> … is a pre-discursive element, which is in excess of, and nevertheless indispensable to, the act of thinking as such …[72]

The recognition of this desire becomes then situated in an understanding both of the contexting of the desire and the possibilities of really activating patterns of truly radical change. For her, premised very much within the work of Gilles Deleuze:

> It is less a question of founding the subject than of elucidating the categories by which the female feminist subject can be adequately represented.[73]

What she emphasises is the 'multi-layered structure of the subject'. It is this which I really want to carry forward. If the politics of difference impel us to adopt a strategy towards law which is based on naming law as gendered and a claim for recognition then of the specificity of our own genders needs and aspiration; we should recognise it as a strategy. The strategy should lead us towards a clearer recognition of law itself as plural; if we can open up and expand that plurality by such a strategy so much the better. The strategy is pragmatic; for it to be enabling it must address both our desire and the multiplicity of different futures. The danger is that it might simply feed back into a reengagement with the modernist project; a project which reinforces an attempt to present and represent law as a coherency. Much much more coherent now because of our own incorporation.

We no longer want to be the objects of desire but we must not lose our own desire. We must demand recognition but not hold ourselves simply to a demand for recognition and an engagement within patterns which have already failed us. Truly radical work now demands that we tell each other good stories but not become entrapped within them. As Peter Goodrich says:

> There is no reason, either in history or in doctrine, why different laws cannot govern different genres, separate statuses or the plural identities of legal persons.[74]

We must not lose sight of the 'plural identities of legal persons'; and of the plural possibilities within law. To keep hold of this we must develop immediate strategies as well as keep in sight the horizons of our desire. That our feminism goes beyond our ability to articulate, that it cannot be finally represented either in theory or in law is our strength. It makes possible future rather than simply grafts us on to existing histories.

72 *Ibid*, p 182.

73 *Ibid*, p 190.

74 Peter Goodrich, *op cit*.

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CHAPTER 4

FEMINIST LEGAL METHODS

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In the quest for equality feminist scholars have adopted a number of methods. Among these, consciousness-raising has played a significant role, not only for feminist legal scholars but for all feminists. From a feminist perspective, society as traditionally ordered, particularly Western 'liberal' societies, establishes a mask – a facade – of gender-neutrality and equality. The tenets of liberalism – representative democratic government under the rule of law – creates the impression that all citizens have equal rights and equal value in society. Once, however, the veneer of liberalism is scratched, it becomes apparent that behind liberalism there lies a vast reservoir of discrimination and inequality. Such discrimination and inequality is not reserved for women: all minority groups in society have suffered the historical and contemporary experience of discrimination. So successful has liberalism been in portraying society as a community of equal genderless, raceless, classless, ageless and equally-able-bodied persons, that a conscious and systematic effort is required in order to unmask the reality of inequality and oppression. As Catharine MacKinnon explains:

> Liberal legalism is thus a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.[1]

Moreover, society and law have traditionally been so ordered that the role of women has been confined to the 'private sphere' of life,[2] and excluded from full participation in civic life. Fostering and maintaining the mythology of the 'natural' role of women as the carers and nurturers in society, disguises the unequal opportunities for women in the 'public sphere', whether that be political participation or employment opportunities. Female consciousness-raising is educative, seeking to reveal and unmask the falsehoods hidden behind the shroud of political theory.

Feminist legal methods also entail the detailed analysis of specific laws, their application and enforcement. Much of the discrimination previously suffered by women in the field of employment law and family law, to take but two examples, has been reversed by the painstaking scholarship involving detailed analysis of specific legal rules. In England, the law – being the product of predominantly male legislators and male judges, has proven a stubborn subject: it was not until 1990, for example, that husband's immunity from prosecution for rape was removed. Furthermore, as will be seen in Chapter 9, the criminal justice system is deeply resistant to evolution and reform in relation to women who – having suffered years of violent persecution at the hands of their male partners – finally break under the strain and kill their violent partners.

1 CA MacKinnon, *Toward Feminist Jurisprudence*, in *Toward a Feminist Theory of the State* (Harvard University Press, 1989), p 237.

2 On the public/private dichotomy see Chapter 5.

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Feminist scholars are also engaged in the process of deconstructing literary, social and legal texts in order to reveal the manner in which women have traditionally been excluded. The supposedly 'gender-neutral', rational, objective language of law masks this exclusion. What feminist legal scholars strive for is full inclusion in law and legal language. The effect of 'gender-neutral' legal language goes beyond a failure to include women. Also implicit in the mask of law is the silencing of women and women's concerns and women's rights. Women must seek to be heard; to be given a voice; to be recognised as equal citizens under the law.

Feminist method is also concerned with the task of theorising about law and inequality. What role does law play? To what extent is the law 'gendered'? What role should – and could – law play? Is law the most appropriate vehicle through which to effect fundamental change in societal attitudes? Whilst there may be little consensus on such questions, the questions are increasingly being asked.

In the three articles which follow, Katherine Bartlett, Ann Scales and Mary Jane Mossman address the importance of and range of methods employed by feminist legal scholars.[3]

FEMINIST LEGAL METHODS[4]

Katharine Bartlett[5]

Introduction

'Doing' and 'Knowing' in Law

In what sense can legal methods be 'feminist'? Are there specific methods that feminist lawyers share? If so, what are these methods, why are they used, and what significance do they have to feminist practice? Put another way, what do feminists mean when they say they are 'doing law,' and what do they mean when, having done law, they claim to be 'right'?

Feminists have developed extensive critiques of law and proposals for legal reform. Feminists have had much less to say, however about what the 'doing' of law should entail and what truth status to give to the legal claims that follow. These methodological issues matter because methods shape one's view of the possibilities for legal practice and reform. Method 'organises' the apprehension of truth; it determines what counts as evidence and defines what is taken as verification.[6] Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead 'recreate the illegitimate power structures [that they are] trying to identify and undermine'.[7]

Method matters also because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or 'correct'. I

3 See also Chapter 6 for analysis of the potential for Carol Gilligan's theory of differing male and female moral reasoning for legal interpretation and application.

4 Katharine Bartlett, 'Feminist Legal Methods' (1990) 100 *Harvard Law Review*, 829. (Footnotes edited.)

5 At the time of writing, Professor of Law, Duke University School of Law.

6 CA MacKinnon, 'An Agenda for Theory' (1982), 7 *Signs* 515, p 527

7 P Singer, 'Should Lawyers Care About Philosophy?' (1989) *Duke Law Journal* 1752.

suspect that many who dismiss feminism as trivial or inconsequential misunderstand it. Feminists have tended to focus on defending their various substantive positions or political agendas, even among themselves. Greater attention to issues of method may help to anchor these defences, to explain why feminist agendas often appear so radical (or not radical enough), and even to establish some common ground among feminists.

As feminists articulate their methods, they can become more aware of the nature of what they do, and thus do it better. Thinking about method is empowering. When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted. In the process, I am likely to become more committed to what it is that I have improved. This likelihood, at least, is a central premise of this article and its primary motivation.

I begin this article by addressing the meaning of the label 'feminist', and the difficulties and the necessity of using that label. I then set forth in Part II a set of legal methods that I claim are feminist.

All of these methods reflect the status of women as 'outsiders', who need ways of challenging and undermining dominant legal conventions and of developing alternative conventions which take better account of women's experiences and needs. The methods analysed in this article include (1) identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups (asking the 'woman question'); (2) reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives (feminist practical reasoning); and (3) seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative (consciousness-raising).

As I develop these methods, I consider a number of methodological issues that feminists have not fully confronted and that are crucial to the potential growth of feminist legal theory and practice. I examine, for example, the relationship between feminist methods and substantive legal rules. Feminist methods emerged from feminist politics and find their justification, at least in part, in their ability to advance substantive feminist goals. Thus, one might argue that the methods I describe are not really methods at all, but rather substantive, partisan rules in the not-very-well-disguised shape of method. I argue, however, that the defence of any particular set of methods must rest not on whether it is nonsubstantive – an impossibility – but whether its relationship to substantive law is defensible. I defend the substantive elements of feminist methods and argue that these methods provide an appropriate constraint upon the application of substantive rules.

Throughout my analysis of feminist legal methods, I also critically examine the place of feminist methods within the general context of legal method. I reject the sharp dichotomy between abstract, deductive ('male') reasoning, and concrete, contextualised ('female') reasoning because it misdescribes both conventional understandings of legal method and feminist methods themselves. The differences between the two methodologies, I argue, relate less to differences in principles of logic than to differences in emphasis and in underlying ideals about rules. Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility, and the ability to identify missing points of view.

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'Feminist' As a Descriptive Label

Although this article necessarily represents a particular version of feminism, I refer to positions as feminist in a broad sense that encompasses a self-consciously critical stance toward the existing order with respect to the various ways it affects different women 'as women'. Being feminist is a political choice about one's positions on a variety of contestable social issues. As Linda Gordon writes, 'feminism ... is not a 'natural' excretion of [woman's] experience but a controversial political interpretation and struggle, by no means universal to women'.[8] Further, being feminist means owning up to the part one plays in a sexist society; it means taking responsibility – for the existence and for the transformation of 'our gendered identity, our politics, and our choices'.[9]

Use of the label 'feminist' has substantial problems. First, it can create an expectation of feminist originality or invention that feminists do not intend and cannot fulfil. This expectation itself demonstrates a preoccupation with individual achievement and ownership at odds with the feminist emphasis on collective, relational discovery. Feminists acknowledge that some important aspects of their methods and theory have roots in other legal traditions. Although permeated by bias, these traditions nonetheless have elements that should be taken seriously. Still, labelling methods or practices or attitudes as feminist identifies them as a chosen part of a larger, critical agenda originating in the experiences of gender subordination. Although not every proponent of feminist practice and reform is unique, these components together address a set of concerns not reached by existing traditions.

Second, use of the label 'feminist' has contributed to a tendency within feminism to assume a definition of 'woman' or a 'women's experiences' that is fixed, exclusionary, homogenising and appositional, a tendency that feminists have criticised in others. The tendency to treat woman as a single analytic category has a number of dangers. For one thing, it obscures – even denies – differences among women and among feminists, especially in race, class, and sexual orientation, that ought to be taken into account. If feminism addresses only oppressive practices that operate against white, privileged women, it may readjust the allocation of privilege, but fail either to reconstruct the social and legal significance of gender or to prove that its insights have the power to illuminate other categories of exclusion. Assuming a unified concept of 'woman' also adopts a view of the subject that has been rendered highly problematic. Poststructural feminists have claimed that woman has no core identity but rather comprises multiple, overlapping social structures and discourses. Using woman as a category of analysis implies a rejection of these claims, for it suggests that members of the category share a set of common, essential, ahistorical characteristics that constitute a coherent identity.

Perhaps the most difficult problem of all with use of the terms 'feminist' and 'woman' is its tendency to reinstate what most feminists seek to abolish: the isolation and stigmatisation of women. All efforts to take account of difference face this central dilemma. Although ignoring difference means continued inequality and oppression based upon difference, using difference as a category of analysis can reinforce stereotyped thinking and thus the marginalised status of

8 Linda Gordon, 'What's New in Women's History', in T de Lauretis (ed), *Feminist Studies/ Critical Studies* (1986) 20, 30.

9 Alcoff, 'Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory' (1988) 13 *Signs* 405, p 432.

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those within it. Thus, in maintaining the category of woman or its corresponding political label 'feminist' to define those who are degraded on account of their sex, feminists themselves strengthen the identification of a group that thereby becomes more easily degraded.

Despite these difficulties, these labels remain useful. Although feminists have been guilty of ethnocentrism and all too often fail to recognise that women's lives are heterogeneous, that women who have had similar experiences may disagree about political agendas, and that women's gender is only one of many sources of identity, gender remains a category that can help to analyse and improve our world. To sustain feminism, feminists must use presently understandable categories, even while maintaining a critical posture toward their use. In this article, I retain feminist as a label, and woman as an analytical category, while trying to be sensitive to the misleading or dangerous tendencies of this practice. I try to acknowledge the extent to which feminist methods and theory derive from, or are related to, familiar traditions. I also try to avoid – to the extent one can – the ever present risks of ethnocentrism and of unitary and overgeneralisations. Where I fail, I hope I will be corrected, and that no failures, or corrections, will ever be deemed final.

Feminist Doing in Law

When feminists 'do law', they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide the resolution of the dispute, and they apply those principles to the facts. This process unfolds not in a linear, sequential, or strictly logical manner, but rather in a pragmatic, interactive manner. Facts determine which rules are appropriate, and rules determine which facts are relevant. In doing law, feminists like other lawyers use a full range of methods of legal reasoning – deduction, induction, analogy, and use of hypotheticals, policy, and other general principles.

In addition to these conventional methods of doing law, however, feminists use other methods. These methods, though not all unique to feminists, attempt to reveal features of a legal issue which more traditional methods tend to overlook or suppress. One method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Another method, feminist practical reasoning, expands traditional notions of legal relevance to make legal decision-making more sensitive to the features of a case not already reflected in legal doctrine. A third method, consciousness raising, offers a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles. In this part, I describe and explore the implications of each of these feminist methods.

Asking the Woman Question

A question becomes a method when it is regularly asked. Feminists across many disciplines regularly ask a question – a set of questions, really – known as 'the woman question'[10] which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective. In this section, I describe the method of asking the woman question in law as a primary method of feminist critique, and discuss the relationship between this method

10 See eg C Gould, 'The Woman Question: Philosophy of Liberation and the Liberation of Philosophy', in C Gould and M Wartofsky (eds), *Women and Philosophy* (1976), p 5; Hawkesworth, 'Feminist Rhetoric' (1986) 16 *Political Theory*, 444, pp 452–56.

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and the substance of feminist goals and practice. I also show how this method reaches beyond questions of gender to exclusions based upon other characteristics as well.

The Method

The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only non-neutral in a general sense, but also 'male' in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.

Women have long been asking the woman question in law. Legal impediments associated with being a woman were, early on, so blatant that the question was not so much whether women were left out, but whether the omission was justified by women's different roles and characteristics. American women such as Elizabeth Cady Stanton and Abigail Adams may seem today all too modest and tentative in their demands for improvements in women's legal status.[11] Yet while social stereotypes and limited expectations for women may have blinded women activists in the eighteenth and nineteenth centuries, their demands for the vote, for the right of married women to make contracts and own property, for other marriage reforms, and for birth control challenged legal rules and social practices that, to others in their day, constituted the God-given plan for the human race ... .[12]

Feminists today ask the woman question in many areas of law. They ask the woman question in rape cases when they ask why the defence of consent focuses on the perspective of the defendant and what he 'reasonably' thought the woman wanted, rather than the perspective of the woman and the intentions she 'reasonably' thought she conveyed to the defendant.[13] Women ask the woman question when they ask why they are not entitled to be prison guards on the same terms as men;[14] why the conflict between work and family responsibilities in women's lives is seen as a private matter for women to resolve within the family rather than a public matter involving restructuring of the workplace;[15] or why the right to 'make and enforce contracts' protected by section 1981 forbids discrimination in the formation of a contract but not discrimination in its interpretation.[16] Asking the woman question reveals the ways in which political choice and institutional arrangement contribute to women's subordination. Without the woman question, differences associated with women are taken for

11 See D Riley, *Am I That Name?: Feminism and the Category of 'Women' in History* (1988).

12 Katherine Bartlett, *op cit*, pp 831–38.

13 See S Estrich, *Real Rape* (1987), pp 92–104.

14 See W Williams, 'Women's Rights', 7 *L Rep* 175.

15 See Dowd, 'Work and the Family' (1989) 24 *Harv CR-CL Law Review* 79; F Olsen, 'The Family and the Market' (1983) 96 *Harvard Law Review* 1497; N Taub, 'From Parental Leaves to Nurturing Leaves' (1985) 13 *NYU Rev L & Social Change* 381; J Williams, 'Deconstructing Gender' (1987) *Michigan L Rev* 797; W Williams, *Equality's Riddle*.

16 *Cf*, 'The Supreme Court, 1988 Term – Leading Cases' (1989) 103 *Harvard Law Review*, 137, p 330.

granted and, unexamined, may serve as a justification for laws that disadvantage women. The woman question reveals how the position of women reflects the organisation of society rather than the inherent characteristics of women. As many feminists have pointed out, difference is located in relationships and social institutions – the workplace, the family, clubs, sports, childrearing patterns, and so on – not in women themselves. In exposing the hidden effects of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.

Once adopted as a method, asking the woman question is a method of critique as integral to legal analysis as determining the precedential value of a case, stating the facts, or applying law to facts. 'Doing law' as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination. It means recognising that the woman question always has potential relevance and that 'tight' legal analysis never assumes gender neutrality.

The Woman Question: Method or Politics

Is asking the woman question really a method at all, or is it a mask for something else, such as legal substance, or politics? The American legal system has assumed that method and substance have different functions, and that method cannot serve its purpose unless it remains separate from, and independent of, substantive 'bias'. Rules of legal method, like rules of legal procedure, are supposed to insulate substantive rules from arbitrary application. Substantive rules define the rights and obligations of individuals and legal entities (what the law is); rules of method and procedure define the steps taken in order to ascertain and apply that substance (how to invoke the law and to make it work). Separating rules of method and procedure from substantive rules, under this view, helps to ensure the regular, predictable application of those substantive rules. Thus, conventional and reliable ways of working with substantive rules permit one to specify in advance the consequences of particular activities. Method and process should not themselves have substantive content, the conventional wisdom insists, because method and process are supposed to protect us from substance which comes, 'arbitrarily', from outside the rule. Within this conventional view, it might be charged that the method of asking the woman question fails to respect the necessary separation between method and substance. Indeed, asking the woman question seems to be a 'loaded', overtly political activity, which reaches far beyond the 'neutral' tasks of ascertaining law and facts and applying one to the other.

Of course, not only feminist legal methods but all legal methods shape substance; the difference is that feminists have been called on it. Methods shape substance, first, in the leeway they allow for reaching different substantive results. Deciding which facts are relevant, or which legal precedents apply, or how the applicable precedents should be applied, for example, leaves a decision-maker with a wide range of acceptable substantive results from which to choose. The greater the indeterminacy, the more the decision-maker's substantive preferences, without meaningful methodological constraints, may determine a particular outcome. Not surprisingly, these preferences may follow certain patterns reflecting the dominant cultural norms.

Methods shape substance also through the hidden biases they contain. A strong view of precedent in legal method, for example, protects the *status quo* over the interests of those seeking recognition of new rights. The method of

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distinguishing law from considerations of policy, likewise, reinforces existing power structures and masks exclusions or perspectives ignored by that law. The endless academic debates over originalism, interpretivism, and other theories of constitutional interpretation demonstrate further that methodological principles convey substantive views of law and make a difference to legal results.

Feminist Practical Reasoning

Some feminists have claimed that women approach the reasoning process differently than men do.[17] In particular, they say that women are more sensitive to situation and context, that they resist universal principles and generalisations, especially those that do not fit their own experiences, and that they believe that 'the practicalities of everyday life' should not be neglected for the sake of abstract justice. Whether these claims can be empirically sustained, this reasoning process has taken on normative significance for feminists, many of whom have argued that individualised fact-finding is often superior to the application of bright line rules,[18] and that reasoning from context allows a greater respect for differences[19] and for the perspectives of the powerless. In this section, I explore these themes through a discussion of a feminist version of practical reasoning.

The Method

As a form of legal reasoning, practical reasoning has many meanings invoked in many contexts for many different purposes. I present a version of practical reasoning in this section that I call 'feminist practical reasoning'. This version combines some aspects of a classic Aristotelian model of practical deliberation with a feminist focus on identifying and taking into account the perspectives of the excluded. Although this form of reasoning may not always provide clear decision methods for resolving every legal dispute, it builds upon the 'practical' in its focus on the specific, real life dilemmas posed by human conflict – dilemmas that more abstract forms of legal reasoning often tend to gloss over. In focusing on the 'real' rather than the abstract, practical reasoning has some kinship to legal realism and critical legal studies, but there are important differences which I will explore in this section.

Practical Reasoning

According to Amelia Rorty, the Aristotelian model of practical reasoning holistically considers ends, means, and actions in order to 'recognise and actualise whatever is best in the most complex, various, and ambiguous situations'.[20] Practical reasoning recognises few, if any, givens. What must be done, and why and how it should be done, are all open questions, considered on the basis of the intricacies of each specific factual context. Not only the resolution of the problem, but even what counts as a problem emerges from the specifics of the situation itself, rather than from some fore-ordained definition or prescription.

Practical reasoning approaches problems not as dichotomised conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. These

17 See C Gilligan, *In a Different Voice* (1982); M Belenky, B Clinchy, N Goldberger and J Taruile, *Women's Ways of Knowing* (1986).

18 K Bartlett, 'Re-Expressing Parenthood' (1988) 98 *Yale Law Journal*, 293, 321–26; Sherry (1986) 72 *Va LR* 543, pp 604–13.

19 See Minow and Spelman, 'Passion for Justice' (1988) 10 *Cardozo I Rev* 37, 53; A Scales (1986) 95 *Yale LJ* p 1388 (extracted below).

20 Amelia Rorty, *Mind in Action* (1988), p 272.

dilemmas, ideally, do not call for the choice of one principle over another, but rather 'imaginative integrations and reconciliations',[21] which require attention to particular contexts. Practical reasoning sees particular details not as annoying inconsistencies or irrelevant nuisances which impede the smooth logical application of fixed rules. Nor does it see particular facts as the objects of legal analysis, the inert material to which to apply the living law. Instead, new facts present opportunities for improved understandings and 'integrations'. Situations are unique, not anticipated in their detail, not generalisable in advance. Themselves generative, new situations give rise to 'practical' perceptions and inform decision-makers about the desired ends of law.

The issue of minors' access to abortion exemplifies the generative, educative potential of specific facts. The abstract principle of family autonomy seems logically to justify a state law requiring minors to obtain their parents' consent before obtaining an abortion. Minors are immature and parents are the individuals generally best situated to help them make a decision as difficult as whether to have an abortion. The actual accounts of the wrenching circumstances under which a minor might seek to avoid notifying her parent of her decision to seek an abortion, however, demonstrate the practical difficulties of the matter. These actual accounts reveal that many minors face severe physical and emotional abuse as a result of their parents' knowledge of their pregnancy. Parents force many minors to carry to term a child that the minor cannot possibly raise responsibly; and only the most determined minor will be able to relinquish her child for adoption, in the face of parental rejection and manipulation. Actual circumstances, in other words, yield insights into the difficult problems of state and family decision-making that the abstract concept of parental autonomy alone does not reveal.

Practical reasoning in the law does not, and could not, reject rules. Along the specificity-generality continuum of rules, it tends to favour less specific rules or 'standards', because of the greater leeway for individualised analysis that standards allow. But practical reasoning in the context of law necessarily works from rules. Rules represent accumulated past wisdom, which must be reconciled with the contingencies and practicalities presented by fresh facts. Rules provide signposts for the appropriate purposes and ends to achieve through law. Rules check the inclination to be arbitrary and 'give constancy and stability in situations in which bias and passion might distort judgment ... Rules are necessities because we are not always good judges'.[22]

Ideally, however, rules leave room for the new insights and perspectives generated by new contexts. As noted above, the practical reasoner believes that the specific circumstances of a new case may dictate novel readings and applications of rules, readings and applications that not only were not, but could not or should not have been determined in advance. In this respect, practical reasoning differs from the view of law characteristic of the legal realists, who saw rules as open-ended by necessity, not by choice. The legal realists highly valued predictability and determinacy, but assumed that facts were too various and unpredictable for lawmakers to frame determinate rules. The practical reasoner, on the other hand, finds undesirable as well as impractical the reduction of contingencies to rules by which all disputes can be decided in advance.

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21 *Ibid*, p 274.

22 See M Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (1986).