference alone. In practice, the priority accorded to legal aid for criminal matters has resulted from the existence of federal-provincial cost-sharing agreements in criminal and young offender legal aid. According to these agreements, the federal government reimburses provincial legal aid schemes for 50 per cent of the cost of providing such services.⁶⁶ Such a contribution to the funding of provincial legal aid schemes makes such services more attractive than civil legal aid services in cost/benefit terms, especially in provinces where funding for legal aid services may be otherwise scarce.

From a perspective of gender bias research, it is important to question the rationale(s) for the existing priority for legal aid in criminal matters. In addition to detailed information about the relative rates for women and men for legal aid services in criminal and civil matters, and their relative rates of access for different kinds of criminal law matters, there is a need for reassessing the philosophical basis for the priority accorded to legal aid in criminal matters. In doing so, feminist analyses suggest that it is critical to approach this inquiry without foreclosing the possibility that the categorical priority for criminal matters is not "neutral" and the need to assess bias in assertions which reinforce the status quo.

In this context, it is interesting to consider the historical and economic rationales for according priority to legal aid in criminal law matters, in addition to philosophical ones. In the historical context, for example, it is evident that expressed needs for representation in criminal law matters was

63 This issue is addressed below. It has been suggested that women and men may have been socialised to use different methods of solving problems, including settling disputes and using legal advice and assistance; see Gilligan, C, *In a Different Voice* (1982).

64 See Mossman, above nn50 and 60.

65 For example, see above n51.

66 For example, Legal Aid Cost-Sharing Agreement, Canada and Ontario (1987-88) Part I and Schedule B. See also "Legal Aid in Criminal Cases" in Study Team Report to the Task Force on Program Review, *Improved Program Delivery: Justice System* (1986).

By contrast, there is less funding available for legal services in civil matters (including family law), although provinces have been able to seek some funding pursuant to the *Canada Assistance Plan*. In recent years, however, the federal government has altered the terms of this legislation unilaterally.

not the sole impetus for the creation of provincial legal aid schemes, although such representation was frequently cited as one of the important reasons for doing so.⁶⁷ In such a context, moreover, there is little historical research which documents the extent to which the needs of poor women, by contrast with poor men, were (or were not) considered, in relation to both criminal and civil legal aid services. Significantly, it may also be important for historical research to assess changes in criminal and civil laws since the introduction of legal aid schemes to take account of the ways in which such changes may have affected the need for representation by men and women in different legal contexts.

From an economic perspective, moreover, there is some evidence that changes in the blend of criminal and civil legal aid services in provincial schemes have coincided with the negotiation of federal-provincial cost-sharing agreements; there is little evidence which suggests that such changes have occurred as a result of changes in philosophical rationales for legal aid services.⁶⁸ In this context, it is arguable that the current priority for legal aid in criminal matters (or at least the extent of the current priority) is based on economic and historical factors rather than on immutable philosophical values. Thus, feminist analyses reinforce the contingency of historical and economic choices in current arrangements which accord significant priority to legal aid services in criminal law matters.

More importantly, gender bias research needs to take account of the impact of the law's traditional dichotomy between the public and private spheres. Thus, to the extent that legal aid may be generally more available in criminal matters (the "public" realm) than in family law matters (the "private" realm), for example, the preference accorded to criminal law in legal aid schemes may correspond to the ways in which the public/private distinction in law has traditionally excluded and disadvantaged women. In this context, it is important to reassess the philosophical rationales for the priority accorded to legal aid services in criminal matters.

These rationales suggest that the criminal law priority is justified for two reasons: one is the disparity of resources involved when the state is a party to the adversary proceedings against an accused person. The other is the seriousness of the possible consequences of the proceedings for the accused, including imprisonment. From the perspective of gender bias research, it is useful to identify other circumstances in which the state is the other party to the proceedings and in which there are serious consequences for an individual, including loss of liberty. For example, in committal proceedings for psychiatric patients; in hearings to determine the status of refugee claimants; and in child protection cases, one party to the proceedings is the state; and the

67 As was noted in the report recommending the establishment of the Ontario Legal Aid Plan, there seemed to be no reason to exclude family law matters from legal aid entitlement: "In the contemplation of the law of Ontario they are equal.... Any legal aid system which intends to ensure the advancement of the protection of the legal rights of the needy must surely include matrimonial causes."

See *Report of the Joint Committee on Legal Aid* (1965) at 65.

68 See, eg, the evaluations of legal aid programs in Saskatchewan and New Brunswick, above n56.

consequences may involve loss of liberty in the form of indeterminate committal for psychiatric patients, deportation (and consequential disadvantages) for refugee claimants who are unsuccessful, and loss of "liberty" for children who are taken from their parents in child protection hearings. For these litigants, as for those charged with criminal offences, there are disparities of resources and serious consequences.

In most Canadian provinces, access to the resources of provincial legal aid schemes for criminal matters and for other matters with these similar features would not be the same. To the extent that access is unequal, moreover, it is also possible that those denied access include substantial numbers of women (for example, psychiatric patients and mothers in child protection cases). Thus, it is arguable that the rationale for according priority to legal aid services in criminal law matters masks a preference which is not neutral in terms of its results for men and women who seek legal aid assistance. Such a conclusion might suggest a need to extend legal aid services to all those matters in which there is a disparity of resources because the state is a party to the proceedings and where the consequences are serious for the individual litigant in terms of loss of liberty or livelihood.

Feminist analyses of the law's division between public and private spheres may also be used to probe more deeply to question the relative values attached to the consequences of criminal law and family law matters. What are the unstated values in a scheme which always regards the consequences of possible imprisonment as more significant than the loss of custody of one's children, a distinction which could result in an accused person receiving legal aid in criminal proceedings while a mother is denied legal aid in a custody action? Such choices seem to be affected by traditional value choices about the public/private dichotomy and which have significant impact on societal policies without careful scrutiny.

In using feminist analyses to probe these underlying rationales, moreover, it is also useful to consider the mutability of the boundaries between public and private spheres. In doing so, there is an opportunity to question the rationale for differential treatment by legal aid schemes of disparity of resources between litigants: why do legal aid schemes readily accept disparity of resources as a justification for giving priority to legal aid clients in criminal law matters, while rejecting disparity of resources as irrelevant in determining eligibility for women who become involved in family law disputes with their more affluent husbands? Is it the fact of disparity of resources or the assumed proportion of the disparity? Moreover, is the disparity of state resources in criminal matters as real in practice as in theory in the context of court congestion, backlogs of cases and overworked court officials, including prosecutors? By contrast, an affluent husband with a well-prepared and well-paid lawyer acting for him may enjoy proportionately greater legal resources than his impecunious wife in a family law case. Such analysis probes the "neutrality" of the public/private dichotomy which distinguishes the disparity of resources available to litigants in criminal and family law cases; *in practice*, this disparity reveals needs for legal aid for women in family law cases which are just as great as those of men in criminal matters.⁶⁹

The idea of the division of public and private spheres also affects gender bias research which focuses on those women who are represented in the public, criminal law sphere in relation to legal aid services. In this context, the

research issue is whether the priority accorded to legal aid in criminal law matters benefits women to the same extent as men. Such research requires an examination of the nature of crimes in which women are involved, by contrast with men, and the ways in which the categories of entitlement for legal aid in criminal law matters may benefit men and women differentially.⁷⁰ Such research might be linked to current research about differential treatment of men and women in the criminal justice system, including the process of sentencing and incarceration. As Shelley Gavigan has suggested, women's unequal status in society has influenced the results for men and women in the criminal law process, particularly in relation to sentencing:

Mary Eaton illustrates that if one posed the question in terms of 'differential treatment', one missed the subtle processes by which gender divisions are reproduced by the courts. Eaton found that men and women defendants who were guilty of the same offences, and who were in the same circumstances (e.g. single, no previous criminal record) received the same sort of sentence. However, she found that men and women defendants were rarely *in the same circumstances*. Both Eaton and Carol Smart argue that criminologists should research the unexamined assumptions of the courts and lawmakers about women's sexuality and women's place in society.⁷¹

69 The relative priority for legal aid services in criminal law, rather than family law, cases has been addressed in the context of legal aid services in the United States as follows:

"One would expect that a system sensitive to client needs to respond to [the increase in marriage breakdown] by spending a *larger* proportion of its resources on the problems of family breakdown. As family breakdown has become a major cause of poverty, family legal problems have taken on even greater importance. Instead, at a time when the poverty caused by family breakdown is at an all-time high, LSC programs seem to be spending *less time on family matters* ... This does not mean that the other legal issues are unimportant, simply that family issues loom large as the ones that shape the lives of the poor. Is it unreasonable to expect legal services providers' to reflect this reality?"

See Besharov, D., "Legal Services for the Poor: Time for Reform" *Conference on Access to Justice in the 1990s* (1989) at 31. See also Besharov, D., "The Feminization of Poverty: Has Legal Services Failed to Respond?" (1990-91) 24 *Clearinghouse R* 210; Woods, L., "Challenges Facing Legal Services in 1990s: Perspectives of Women and Family Law Advocates" (1988) 22 *Clearinghouse Rev* 457.

For a review of equality issues in the context of family law in Canada, see Busby, Fainstein and Penner, (eds) *Equality Issues in Family Law* (1990). For a critique of gender equality in the context of housing policies and homelessness, see Parkdale Community Legal Services, "Homelessness and the Right to Shelter" (1988) 4 *J Soc Pol* 33, especially at 72 ff; and in the context of welfare, see Stairs, F., "Sole Support Mothers and Opportunity Planning in the Thomson Report" (1989) 5 *J Soc Pol* 165.

70 Where legal aid statutes provide for mandatory entitlement for indictable offences, and discretionary entitlement for summary conviction offences, for example, the kinds of crimes committed by men and by women will result in different bases for entitlement at least and may also result in some dissentitlement to legal aid services; in this way, the characterisation of offences as indictable or summary conviction, and possible gender biases in such characterisation, are reinforced by the categorisation adopted by legal aid schemes. See Adelberg, E, above n61, for current statistics on this issue.

Some interesting questions about women in the criminal justice system are also raised in Heidensohn, F., "Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice" (1986) 14 *Int'l J Soc L* 287.

71 Gavigan, S., "Women's Crime: New Perspectives and Old Theories" in Adelberg, E and Currie, C, (eds) *Too Few to Count: Canadian Women in Conflict with the Law* (1987) 47 at 53. Gavigan was quoting Eaton, M., "Mitigating Circumstances: Familiar Rhetoric" (1983) 11 *Int'l J Soc L* 385; and "Documenting the Defendant: Placing Women in Social Inquiry Reports" in Brophy, J and Smart, C, (eds) *Women in Law: Explorations in Law,*

Thus, the priority accorded to legal aid in criminal law matters may not benefit women who are participants in the criminal law process (the public sphere) just as it disadvantages women in family law matters (the private sphere).

Related to this concern is the need for gender bias research to address the impact of according priority to legal aid in criminal law matters in the context of male violence in Canadian society. To the extent that legal aid schemes give priority to persons charged with violent criminal offences, while denying resources to victims of such crimes, gender inequality will be reinforced and exacerbated in terms of access to legal aid services; most accused persons are men and many of their victims are women.⁷² In this context, violence in the "private" sphere results in legal aid representation for those who must answer in the "public" sphere (men), while women's concerns for representation (and protection) remain "private". Such an arrangement suggests that the law's traditional public/private dichotomy may be used to reinforce differential and gendered power relationships.

Experience-based methodology: legal aid services for women

From a feminist perspective, the starting point for defining appropriate legal services for women is women's experiences. Such a methodological approach means starting from the position which women occupy in society and defining legal aid services which will assist them.⁷³ Such an approach starkly contrasts with that of most legal aid schemes which start by extending existing legal services to legal aid clients, both male and female. As has been suggested, the latter approach may not meet the needs of women, either because services defined in terms of paying clients will not necessarily reflect the needs of women to the same extent as men, or because women's needs for legal aid services may be different from men's needs for legal aid services, as well as different from the needs of paying clients. This argument suggests, in particular, that women may experience poverty for different reasons and in different circumstances by contrast to men. Thus, according to two American scholars, female poverty has unique qualities:

While many women are poor for some of the same reasons that men are poor, such as living in a job-poor area or lacking the necessary skills or education, much of women's poverty is due to two causes that are basically unique to women. The first has to do with children, particularly the economic burdens associated with having the primary responsibility for children, with or without child support. The second has to do with the labour market, where women experience discrimination, harassment, and

Family and Sexuality (1985). See also Smart, C, *Women, Crime and Criminology: A Feminist Critique* (1976) and "Legal Subjects and Sexual Objects: Ideology, Law and Female Sexuality" in Brophy and Smart, id.

72 See, eg, Abell, J, "Women, Violence and the Criminal Law: 'It's the Fundamentals of Being a Lawyer that are at Stake Here'" (1992) 17 *Queen's LJ* 147; and presented at *Feminist Analysis: Challenging Law and Legal Processes* (1992).

73 See Dahl above n9. Dahl's analysis identified inequality for women in terms of money, time and work. In exploring this inequality, she asserted that it was necessary to do more than "add on" women's perspectives to existing law to overcome current inequality.

confinement to low-paying and dead-end jobs often *because* they are women.⁷⁴

Thus, research directed to defining women's needs for legal aid services, from the perspective of women, would need to assess the status of women, relative to men, in Canadian society. Such a research approach would need to take account of economic disparities in women's work, including both differential wages and benefits in their paid employment as well as their unpaid labour in the home.⁷⁵ It would also need to document the role of women in families and the ways in which such roles both limit other economic opportunities and create gendered burdens of child care and household responsibilities in ongoing family units,⁷⁶ as well as economic disadvantages when family units break apart.⁷⁷ As well, such research should take account of the ways in which discrimination and violence against women occur in terms of sexual harassment, sexual assault and wife battering, and the limited success of legal and other measures to combat them.⁷⁸ In this context, moreover, research would need to document the extent to which women currently exercise political, economic and judicial power in decision-making in Canadian society.⁷⁹ Such research would define the nature of the gendered experiences of women as the basis for considering their needs for legal aid services.

However, such a research approach would need to encompass not only the differing gendered experiences of women by contrast with men, but also the differing ways in which gender is experienced by women in differing contexts, including the obvious differences of race, class and sexual orientation, but also taking account of other differences which may affect the ways in which women experience the world. As Fineman suggested, these differences may include many other factors such as age, physical characteristics, marital status, motherhood, sources of income, etc.⁸⁰ In the context of research about gender equality and legal aid services, issues of race and class will, of course, remain particularly important. Thus, while the disproportionate representation of native women among women accused may parallel the disproportionate representation of native men among men accused, gender bias research must confront the relationship of gender and race to account for the starkly unequal situations of native men and women in the criminal justice system.⁸¹ Similarly, such research must take account of

74 Pearce, D and Ellsworth, K, "Welfare and Women's Poverty: Reform or Reinforcement" (1990) 16 *J Legislation* 141, at 142-3.

75 See, eg, Armstrong, P and Armstrong, H, "Women, Family and Economy" in Mandell, N and Duffy, A, (eds) *Reconstructing the Canadian Family* (1988). There is significant research in Canada which documents the poverty of women, relative to men. For some details, see *Welfare Incomes 1990* (1991); and Abner, Mossman and Pickett, above n62.

76 See, eg, Eichler, M, *Families in Canada Today* (1988).

77 See, eg, Weitzman, L, *The Divorce Revolution* (1985); and Mossman and MacLean, "Family Law and Social Welfare: Toward a New Equality" (1986) 5 *Can J Fam L* 79.

78 For references, see Mossman, "Shoulder to Shoulder", above n61. See also "Note: Sexual Harassment in Rental Housing" [1989] *Univ Ill LR* 175.

79 See "Workshop Reports: Gender" in Hutchinson, A, (ed) *Access to Civil Justice* (1990) at 281 ff.

80 Fineman, above n7. "Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship".

the relationship of gender and class to explain the disproportionate number of women accused who are involved in welfare fraud and prostitution-related offences.⁸²

In all these situations, research which documents women's experience(s) is the first step in the process of designing legal aid services which respond to women's needs, needs which may sometimes be similar to those of men but which may also diverge in significant ways.

Gender equality: difference, dominance and disadvantage

In reassessing women's needs for legal aid services and the ways in which legal aid schemes may be revised to meet them more effectively, gender bias research must take account of ideas of equality based on difference, dominance and disadvantage. However, in the short term, such research may be more useful if it adopts the approach preferred by Canadian courts: the idea of equality as "disadvantage". Significantly, such a "disadvantage" approach is entirely consistent with some suggestions by legal aid scholars for defining entitlement to legal aid services; for example, Peter Hanks has suggested a model for identifying potential legal aid recipients in Australia utilising a "social indicator" approach, rather than one based on demands, because the latter are inevitably reflective of current legal problems. According to Hanks, the need for legal services has been largely constructed "in terms of the experiences of individuals involved in the provision of legal services" reflecting "current delivery patterns":

Many Australian initiatives have been a response to expressed need rather than measured need. To this extent, they have ignored the inarticulate or powerless who have not known how to express their needs effectively. [Such a process] has very little to do with the level of need in the community [and] largely ensures that resources will go to the aspirant with the loudest voice.⁸³

By contrast, Hanks asserted that the use of a "social indicator" approach would identify those entitled to legal aid services on the basis of two characteristics: "a need for legal services and a reduced capacity to obtain those services through the private market". According to Hanks, moreover, potential recipients would be thus identified from indicators of social deprivation, including unemployment, geographic isolation, ethnicity, and dependency on the social security system for income support.⁸⁴ Moreover, while both the social indicator approach and the characteristics identified were expressed in gender neutral terms, further research might reveal that such an approach would tend to make legal aid services more available to poor women because of their greater poverty relative to men, and women's consequential difficulty in obtaining legal services through the private legal services market.

81 See Adelberg, E, above n61.

82 Ibid.

83 Hanks, P, *Social Indicators and the Delivery of Legal Services* (1987) at 1-2, citing Cass and Western, *Legal Aid and Legal Need* (1980) at 18 and Australian Senate Committee on Social Welfare, *Through a Glass Darkly* (1979) at 57-58.

84 Hanks, id at 49. Hanks' approach was strongly supported by the National Legal Aid Advisory Committee, *Funding, Providing and Supplying Legal Aid Services* (1989) at 24.

In the context of Hanks' social indicator approach, women on welfare, women in rural areas and immigrant women would be regarded as particularly disadvantaged and in need of legal aid services.

In the context of gender equality jurisprudence in Canada, however, the essential element in research to design legal aid services for women is a focus on substantive, and not merely formal, equality. Because judicial decisions interpreting gender equality claims pursuant to both human rights legislation and the Charter have defined gender equality as a matter of substance, legal aid programs must take into account the substantive impact of their coverage for men and women. In this way, they must meet the standard of gender equality not just in relation to gender neutral language, but in the substantive ways in which they respond to women's experiences and legal needs. In this sense, the extent to which legal aid services meet gender equality objectives must be tested in terms of outcomes and results. Such suggestions about redefining the rationale for the provision of legal aid services both challenge the neutrality of current arrangements and define priorities and objectives for redesigning legal aid services to meet gender equality goals.

Related concerns: arrangements for providing legal aid services

Legal aid schemes in Canada provide services to clients using a variety of delivery systems;⁸⁵ while some provinces have opted to utilise mainly private practice lawyers in fee-for-service arrangements, others have adopted "clinics" as the primary method for providing legal aid services, and some others have used both: the "mixed delivery" system recommended by the Canadian Bar Association in its 1987 report. Debate about the utility of these different kinds of delivery systems has tended to focus mainly on issues of quality and cost; however the research to date has not yet resulted in clear conclusions about the relative merits of differing systems because of the numbers of variables which must be taken into account.⁸⁶

From the perspective of gender equality and legal aid services, however, the issues about delivery systems may be somewhat different. There have been suggestions, for example, that the services offered by fee-for-service systems and those offered by clinics are very similar in practice, and that both delivery systems tend to replicate legal services available to paying clients in delivering legal aid services.⁸⁷ Having regard to the analysis in the previous section about possible differences in the use of legal services generally by men and women, and also differences in the needs of poor women by contrast

85 For details of delivery system arrangements, see National Legal Aid Liaison Committee, *The Provision of Public Legal Aid Services in Canada: Report to the National Council* (1985). See also Mossman above n50 at 120 ff.

86 Examples of such efforts to compare costs include in British Columbia: Brantingham, P and Burns, P, *The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation* (1982); and in Quebec: *Evaluation de l'Aide Juridique* (1982).

87 CBA Report on Legal Aid above n85 at 233; the report recommended the use of fee-for-service and staff clinics and also poverty law clinics; the latter were needed to provide services in relation to "distinctive" legal problems of the poor, services often unrecognised by a *judicare* system. See also Mossman, "Community Legal Clinics in Ontario" (1983) 3 *Windsor YB Access Just* 375.

with poor men, research about gender equality in legal aid delivery systems must start by questioning the neutrality of current arrangements for providing legal aid services to men and women, and the extent to which these arrangements may fail to offer access to legal aid services to women and to men, in terms of both quality and cost issues.

In the context of gender bias research, there are three issues related to the process of delivering legal aid services. One is the accessibility of legal aid services, a concept which has evolved to include ideas about geographic, linguistic, and physical access, as well as "intellectual" access and timeliness.⁸⁸ In the context of gender equality goals, research would need to take account of the kinds of services which would most effectively respond to women's substantive service needs. For example, if women's needs for civil legal aid services in family law matters were defined as legal aid service priorities, research would need to consider what kinds of delivery arrangements would be most effective in achieving these objectives; such research would need to consider both current arrangements for providing legal aid services, as well as other possible arrangements which might better take account of women's circumstances (including their familial roles and potential vulnerability to violence from male partners, for example). As well, such research could examine issues about appropriate locations for service providers, their ability to provide referrals for related kinds of needed services (including advice about housing, childcare, employment opportunities and educational programs), and the relationship of family law to the legal system as a whole.⁸⁹ In this way, research about accessibility could further the substantive goals of gender equality in legal aid services.

A second research issue focuses on tariff arrangements in fee-for-service delivery systems, and the ways in which it may reduce incentives for lawyers to provide legal aid services in matters other than criminal law cases. In this context also, gender bias research must start from the assumption that tariff arrangements may not be neutral, but instead may contain embedded choices which encourage the delivery of legal aid services in the public sphere while curtailing those in the private sphere. Thus, research about tariff arrangements needs to question the ways in which legal aid fees are calculated for criminal law matters and the impact of these arrangements on remuneration for lawyers who provide such services, compared with the calculation of fees in civil law matters and the impact on lawyers who provide these services. There is some data which suggests that legal aid lawyers are seldom compensated for time spent on "paper work", an important feature of most family law cases, by contrast with criminal law matters. Such a choice in tariff arrangements will thus provide incentives for lawyers to do legal aid work in criminal matters more frequently than in civil law matters.⁹⁰

88 See *Report of the Ontario Courts Inquiry* (1987). The report did not address issues of gender inequality and problems of access for women.

89 Such an approach is somewhat evident in Ellis, D, Ryan, J and Choi, A, *Lawyers, Mediators and the Quality of Life Among Separated and Divorced Women* (1988).

90 MacLean, M, *A Preliminary Assessment of the OLAP Tariff* (Background Paper for Mossman, "Civil Legal Aid Services in Canada: Policy Options", above n50).

The third aspect of research about legal aid delivery systems and gender bias is the choice of service providers: the roles for lawyers and others in offering legal aid services for women. Research about service providers could explore a number of related issues. One is the extent to which men and women who are lawyers are involved in the delivery of legal aid services. To the extent that there is a preference for criminal legal aid services in Canada, some preliminary research suggests that male lawyers are more likely to provide such services,⁹¹ and thus to obtain the benefits of the tariff for criminal legal aid services.⁹² Moreover, the issue of whether it is male or female lawyers who provide legal aid services in criminal cases is also related to the issue of which lawyers provide legal aid services in family law or poverty law matters. Again, some preliminary data suggests that women lawyers in Ontario are more often involved in providing family law services, and that they are also more likely to be employed in legal aid (community clinics and legal aid administrative positions) than men.⁹³

Research about the relationship between male and female lawyers in the delivery of legal aid services needs to define the relative participation rates for men and women in respect of different kinds of legal aid services, and then to explore possible reasons for differing patterns of activity. Differing patterns of activity for male and female lawyers in providing legal aid services may suggest that apparently neutral arrangements which provide priority for criminal law matters result in gender inequality for participating lawyers, in addition to substantive inequality for women who are legal aid clients. In addition, however, such research needs to identify the kinds of legal aid work undertaken by male and female lawyers in "mixed delivery" systems, and to assess the extent of and reasons for differential participation rates in clinic employment and in fee-for-service arrangements. Such research may question whether there are any differences in motivation, in familial roles and responsibilities, or in approaches to problem-solving as possible explanations for differing roles for men and women lawyers⁹⁴ in providing legal aid services.⁹⁵

91 There is some data which suggests that men practise criminal law more frequently than women: see *Transitions in the Ontario Legal Profession* (1991) at 16-17. See also Brockman, J, Evans, D and Reid, K, *Feminist Perspectives for the Study of Gender Bias in the Legal Profession*" (forthcoming: 1992) 6 *CJWL*.

92 Mandel, M *The Charter of Rights and the Legalization of Politics in Canada* (1989).

93 The *Transitions* report, above n91, stated that "18 per cent of women compared with 8 per cent of men ranked family law as the field of law to which they devoted most time". At 16; note that this statistic does not separate legal aid services from other services in the family law area. For details relating to employment with legal aid, see *id* at 14-15 and Table 4.

In the United States, it has been suggested that the work of legal aid lawyers who do family law is the most significant contribution to legal aid services, especially in relation to the substantial number of the poor who are women; see "Challenges Facing Legal Services in the 1990s: Perspectives on Women and Family Law Advocates" (1988-89) 22 *Clearinghouse Rev* 457.

94 See Menkel-Meadow, C, "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change" (1989) 14 *Law and Social Inquiry* 289; Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 1 *Berkeley Women's LJ* 39; and Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Legal Problem-Solving" (1984) 31 *UCLA LR* 754.

95 In the case of paralegals see Ianni, R W, *Task Force on Paralegals* (1990); and Noone, M A, "Paralegals and Legal Aid Organizations" (1988) 4 *JL Soc Pol* 146.

Thus, these issues about delivering legal aid services so as to meet gender equality objectives illustrate the close connections between issues of entitlement and issues of delivery systems; and the ways in which the concepts of neutrality, the law's division between public and private, the centrality of women's experiences in defining needs, and a focus on substantive, not merely formal, equality may inform research projects in relation to both issues. All of these suggestions for research focus on current arrangements for legal aid services, and the ways in which they may fail to meet gender equality objectives. In envisioning gender equality goals for legal aid services, however, it may also be useful to consider more transformative research which can revision our conceptions of "access" and "justice" for women, so as to foster legal aid programs which meet these more imaginative goals. The final section of this paper explores the conception of this more transformative research about legal aid services and gender equality.

Revisoning Access to Justice for Women

Effective strategies for gender equality require a reassessment of ends as well as means. The paradigmatic liberal prescription — equal opportunity — is a necessary but never sufficient social objective. The ultimate goal is not simply to ensure women's full participation in organizations that wield social, economic, and political power; it is rather to change the nature of those organizations and the way power is distributed and exercised. Our priority should be to empower women as well as men to reshape the institutions that are shaping them. At issue is not simply equality between the sexes, but the quality of life for both of them.⁹⁶

Deborah Rhode's assertion captures the difference between a search for gender equality in relation to current legal aid arrangements and a research approach which goes beyond the present system to revision ideas about "access" to "justice". In her view, such revisoning means that legal analysis should replace concern for individual intent with a focus on institutional practices in discrimination matters; and that "the law's approach to rape, sexual harassment, and domestic violence must reach beyond the relatively rare circumstances in which an individual plaintiff comes forward with conclusive proof of injury". Instead, "analysis must focus more critically on the cultural conditions that foster sexual abuse and on the law-enforcement practices that discourage redress".⁹⁷ As well, she recommends major efforts to reduce the cost, complexity and contentiousness of dispute-resolution processes, and strategies for removing the psychological and financial barriers of legal processes.

Such recommendations create demands for research about legal aid services which go beyond the problems of achieving gender equality within current structures of legal processes, the context in which legal aid services

⁹⁶ Rhode, above n2 at 320.

⁹⁷ *Ibid.* Rhode also notes that most legal theories about justice do not take gender into account, a point which has also been explored by Okin, S M, *Justice, Gender and the Family* (1989); according to Okin, justice for women depends on structural changes to family life.

are now provided. In a context which revisions legal processes, there is a need for gender bias research which reconceptualises legal aid services within a transformed legal system, a system which offers substantive gender equality to men and women. In such a context, the research approaches defined in the previous section would be necessary, but not sufficient, efforts to ensure gender equality in legal aid services.

Research about gender equality and legal aid services in a context which revisions law and legal processes must rethink the goals and objectives of legal aid services in such a context. For example, Christine Boyle's suggestions for feminist visions in criminal law would require significant changes in definitions of entitlement for legal aid services and would probably require some changes in delivery systems as well.⁹⁸ Similar changes in other aspects of law and legal process would necessitate rethinking about the appropriate arrangements for defining entitlement to legal aid services and for designing delivery systems. Such research might best be undertaken in terms of particular reform areas; for example, a research project might reconsider what legal aid services could be provided, and how they should be organised, for the victims of family violence (women and children) in the context of differing options for reforming the criminal law and legal processes relating to family violence. In doing so, of course, research which has been done about current arrangements for legal aid services in the context of family violence (as experienced by women in many different "family" contexts) can usefully inform both the approach and the conceptualising of research in a revised context. Thus, while it is important to clearly define the scope of revised legal aid research, it is also crucial to understand the connections between research about current legal aid arrangements and research which takes account of the revisioning of law and legal processes to achieve gender equality goals;⁹⁹ as Deborah Rhode has asserted, "by broadening our aspirations to justice, we may come closer to attaining it".¹⁰⁰

Research about gender equality and legal aid services in this revised context also needs to address issues about ways of conceptualising "access" for women. In this context, research may need to explore the ways in which women engage in dispute resolution, approaches which seem, on the basis of women's less frequent participation in courts and other legal processes to suggest that women may prefer other ways of solving problems. Such research needs to explore whether men and women have differing expectations of the legal system, or differing expectations in the context of legal aid

98 Boyle, Bertrand, Lacerte-Lamontagne and Shamaï, *A Feminist Review of Criminal Law* (1985) at 67-69.

99 For an account of the emerging norms about gender, see Razack, S, *Canadian Feminism and the Law* (1991); for a somewhat more pessimistic account of the responsiveness of law to gender equality claims, see Brodsky, G and Day, S, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (1989). For an analysis of the ways in which lawyers approach gender equality litigation, see MacDonald, G, "The Process of Litigating Charter Sex Equality Cases: A Summary of Findings" (1991).

100 Rhode, D, n2 at 321. It may also be significant that the process of investigating gender bias may itself be a "transformative experience", an assertion which has been made in the context of gender bias task force activities in the courts in the United States: see Schafran, L H, "Gender and Justice: Florida and the Nation" (1990) 42 *Fla LR* 181, especially at 202ff.

services;¹⁰¹ whether women's less frequent participation in legal processes is the result of differing expectations or socialisation,¹⁰² or whether it relates to differential access to economic resources; and whether women use other means of solving problems which might be usefully adopted by men as well.

Thus, research about gender equality and legal aid services in the context of revisioning "access" to "justice" challenges the fundamental concepts of law and legal processes. Among these fundamental concepts are the same themes which provided the framework for analysis in the previous section: the law's claim to neutrality and the status quo, its division between public and private spheres, the need to take account of contextualised human experiences rather than using abstract ideas, and the evolution of conceptions of equality beyond formality to substance. Thus, the same features of feminist analyses which informed research approaches in the context of existing arrangements for legal aid services are equally applicable in the context of revisioning law and legal processes. In this way as well, there are important connections between research projects which may be undertaken in these two differing contexts.

In the end, therefore, research about gender equality and legal aid services must confront Evatt J's assertion about the pervasiveness of gender bias in legal institutions, its entrenched and insidious qualities, and the continuing challenge to identify and eradicate it.¹⁰³ As was suggested in the context of women's claims for legal status at the turn of the century:

... there is no solution ... except to confront the reality that gender and power are inextricably linked ... Honestly confronting the barriers of our conceptual framework may at least permit us to begin to ask more searching and important questions.¹⁰⁴

101 For an interesting analysis of efforts to use divorce processes to "empower" women, see Joselson, E and Kaye, J, "Pro Se Divorce: A Strategy for Empowering Women" (1983) 1 *Law & Ineq J* 239.

102 See, eg, the work of Gilligan, C, above n63 and the adaptation of her ideas in the legal context by Menkel-Meadow, C, above n94.

103 Evatt, above n1.

104 Mossman, "Feminism and Legal Method: The Difference it Makes" in Fineman and Thomadsen, (eds) above n7 at 298.