religion, for example, emphasised the differences between men and women. Moreover, even where women and men were regarded as equal in the eyes of God (in the ideas of reformers such as Calvin, for example), women were still expected to be subordinate to men, their subordination reflecting 'the divinely created social order' in which God 'ordained' the subjugation of wives to their husbands.

The idea of a divinely created 'social office' in the religious tradition, which required women and, men to perform quite different social roles, was reinforced by secular ideas in philosophy in which the role of the family prescribed defined roles for women. 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. Moreover, even if Mr Justice Barker had turned to scientific thought at the turn of the century, he would have found these views confirmed. Because scientific inquiry took place within an already existing framework of knowledge, it was almost inevitable that scientists would find the answers to questions they asked rather than to others which they did not ask, and confirmation of differences rather than similarities between women and men.

The ideas described from religion, philosophy, and science were those current in the mainstream of intellectual life at the turn of the century. There were, of course, other ideas also current at that time: ideas of religious equality among the Shakers, and also with liberals such as the Grimke sisters; ideas about sex equality, however flawed, in the work of philosophers like Mill and scientific ideas about the influence of environment on traits of men and women. Yet such ideas were less well accepted than those in the mainstream, those so warmly embraced in the court by Barker, J.

What is significant here is the court's uncritical acceptance of ideas from the mainstream of intellectual life, as if they were factual rather than conceptual. Moreover, in accepting these ideas and making them an essential part of his decision, Barker, J. provided an explicit and very significant reinforcement of the idea of gender-based difference. In this way, the particular decision denying French's claim to practice law had an impact well beyond the instant case. Thereafter, in the law, as well as in other intellectual traditions, there was a recognised and 'legitimate' difference between women and men.

Two other points must also be mentioned. It is significant to an assessment of legal method that the ideas about the role of women, first expressed in the *Bradwell* case in 1873, were adopted without question over thirty years later in *French's* case in 1905. That the court apparently did not question the appropriateness of applying a precedent from an earlier generation, and from a foreign jurisdiction, seems remarkable. The possibility of distinguishing the earlier decision is clear; and the court's acceptance, without question, of the *Bradwell* decision as both relevant and apparently binding is initially perplexing. As well, the *Bradwell* decision relied in part on the inability of married women to enter into contracts because of their common law disability, still in existence in 1873. Barker J might have been expected to comment on the fact that married women's property legislation, both in Canada and in the United States, had erased most of these disabilities by 1905, thereby providing a further reason for distinguishing rather than following *Bradwell*. As such analysis demonstrates, the *Bradwell* precedent was not self-applying; there was a choice to be made by the court in *French*. The more difficult problem, therefore, is to explain the reasons for the judicial choice. Even more fundamentally, the ideas accepted in *Bradwell*

and restated in *French* were quite inconsistent, and probably known to be so by the judges, with the reality of women's work outside the home at the turn of the century. In Canada, as well as in Great Britain, very few of the women whom the judges knew, whether they were litigants, or cleaners of the courtroom, or servants in the home, actually corresponded in any way to the judicial representation. At the time when the judges were speaking, more than a million unmarried women alone were employed in industry, while a further three quarters of a million were in domestic service. For the great majority of Victorian women, as for the great majority of Victorian men, life was characterised by drudgery and poverty rather than by refinement and decorum.[53]

Despite this reality, Mr Justice Barker reiterated without criticism or qualification the authoritative statement from *Bradwell* that 'the paramount destiny and mission of women' was that of wife and mother – because 'this is the law of the Creator'.[54] The conflict which is apparent to us between the judicial description of all women, and the known conditions in which at least some of them lived at that time, suggests a further element of legal method: abstraction from the real lives of women. Indeed, what seems evident is a willingness to use the ideas of (male) theologians, philosophers, and scientists as the basis of 'reality,' in preference to the facts of life in the real lives of actual women.

The judicial approach evident in *French* changed significantly, however, by the time of the *Persons* case. There is little mention of the idea of gender-based difference in the analysis of either the Supreme Court of Canada or the Privy Council in that case. In the Supreme Court of Canada, Mr Justice Mignault referred to the petitioners' claim only as a 'grave constitutional change',[55] and Mr Justice Anglin restated the 'apologia' from *Chorlton v Lings*[56] that:

> ... in this country in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.[57]

However, nothing in the judgments of the Supreme Court of Canada reflects the rhetoric and ideas expressed by Mr Justice Barker in Mabel French's case. And, by contrast, Lord Sankey commenced his opinion in the Privy Council by stating:

> The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary.[58]

His words represented a clear signal that, although the treatment of women in the past may have been understandable in the context of those times, the world had changed.

In the *Persons* case, that is all there is about the difference between men and women. The contrast between the reliance on gender-based difference as incontrovertible fact in *French* at the turn of the century, and the virtual absence

53 A Sachs and J Hoff Wilson, *Sexism and the Law* (1978), p 54.

54 At p 366.

55 At p 303.

56 (1868) LR 4 CP 374.

57 At p 283.

58 At p 128.

of such ideas in the *Persons* case in the late 1920s, seems highly significant. It seems, indeed, to offer an explanation for the differing outcomes in the two cases: when difference was emphasised in *French*, women were excluded from membership in the legal profession, while when it was discounted in the *Persons* case, women were included with men in opportunities to participate in public life.

This analytical approach, based as it is on the methodology actually observed in these two judicial decisions, suggests that the dictates of legal method were not strictly followed in the decision-making process. In addition to this approach, however, it is necessary to assess the legal method actually described by the judges in the cases. The contrast between what they said they were doing, and what they actually did, also offers some important insights into legal method. To this contrast we now turn.

The Principles of Legal Method

The stated reasons in these cases were consistent with well established principles of legal method. The principles can be analysed in terms of three aspects: (1) the characterisation of the issues; (2) the choice of legal precedents to decide the validity of the women's claims; and (3) the process of statutory interpretation, especially in determining the effect of statutes to alter common law principles. Both the principles themselves and their application to these specific claims are important for an understanding of the potential impact of feminism on legal method.

Characterising the Issue

In both *French* and the *Persons* case, the judges consistently characterised the issues as narrowly as possible, eschewing their 'political' or 'social' significance, and explaining that the court was interested only in the law. For example, in the *Persons* case in the Canadian Supreme Court, Chief Justice Anglin stated pointedly:

> In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the BNA Act, 1867, and upon that construction to base our answer.[59]

Even the Privy Council which came to a distinctly different conclusion framed the scope of its inquiry as narrowly as possible. Clearly evident in these judicial statements is a felt need to distance the court from the 'political' or moral issue, and a desire to be guided only by neutral principles of interpretation in relation to abstract legal concepts. The judges' confidence in the principles of legal method as a means of deciding the issue, even confined so narrowly, is also evident. While their comments suggest an awareness of broader issues, there is a clear assertion of the court's limited role in resolving such disputes.

Equally clearly, the women claimants never intended to bring to the court a 'neutral' legal issue for determination; they petitioned the court to achieve their goals, goals which were unabashedly political. In the face of such claims, however, the court maintained a view of its process as one of neutral interpretation. More significantly, the court's power to define the 'real issues' carried with it an inherent absence of responsibility on the part of the (male) judges for any negative outcome. It was the law, rather than the (male) person

59 At pp 281–82.

interpreting it, which was responsible for the decision. The result of such a characterisation process, therefore, is to reinforce the law's detachment and neutrality rather than its involvement and responsibility; and to extend these characteristics beyond law itself to judges and lawyers. Yet, how can we accommodate this characterisation of detachment and neutrality with the opinions expressed, especially in *French*, about the role of women? The ideas about gender-based difference expressed forcefully by Mr Justice Barker in that case appear very close to an expression about the 'desirability' of women as lawyers and not merely a dispassionate and neutral application of legal precedents. Thus, at least in *French*, there is inconsistency between the legal method declared by the judges to be appropriate, and the legal method actually adopted in making their decisions. In this context, the expressed idea of detachment and neutrality both masks and legitimates judicial views about women's 'proper' sphere,

Using Precedents in the Common Law Tradition

The existence of women's common law disability was regularly cited in both these cases as the reason for denying their claims to be admitted to the legal profession and to take part in public life. The judges used numerous precedents for their conclusion. For example, Chief Justice Anglin cited as a 'fact or circumstance of importance ... that by the common law of England (as also, speaking generally, by the civil and the canon law ...) women were under a legal incapacity to hold public office ... .[60] At the end of the 19th century, of course, there were a number of respects in which women (especially married women) suffered disabilities at common law: married women were denied the right to hold interests in property until the married women's property statutes, and all women were denied the right to vote until the 20th century. As well, however, courts regularly asserted that, because of women's common law disabilities, there were no precedents for admitting women to the legal profession or to full participation in public life.

It has been suggested that the absence of such a common law precedent can be traced to Lord Coke who (apparently without the benefit of precedent) 'had stated that women could not be attorneys' 300 years previously.[61] What is clear, at least, is that the absence of precedents declaring women eligible to take part in public life and enter the legal profession created a significant handicap for those presenting arguments in favour of the women's claims. From a broader perspective, this difficulty epitomises the negative effects of the doctrine of precedent on newly emerging claims to legal rights. If a precedent is required to uphold a claim, it is only existing claims which will receive legal recognition; the doctrine of precedent thus becomes a powerful tool for maintaining the *status quo* and for rationalising the denial of new claims. Seen in this light, the law itself is an essential means of protecting the *status quo*, notwithstanding the challenge of feminist ideas.

Yet, if this conclusion is correct, how can we explain the Privy Council decision, a decision in which the same conceptual framework of law was viewed very differently. After canvassing the precedents, Lord Sankey stated:

> The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested. Customs are

60 At p 283.

61 A Sachs and J Hoff Wilson, *op cit*, p 32.

> apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.[62]

Obviously, the Privy Council was less concerned with the absence of precedent in their decision-making than the judges in *French*. Is this approach simply an early example of a court of highest jurisdiction deciding not to be bound by precedent in appropriate cases, or is there some other explanation?

One suggestion is that the decision of the Privy Council in 1929 simply reflected the spirit of the times in relation to the role of women. Much had indeed changed since Clara Brett Martin and Mabel Penury French had sought admission to the legal profession at the turn of the century. As was noted earlier, there had been legislation enabling married women to enter into contracts and to hold interests in property even before the end of the 19th century. In the early part of the 20th century, moreover, women had participated successfully in World War One, and they had attained suffrage in many jurisdictions after the War and the benefit of the Sexual Disqualification Removal Act in England in 1919. It may, therefore, be quite accurate to conclude that the explanation is not one of 'legal logic'; instead, it is evident that 'what had changed was not ... the modes of reasoning appropriate to lawyers, but the conception of women and women's position in public life held by the judges.'[63]

At the same time, if this explanation is accepted, it is difficult to account for the differences in perspective of the judges of the Supreme Court of Canada in 1928 from those in the Privy Council in 1929. It is true that Lord Sankey sat in the English Cabinet alongside Margaret Bondfield, the first woman to hold Cabinet office in Britain; and it is, therefore, possible that he had become accustomed to the idea of women holding public office as a result of this 'precedent'. This conclusion, of course, depends on the assumption that no similar role models existed in Canada. Yet such a conclusion denies the importance of the roles of the five women challengers in the *Persons* case: Henrietta Muir Edwards was the Alberta Vice-President of the National Council of Women for Canada, Nellie McClung and Louise McKinney had been members of the Legislative Assembly in Alberta, while Irene Parlby was then a member of the same Legislative Assembly and of its Executive Council; and Emily Murphy was the first woman police magistrate in Alberta. It is therefore difficult, if not impossible, not to accept these Canadian women as 'precedents' equal to Margaret Bondfield. What, then, is the explanation for these differing perspectives and the different outcomes which resulted in the two courts? In terms of the legal method described by the judges, of course, there is no answer to this question. Neither the judgments in the Supreme Court of Canada nor Lord Sankey's opinion in the Privy Council expressly consider the reality of women's experience at that time at all, and they specifically do not consider the reality of experience for the actual women claimants in the *Persons* case. Thus, even if the judges' perspectives on women's place were different in the two courts, there is virtually nothing in their judgments expressly reflecting them. For this reason, it is impossible to demonstrate that Lord Sankey's differing perspective was the reason for the different outcome in the Privy Council. At the same time, it is hard to find any other convincing explanation.

62 At p 134.

63 A Sachs and J Hoff Wilson, *op cit*, p 42.

What does, of course, seem clear is the existence of judicial choice in the application of precedents. In the process of choosing earlier cases and deciding that they are binding precedents, judges make choices about which aspects of earlier cases are 'relevant' and 'similar,' choices which are not neutral but normative. In suggesting that the earlier decisions (relied on by the Supreme Court of Canada as binding precedents) were not determinative, Lord Sankey was declaring that the earlier decisions should not be regarded as exactly the same as the situation before the court in the *Persons* case. In this way, Lord Sankey's decision demonstrates the availability of choice in the selection of facts, in the categorisation of principles and in the determination of relevance. At the same time, his opinion completely obscures the process and standards which guided the choice he actually made. To the myth of 'neutrality,' therefore, Lord Sankey added the 'mystery' of choice.

Interpreting Statutes and Parliament's Intent

The interpretation of the law relating to women's claims was complicated by the need for judges to construe statutes as well as take account of common law principles. in some earlier cases, for example, women had challenged their exclusion from rights in statutes where the statutory language referred to 'men'. Such claims were based on the 1850 legislation[64] in England which provided that 'words importing the masculine gender should be deemed and taken to include females, unless the contrary was clearly expressed'. In *Chorlton v Lings*, a case involving the right to be registered to vote under legislation which gave such a right to any 'man,' the court dismissed the women's claim on the basis that it could not have been the wish of Parliament to make so drastic a change; had Parliament wished to enable women to vote, it would not have used the word 'man' in setting out the qualifications for voting in the statute.

Even in the statutes which used gender-neutral language, however, there were problems of statutory interpretation in relation to these cases. The legislation reviewed in the *Persons* case, as well as that at issue in the admission of both Martin and French, used the word 'person' in describing the qualifications for being appointed to the Senate and called to the bar respectively. In the *Persons* case in the Supreme Court of Canada, Chief Justice Anglin expressed his surprise that such a monumental change in the position of women could be conferred by Parliament's use of such insignificant means; as he stated rhetorically: 'Such an extraordinary privilege is not conferred furtively'.[65] Not surprisingly, he concluded that the women's claim must be dismissed because there was no evident express intent on the part of Parliament to effect the change advocated by them; the use of the word 'person' was not, by itself, sufficient.

A similar result occurred in French's challenge in the New Brunswick court. The legislation governing the admission of lawyers used the word 'person'; indeed, the legislation in New Brunswick had used gender-neutral language for many years. Unfortunately, this latter fact reinforced the judges' conclusion that the statute could not have been intended to include women, since they had never been lawyers.[66] Mr Justice Barker had doubt at all as to the appropriate resolution of this problem of statutory interpretation, concluding that any

64 Lord Brougham's Act 1850 (Imp) c 21.

65 At p 285.

66 At pp 370–71.

suggestion that the word 'person' encompassed females was a 'radical change' indeed.[67]

Thus, Canadian judges uniformly interpreted the word 'person' in a way which seemed most consistent with their time and experiences. For them, it was radical indeed to think of a woman in public office or in the legal profession, and their interpretation of the statutory language reflected their own understanding of what Parliament might have intended, had Parliament considered the matter explicitly. Presumably, the judges also felt confidence that members of Parliament, (male) people much like the judges themselves, would have agreed with their interpretation.

Once again, however, the opinion of the Privy Council is different. After reviewing at some length the legislative provisions of the BNA Act, Lord Sankey stated conclusively:

> The word 'person' ... may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not. In these circumstances the burden is upon those who deny that the word includes women to make out their case.[68]

Lord Sankey cited no precedent to support this presumption in favour of the most extensive meaning of the statutory language, even though it expressly contradicted the principles of statutory interpretation adopted by all the judges in the decision of the Supreme Court of Canada. In the end, just as the Privy Council decision was puzzling in relation to the effect of legal precedents about women's common law disabilities, it is also difficult to reconcile Lord Sankey's conclusions about the interpretation of the statute to the principles and precedents accepted in the Supreme Court of Canada. Clearly, the Privy Council departed from the Supreme Court's approach to legal method in reaching its conclusion to admit the women's claim. What remains unclear are Lord Sankey's reasons for doing so.

Feminism and Legal Method

In such a context, what conclusion is appropriate about feminism's potential for perspective transforming in the context of legal method? The analysis of these cases illustrates clearly the structure of inquiry identified as legal method. First of all, legal method defines its own boundaries: questions which are inside the defined boundaries can be addressed, but those outside the boundaries are not 'legal' issues, however important they may be for 'politics' or 'morals,' etc. Thus, the question of women becoming lawyers or Senators was simply a matter of interpreting the law; it did not require any consideration of utility or benefit to the women themselves or to society in general. The purpose and the result of the boundary defining exercise is to confer 'neutrality' on the law and on its decision-makers; in so doing, moreover, the process also relieves both the law and its decision-makers of accountability for (unjust) decisions – ('our whole duty is [only] to construe ... the provisions of the [constitution]').

More serious is the potential for judicial attitudes to be expressed, and to be used in decision-making (either explicitly or implicitly), when there is no 'objective' evidence to support them; because of the myth of neutrality which surrounds the process, such attitudes may acquire legitimacy in a way which strengthens and reinforces ideas in 'politics' and 'morals' which were supposed to be outside the

67 At p 371.

68 At p 138.

law's boundary. After the decision in *French*, for example, women were different as a matter of law, and not just in the minds of people like Mr Justice Barker. Thus, the power to name the boundaries of the inquiry (and to change them, if necessary) makes legal method especially impervious to challenges from 'the outside'.

Second, legal method defines 'relevance' and accordingly excludes some ideas while admitting others. Some facts, such as inherent gender-based traits, were regarded as relevant in *French*, for example, while in both cases the actual conditions in which women lived their lives were not relevant at all. What was clearly relevant in both cases were earlier decisions about similar circumstances from which the judges could abstract principles of general application. That all of the earlier cases had been decided by men, who were interpreting legislation drafted when women had no voting rights, was completely irrelevant to the decision-making in the cases analysed; even though the cases represented direct challenges to the continuation of gender-exclusive roles and the circumstances of the historical context may seem quite significant to women now. The irony of solemn judicial reliance on precedent in the context of significant efforts by women to change the course of legal history underlines the significant role of legal method in preserving the *status quo*.

Finally, the case analysis demonstrates the opportunity for choice in legal method: choice as to which precedents are relevant and which approach to statutory interpretation is preferred; and choice as to whether the ideas of the mainstream or those of the margins are appropriate. The existence of choice in legal method offered some possibility of positive outcomes in the women's rights cases, at the same time as legal method's definition of boundaries and concept of relevance ensured that positive outcomes would seldom occur. Lord Sankey's opinion in the Privy Council is an example of choice in legal method, however, which is as remarkable for its common sense as it is for its distinctiveness in legal method. Yet because Lord Sankey obscured the reasons for his choice, he also preserved the power and mystery of legal method even as he endowed women with the right to be summoned to the Senate. Thus, the opportunity for choice of outcome, positive as it appears, will not automatically lead to legal results which successfully challenge 'vested interests' or the '*status quo*', especially in relation to the law itself.

The conclusion that legal method is structured in such a way which makes it impervious to a feminist perspective is a sobering one. Within the women's movement, it has concrete consequences for the design of strategies for achieving legal equality: it suggests, for example, the general futility of court action for achieving significant change in women's rights, even though such action may be useful to monitor interpretation by courts or to focus attention on legal problems. For a feminist who is also a lawyer, however, the effort of 'double-think' may be both taxing and ultimately frustrating; the needs of clients require her to become highly proficient at legal method at the same time as her feminist commitment drives her to challenge the validity of its underlying rationale.

This dilemma also exists for feminist scholars. Feminist legal scholars are expected to think and write using the approaches of legal method: defining the issues, analysing relevant precedents, and recommending conclusions according to defined and accepted standards of legal method. A feminist scholar who chooses instead to ask different questions or to conceptualise the problem in different ways risks a reputation for incompetence in her legal method as well as lack of recognition for her scholarly (feminist) accomplishment. Too often, it seems almost impossible to be both a good lawyer and a good feminist scholar.

This dilemma is similarly acute for feminist law teachers and students. With the advent of large numbers of women law students and increased numbers of women on law faculties, many have concluded that there is now a feminist perspective in the law school. Such a conclusion ignores the power of legal method to resist structural change. For example, discussions about whether feminist law teachers should create separate courses with feminist approaches and content, or whether we should use such approaches and content in 'malestream' courses, or whether we should do both at once, etc, clearly confirm the 'reality' of the existing categories of legal knowledge, and reinforce the idea of the feminist perspective as 'Other'. While the separate course approach marginalises the feminist perspective, the process of 'tacking on' feminist approaches to malestream courses only serves to emphasise what is really important in contrast to what has been 'tacked on'. Even efforts to give equal time to the feminist perspective and to reveal the essential maleness of the 'neutral' approach may underline that what is male is what really has significance. On this basis, adding women's experience to the law school curriculum cannot transform our perspective of law unless it also transforms legal method.

Taking this conclusion seriously, as I think we must, leads to some significant conclusions for women who are feminists and who are lawyers, law teachers and law students. It is simply not enough just to introduce women's experience into the curriculum or to examine the feminist approach to legal issues, although both of these activities are important. Yet, especially because there is so much resistance in legal method itself to ideas which challenge the *status quo*, there is no solution for the feminist who is a law teacher except to confront the reality that gender and power are inextricably linked in the legal method we use in our work, our discourse, and our study. Honestly confronting the barriers of our conceptual framework may at least permit us to begin to ask more searching and important questions ... .

PART II

CENTRAL CONCEPTS IN FEMINIST JURISPRUDENCE