A MATTER OF DIFFERENCE: DOMESTIC CONTRACTS AND GENDER EQUALITY

BY BRENTA COSSMAN

This essay explores the feminist debates around gender difference and gender equality in the context of the Supreme Court of Canada's Pelech trilogy. It argues that the Court's approach to the enforcement of separation agreements does not adequately account for gender difference. Based on feminist critiques of difference, the essay then suggests an approach which might allow us to move beyond the dilemmas that difference presents to feminist legal theory and practice, and to the enforcement of separation agreements in particular.

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* Assistant Professor, Osgoode Hall Law School. Special thanks to Martha Minow, whose encouragement and inspiration helped me to explore the dimensions of difference. Thanks also to Ratna Kapur, Marlee Kline, Irene Lamb, and Mary Jane Mossman for their helpful comments and support, and to Lee Waldorf for her research assistance.
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In the recent Supreme Court of Canada trilogy of decisions of *Pelech v. Pelech*, *Richardson v. Richardson*, and *Caron v. Caron*, the Court specifically addressed the question of the appropriate exercise of its supervisory jurisdiction of separation agreements. While all three cases involved an application under section 11(2) of the *Divorce Act, 1970* to have a separation agreement varied, the significance of the trilogy extends well beyond the interpretation of the specific statutory provision. On one level, these decisions represent a general approach to the enforcement of domestic contracts based on a particular conception of support. This conception may inform similar applications under the new *Divorce Act, 1985* and provincial statutes such as the *Family Law Act*.

These decisions deal not only with the reach of the Court’s supervisory jurisdiction over separation agreements, but, at a deeper level, they tell a story, as law always tells stories, about our relationships with ourselves, one another, and authority. The story that these decisions tell us about the enforcement of domestic contracts is a story about the nature of individuals, the family, and...
society, and about the relationships between them. It is a story about the relationships between self and other, private and public. At the same time, this is a story about the nature of, and the relationship between, men and women in our society, about gender, gender difference, and gender equality.

Stories that we tell about gender are not just stories about gender; rather, they also implicate race and class. Unfortunately, we tend to forget about these other stories because we treat race and class as constants in our stories, that is, we simply assume white and middle class. So it is the case with the story of gender, gender difference, and gender equality being told in these cases. It is more appropriate to describe the story as one about some women and some men in our society.

It is these stories underlying the trilogy that I hope to explicate and examine. In its approach to the enforcement of domestic contracts, the Court's decision rests on an understanding of the individual, of the family, and of gender equality. While the Court did not articulate its story in terms of gender equality, an approach to gender relations is implicit in the judgments. The Court's approach to gender relations is so dominant and widespread that it is taken for granted. In making it explicit, this essay examines the dilemma produced, and offers an alternative story that moves beyond that dilemma.

II. THE PELECH DECISION

In Pelech,7 an application was brought under section 11(2) of the Divorce Act, 1970, to vary an award of maintenance made thirteen years earlier. The applicant had suffered severe physical and psychological problems, and her economic circumstances had significantly deteriorated as a result.

The Supreme Court of Canada held that the original order of maintenance ought not to be varied. Justice Wilson, writing for the majority, identified two approaches to the enforcement of

7 This essay will focus primarily on the Pelech decision as it is the case in which the Court articulated the principles of the law governing its supervisory jurisdiction of separation agreements.
separation agreements. The private choice approach, exemplified by the decision of Zuber J.A. in *Farquar v. Farquar*, emphasizes the importance of freedom of contract, and the value of allowing the parties to determine their relationship upon a marital breakdown. According to this approach, the Court should only intervene to invalidate a separation agreement when traditional common law or equitable doctrines permit, or should overturn an otherwise valid agreement in a narrow range of cases.

The second approach, which Wilson J. referred to as paternalistic, is exemplified by the decisions of the Manitoba Court of Appeal in *Newman v. Newman*, *Katz v. Katz*, and *Ross v. Ross*. In *Pelech*, Wilson J. emphasizes the need for agreements to conform to judicial standards of reasonableness and fairness. A Court taking this approach will be far more willing to intervene in the contractual arrangements of the parties and to examine whether the arrangements meet these judicial standards. The concern with fairness focuses attention on the need, or potential need, to compensate for gender-based inequalities. Wilson J. then identified a compromise approach which concentrates on the magnitude of the change to the parties’ lives. She associated this approach with the decision of the Ontario Court of Appeal in *Webb v. Webb*.

Wilson J.’s conclusion most closely approximates this compromise position. She rejected Matas J.A.’s paternalistic approach by affirming the finality of separation agreements and the need for judicial deference to individuals who make their own private choice decisions. However, she diverged from the private choice approach as articulated by Zuber J.A. She concluded that his decision fell "short of articulating a workable criterion by failing

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8 (1983), 1 D.L.R. (4th) 244 (Ont.C.A).
13 Pelech, supra, note 2 at 268.
to identify the requisites of the 'narrow range of cases'. Wilson J. similarly rejected the test in Webb as inadequate because its sole criterion was the magnitude of the change; it takes no account of whether the change was in some way "related to the fact of the marriage." Wilson J. concluded that the Court should only exercise its jurisdiction to override the provisions of a separation agreement "where an applicant seeking maintenance or an increase in the existing level of maintenance establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage." Wilson J. decided on the facts of the case that despite Mrs. Pelech's substantial change in circumstances, her current hardship was not causally related to the marriage and the separation agreement ought thus to remain intact.

On its face, the Pelech decision may not seem to involve a question of gender equality. Rather, it seems to question the judicial supervisory power over separation agreements. The decision tells us that there are at least two approaches to this supervisory question, one that recognizes a gender equality question in the enforcement of separation agreements, and one that does not. The compromise position adopted by the Court specifically denies that compensation for systemic gender inequality is a ground for exercising the supervisory power. The decision suggests that the enforcement of separation agreements is not a question of gender equality.

The Court treats only one of these approaches as an issue of gender equality. Yet, this is just the Court's story and I will argue that both approaches involve stories of gender equality, although they differ as to its meaning. The two approaches correspond to the two competing models of gender equality, that is, the sameness or equal-treatment model and the difference or special-treatment

14 Ibid. at 269.

15 Ibid. at 269. Further, "In order to impose responsibility for changed circumstances on a former spouse it seems to me essential that there must be some relationship between the change and the marriage." Ibid. at 269-70.

16 Ibid. at 270.
model. In Pelech, a normative choice between these competing models was required. The compromise position adopted by the Court is an attempt to bridge the gap between the approaches of sameness and difference and to overcome the dilemma of difference.

III. GENDER EQUALITY AND THE DILEMMA OF DIFFERENCE

The prevailing conception of equality as "treating likes alike,"\(^\text{17}\) and its constitutional expression in equal protection doctrine as the requirement that "those [who are] similarly situated be similarly treated,"\(^\text{18}\) have made sameness the fundamental prerequisite of equality. If you are not the same, that is, if you are different, then you are not entitled to equality.\(^\text{19}\) From this perspective the only question that matters is: are you the same?

This underlying connection between equality and sameness has led to a focus in the theory and practice of gender equality on the questions of gender difference and its significance.\(^\text{20}\) Two

\(^{17}\) This conception of equality has dominated Western thought since Aristotle's Nicomachean Ethics.

\(^{18}\) J. Tussman & J. tenBroek, "The Equal Protection of the Laws" (1948) 37 Calif. L. Rev. 341 at 345. This standard of "similarly situated," which has long been the standard in American equal protection doctrine, has recently been explicitly rejected by the Supreme Court of Canada in Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1.

\(^{19}\) This connection between sameness and equality, and between difference and inequality, is developed by M. Minow in "Learning to Live with the Dilemma of Difference: Bilingual and Special Education" (Spring 1985) 48:2 Law & Contem. Prob. 157 at 202-06 [hereinafter "Dilemma of Difference"].

competing models of gender equality have emerged which are divided precisely on the question of the significance to be attached to the gender difference.

One model is premised on the essential sameness of the sexes, and the requirement of equal treatment or formal equality. This model accepts the assumed connection between sameness and equality. It attempts to fit women within this prevailing conception by insisting that they are the same as men, and therefore have the right to equal treatment. The model claims women should be let into the world of men, from which they have traditionally been excluded, because of their difference.

Proponents of this approach to gender equality argue that special treatment has historically been used as a double-edged sword. Under the guise of protection, special treatment has been used to discriminate against women and has kept them out of the public world of men. It is argued that any admission of gender difference, and any corresponding attempt to provide for such difference, will simply provide a justification for continued unequal and discriminatory treatment. Simply stated, any recognition of difference will perpetuate the difference, and with it the inequality.

The second model of gender equality is premised on a recognition of gender difference. Without necessarily agreeing about what these differences are, nor about whether they are natural or socially constructed or both, proponents of this model insist that in the life experiences of women these differences are real. Ignoring these real differences will eradicate neither the differences nor the underlying inequalities. The ostensibly gender neutral standards of the equal treatment model are argued to be male

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21 This equal treatment approach is most often associated with the work of Williams, supra, note 20.

22 See, for example, Wolgast, supra, note 20, and A.C. Scales, "Towards a Feminist Jurisprudence" (1981) 56 Ind. L. J. 375.
standards; that is, standards established from a male perspective. Application of these gender biased standards will punish women for their difference and reinforce the underlying inequalities. In judging women by male norms, the equal treatment model is seen to deliver the limited promise held out by the conception of equality as sameness – women are only treated equally to the extent that they are like men. When women are not the same as men, when they are different, they are denied equality. The difference model concludes that substantive equality between the sexes therefore demands the recognition of difference.

23 N. Taub, Book Review (1980) 80 Colum. L. Rev. 1686 at 1694, writes: "Rules formulated in a male-dominated society reflect male needs, male concerns and male experience." Christine Littleton has similarly argued, in "Toward a Redefinition of Sexual Equality," supra, note 20 at 487, that the dominant conception of sexual equality as equal treatment demands assimilation to these male norms: "In this conception, women are told that they can only hope to gain a share of social rewards equal to men's by adopting traditional male roles. Women are thus convinced to demand no more, and often substantially less, than the chance to assimilate themselves into existing educational, labour, and other social institutions – rather than to demand that the institutions change to meet women's needs as they see them." From this perspective the standard of sameness – that is, the answer to the question "the same as who?" – is thus "men."

24 Proponents of this approach have difficulty reconciling its recognition of difference with the prevailing conception of equality as sameness. Wolgast, supra, note 20 at 50 concedes the point in arguing that equality cannot accommodate differences; equal rights "are rights with respect to which Justice should be blind, for their possession does not depend upon a person's having any qualification." Such rights, according to Wolgast, supra, note 20 at 49, are appropriate when sex differences are irrelevant, and when the sexes are similarly situated; special rights, on the other hand, are rights in which "qualifications are relevant and important," and are appropriate when sex differences are relevant.

Other proponents of this special treatment of the difference model do not so readily concede the incompatibility of equality and difference. Many argue that the very notion of equality must be restricted or reformulated to accommodate difference. See Littleton, supra, note 20. Notwithstanding her belief in the possibility of synthesis, Miles, supra, note 20 at 52 notes that the themes of equality and difference "continue to coexist ... in awkward contradiction." See also, MacKinnon, Feminism Unmodified, supra, note 20 at 33.

The Andrews case, supra, note 18, in rejecting the similarly situated test for discrimination under section 15, may be seen to represent a rejection of the simple equation of equality and sameness, and to provide at least the basis for a reconciliation of equality and difference. While the decision confirmed the rejection of a more formal equality approach, and opened space for a substantive approach to equality in which gender differences could be recognized, it has not entirely resolved the sameness/difference dilemma in the context of gender equality. The decision has not, however, eradicated the need to make choices regarding when difference ought to be recognized in the name of substantive equality. It states only that the difference can be recognized.
These two models of gender equality thus represent two different approaches to the question of gender difference. The sameness model denies the relevance of difference, but fails to deliver any substantive equality in a world which does not deny the relevance. On the other hand, the difference model recognizes the relevance of difference but encounters problems in translating difference into equality discourse and risks recreating the difference. The prevailing understandings of gender equality have thus run into what Martha Minow has described as the "dilemma of difference."\(^{25}\)

The dilemma of difference involves the risk of both recreating and devaluing difference by recognizing or ignoring it.

Identification or acknowledgement of a trait of difference, associated by the dominant group with minority identity, risks recreating occasions for majority discrimination based on that trait. Non identification or non acknowledgement, however, risks recreating occasions for discrimination based on majority practices such as tests, norms, and judgments forged without regard for difference, or with regard solely for the perspective, needs, and interests of the dominant group. Because minority differences have been made to carry implications for a person's worth and status a minority member may be reluctant to expose or emphasize such difference. Yet nonexposure can subject the minority to evaluation by allegedly neutral criteria that in fact implement the majority values and view.\(^{26}\)

The sameness approach and the difference approach represent the two sides of this dilemma. In ignoring gender difference, the sameness approach both devalues it and risks recreating the underlying inequality by judging women according to the norms, perspectives, and standards of a male-defined world. For example, ignoring pregnancy as a difference both devalues the experience of pregnancy for women and risks recreating the conditions of social inequality that have flowed from pregnancy as a socially relevant difference.

\(^{25}\) Minow, "Dilemma of Difference," supra, note 19. Also see Minow, "When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference" (1987) 22 Harv. Civ. Rts. - Civ. Lib. L. Rev. 111 [hereinafter "When Difference Has Its Home"] and M. Minow, "The Supreme Court 1986 Term - Foreword: Justice Engendered" (1987) 101 Harv. L. Rev. 10 [hereinafter "Foreword"]). Minow identifies three versions of the dilemma of difference: (1) the risk of recreating difference by either noticing or ignoring it, (2) the riddle of neutrality, and (3) the choice between discretion and formal rules. The second and third dilemma are discussed infra at 334-37 and 364-65.

\(^{26}\) M. Minow, "Dilemma of Difference," supra, note 19 at 160.
Similarly, the difference approach risks reinstating the differences it recognizes, and the underlying structures of inequality which have produced them. Thus, to recognize pregnancy as a socially relevant difference is to risk reinstating the social construction of woman as mother and recreating the opportunity to discriminate against women in the distribution of benefits and burdens in society. Furthermore, the recognition of pregnancy as a relevant difference does not necessarily affirm the value of difference. Rather, in the context of a male standard of value and the association of difference and inequality, the difference label may reinforce the undervaluation of pregnancy.  

In the context of family law, the dilemma of difference can be seen in the debate regarding the approach to property division and support upon marital breakdown. The debate has focused on the question of how women's economic dependency, resulting from the traditional division of labour within the family, can be overcome. One favours an approach of formal equality based on the equal application of gender-neutral rules to women and men. Reflecting the general structure of the sameness approach, any recognition of economic dependency is said to simply recreate that dependency. The opposing argument is that substantive equality demands a recognition of women's economic dependence. By failing to recognize the economic dependency of women on men, it is argued that the formal equality approach will recreate the very difference

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27 The dilemma of difference is not limited to the classic example of pregnancy but rather, has plagued virtually all areas of gender equality, from the question of women in the military to questions of pay equity and comparable worth. Nor is the dilemma limited to the issue of gender equality. The dilemma plagues all areas of equality where difference is an issue, from race and religion to physical and mental handicap. The fundamental question in all of these areas is whether to apply principles of formal equality, and thus ignore difference, or whether the principle of substantive equality requires the recognition of difference. See M. Minow, "Foreword," supra, note 25 and F. Michelman, "The Meanings of Legal Equality" (1986) 3 Harvard Blackletter J. 24.

28 R. Deech, "The Principles of Maintenance" (1977) 7 Fam. L. Rev. 229 at 230: "... [L]egal supposition of female dependency tends to deny freedom of choice to married and formerly married persons; it is widely considered degrading to women and it perpetuates the common law proprietary relationship of husband and wife even after divorce."
it has set out to transcend. This debate has been played out in the recent process of family law reform. While the formal equality approach won the day, the reform has been severely criticized as having realized the fears of the difference approach, that is, of having exacerbated the harsh economic reality women face upon marital breakdown.

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... [T]he current organization of family life is premised on the assumption that one partner will sacrifice a cash income in order to rear children and manage the home. The dependence of the non-earning spouse on the wage-earner is inevitable under present family arrangements. This leads in turn to inequality of earning power of spouses. Without a major change in social and family structures the Deech or Gray proposals serve merely to perpetuate an already unfair solution and will not secure equality.


31 M.J. Mossman & M. MacLean, "Toward a New Equality," supra, note 29 at 93: The recent family law reform legislation establishes a principle of equality of spousal entitlement to the division of matrimonial property and then declares each spouse independent and autonomous for purposes of legal rights and obligations, especially regarding ongoing financial support. Such an approach, however, essentially fails
IV. THE DILEMMA OF DIFFERENCE IN PELECH

The two competing approaches to the enforcement of separation agreements outlined by Wilson J. in *Pelech*\(^{32}\) correspond to these two sides of the dilemma of difference. The private choice approach is based on the sameness model and the paternalistic approach is based on the difference model. Moreover, the compromise adopted by the Court is based on both sides of the dilemma, that is, the rule is based on the sameness model whereas the exception is based on the difference model.

A. The Private Choice Approach

In outlining the private choice approach, Wilson J. reviewed Zuber J.A.'s reasons in *Farquar*\(^{33}\) holding that it is preferable for parties to settle their own affairs upon marital breakdown. Zuber J.A.'s reasons included that:

1. the parties are more likely to accept and live with an arrangement they have made themselves as opposed to one imposed upon them;
2. the administrative burden of the courts is relieved by respecting parties' freedom of contract; and
3. to achieve effective equality because male and female spouses are not similarly situated upon divorce or marriage breakdown, particularly in relation to access to financial security.


\(^{32}\) *Supra*, note 2.

\(^{33}\) *Supra*, note 8.
treat the agreement reached by the parties as final allows them to plan their separate futures with relative peace of mind.\textsuperscript{34}

As Wilson J. explained, "the core values underlying" the private choice approach to the enforcement of separation agreements "are those of individual responsibility and freedom of contract."\textsuperscript{35} At first glance, these values may not appear to be related to the question of gender equality, but on further reflection, an intimate, albeit silent, connection is evident.

In the private choice approach to the enforcement of separation agreements, nowhere is gender equality explicitly mentioned. No differences between women and men are recognized. No mention is made of women's economic dependence on men. Rather, the focus of the approach is on the importance of the values of individual responsibility and freedom of contract, values which are equally applied to women and men. The assumption underlying this approach is that, for the purposes of the enforcement of separation agreements, women are the same as men. They are presumed to be the same in entering into such agreements and in the situations giving rise to enforcement disputes. Therefore, in accordance with the sameness approach, women must be treated the same as men, and the same gender neutral universal principles of individual responsibility and freedom of choice must be applied, irrespective of gender.

It is the very adoption of the sameness approach to gender equality in this context that can be seen to silence the question of gender equality. When dealing specifically with a constitutional or

\textsuperscript{34} Pelech, supra, note 2 at 257; Wilson J. also cited with approval Anderson J. in Dal Santo v. Dal Santo (1975), 21 R.F.L. 117 at 120:

It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

\textsuperscript{35} Pelech, supra, note 2 at 258.
discrimination issue, the sameness approach must speak the discourse of equality. However, when dealing with private family law, where the doctrines of constitutional or discrimination law are not immediately implicated, the premise of the sameness approach, superimposed on the deeply gendered roles and role enforcement of family law and practice, seems to preclude or at least divert any question of gender equality. The premise of this approach is that gender ought not to make any difference and that gender neutral principles ought to be universally applied. Since gender is not constructed as a relevant difference, there is simply no reason for this sameness approach to broach the question of difference. According to its own internal logic, its very approach to gender equality thus silences the question of gender equality.

B. The Paternalistic Approach

Though described by Wilson J. primarily in terms of its concern with the standards of fairness and reasonableness in enforcing separation agreements, this approach recognizes the question of gender equality as tied to the more general questions of fairness and reasonableness. This recognition of gender equality as an issue is perhaps most explicit in Ross v. Ross, a decision of the Manitoba Court of Appeal, wherein Matas J.A. held:

In my opinion, we have not yet reached the stage where we can safely say that generally husbands and wives are equal or nearly so, in earning capacity, or where we can necessarily say that generally the responsibilities of marriage have not disadvantaged the earning potential of the wife. In many cases, especially of more recent marriages, the Courts could rely on the fairness of imposing an obligation on the wife to quickly become self-supporting. In some cases, the court could not. 37

Matas J.A.'s approach to the enforcement of separation agreements is premised on a recognition of the existing inequalities between women and men and, thus, of difference. He expressly acknowledges the economic inequality women continue to face in

37 Ibid. at 396.
society and the relationship between that inequality and women's traditional position in the marital relationship. Underlying this approach is the understanding that women are not traditionally the same as men. Rather, women are economically unequal to men in society and economically dependent on men in marriage.

Matas J.A. sets out two contrasting hypothetical marital relationships through which he argues that treating persons who are not the same as though they were would produce unfair results. It would be unfair to treat women who are not economically self-sufficient as if they are economically equal to men who are economically self-sufficient.

Take two extreme hypothetical examples: In the first, a wife entered marriage 30 years ago, before the development of current concepts in respect of a wife becoming self-supporting. She did not have the opportunity to become suitably trained for the job market.... Her husband, in the meantime, has advanced his career and has become a successful and possibly wealthy professional or businessman. After 30 years, the parties divorce.

In the second example, a young woman enters marriage having been well trained for the job.... The parties have children but the wife and her husband share equally in the responsibilities of caring for them, and looking after the home. They each advance in their respective careers in a way that does not place the wife at a permanent disadvantage in the labour market....

It would be patently unfair to try to force both these kinds of marriages into specific categories in order to decide the appropriate level of maintenance to be paid, or to decide if the court should intervene to correct an unjust agreement. 38

In accordance with the difference model, Matas J.A.'s approach can be seen to recognize that ignoring these differences will punish women for their differences. Rather than overcoming or reducing the economic inequality, ignoring these differences will simply reaffirm them. In effect, women's economic dependence on men in marriage will be used to reinforce or perpetuate their economic inequality in society.

The dilemma of difference emerges regardless of which two of the competing models is initially adopted in judging the enforcement of separation agreements. The private choice approach, in ignoring women's economic dependence on men in marriage, recreates women's economic inequality in society, while at the same time devaluing women's traditional role in, and

38 Ibid. at 396.
contribution to, the family. The paternalistic approach, by focusing on women’s economic dependence on men, recreates the construction of women's identity as economically dependent on men. It reinforces the portrayal of women as different from the male norm – a difference which has a negative connotation.

C. The Pelech Compromise

The compromise position in Pelech can be seen to be constituted of a rule and an exception to the rule. Wilson J. rejects the paternalistic approach as the general policy for the enforcement of separation agreements. She explicitly rejects its recognition of the "need to compensate for systemic gender-based inequality" on the ground that such recognition will reinforce this gender-based inequality:

> While I am in sympathy with Matas J.A.'s concern, I believe that the case by case approach and the continuing surveillance by the courts over the consensual arrangements of former spouses which he advocates will ultimately reinforce the very bias he seeks to counteract. 39

Her analysis can be seen to embrace one side of the difference dilemma, that is, focusing on differences risks recreating the differences.

Wilson J. adopts the private ordering approach and its underlying rationale as the general policy for the enforcement of separation agreements:

> ... I believe that every encouragement should be given to ex-spouses to settle their financial affairs in a final way so that they can put their mistakes behind them and get on with their lives. 40

In so doing, she embraces the sameness model of gender equality implicit in this approach. The spouses are assumed to be situated similarly in relation to their past shared mistakes. There is, accordingly, no recognition of gender difference. Rather, it is assumed, as a general rule, that both parties are equally capable of

39 Pelech, supra, note 2 at 268.

40 Ibid.
getting on with their lives. Furthermore, the role of law apparent in Wilson J.'s private ordering approach corresponds to the role of law embodied in the sameness approach. She repeatedly emphasizes that "people should be encouraged to take responsibility for their own lives and their own decisions." It is the role of law to provide such encouragement.

Wilson J. creates an exception to this private ordering rule, according to which the court may exercise its discretionary power to intervene in the private agreement of the parties where there has been "a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage." Where a causal connection can be shown between the changed circumstances and the marital relationship, Wilson J. is prepared to recognize women's economic dependency on men within the marital relationship. This exception to the general rule is based on the recognition of difference, which underlies the paternalistic approach. According to this exception, the difference is recognized if it has produced the change in circumstances and the economic dependence. Within the narrow confines of this exception, Wilson J. implicitly responded to the other side of the dilemma of difference, acknowledging that to ignore difference is to risk recreating it. There is an underlying understanding that to ignore the woman's economic dependence, which has produced her radically worsened economic situation, will do no more than reaffirm the economic inequality.

However, despite this exception to the general rule, the decision obscures the question of gender equality. The exception is individual in nature and it is overshadowed by the explicit rejection of gender equality as an appropriate criterion for the exercise of judicial discretion. The exception to the rule may enlarge judicial discretion, but it does so without developing any norms, or acknowledging the role, of equality.

Notwithstanding its failure to unearth and address directly the societal issues of gender inequality, Wilson J.'s approach to the
enforcement of separation agreements attempts to bridge the gap between the two competing approaches, and, in turn, between the competing models of gender equality. While adopting, as the general rule, the private ordering approach, and the underlying sameness model of gender equality, the decision also provides an exception based on the paternalistic approach, and the underlying difference model of gender equality. The position can perhaps be construed as an example of the feminist dilemma of "describing yet changing,"\(^\text{43}\) that is, allowing for existing differences so as not to punish women for these differences, while providing a model of change in which the inequalities and negative connotations underlying the differences are not perpetuated. This dilemma can be seen as an alternative formulation of the difference dilemma. It focuses on the need to affirm differences without recreating them, or, at least, without recreating the negative construction of them. In *Pelech*, the rule of private ordering can be seen to provide the normative model for change towards which the regulation of separation agreements should move, in order to eliminate the underlying inequalities produced by women's economic dependence on men. The exception of judicial intervention, on the other hand, can be seen to provide the necessary description of the existing differences in women's lives.

The general question which must be addressed is whether the approach adopted in *Pelech* is an appropriate compromise. Is it successful at bridging the gap between the competing approaches to the enforcement of separation agreements and to gender equality? Does it overcome the dilemma of difference? The evaluation of this approach must consider whether it contains an adequate description of women's difference, and, on the other side of the dilemma, whether it posits an appropriate normative model for change. At a deeper level, we must also ask whether an approach in which one foot is planted firmly in each model of gender equality can accurately be described as having moved beyond the dilemma of

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\(^{43}\) See E. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1987) 9 Women's Rights L. Rep. 195 at 200 wherein one of the dilemmas for feminist legal theory is described in terms of "How do we develop legal theory and practice that is not only accurate to the realities of women's experience but also takes account of complexity and allows for change?"
difference, or whether it is more accurately characterized as simply straddling the dilemma. Are the competing models of gender equality and the two sides of the difference dilemma reconcilable in the manner adopted by the decision in *Pelech*, or is the decision internally inconsistent? Is a compromise between the competing conceptions possible at all, or, are they irreconcilable?

In posing these questions, it is important to note that the problem with Wilson J.'s compromise — both describing and providing change — is not that it attempts to embrace two irreconcilable approaches to gender equality and is therefore inconsistent. Accepting inconsistencies and contradictions may be an integral part of coming to terms with these difficult dilemmas. If the construction of our reality is itself inconsistent and contradictory, then our attempt to describe this reality must not shy away from recognizing and affirming these inconsistencies.44 Rather, revealing inconsistencies may be essential in both describing our world as it presently exists and in prescribing normative models for changing it. As Martha Minow argues:

... [N]eglect of potentially inconsistent or antagonistic meanings for the norms that propel and inspire reforms could well give rise to disappointing results, and acknowledgement of competing meaning might help explain disappointments.45

While the allegation of inconsistency does not deliver a fatal blow to a model for describing yet changing it, it is nevertheless important to reveal these inconsistencies in order to see where we think we are coming from, where we think we are going, and whether we can actually get there from here.


... [T]ensions, contradictions and ambivalences within and between theories are not always bad... Coherent theories in an obviously incoherent world are either silly and uninteresting or oppressive and problematic, depending upon the degree of hegemony they manage to achieve... Coherent theories in an apparently coherent world are even more dangerous, for the world is always more complex than such unfortunate hegemonic theories can grasp.... Not that we should try to produce incoherent theories but that we should try to fashion conceptual schemes that are more alert to the complex and often beneficial ways in which the modernist world is falling apart.
An evaluation of Wilson J.'s compromise can be divided into two separate but inextricably linked questions, each relating to one side of the describing yet changing dilemma. One asks whether the model provides an adequate description of differences. The other asks whether the compromise provides an appropriate normative model.

This distinction suggests that normative and descriptive issues are analytically distinct, neglecting the normative content of any ostensibly descriptive analysis. It is difficult, if not impossible, to address one of the questions independently of the other as the answer to one necessarily implicates an answer to the other. For example, the limited extent to which Pelech recognizes difference is intricately connected to the underlying normative approach of the Supreme Court of Canada trilogy. The attempt to examine these questions separately must therefore at least begin from an acknowledgement of the inextricable connection, and thus of the arbitrary and even artificial nature of the construction of these questions as distinct.

V. THE DESCRIPTIVE NARRATIVE

A. The Recognition of Difference: Economic Dependence in Pelech

I will first consider whether the compromise in Pelech has adequately accommodated difference. The limited exception to the rule of formal equality is the Court's recognition of women's economic dependence on men. While arguing that too much recognition of this difference would simply recreate it, the Court was willing to recognize a limited exception to the rules of formal equality, namely, when the radical change in circumstances was causally connected to the marriage. A more detailed examination of this test will demonstrate that it is highly restrictive and will do little to alleviate the impact of the difference on the lives of dependent spouses upon marital breakdown.

46 See infra, at 338-39.
The test in Pelech for the variation of separation agreements comprises two steps. The first step requires a radical change in circumstances between the time of the agreement and the variation application. We must first ask what would constitute a radical change of circumstances within the meaning of the test. Lenore Weitzman's studies about the economic effect of marital breakdown on women show that women experience an average 73 percent decrease in standard of living in the first year of divorce.\(^{47}\) If such a decrease is demonstrated to be the norm for women on marital breakdown, would it constitute a radical change in circumstances? While the three cases give little indication of how much change is required, some guidance may be derived from the Court's discussion of the second branch of the test, and from the application of the test to the facts of the cases.

The Court emphasizes that the mere fact that an ex-spouse is receiving public assistance, is unable to work, or suffers from ill health does not justify the variation of a separation agreement unless the condition is causally related to the marriage.\(^{48}\) However, this emphasis implies that such factors may at least satisfy the requirement of radical change. The implication is supported by the Pelech application of this branch of the test, wherein the Court was willing to conclude that Mrs. Pelech's circumstances constituted a radical change.

However, the scope of the radical change in circumstances is limited by the time restrictions as the change must occur between the time of the agreement and the time of the variation application. In Richardson,\(^{49}\) the Court held that because Mrs. Richardson was unemployed and receiving public assistance at the time of the agreement, there was no change in circumstance between the time of the separation agreement and the time of the variation application. Therefore, the requirement of radical change is only

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\(^{48}\) Pelech, *supra*, note 2; Richardson, *supra*, note 3.

\(^{49}\) Richardson, ibid.
fulfilled if the decrease in a woman's standard of living occurs within the time limits.

The requirement of foreseeability similarly narrows this branch of the test. According to the test in *Pelech*, as further elaborated in *Richardson*, the change in circumstances must have been unforeseeable at the time of the agreement.50 In *Richardson*, Wilson J. held that the parties' expectations about restricting spousal support to one year were not clear, and that without evidence of a common expectation, the separation agreement should be upheld. She also found that the possibility of Mrs. Richardson being unemployed after a year of spousal support was not unforeseeable at the time of the agreement.

An objective test of foreseeability severely limits the circumstances in which the court will be willing to intervene in separation agreements and further limits the extent to which the difference of dependency will be taken into account. It imposes an onerous burden on the parties to reasonably anticipate the future consequences of economic dependence. Is it reasonable to expect the parties on marital breakdown to be in a position to appreciate these consequences, to be able to turn their minds to, and provide for all future contingencies of economic dependence? This problem is exemplified in *Richardson* where the parties turned their minds to the issue but failed to adequately appreciate the future effects of the dependency.

Furthermore, it may be the very circumstances of economic dependency that put women in the position of being unable to predict their future circumstances according to the reasonable person standard. A woman's lack of experience in the labour market may preclude her from an appreciation of her own marketability. We must ask how adequately the difference of economic dependence is being accommodated if this very difference may preclude the woman from satisfying the requirements of the test.

The second step of the test requires that the change in circumstances be causally connected to patterns of economic dependency.

50 It is unclear whether the requirement of foreseeability constitutes a third and separate step of the test, or whether the issue of foreseeability goes to the determination of radical change in circumstances. MacLeod, in his annotation of the trilogy (1987), 7 R.F.L. (3d) 225 at 229, suggests that it is a separate step in a three-step test.
dependency in the marriage. Wilson J. held in *Pelech* that this determination is a factual one to be made by the trial judge.\(^{51}\) However, a review of the *Richardson* application of this branch of the test further reveals the Court's understanding of this requirement. Wilson J. found no evidence that Mrs. Richardson's unemployment could be attributed to a pattern of economic dependence during the marriage. She held that since Mrs. Richardson had worked during the marriage, it cannot be said that the marriage atrophied her skills or impaired her marketability.

It is difficult to see how Mrs. Richardson's unemployment at the end of the year was not engendered by the patterns of economic dependency during the marriage. While Mrs. Richardson did work for the first seven years of the twelve-year marriage, she withdrew from the labour market for five years of the marriage following the birth of her child. Her absence from the labour market was directly related to her role in the marriage, a role which made her economically dependent on her husband for that period. As Laforest J. notes in his dissenting opinion:

> During the years she stayed home with the children, her skills would, in my view, not only have atrophied, she would not have been able to gain the new skills that are so necessary today in her field as well as in others. To use the words of Judge Rosalie Abella, "The years when the husband was increasing his educational and career prospects, were years which increasingly diminished the wife's prospects in the labour force" [citation omitted]. Nor must one overlook that Mrs. Richardson is now in her mid-forties and must find time and energy to care for a child, factors that are by no means negligible in assessing her competitive position as against younger people with recent training. Her present situation thus flows directly from the marriage.\(^{52}\)

Furthermore, Wilson J. did not consider the relative contributions of Mrs. Richardson to the family's finances. Mrs. Richardson worked as a clerk-typist, a traditionally female and thus low-paying occupation. Wilson J. seems to assume that economic

\(^{51}\) *Pelech*, supra, note 2 at 270: "Each marriage relationship creates its own economic pattern from which self sufficiency or dependency of the partners flows. The assessment of the extent of that pattern's post-marital impact is essentially a matter for the judge of first instance."

\(^{52}\) *Richardson*, supra, note 3 at 325. The internal citation is from "Economic Adjustment on Marriage Breakdown: Support" in Family Law and Social Policy Workshop Series, Faculty of Law, University of Toronto, 14 January 1982 at 19.
self-sufficiency results from full-time employment, but in view of the significant wage differentials between male- and female-dominated occupations, the assumption is problematic. In addition to being totally economically dependent on her husband for five years, Mrs. Richardson may also have been partially dependent on him during the seven years of her full-time employment. However, the Pelech test does not seem to contemplate broader social factors, such as the wage differential, in assessing the causal relation between the change in circumstances and the marriage. The causal connection contemplated by the test seems to require total dependence throughout the marriage, so that the marriage alone can be said to have caused the dependence and the subsequent change in circumstances.

We have to ask whether it makes sense to speak of a causal relationship in such direct and individual terms in the context of a discussion of women's economic dependence and inequality. Women's economic dependence is not produced exclusively by the particular patterns of the family. The assumption of economic dependence underlies, and is recreated by, a multiplicity of social relationships and social institutions.

53 On the problem of attempting to construct the injury inflicted upon women by pornography in terms of an individual model of causality, C. MacKinnon, "Not a Moral Issue" (1984) 2 Yale L. & Pol'y Rev. 321 at 338 [hereinafter "Not a Moral Issue"] writes: "Its causality is essentially collective and totalistic and contextual. To reassert atomistic linear causality as a *sine qua non* of injury — you cannot be harmed unless you are harmed through this etiology — is to refuse to respond to the true nature of this specific kind of harm." See also M. Horowitz, "The Doctrine of Objective Causation" in D. Kairys, ed., *Politics of Law* (New York: Pantheon Books, 1982).
The market is one example. On average, women's wages are two-thirds of men's wages. One assumption underlying the valuation of women's labour is that women do not support their families and are economically dependent on their husbands. This assumption of economic dependency adversely affects even those women who have not been economically dependent within the marriage. Similarly, social welfare assistance continues to be predicated on the assumption of women's economic dependence and serves to reinforce that condition. How can we sensibly talk

54 Ontario Ministry of Labour, Women's Bureau, Women in the Labour Force "Basic Facts" Update (Toronto: Ontario Ministry of Labour, 1982); K.E. Mahoney, "Overview: Equal Pay for Work of Equal Value" in E.D. Pask, K.E. Mahoney & C.A. Brown eds, Women, the Law and the Economy (Toronto: Butterworths, 1985) where it is indicated that women employed in full-time jobs earn only 58 cents compared to every dollar earned by working men, and that women earning the minimum wage outnumber men 2 to 1. L. Weitzman, The Divorce Revolution, supra, note 30 at 351:

With women's current disadvantages in the labour market, getting a job cannot be the only answer - because it does not guarantee a woman a way out of poverty. Even with full-time employment one-third of the women cannot earn enough to enable them and their children to live above the poverty level. The structure of the job market is such that only half of full-time female workers are able to support two children without supplemental income from either the children's fathers or the government.

55 M. Leighton, "Handmaids' Tales: Family Benefits Assistance and the Single Mother-Led-Family" (1987) 45 U.T. Fac. L. Rev. 324 at 329 [hereinafter "Handmaids' Tales"]: Working class women, however, had never experienced the sexual division of labour, which the cult of motherhood presupposed. They and often their children, worked both inside the home and in the market economy. Yet the middle class ideology of motherhood was incorporated into and considerably strengthened male trade unionists' demands for "family wage." See also A. Vanderpol, "Dependent Children, Child Custody and the Mothers Pensions: The Transformation of State-Family Relations in the Early Twentieth Century" (1982) 29 Social Problems 228.

56 See S. Law, "Women, Work, Welfare and the Preservation of Patriarchy" (1983) 131 U. Pa. L. Rev. 1249 at 1251 regarding how American welfare policy impedes women's access to the labour market and denies the value of women's traditional non-wage labour: "Ultimately federal welfare and labour policy, by denying the value of women's work in the wage market and in the home, can most reasonably be understood as serving to protect the dominance of men in the wage market and in the home. The controlling assumption is that marital stability, and the family itself, depend upon male economic dominance." See generally, M. Leighton, "Handmaids' Tales," ibid.; M.J. Mossman, "Family Law and Social Welfare" supra, note 29 at 50: "Formerly dependent on their husbands, their independence and equality in marriage breakdown may lead to dependence on social welfare programs"; M.J. Mossman & M. McLean, "Toward a New Equality," supra, note 29 at 98: "... [I]n many cases, the social welfare system seems to 'presume' the availability of family support based on the married (or
about a causal relationship on an individual basis, in light of the construction of social institutions and relationships, upon this assumption?

When economic dependence is seen in its broader context of mutually constituting social relationships, we can see how the question of harm being caused to one individual woman by the marital relationship is somewhat distorted. While the sexual division of labour within the individual marital relationship is undoubtedly an important factor in explaining why some women are hurt by divorce, the more general societal factors contributing to the construction of economic dependence cannot be ignored. When analyzed on a group, rather than individual, basis economic dependency is "essentially collective and totalistic and contextual." Yet, the decision in Pelech demands individual causality. Only if an individual causal relationship can be established is the former spouse found to be responsible. If there is no such causal relationship, then the state must assume responsibility.

Wilson J. defended her principled approach to the enforcement of separation agreements on the ground that such recognition will only serve to recreate difference. However, she is silent on the implications of shifting the responsibility to the state and forcing the state to recognize the difference. There is no discussion of the nature of this responsibility or how dependence on the state may perpetuate economic dependence and inequality. The Court's refusal to recognize difference forces the state to recognize it. Shifting the responsibility for dependence to the state simply shifts the locus of the debate. Questions of recognizing or ignoring difference, of breaking out of the dependency cycle, and of different

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58 Pelech, supra, note 2 at 268-70: "Otherwise, the obligation to support the former spouse should be as in the case of any other citizen, the communal responsibility of the state." Richardson, supra, note 3 at 311-12: "Otherwise a person who has once been married continues to be contingently liable for the support of his or her former spouse for the duration of their joint lives."
models of the family representing different models of equality still remain. While acknowledging the shift of responsibility from spouse to state, the Court does not address the question of recreating the difference in this new sphere. Wilson J.'s discussion of the basis for rejecting the recognition of difference is incomplete. Thus, not only does the approach in Pelech fail to adequately address the problem of economic dependency within the family, it completely fails to address the problem of reproducing dependence in the other realms of market and state.

The Pelech decision goes a very short distance in accommodating the modicum of gender difference that it does recognize. It makes economic dependence engendered by the marriage a factual matter to be determined by the trial judge. However, the test as applied by Wilson J. is restrictive and under-inclusive. This test will severely limit the circumstances in which the difference of economic dependence will truly be taken into account by the Courts. The approach adopted to accommodate women's difference is, at the end of the day, one that will do little to alleviate the harsh impacts of economic dependence on women in marital breakdown.

VI. THE NORMATIVE NARRATIVE

In turning to a consideration of the normative model informing the decision in Pelech, I will examine whether the private ordering approach and the sameness model of gender equality upon which it is predicated are appropriate and/or desirable models on


60 Yet, Wilson J. has shown in her extra-judicial writings that she is not insensitive to the implications of shifting the responsibility from family to state. In "The Variation of Support Orders" in Family Law: Dimensions of Justice, supra, note 30 at 61, 67:

What happens, though, when there are simply not enough resources to go around? Can the Courts close their eyes to the reality of welfare and the role it is playing in the support of families living near the poverty line? It seems to me that we really have been closing our eyes to this in most Canadian jurisdictions... [W]e are beginning to think about the relationship between family law as administered by the Courts and welfare as administered by the state. We are groping for the right principles and the right policies.
which to structure relationships upon marital breakdown. As a means of evaluating this normative model, I will attempt to reveal some of the deeper stories being told by these competing models, some of the deeper contradictions in the conception of the self, the self and other, and, in turn, of the individual, family, and state.

A. Contract and the Family: Stories of Self, Other, and Neutrality

The private choice approach adopted as the rule in *Pelech* is premised on the model of freedom of contract. The question which must be addressed is why the model of contract is considered to be applicable to the regulation of relationships upon marital breakdown. What values does this contract model promote, and why is it considered desirable to promote these values upon marital breakdown?

Wilson J.'s implicit response to this question seems to be a focus on the value of finality. In choosing between the competing approaches, she noted that:

> [e]very encouragement should be given to ex spouses to settle their financial affairs in a final way so that they can put their mistakes behind them and get on with their lives.... [I]t seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should be free to make new lives for themselves without an on-going liability for future misfortunes which may befall the other.61

From this passage, it is apparent that Wilson J. is also concerned with the value of free choice. Marriage is seen as an exercise of the individual's free choice, that is, the individual is free to enter into marriage and free to terminate marriage. The marital relationship is analogous to any other contractual relationship. Its existence is based on the free will of the parties. An understanding of the stories about self and other underlying the normative rule in *Pelech* thus requires an understanding of the stories about self and other of the model of contract.

The classical nineteenth century model of contract was based on one of the fundamental premises of liberal political theory, that

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61 *Pelech*, supra, note 2 at 262.
is, on the liberal understanding of the self and the relationship between self and other and the role of the state in regulating this relationship.\textsuperscript{62} The liberal conception of the self is individualistic and atomistic. The self is posited as a separate, autonomous unit capable of free choice. This voluntarist self exists prior to its aims and attachments – it is a self unconstituted by its relationships with others.\textsuperscript{63} Rather, the self's relationship with others is but an exercise of the self's free choice.\textsuperscript{64}

This priority of the self over its ends leads to a non-teleological conception of human nature. There can be no transcendent conception of the good, no human \textit{telos} to which all individuals may aspire.\textsuperscript{65} Rather, it is the self which must be left to choose its own ends, its own conception of the good life. This priority of the self over its ends dictates a particular relationship between the self and the state. This non-teleological conception of human nature requires that the state be neutral as among competing


\textsuperscript{63} This Kantian notion of the self has perhaps its most influential modern day expression in the liberalism of J. Rawls, \textit{A Theory of Justice} (Oxford: Oxford University Press, 1971) at 560: "The self is prior to the ends which are affirmed by it, even a dominant end must be chosen from among numerous possibilities." M. Sandel "Introduction" in M. Sandel, ed., \textit{Liberalism and its Critics} (Oxford: Blackwell Press, 1984) at 5 describing this Kantian self: "The priority of the self over the ends means I am never defined by my aims and attachments, but always capable of standing back to survey and assess and possibly to revise them. This is what it means to be a free and independent self, capable of choice."

\textsuperscript{64} M. Sandel, \textit{Liberalism and the Limits of Justice} (Cambridge: Cambridge Press, 1982) at 133 describing this liberal self: "[W]hat separates us is in some important sense prior to what connects us - epistemologically prior as well as morally prior. We are distinct individuals first, then we form relationships and engage in cooperative arrangements with others; hence the priority of plurality over unity."

\textsuperscript{65} S. Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72 Va. L. Rev. 545 [citing A. MacIntyre, \textit{After Virtue: A Study in Moral Theory} (Notre Dame, Indiana: University of Notre Dame Press, 1981) at 133]: "This view holds that there is no unitary end toward which humans aspire, no transcendent concept of the good life. [The] variety and heterogeneity of human goods is such that their pursuit cannot be reconciled in any single moral order."
conceptions of the good. The state must not impose or prefer any one conception of the good on the individual. The state can only provide a framework of basic rights and liberties within which individuals may pursue their own conceptions of the good.

This understanding of the self is the premise for the enforcement of contracts in the classical model. As Gabel and Feinman describe:

The legitimating image of classical contract law in the nineteenth century was the ideal of free competition as the consequence of wholly voluntary interactions among many private persons all of who were in their nature free and equal to one another.

The independent, voluntarist self is seen to freely enter into a contractual relationship with another independent self. The relationship is an exercise of the individual's freedom of choice in pursuit of his or her own conception of the good. The state is seen to provide the legal framework for this contractual relationship, that is, the framework for enforcing the obligations of these freely choosing, voluntarist selves. The state can only oversee the contract to ensure that the rules have been followed. Just as the state must remain neutral among competing conceptions of the good, so it must remain neutral as to the substantive content of a contractual bargain. It cannot evaluate the content of the contract, to see whether it was a good or a fair bargain, as such would involve measuring the private agreement of the parties according to some objective standard of good or fair contract, an exercise which would thus involve the imposition of a particular conception of the good.

The application of contract doctrine to the regulation of the affairs of spouses upon marital breakdown imports these liberal conceptions of the self, and the self and other, into the marital relationship. The marital relationship, indeed the family, becomes

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66 Sandel, *Liberalism and the Limits of Justice*, supra, note 64 at 5 describes ...this is [sic] the vision of the self that finds expression in the ideal of the state as a neutral framework. On the rights-based ethic, it is precisely because we are essentially separate, independent selves that we need a neutral framework, a framework of rights that refuses to choose among competing purposes and ends. If the self is prior to its ends, then the right must be prior to the good.

a voluntary association between autonomous, independent selves. There are no obligations or duties beyond those voluntarily assumed. As Wilson J. states in *Pelech*, "[T]hey made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected." The voluntarist self can freely choose to enter the marriage, and freely choose to exit the marriage. Since the self exists prior to its relationships, it remains fundamentally unchanged upon the termination of the marital relationship. The individual is free to get on with life, that is, to exercise free will, and enter into relationships with others in pursuit of his or her own conception of the good.

Similarly, the role of the Court in the family is to enforce the contract. It cannot evaluate the fairness or content of the separation agreement nor impose its own substantive conception of how the contract ought to have been written.

Where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way ... it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently.

Rather, the Court must remain neutral and simply enforce the agreement between freely choosing individuals.

This emphasis on state neutrality is significant, not only for the underlying story of the individual and the state it contains, but also for the story of difference it tells. The understanding of neutrality as facial neutrality presents a second version of the dilemma of difference. As Minow writes:

The second version of the dilemma is the riddle of neutrality.... Governmental neutrality may freeze in place the past consequences of differences. Yet any departure from neutrality in governmental standards uses governmental power to make those differences matter and thus symbolically reinforces them.

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68 *Pelech*, supra, note 2 at 270.

69 *Pelech*, ibid. at 271.

70 Minow, "Foreword," supra, note 25 at 12.
She further explains:

The dilemma of difference appears especially acute for a government committed to acting neutrally. Neutral means might not produce neutral results, given historic practices and social arrangements that have not been neutral.71 Facial neutrality ignores, and thus risks reinforcing, the non-neutral impact of these apparently facially neutral policies. It is a reflection of the sameness approach. By ignoring differences among individuals and applying policies in an ostensibly facially neutral manner to all individuals regardless of difference, it risks reinforcing the differences. The emphasis on the principle of neutrality is connected to the emphasis on formal equality, which is part of the sameness approach to difference.

This insistence on formal equality and facial neutrality in family law sits in direct contrast to the approach to equality emerging in Canadian constitutional law. The Supreme Court of Canada has explicitly endorsed an approach to equality that includes a consideration of the non-neutral impact of state action, notwithstanding its facial neutrality. The approach reflects, at least in principle, a commitment to substantive rather than mere formal equality.72 Moreover, the premise of state neutrality underlying the conception of the self and the family in Pelech, while consistent with the liberal stories of self and other, seems contradictory in the broader regulatory context of family law. The state has intervened extensively in the regulation of the marital and familial relationship. Statutes at both the provincial and federal levels provide a comprehensive regulatory scheme governing the range of these

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71 Ibid. at 22.

relationships. The state has expressly provided for the availability of judicial review of separation orders.

Why does the Supreme Court of Canada continue to insist on the principles of neutrality and formal equality in the area of family law? First, the individualistic conception of the family, and the role of the state as neutral arbitrator, can be seen as part of a historical trend in the regulation of the family. Family law reform in the last two decades has moved from gender-based rules and distinctions to a conception of the family as an equal partnership between two equal and independent individuals. Family law has shifted to a model of formal equality and a concomitant focus on individual rights, expressed through the adoption of the general principles of equality and independence. According to this model,

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74 Under section 17 of the Divorce Act, 1985, the court is given discretion to vary maintenance orders. The principle that a maintenance order does not extinguish the jurisdiction of the court derives from Hyman v. Hyman, [1929] A.C. 601, and was affirmed in Pelech, supra, note 2 at 252-53.

75 Weitzman, The Divorce Revolution, supra, note 30 at 368: The new divorce laws "adopt a laissez-faire attitude toward both marriage and divorce. They leave both the terms of the marriage contract - and the option to terminate it - squarely in the hands of individual parties"; Glendon, The New Family, supra, note 30 at 52: individual family members are increasingly treated as economically independent for the purposes of the law of support.

76 See authorities cited, supra, note 30. While provincial family law statutes continue to be based on a hybrid of formal and substantive equality approaches to family law, the judicial interpretation thereof has overwhelmingly continued in the direction of formal equality. The Pelech decision, supra, note 2, and subsequent decisions giving far-reaching application to the reasoning in Pelech, epitomize this trend.

77 Weitzman, The Divorce Revolution, supra, note 30 at 367: The new divorce laws "... abandoned the gender-based assumptions of the traditional law in favour of standards for treating men and women 'equally' in alimony and property awards." Fineman, "Implementing Equality," supra, note 29; Mossman, "Family Law and Social Welfare," supra, note 29; M. Eichler, "Family Policy in Canada: from Where to Where" in R.S. Abella & M.L. Rothman eds, Justice Beyond Orwell (Montreal: Editions Y. Blais, 1985); Payne "The Financial Consequences," supra, note 30; Olsen, "The Family and the Market," supra, note 29 at 1517: "The liberalization of the family was marked by shifts toward equal juridical rights and the withdrawal of the state. This trend has continued to the present, with the family coming to
upon marital breakdown, the state must remain neutral among competing substantive conceptions of the family and of its own normative conception of the good. It must simply apply the general principles of equality and independence. The liberal understanding – that the voluntarist self and the state as neutral arbitrator underlie the traditional model of contract – has been incorporated into, and become the stories underlying, the regulation of the family.78

However, the insistence on neutrality must furthermore be seen in the context of the continuing resonance of the idea of the family as a private sphere. The family is commonly understood as a sanctuary from the demands of the public world, as a haven in a heartless world.79 Notwithstanding the extensive regulation of the family, the public-private distinction continues to inform the social understanding of the family, that is, the construction of the family as private and the state as public, and thus of the family as beyond the proper reach of state intervention.

However, this contrast between the extensive public regulation of the family and the understanding of the family as private is indicative of the artificiality of the public-private distinction. As Minow notes:

Once government has the authority to intervene which it may or may not exercise – and, indeed, the authority to consider its own authority to intervene – the idea of state intervention fails to have a sharp edge.80

This dull edge of state intervention is a manifestation of the untenable nature of the public-private distinction. The private family is not simply an a priori entity – it does not exist prior to the

assume more of the characteristics associated with the market." See also, Glendon, The New Family and the New Property, supra, note 30.


state but rather, must be seen as constructed by the state. Nikolas Rose constructs different aspects of the family, such as marriage, divorce, and sexual behaviour, as:


The decision in *Pelech* can be understood in this context. The Court uses its own authority to intervene, and in fact to consider its own authority to intervene, to establish a principle of non-intervention in separation agreements. The Court has chosen to structure its discretion in terms of a general principle of limited intervention. In effect the Court uses its power to define separation agreements as private, and then uses this notion of privacy as the justification for non-intervention.

Furthermore, the significance of neutrality in *Pelech* must be seen in the context of the convergence of the liberal models of contract and family. The model of contract is similarly based on the construction of the market as private, as prior to and beyond the reach of the state. Both the family and the market are constructed as the private sphere, as the sphere of individual choice, as the sphere beyond the legitimate reach of the state. The vision that emerges is that if contracts are private, and the family is private, then family contracts must be quintessentially private. It is this convergence of the market and the family that makes the demand for state neutrality, and for the private ordering of relationships upon marital breakdown through separation agreements, so powerful. The stories of the self, self and other, and authority of the market

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reinforce, and are reinforced by, the stories of self, self and other, and authority underlying family law.

These stories of self and other which inform the normative model can be seen to be intricately related to the limited recognition and accommodation of difference in *Pelech*. The very recognition of the empirical difference arguably stretches the liberal conception of the self as separate and autonomous to its outer limits. Women are different because their life situations have been different from men's. Their relationships with others, and their role within these relationships, have been substantially different and have affected the nature of who they are. It is because of their role in the traditional division of labour in the marital relationship as domestic labourer and child-rearer, dependent on their spouse for economic support, that women are different, and consequently, not economically self-sufficient upon marital breakdown. This is not the story of a voluntarist self, but of a self whose aims and attachments are at least partly constitutive, a self which is affected by its relationship with others.

We might ask at this point how an approach based on the liberal concept of the self can reconcile such a recognition of difference, which seems to implicate a self at least partly constituted by its relationships? However, the issue is not one of consistency. Rather, the important point is to recognize the connections between the normative and descriptive narratives of difference in *Pelech*. The normative model, with its stories about the self and other, limits the differences which can be recognized. It is the model that informs the Court that the line must be drawn at a narrow recognition and accommodation of empirical difference to ensure that the exception does not undermine the rule.

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83 See text, *supra*, at 323-30.

84 See text, *supra*, at 322 and notes 44-45.
B. Challenge to the Liberal Stories of Self, Other, and the State

The liberal stories of the self, other, and the state have come under considerable criticism. The liberal understanding of the self has been challenged from a multiplicity of disciplines and perspectives. This essay will examine, and subsequently interrogate, two such challenges to the liberal self, namely, those presented by feminist object-relations theory and by communitarian theory.

Feminist object-relations theory, which refers to a literature of feminist psychoanalysis and psychology, has been particularly influential in the feminist critique of the liberal self. Feminist psychoanalytic theory has explored gender difference as constructed in the relationship of the child to the mother.\(^85\) Nancy Chodorow, for example, has argued that there are different "relational capacities" and senses of self between women and men, and that these differences are produced by the sexual division of labour in which women mother.\(^86\) She argues that the processes of separation and individuation are different for girls and boys because of the different relationships that daughters and sons have with their mothers.\(^87\) Female identity formation occurs in the context of an ongoing relationship between mothers and daughters. Daughters, in


\(^{86}\) Chodorow, *supra*, note 85 at 76: "An account of the early mother-infant relationship in contemporary Western society reveals the overwhelming importance of the mother in everyone's psychological development, in their sense of self, and in their basic relational stance."

\(^{87}\) J. Flax, "Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics" in S. Harding & M.B. Huitikka eds, *Discovering Reality* (Boston: Kluwer, 1983) at 251: "Separation means establishing a firm sense of differentiation from the mother, of possessing one's own physical and mental boundaries. Individuation means establishing a range of characteristics, skills, and personality traits which are uniquely one's own."
experiencing themselves as female, identify themselves with their mothers, fusing the experience of attachment with identity formation. Male identity formation is experienced by sons in differentiating themselves from their mothers, and thus involves a more severe "individuation and a more defensive firming of ego boundaries." Furthermore, the daughter's process of gender identity formation, of learning what it is to be female, of identifying with her mother, takes place in the context of a personal relationship. However, the son's process of gender identity formation, of learning what it is to be male, does not occur in the context of a personal relationship. Rather, due to the absence of the father, this gender identity formation occurs "through identification with cultural images of masculine models." Chodorow concludes that "the basic feminine sense of self is connected to the world, the basic masculine sense of self is separate.

The cognitive, moral development studies of Carol Gilligan have similarly been influential in the feminist critique of the liberal self. Gilligan identifies two voices in moral development, which she labels as male and female. However, it is important to note that she argues that there is a gender link as a tendency, but not a direct gender correlation to the two voices. Through her studies of moral development, she has argued that male moral development tends to focus on individuation and autonomy whereas female moral development tends to focus on caretaking and relationship with others. She argues that whereas men's conception of morality involves abstract principles of fairness and a concomitant focus on rights and rules, women's conception of morality is concerned primarily with the activity of care, and focuses on relationships and responsibilities. The male morality of rights differs from the female morality of responsibility in both its emphasis on separation rather than connection and its consideration of the individual rather than

88 Chodorow, supra, note 85 at 176.

89 Ibid. at 169.

the relationship as primary.\textsuperscript{91} This difference in morality is argued to reflect a fundamental difference in self-definition between men and women. Whereas the male self is defined through separation, and measured against an abstract ideal of perfection, the female self is delineated through connection to others and through particular activities of care.\textsuperscript{92} For men, the moral imperative is perceived as an "injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfilment."\textsuperscript{93} For women, however, the moral imperative is perceived as "an injunction to care, a responsibility to discern and alleviate" pain and trouble.\textsuperscript{94} Moral dilemmas for women are not cast as a contest of conflicting rights in which one must decide how to exercise one's rights without interfering with the rights of others. Rather, women perceive moral dilemmas in terms of conflicting responsibilities, in which the only acceptable resolution is that which is most inclusive of everyone's needs.\textsuperscript{95}

The feminist critique is often related to the critique of the liberal self emanating from a more general political theory of communitarianism. According to communitarian theory, the self must be understood as at least partly constituted by its communities. The self does not exist prior to its social relationships, nor its aims and attachments, but rather, is constituted by these relationships, aims, and attachments. This communitarian challenge has rejected the liberal conception of the "disengaged self" or "unencumbered

\textsuperscript{91} Ibid. at 19.
\textsuperscript{92} Ibid. at 35.
\textsuperscript{93} Ibid. at 100.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid. at 59. Gilligan does not posit these moral differences as absolute, but rather, as differences within a process of moral development, a process which remains incomplete until a third stage of moral development is reached. She seems to suggest that the final stage of moral development, the development to moral maturity, is thus also different for men and women. Whereas men, whose moral development has focused on individuation and separation, must learn the values of care and relationship, women, whose moral development has focused on care and connection, must learn some degree of individuation, that is to overcome self sacrifice, and to assert their individual interest.
subject."96 The communitarian understanding of the self is described by Sandel:

Communitarian critics of rights-based liberalism say we cannot conceive ourselves as independent in this way, as bearers of selves wholly detached from our aims and attachments. They say that certain of our roles are partly constitutive of the persons we are - as citizens of a country, or members of a movement, or partisans of a cause. But if we are partly defined by the communities we inhabit, then we must also be implicated in the purposes and ends characteristic of these communities. As Alasdair MacIntyre writes: "what is good for me has to be the good for one who inhabits these roles." Open-ended though it be, the story of those communities from which I derive my identity - whether family or city, tribe or nation, party or cause. On the communitarian view, these stories make a moral difference, not only a psychological one. They situate us in the world, and give our lives their moral particularity.97

Communitarian theory and feminist object-relations theory have often been merged in considering the implications of the theory for legal and political theory.98 The resulting critique, which frequently draws upon both of these critiques of the liberal self without distinguishing between them, is one which attacks the liberal

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97 Sandel, "Introduction," supra, note 63 at 5-6.

self for failing to recognize the extent to which the self is relational. It advocates the substitution of an understanding of the self, as constituted in relation to others, as constituted in relationships.

C. Implications of the Challenge to the Liberal Self

The critique of the liberal self, and the notion of the self as constituted in relation to others, has potentially far reaching implications for liberal theory in general, and contract theory in particular.\textsuperscript{99} For the purposes of this analysis, with its focus on the enforcement of separation agreements, two possibly contradictory implications can be drawn from this critique. First, it might suggest that the understanding of the self as separate and autonomous is based on a male understanding of the self, and thus reveals the male norm as the unstated norm. Second, it challenges the very understanding of the self posited by the dominant Western philosophical tradition. Even the male understanding of the self as separate and autonomous is revealed to have been forged in relationship with others, in the context of a broader social structure.

On one level, the feminist object-relations approach suggests that women and men have different senses of self and morality. This idea of an epistemological gender difference between self and morality, between ways of knowing the world, might make a difference in our understanding of how and why women and men contract, and particularly, of how these contracts are entered in the context of a familial relationship.\textsuperscript{100} To the extent that women (whether some, most, or many) do not have the same sense of self and morality as men, that is, to the extent that self and morality might constitute a gender difference, the applicability of the contract model to women comes into question.\textsuperscript{101} The paradigm contract is based on the notion of two separate and autonomous individuals, agreeing to enter into a contract when and only when it is perceived

\textsuperscript{99} See authorities cited, \textit{supra}, note 98.

\textsuperscript{100} See, \textit{infra}, 345-46.

\textsuperscript{101} See, \textit{infra}, 360-62.
by the two individuals to be mutually advantageous, that is, when the contract is in the self interest of both parties to the contract. However, if women's moral specificity is such that they are not motivated by the maximization of their self interest, but rather may, under certain circumstances, consider the interests of others, a fundamental assumption underlying the justification for the enforcement of contracts is undermined.

One conclusion that might be drawn from the critique of the liberal self is that the liberal model of contract is predicated on a male sense of self, and accordingly, the applicability of the model of contract to women comes into question. This problem is highlighted by domestic contracts which are made in the context of intimate relationships, that is, contracts made between and involving the individuals to whom women feel the strongest sense of responsibility — their families — and thus for whom the sacrificing of self interest is most likely. This problem is arguably most evident in the context of separation agreements upon marital breakdown, when a woman feels that she has initiated or caused the breakdown of the relationship. According to this relational sense of self and morality, a woman might feel that in asserting her self interest by leaving the marriage, or causing the marriage to dissolve, she is inflicting hurt on her others and violating her sense of her most fundamental responsibilities. In this scenario, she might not be expected to further assert her self interest in negotiating a separation agreement, but rather, in the attempt to find a solution to this moral dilemma which best accommodates the interests of all, she may sacrifice her own self interest.

Furthermore, when constructed as a gender difference, this relational self might be seen to present another dilemma of difference. Failing to recognize the difference by adopting formal, facially neutral equality will penalize women for their difference, because the unstated norm in the ostensibly neutral standard is a male norm. The "neutral" application of contract principles to women and men alike may unduly burden women because they do not conform to the male norm.

A woman may have entered the contract because she trusted her husband, or because she thought it would be best for the others in her family, or because she felt guilty at having caused or contributed to the marital breakdown. According to the general
principles and underlying assumptions of contract, these are not the sorts of considerations which ought to be taken into account. The failure to take these considerations, or this difference, into account also means failure to value differences which may be valuable, that is, the taking into account of the other in a contract decision. We have to ask whether we really want to punish women who, in the face of a personal crisis, did not attempt to maximize their self interest. Furthermore, the failure to recognize this difference risks recreating the difference of economic dependence and inequality. By not recognizing the way she has sacrificed her self interest, the woman will be left to suffer the economic consequences of her contract and exacerbate the economic hardship she nevertheless faces upon marital breakdown.

Yet to recognize this relational sense of self and morality as a gender difference risks recreating traits of the difference which are negative. The recognition of women's tendency to focus on relationships and responsibilities, on the other instead of the self, risks reinforcing the construction of woman as caretaker, as nurturer, and as other-serving. It reinforces the construction of woman as other.\textsuperscript{102}

On a second level, the critique of the liberal self can be seen to suggest that neither women nor men have voluntarist selves. The convergence of the feminist object-relations critique and the communitarian critique suggests that the self is not in fact prior to its relationships and cannot be understood in isolation from its relationships with others. Rather, these relationships are at least partially constitutive of the self and the self can thus only be understood in the context of these relationships. Accordingly, a conclusion that can be drawn from this critique is that the liberal model of contract is based on an impoverished and illusory notion of the self. The critique of the liberal voluntarist self can thus be seen to challenge the very conception of self underlying the model of contract.

These two levels of implications flowing from the critique of the liberal self, while seemingly contradictory on their face, are not so. The second level can perhaps be seen to embrace the implications of the first. Men may, to a much greater extent than women, perceive themselves as separate and autonomous selves, and their senses of self and morality may thus more closely approximate the voluntarist self posited by the contract model. However, according to the critique, the self is forged through relationship, it is affected by its relationships, it is constituted by its relationships. While it may have separate and autonomous traits, it is not essentially a separate and autonomous self, and as such, undermines a fundamental assumption underlying the enforcement of contracts.

The implications of the critique of the liberal self for the enforcement of separation agreements are profound. It questions the very normative framework on which Pelech is based and seems to suggest an alternative framework, namely, one grounded in a story of self as relational. According to this critique, underlying the rule in Pelech is a story about the self, which although advanced as a universal story, is a story about the male self and its understanding of its interaction with others, an understanding which is then advanced as the universal story. This story of the self and other might thus be rejected, not only because it is not a universal story, but moreover, because it tells an inadequate story about the relationship between self and other.

However, in order to evaluate these implications and their potential meaning to the analysis of Pelech, and before an alternative normative framework can be advanced in place of the liberal story, the concepts underlying the critique of the liberal self must be further examined. The notions of difference and of relational self, which have themselves been subject to powerful critiques, must be further deconstructed if these concepts are to be useful in our attempt to come to terms with the dilemmas presented by Pelech.
VII. THE DILEMMA REVISITED


Luce Irigaray
When Our Lips Speak Together

The defining of difference has traditionally been linked to the exercise of power, to those who have been in a position to say who is "different" and should therefore be subordinate.

Hester Eisenstein
The Future of Difference

A. The Critique of Difference

The analysis has, in effect, come full circle. I have tried to show the fundamental dilemma of difference presented to the theory and practice of gender equality, to unearth the manner in which this dilemma presents itself in Pelech, and to argue how the attempt to overcome the dilemma in Pelech is ultimately unsatisfactory. However, we are still left with the unresolved dilemma and thus the question of how to get beyond it.

The traditional feminist approaches to the question of gender difference have been the subject of an incisive internal critique, a critique which is part of a more general critique of the whole spectrum of Western feminism, and which I believe may provide the basis for an alternative approach to the questions of difference. Rather than focusing on the question of whether or not to recognize difference, an alternative approach has begun to emerge focusing on the question of what we mean when we talk about difference, and who we are talking about when we talk about difference. Unlike the traditional approaches, which have been unable to get beyond their

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103 L. Irigaray, "When Our Lips Speak Together" in This Sex Which is Not One, supra, note 102 at 208.

own reflections, this emerging approach may provide a path through the looking glass of the dilemma of difference.

The challenge to the traditional understanding of difference has occurred on a number on interrelated levels. On one level it is a challenge to the tendency to essentialize existing gender differences, differences which are the product of a patriarchal society. MacKinnon argues, for example, that the current social construction of woman is a product of a world in which men have the power to define, and have used this power to define women. According to MacKinnon, differences, including the differences in self and morality identified by Gilligan and others, are the product of the structures of dominance in society, that is, of the power of men and the powerlessness of women, and any affirmation of these differences constitutes an affirmation of these very structures of dominance.

On another level, it is a challenge to the tendency to ignore difference within difference. It is a critique, from those who have up to now remained voiceless and faceless in feminist theory and practice, of the blindness of feminism to women who are not white and not middle class and not heterosexual, and any of these things that feminism has simply assumed when it speaks of women. It is, in more direct words, an allegation of racism, of classism, of ageism, of a whole range of ism's, from women who do not fit the model upon which feminism was initially constructed. The critique is internal, in so far as it emanates from those whom feminism claims to represent and claims to speak on behalf of. Yet, as the voices of those become heard, it becomes increasingly clear that these are the voices of women that have not been represented by feminism, these are voices which come from the outside, or as bell hooks

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106 C. MacKinnon, Feminism Unmodified, supra, note 20 at 39: "Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don’t speak."
describes, from the margins. The critique is a critique of blindness to difference within difference. Women may be as different from one another as they are different from men. It is a critique of the hierarchy of oppression, of the positing of gender as the primary division and primary form of oppression in society.

It is at the same time a critique of the positing of an essentialist woman. The fractured identities emerging from within

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108 M. Minow "Foreword," supra, note 25 at 62-63: "... [B]y urging the corrective of the women's perspective, or even a feminist standpoint, feminists have jeopardized our own challenge to simplification, essentialism, and stereotyping. Women fall into every category of race, religion, class and ethnicity, and vary in sexual orientation, handicapping conditions, and other sources of assigned difference. Claims to speak from women's point of view, or to use women as a reference point, threaten to obscure this multiplicity and install a particular view to stand for the views of all." Also, see *Feminism as Critique, supra*, note 98 at 13: "How can feminist theory base itself upon the uniqueness of the female experience without reifying thereby one single definition of femaleness as the paradigmatic one – without succumbing, that is, to an essentialist discourse on gender?" Harding, supra, note 45 at 163: "... [C]an there be a feminist epistemological standpoint when so many women are embracing 'fracture identities' as Black women, Asian women, Native American women, working class women, lesbian women? Do not these identities undercut the standpoint assumption that common experiences as women create identities capable of providing the grounds for a distinctive epistemology and politics." She concludes, on the basis of the postmodern challenge to feminist epistemology, that "[t]here is no 'woman' to whose social experience the feminist empiricist and standpoint justificatory strategies can appeal: there are, instead, women: chicanos and latinos, black and white, the 'offshore' women in the electronics factories in Korea and those in the Caribbean sex industry." L. Nicholson, *Feminism and Postmodernism* (London: Routledge, 1990).
the feminist movement have begun to undermine the very notion of a general concept of woman, of a universal or an essential nature.

At yet another level, it is part of a more general postmodern challenge to the very notion of any generalized construction of a universal or essential nature of difference, of any universals or essences that must be discovered.\(^{109}\) It is part of the challenge to the very foundations of Western thought and to notions of rationality, objectivity, and truth. Alice Jardine writes of the postmodern challenge:

The clearest way, perhaps, to contain in one word the gesture they have performed on the texts and contexts of humanist ideology is to focus on the word denaturalization: they have denaturalized the world that humanism naturalized, a world whose anthropo­logy and anthro-centricism no longer make sense ... [o]ver the past century, those master (European) narratives — history, philosophy, religion — which have determined our sense of legitimacy in the West have undergone a series of crises in legitimation.\(^{110}\)

It is a rejection of meta-narratives, of the telling of one story.\(^{111}\) Rather than an external truth to be discovered by human reason, knowledge is understood as a product of the vantage point of the observer, and social knowledge, as the power of the observer to impose his own views on others. The rejection of the one true

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\(^{109}\) It is, of course, a ludicrous task to attempt to encapsulate the entire postmodern assault on rationality, objectivity, indeed on the whole of the Western philosophic tradition in a few short passages. The very nature of the postmodern project eludes the telling of such a simple story. However, with this self conscious apology in mind, I will attempt to tell just such a story.

Postmodernism is a breakdown of the stories that we have always told ourselves. The stories about the nature of the universe, the nature of society, the nature of government, the nature of our selves no longer seem to make sense. The stories no longer hold together, and once we start pulling on the loose threads of the stories, the whole stories dissolve and unravel.


\(^{111}\) J.F. Lyotard, *La Condition Postmoderne* (Paris: Editions de Minuit, 1979) at 7 defining the postmodern as "incredulity with regard to the master-narrative."
story is at the same time the recognition of the multiplicity of stories, coming from a multiplicity of perspectives.\textsuperscript{112}

In the context of law, it can perhaps be seen as an attempt to denaturalize law, to unravel the master narratives in legal reasoning that has held law together, to illustrate the contingency of law, to question the authority of these meta-narratives, and thus, the authority of law. It is at the same time an attempt to bring new voices, to tell new stories, into the legal arena, an attempt to expand law to include a multiplicity of perspectives.

The postmodern challenge to rationality, objectivity, and the foundations of knowledge has lead to allegations of nihilism and relativism. If no perspective can make any higher claim to the truth than any other, if no perspective can be absolutely grounded, can we speak at all? If we accept that there is no point of view that cannot be treated as a point of view,\textsuperscript{113} can we attempt to persuade by argument, or do we fall into the abyss of nihilism. In the context of the feminist project, the problem presented by the post modern challenge is how can we even speak of woman, of gender, and of difference\textsuperscript{113}? Can we use these terms, these constructs in a meaningful way? If we cannot, then we cannot speak. To not speak means a return to the silence from which we are only now emerging. Not speaking is simply not an option. So we must speak. But how can we speak of woman, of women, of gender, of difference?

I do not believe that the postmodern rejection of the absolute grounding of truth, and of essences discoverable by human reason, necessarily implies the rejection of the possibility of persuasion. This nihilistic tendency of postmodernism is both

\textsuperscript{112} Minow, "Partial Justice: Law and Minorities" in Austin Saret, ed., \textit{Amherst Lecture Collection} [forthcoming]: "All knowledge is partial and constructed through the perspective of particular people, in particular social and historical situations."

\textsuperscript{113} Minow, "When Difference Has Its Home," \textit{supra}, note 25 at 179: "Once one participant in the debate says 'All claims of knowledge carry a perspective: none are based in an unchanging reality' then anyone else who claims to know an unchanging reality at least becomes vulnerable to the challenge: what is your perspective, that so entitles you or so blinds you to make such a claim? Once there is more than one point of view, no point of view can be treated as not a point of view."
depoliticizing and unnecessary.\textsuperscript{114} There are many ways that we can engage in the activity of persuading others, short of basing such persuasions on absolute truth. We have many stories of power, of history, of experience to tell one another, and with one another. If the postmodern project is understood as an attempt to recognize the multiplicity of perspectives and stories, then it would seem to be perfectly consistent with the project to bring forth women’s experiences and perspectives as one which has been silenced, and excluded from the official story.\textsuperscript{115} While we must recognize that on one level the varieties of women’s experience make every woman unique, we may still be able to articulate types of perspectives, based on particular historical and psychological experience. We might usefully be able to compare types of perspectives, or categories, recognizing all the while the limitation of such categorization, and the danger of ignoring difference within sameness, of universalizing the experience of some women to the experience of all women.

And so, returning to the question of how do we speak of woman, of gender, and of difference, I believe that the answer is carefully and contingently. Carefully, in so far as we must be careful to specify who is speaking and who is being spoken about. It is true


Rather than depoliticising, the feminist method, or rather, a method within feminism, can be seen to be based upon recognising the fundamental importance of social change and the importance of social criticism as a basis for such social change. It is, moreover, based on the recognition of the need for social experience to inform and reform the criticism. See Schneider, "Rights and Politics," \textit{supra}, note 98 emphasizing the fundamental interaction between feminist theory and practice, as a form of consciousness raising. Schneider elaborates at 603 that: "The idea of consciousness-raising as a method of analysis suggests an approach to social change which recognizes dynamic tension, reflection, and sharing as essential aspects of growth. Feminist theory values this process which starts with experience, generalizes through self-reflection and evaluation, and then returns to experience. This dialectical process transcends the oppositions of self and other, public and private, individual and community, and is simultaneously grounded in an understanding that any connections between these apparent dualisms will be only partial and tentative, and that distinctions will again emerge."

\textsuperscript{115} Schneider, "Rights and Politics," \textit{supra}, note 98 at 603: "... [F]eminist theory is concerned with the articulation of women's voices and issues of silence. Power gives people a voice and lack of power silences them. Women's voices and experiences have not been heard because the subordination of women has denied them access to power."
that we cannot all speak at once, and we cannot speak about everything at one time. To avoid this cacophony, yet to allow us to speak, we must be careful not to pretend to speak for those that we do not speak for. And we must be careful to listen to one another when we speak, to consult one another rather than hypothesize on one another’s views. Contingently, in so far as we must admit the partiality of our perspectives, and the contingency of our knowledge on these perspectives. We cannot pretend to discover truth, to tell the one true story. While we can strive to embrace the perspective of others, to expand the outer limits of our own perspectives, to recognize a multiplicity of voices, we can never forget our partiality, and thus, the contingency of our views.\textsuperscript{116} The postmodern message to feminism, and particularly, to feminist legal theory, is to recognize the partiality of our own views and realize we can never pin down the ultimate truth, or find the one true story. We must remain, at least contingently, committed to contingency.

B. Deconstructing the Dilemma

But what of the dilemma? Can these insights of the critique of difference be used to resolve the dilemmas of difference?

Minow has suggested an approach in which these insights can assist us in deconstructing the dilemma. She has directly confronted the dilemma of difference, in seeking to translate the insights of these general critiques of difference and self into a concrete approach for overcoming the dilemma. Minow seeks to unearth the deeper stories in difference. She argues that the dilemma may be resolved by revealing the unstated assumptions which underlie the assignment of difference, the power underlying the construction of difference that have characterized the traditional approaches to questions of difference.

Rather than accepting difference as an intrinsic characteristic or property, she begins from an understanding of difference as relational, as a measure of comparison.

\\textsuperscript{116} Harding, \textit{supra}, note 45 at 194: "By giving up the goal of telling ‘one true story,’ we embrace instead the permanent partiality of feminist inquiry."
"Difference" is only meaningful as a comparison. I am no more different from you than you are from me. A short person is different only in relation to a tall one. Legal treatment of difference tends to take for granted an assumed point of comparison.\textsuperscript{117}

Through the social relations approach, Minow seeks to unearth the connections between difference and power, that is, the relationships of power that underlie the assignment of difference. Minow identifies five unstated assumptions: (1) the assumption that differences are intrinsic, not relational; (2) the assumption of an unstated point of reference when describing someone as different; (3) the assumption that the perspective of the person seeing or judging is assumed to be objective; (4) the assumption that the perspective of others, particularly the perspective of those being judged is irrelevant; and, (5) the assumption that existing social and economic arrangements are natural and neutral.\textsuperscript{118}

Minow argues that the dilemmas of difference can be overcome by seeking out these powerful unstated assumptions, and the relationships of power which underlie the assignment of difference. She argues that:

The difference dilemmas, disrobed, are not insoluble problems about neutrality and discretion, but are instead serious struggles over which versions of reality judges should embrace. Taking minority perspectives seriously calls for a process of dialogue in which the listener actually tries to reach beyond the assumption of one reality, one version of truth.\textsuperscript{119}

She argues that we must have a "commitment to seek out and to appreciate a perspective other than one's own."\textsuperscript{120} We must seek out a multiplicity of perspectives and attempt to take the perspective

\textsuperscript{117} Minow, "Foreword," supra, note 25 at 13.

\textsuperscript{118} Minow, "Foreword," supra, note 25 at 34-54. Three propositions follow from this assumption: "... first, the goal of governmental neutrality demands the status quo because existing societal arrangements are assumed to be neutral. Second, governmental actions that change the status quo have a different status than omissions, or failures to act, that maintain the status quo. Third, prevailing social and political arrangements are not forced on anyone. Individuals are free to make choices and to assume responsibility for those choices."

\textsuperscript{119} Ibid. at 69-70.

\textsuperscript{120} Ibid. at 14.
In seeking out these multiple perspectives, we must remain sensitive to the narratives of power relationships which do not disappear in the search for these perspectives.

C. The Relational Self and the Social Relations Approach

The idea of the relational self was used to critique the stories of self and other underlying the traditional model of contract and the liberal model of the family upon which the decision in Pelech was predicated. Two possible implications of the critique were suggested. On one level, the critique suggested that women may be different than men in their approach to contract. The idea of the relational self might be understood as a gender difference, and seen to present a dilemma of difference. At another level, the notion of the relational self was used to critique the liberal voluntarist self, suggesting instead that all selves are relational.

These preliminary observations must now be reconsidered. In light of the critique of feminist object-relations theory, of difference, and of the more general challenge of postmodernism, we have to ask whether we can talk about the relational self as a meaningful concept. More specifically, can we talk about the relational self as a difference, and at the same time talk about the relational self as a more general description of the self? Moreover, we have to ask how the notion of the relational self can help us overcome the dilemmas of difference.

It is useful to begin by considering what we are talking about when we talk about the relational self. Any number of meanings

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121 Ibid. at 70-82.

122 Ibid. at 68. "Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination. Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference. It becomes hard, in the face of such daily practices, to regard the glimpses of dominant conceptions as contestable assumptions."

123 Supra, at 344-47.
might be assigned to this notion. It might be a description of an individual's self understanding, that is, the individual may have a sense of herself as connected and related to others. It might be a description of the description or label that others assign to particular individuals. Along similar lines, it might describe the description that we would assign to particular group of individuals, such as women. It might also be a description assigned to all individuals based on a theory of psychological development.

The notion of the relational self can be further deconstructed, allowing us to more fully grasp its potential contribution to our inquiries. The basic understanding of the self as relational, as Minow writes "assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood".\textsuperscript{124} It is an understanding of the self as implicated in and by others. It contains the idea that we are situated in relation to others, and that our relationships with others are partially constitutive of who we are.\textsuperscript{125}

Through this understanding of the relational self, we can gain further insight into the notion of the autonomous self. The sense of self as a separate and unconnected self can be understood not in opposition to the relational self, but rather as a relational self. The autonomous self is as much a product of its social relationships as the sense of self as connected and dependent. Feminist object-relations theory, for example, has attempted to illustrate how the male sense of self as separate is forged in relationship to others.\textsuperscript{126} Moreover, the very concept of autonomy is only meaningful as a result of relationships of interdependence.

\textsuperscript{124} Minow, "When Difference has its Home," \textit{supra}, note 25 at 127.

\textsuperscript{125} \textit{Supra}, at 342-43; S. Benhabib, "The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory" in \textit{Feminism as Critique}, \textit{supra}, note 98 at 87 regarding the contrast between the "generalized other" and the "concrete other": "The standpoint of the concrete other, by contrast, requires us to view each and every rational being as an individual with a concrete history, identity and affective-emotional constitution. In assuming this standpoint, we abstract from what constitutes our commonality. We seek to comprehend the needs of the other, his or her motivations, what s/he searches for, and what s/he desires."

\textsuperscript{126} \textit{Supra} at 38-42.
and power that allow some people to feel powerful in this way.\textsuperscript{127} The very idea of an autonomous self depends on the idea of a dependent self, which makes both relational selves, but relational selves which are asymmetrical in relation to power.

This understanding of the self as relational underlies what Minow has identified as the \textit{social relations approach}.\textsuperscript{128} It is an approach which attempts to translate the insights of the post-modern challenge into a concrete approach to the study of social practices, and particularly, legal practices. Minow describes the approach as "emphasiz[ing] the social relations of groups and how these relationships between people construct and express power and knowledge."\textsuperscript{129}

This social relations approach and the understanding of the relational self on which it is based can provide valuable assistance in both our general inquiries of differences and the dilemmas they present, as well as to the particular question of the enforcement of separation agreement. For example, by focusing our attention on relationships, on particular relationships in particular contexts, this approach can help us talk about the relational self as a difference without reducing the notion to only a question of difference and moreover, without constructing the difference as essential. The self-understanding of some women as connected and dependent upon others can be constructed as a difference; without essentializing the difference, or losing sight of the broader implications of the relational self. By focusing on particular relationships in particular contexts, we can avoid overgeneralizing on the extent of the


\textsuperscript{129} Minow, "When Difference Has Its Home," \textit{supra}, note 25 at 128. Singer, \textit{supra}, note 127 at 655 describing how the social relations approach directs our attention: "(1) It encourages us to see people as situated in various relationships with others that continue overtime. (2) It describes social relations as comprising a spectrum from short-lived relations among strangers to continuing relations in the market to intimate relations in the family. (3) It comprehends rights as emerging out of understandings that develop over the course of relationships rather than as being fully articulated at clear decision points. (4) It encourages us to ask various questions about relationships between the parties."
difference. If we understand the self as socially constructed, we can see how certain categories of women, with similar histories and life experiences, may have similar self understandings.

By focusing our attention on the relationships between people and the power contained and expressed in these relationships, the idea of the relational self can help in our understanding of the world as socially constructed and thus, reconstructible, as opposed to given and immutable.

And by focusing on the relationships between people, the relational self can be seen as integral to the strategy suggested for deconstructing the dilemma of difference. The understanding of the self as relational is crucial to this understanding of difference:

If one assumes that people are related to each other, then assertions of differences are actually statements of relationships, since they express a comparison between the one doing the asserting and the one about whom the assertion is made.\textsuperscript{130}

It is through the social relations approach that Minow seeks to reveal the connections between power and difference.

VIII. WHAT DIFFERENCE DOES DIFFERENCE MAKE IN PELECH?

With this social relations approach to difference and the relational self in mind, we can return to a consideration of the implications of the analysis for the enforcement of separation agreements. What difference, if any, should either the relational self or economic dependency make in the enforcement of separation agreements? Can we talk about the relational self or economic dependence as a meaningful difference? Can the differences survive the postmodern challenge? How, if at all, does this challenge, this new approach to difference, assist us in moving beyond the dilemma of difference in Pelech?

\textsuperscript{130} Minow, "When Difference Has Its Home," \textit{supra}, note 25 at 128.
A. The Relational Self: What's the Difference?

As a gender difference, the idea of the relational self refers to the understanding of the self as related and connected, either as a description of self understanding, or as a description that we might apply to particular individuals self understanding. It is in contrast to an understanding of the self as autonomous, although both senses of self are relational selves in the broader meaning of the term as a self constituted by its social relationships.

As a gender difference, we must not overgeneralize the applicability of the relational self. The postmodern challenge to this understanding of the self as relational would reject the neatly dichotomized constructions of self and question both the linear causality between mothering and gender identity formation, and the primary significance attached to gender. The idea of women's sense of self as related and connected cannot therefore be thought to be an intrinsic characteristic of women. Nor is this relational self a universal characteristic of women. Rather, it is an expression of relationship and a product of particular relationships. We must focus on the particular relationships of particular women to determine whether the understanding of self as connected and dependent affected their approach to understanding their separation agreements. While it is not a difference which will affect all women, it is a difference which may affect some women with certain share life experiences, and the objective ought to be to try to take these differences into account in considering whether a separation agreement ought to be enforced.

Feminist object-relations theory has been criticized, of assuming white and middle class.\textsuperscript{131} It has focused on the question

\textsuperscript{131} See E. Spelman, \textit{The Inessential Woman: Problems of Exclusion in Feminist Thought} (Boston: Beacon Press, 1988) regarding race and class as constitutive elements of gender. Feminist object relations theory, in focusing on gender, has simply assumed race and class as a constant, that is, as white and middle class; Fraser & Nicholson, \textit{Feminism and Postmodernism}, supra, note 108 at 22 regarding feminist object-relations theory emphasizing similarities among women at expense of differences: "Although the theory allows for some differences among women of different classes, races, sexual orientations and ethnic groups, it construes these as subsidiary to more basic similarities." Harding, supra, note 45 regarding exploring problems presented to both theories by the commonalities and differences of the feminine relational self and world view, and the "African" relational self and world view.
of gender, but not to the exclusion of race and class. Rather, there is an underlying assumption of race and class, that is, of white and middle class. We have no way of knowing to what extent, if at all, this relational sense of self applies to non-white and non-middle class women, and we can not simply generalize from the experience of a limited class of women to the universal category of all women. Furthermore, there is no basis for asserting that all women in the category of white, middle class women have such senses of self. There are undoubtedly many women within this category who have developed a sense of self more accurately described as autonomous.

It is, moreover, a sense of self which may be closely connected to economic dependency. The life history and experience of women who are economically dependent may be a similar history and experience giving rise to an understanding of the self as related and connected, as dependent upon others.

The general issue which must be addressed is how this understanding of the relational self as gender difference might help us decide questions involving the enforcement of separation agreements. First, it tells us how not to decide such cases. It tells us that we cannot simply establish a gender-based principle, and assume that all women have a related and connected sense of self which must be taken into account in considering whether a separation agreement ought to be enforced. Neither do all women have such senses of self, nor are all those women who may have such senses of self necessarily motivated or affected by it in a particular contractual setting. Rather, the insights of feminist object-relations theory, as historicised, can be used to recognize that the assumptions underlying the traditional justification for the enforcement of contract do not hold for all women in all situations, that in some circumstances, some women may be motivated by considerations that the traditional model of contract law does not take into account. We must seek out the historicised, contextualized narratives of the individuals involved. We must examine the particular relationships of individuals. Only then can we determine the appropriateness of taking the individual's sense of self into account.

The insights of the feminist object-relations theory can be used as a means of expanding the limits of our perspectives, of taking the perspective of the other, of recognizing that the
perspective of those being judged may be relevant to the very matter being judged. It may be useful to at least entertain the idea that the individual in question may have been motivated by the considerations identified by this theory, if the behaviour of the individual does not seem to fit within the traditional model.

Moreover, it is only once the legitimacy of these considerations are recognized that we can properly begin our assessment of whether they were operative factors in particular cases. Our inquiries are invariably affected by our understanding of what we are trying to find. In the case of Mrs. Richardson, Mrs. Pelech, and Mrs. Caron we have absolutely no way of knowing whether any of these considerations were operating in the contract because no one asked.

It may be that the inability to draw general principles from the feminist critique of contract renders the resolution of these matters more difficult, and more complex. However, it just may be that the more complicated the resolution of these matters becomes, the closer we are approaching a fair resolution, a resolution that is capable of taking into account the complex totality of factors which ought to be taken into account.

B. Economic Dependence: What's the Difference?

This analysis has identified economic dependence as presenting a dilemma of difference— that is, that recognizing it and ignoring it risks recreating it. The analysis has assumed that it is a meaningful difference. The question which must now be addressed is whether it is in fact a meaningful gender difference, and if so, how? We must re-conceptualize the nature of the difference we are talking about when we talk about women’s economic dependence on men, in light of the alternative approach to difference, to the relational self, and to overcoming the dilemmas of difference.

First, we must recognize that we cannot talk about economic dependence as a general difference which applies to all women. Economic dependence is a condition which is both race and class specific. Economic dependency, as traditionally constructed, is a condition primarily of white, middle class women. Working class
and minority women have a history of long-standing participation in
the market, and thus, the traditional pattern of economic
dependency has never described their experience. However, the
spectre of economic dependence looms large over even these
women.\textsuperscript{132} The assumption of dependency is firmly embedded in a
myriad of our social relationships, and thus affects women whose
lives have never been structured according to this assumption.\textsuperscript{133}
The lives of working class and minority women fit neither the model
of dependency nor the model of economic self-sufficiency.
Furthermore, even within the limited category of white middle class
women, it is no longer a condition which describes all these women.
It is primarily white middle class women who have been able to
break out of dependency, and become economically self-sufficient in
the labour market. The \textit{difference} of economic dependence is thus
a condition which specifically applies to a limited category of women,
but which nevertheless affects a much broader category of women.

Second, economic dependence is not a description of an
intrinsic characteristic of women, but rather, a description of a
relationship between some women and some men. It is a measure
of comparison in which the male norm is the unstated point of
reference. Women’s economic dependence is only meaningful in
relation to men’s economic self sufficiency. The relationship of
dependence means a relationship in which a woman is financially
dependent upon her husband. It implies a particular configuration
of family relationships, a particular relationship between women and
men. The norm is economic self-sufficiency, and women’s economic
dependence is understood as a deviance from this norm. According
to this construction of difference, the male standard of economic self
sufficiency is thus implicitly accepted as the norm towards which
women must strive.

The difference of economic dependence is thus an extremely
complex difference. It is a difference which applies in varying
degrees to different women, and which is loaded with powerful
unstated assumptions about the way we organize the world. The

\textsuperscript{132} See \textit{hooks, From Margin to Centre}, supra, note 107.

\textsuperscript{133} \textit{Supra}, notes 54-6.
question then becomes how we ought to approach this difference. I believe that this question must be addressed on two levels. On the level of principle, it is a question of both retrospective and prospective justice, that is, of the principles according to which cases like Pelech ought to be decided, and according to which individuals will be encouraged to structure their lives. On a structural level, it is a question of the connections between separation agreements and broader societal structures which continue to create relations of dependency. It is a question of who we believe should be responsible for dependents in our society, particularly dependency following marital breakdown. It is a question of how, if at all, self-sufficiency can be realized for individuals who make certain choices.

1. Towards a principled approach to overcome dependence

The question which must be addressed at the end of the day is how we believe cases like Pelech, Richardson, and Caron, ought to be decided. Under what conditions should separation agreements be enforced, and under what conditions should the Courts intervene? What principled approach, if any, can the courts adopt to resolve these cases, without recreating the problem it has set out to deal with? Are there any general principles which can be invoked to deal with the problem or in view of the complicated and varied nature of the difference of dependence, should the courts proceed with greater discretion, on a case by case basis?

(a) Formality vs. discretion

These remedial questions raise yet a third version of the dilemma of difference identified by Minow:

The third version of the dilemma is the choice between broad discretion, which permits individualized decisions, and formal rules that specify categorical decisions for the dispensing of public - or private - power.\textsuperscript{134}

\textsuperscript{134} Minow, "Foreword," supra, note 25 at 13.
Minow describes the relationship of the question of discretion versus formal principles to the question of difference:

The Court's commitment to the rule of law often leads it to specify, in formal terms, the rules that govern the decisions of others. This practice can secure adherence to the goals of equality and neutrality by assuring that differences are not taken into account except in the manner explicitly specified by the Court...[M]aking and enforcing specific rules engages the Court in the problem of reinvesting differences with significance by noticing them...[T]he tension between formal, predictable rules and individualized judgments under discretionary standards thus assumes heightened significance in dilemmas of difference.135

In the context of the dilemmas presented by difference, both formal rules, like the sameness model, and the discretionary approach, like the differences model, risk recreating and devaluing these differences.

In *Pelech*, the Court established a formal principle to govern the enforcement of separation agreements, a formal principle which, but for the limited exception, ignores differences and threatens to recreate the underlying difference of economic dependence. However, the alternative of the judicial exercise of discretion on a case by case basis, to take the full range of individual exigencies and circumstances into account in the enforcement of separation agreements, may reproduce the same difference. The very crux of the dilemma of difference comes home to roost in this remedial question.

In addressing the now familiar question of how this dilemma can be overcome, we must recall the insights of the deconstruction of difference. Difference is a relationship, and its dilemmas arise "from powerful assumptions about whose point of view matters, and what is given and what is mutable in the world."136 Neither an approach based on formal principle nor an approach based on broad discretion can solve the complexities posed by difference. Rather than constructing the dilemma as an *either/or*, we must appreciate that the solution to the dilemma lies somewhere in the balance


between these two contrasting approaches.\footnote{137} It is not necessarily
general principles that we must reject to move towards a more
contextual justice, and towards a more contextualised mode of
decision making. Our effort to tell historicised, contextual narratives
is not inconsistent with principle, but it substantially qualifies our
expectations of the guidance that principle can give us. While we
need to retain principles to reflect our general commitments, and to
provide a degree of predictable and non-arbitrary decision making,
we need to recognize the limitations of any principle. We must not
expect that a single principle will be able to accommodate difference
in all its complexity, but rather, we may require a number of
competing principles, which will more adequately reflect the range
of individual exigencies and circumstance. Furthermore, we must
realize that principles cannot, in and of themselves, provide the
answers to the problem of difference. Rather, our decisions will
require normative choices, normative choices made in particular
social contexts.

As Minow writes:

\begin{quote}
I believe we should welcome complexity and challenge complacency - and stop
fearing that we will be unable to make judgments.\footnote{138}
\end{quote}

Instead of trying continually to fit people into categories, and to enforce or deny
rights on that basis, we can and do make decisions by immersing in particulars to
renew commitments to a fair world.\footnote{139}


\footnote{138} Minow, "Foreword," \textit{supra}, note 25 at 90-91.

\footnote{139} \textit{Ibid.} at 91.
Moving between specific contexts and general commitments, we can challenge unstated assumptions that might otherwise rule. Thus, one reason we can still decide, amid powerfully competing claims, is that immersion in particulars does not require the relinquishment of general commitments. The struggle is not over the validity of principles and generalizations — it is over which ones should prevail in a given context.¹⁴⁰

Our decisions are not easy, and we ought not shy away from a recognition of their complexity, nor from a recognition that we must make them.¹⁴¹

(b) Towards a principled approach to the enforcement of separation agreements

The analysis of the nature of the difference of dependency has revealed that we cannot simply assume that all women are in a comparable situation of economic dependence. We cannot simply draw a line on the basis of gender, and treat all women similarly on marital breakdown. Economic dependency is a social relationship that neither applies to all women, nor applies in the same degree to the women to which it does apply. The approach we adopt to the enforcement of separation agreements must recognize this complex nature of the problem. No single principle will be capable of accommodating these differences within difference and we, therefore, must seek out the different principles required to take the multiplicity of difference into account.

One possible approach to the dilemma presented by the difference of dependency may be to break down the categories with which we are dealing. Rather than classifying persons for comparable treatment upon marital breakdown on either gender-neutral or gender-based lines, it might be more useful to classify

¹⁴⁰ Ibid. at 91-92.

¹⁴¹ J.W. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) Wis. L. Rev. 975 at 1059: "To make conscious choices, it is necessary to realize that we are making a choice. To choose wisely, we must know who gains and who loses from the concrete legal rules and what values are thereby preserved or undermined. Once we know everything that is involved in the decision, and we have not arbitrarily constricted the alternatives available to us, then we make a choice. Those decisions may be difficult and they may be painful, but making choices is what human beings do."
persons according to the difference in question, that is, according to economic dependency or non-economic dependency. Beginning with this characteristic rather than gender as the basis for determining how individuals are to be treated avoids the problem of drawing over or under-inclusive generalizations on the basis of gender.\textsuperscript{142}

We might begin by identifying at least two categories of persons upon marital breakdown: economically dependent persons and non-economically dependent persons. A third category of semi-dependent persons might also be identified who may not exhibit the full pattern of economic dependency, but who nevertheless fall considerably short of economic self-sufficiency. Examples of persons who might fall within this category are women who have worked sporadically during marriage, who worked part-time during marriage, or who worked full-time, but in low paying occupations, and thus relied on their husbands’ income.

Different rules governing marital breakdown in general, and the enforcement of separation agreements in particular, could be devised for these different categories.\textsuperscript{143} In marital relationships between non-dependent spouses, there is no difference of economic dependence and thus no reason to be concerned with recognizing the difference upon marital breakdown. Rather, the principles of equality and independence may reflect the relative economic position of the spouses, and are, thus, appropriately invoked to govern the relationship between the parties upon marital breakdown. Dependent and semi-dependent spouses could, on the other hand, be treated in a manner that recognizes their distinctive economic relationship within marriage.

\textsuperscript{142} There is no reason to limit the analysis to the economic dependency of women. The analysis is equally applicable in general to dependent persons, for example, persons with disabilities and male spouses who choose to raise the children.

\textsuperscript{143} See Minow, "Consider the Consequences," \textit{supra}, note 44 at 909: "Some of Weitzman's findings suggest that a two-tiered divorce system - with one set of rules for couples conforming to traditional gender expectations and another set of rules for hypothesized 1980s style dual-career, dual parenting couples - could take care of the worst applications of current law." This two-tiered approach can also be seen to have been implicitly suggested by Matas J.A., in his admonition that it would be unfair to attempt to treat his two hypothetical examples of different kinds of marriage, exhibiting different patterns of financial relationships, according to the same principle. See, \textit{supra}, at 317-19.
However, a rigid classification scheme of spouses on the basis of economic dependency, semi-dependency and non-dependency presents a number of problems. First, it will entail the drawing of sharp lines between categories. What criteria can be devised to categorize spouses, particularly, those spouses at the margins. For example, where might a woman be classified who was married for fifteen years, with three children, was employed in a clerical position for the first three years of marriage and who has been economically dependent on her husband since that time? Is twelve years of economic dependency, and atrophied labour skills, sufficient to classify the woman as totally dependent? Or, is she only semi-dependent as a result of her employment history during the marriage? We may furthermore want to ask how much ought to be contingent upon the category in which the woman falls. How different should the treatment be between the dependent spouse and the semi-dependent spouse?

Furthermore, there is a more general question of whether any individual can ever be described as non-dependent. Prager, for example, argues that separate marital property regimes, based on notions of independent financial relationships during marriage, fail to reflect the interdependent reality of spouses financial affairs. Even seemingly economically self-sufficient spouses are often intricately involved in each other’s financial relationships. Moreover, we need to ask what non-economic dependency means in light of an understanding of the self as relational. Individuals are deeply implicated in their relationships with others, including their economic relationships. The very notion of economic self-sufficiency, while meaningful on one level, seems to be predicated on a voluntarist self, on a self that exists independently of and prior to its

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144 Prager, "Shifting Perspectives on Marital Property Law" in B. Thorne & M. Yalom, eds, Rethinking the Family: Some Feminist Questions (New York: Longman, 1982) at 117 discussing the needs and expectations created by marriage. "... [They] shape the frame of mind with which decisions are made during marriage. The expectation of stability and continuity and the desire for a shared life suggest that married people are unlikely to make decisions on an individually oriented basis; rather, the needs of each person tend to be taken into account. Thus, married people will often make different decisions from those they would make if there were no marriage or marriage-like relationship functioning." See also P. Synes, "Property, Power and Dependence: Critical Family Law" (1987) 14 J. of Law and Society 199 for a discussion of the "dilemma of dependence."
relationships. The substitution of a relational understanding of the self challenges the meaning of economic self-sufficiency, and leads instead to an understanding of all individuals as being, in some respect, dependent.

Rather than constructing non-dependence, semi-dependence and dependence as three conceptually distinct categories, it might be more in accord with a relational approach to conceptualize economic dependency as a continuum. The particular treatment to be given to particular individuals would depend where they were located on this continuum. When understood as a continuum, we would avoid the problems associated with a rigid classification scheme. Rather than forcing fine distinctions, this approach would examine the extent of the dependency and compensate the spouse accordingly. It would begin from the assumptions that we are all in some respects dependent, but that marriages can and do engender differing degrees of dependency which will require differing degrees of compensation.

An understanding of economic dependency as a continuum would furthermore assist us in moving beyond the dilemma of difference. If we recognize that we are all in some ways dependent, we avoid the construction of the difference, as an either/or, as something to be recognized or not. The question then becomes not whether there is a difference to be recognized, but rather, whether the degree of dependency is sufficient to warrant that it be taken into account. This rather subtle distinction allows for the construction of the difference of dependency in relative terms, and the relevant inquiry becomes how the degree of dependency ought to be taken into account. While in some respects, the issue still comes down to whether or not in the enforcement of a separation agreement economic dependency will be taken into account, the construction and deconstruction of the concept of difference, as Minow has argued, is crucial to the project of overcoming the dilemma.145

It might still be argued that in the cases where the dependence is such that it is held to warrant recognition that the same dilemma of recreating difference by recognizing it will be

145 Supra, note 25 and at 355-56.
encountered. We must recall that the dilemma of difference is only a problem as long as the recognition of the difference could be harmful or stigmatizing. By not recognizing dependence when it is not as significant a factor in the economic relationship of the parties, the problem of recreating the stereotype of woman as dependent, for women who are not economically dependent to the same degree vanishes. However, we still have to consider the implications for more dependent persons of the recognition of this difference. Will such recognition of difference reinforce the existing imbalances in the distribution of power? Will those women be hurt by the recognition of this dependency?

It is reasonably clear that these economically dependent women will be hurt and the existing distribution of power will be reinforced, if these differences are ignored. We can again see how the question then becomes not whether or not to recognize the difference, but rather how best to recognize the difference without recreating the problem. Another question that might arise is whether this approach amounts to anything more than judicial discretion. There is no doubt that there is discretion in this approach. Yet, there is always discretion in judicial decision making, even if often masked in the guise of principle. A recognition of discretion need not lead to an abandonment of principle. Rather, we can return to a reformulation of the test, or at least a broader approach to the test, when dealing with those spouses who exhibit a greater degree of dependency.

(1) The requirement of a change in circumstances ought to be broadly construed. Once an underlying pattern of economic dependence is evidenced, the change in circumstances with which the court ought to be concerned is a change following the marital breakdown. Furthermore, the court ought to be concerned with a change in the fundamental assumptions regarding circumstances underlying the separation agreement.

146 Minow, "When Difference Has its Home," supra, note 25 at 128: "Attributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful."

147 Christine Littleton has argued that we must make difference cost-less. See C. Littleton, "Reconstructing Sexual Equality" (forthcoming Cal. L. R.).
(2) The objective test of foreseeability ought to incorporate a more subjective element. The courts ought not to be concerned with foreseeability from the perspective of the reasonable white, middle class, male judge, who may have a more sophisticated grasp of the harsh economic reality facing women upon marital breakdown, and may be in a better position to evaluate the marketability of the woman in the labour force. Rather, we ought to be concerned with the question of foreseeability from the perspective of the person being judged. As part of the historicised, contextualised narrative that we must unravel in dealing with each of these cases, we must examine the particular relationships, and determine, as best we can, the particular individual's understandings of the implications of the marital breakdown. Rather than treating the self conception and worldview of the person being judged as unimportant to our treatment of that person, we must seek out this perspective. We must not judge this particular relationship according to some objectively determined standards, but rather, strive to understand the perspective of those within the relationship. By tailoring the remedy more specifically to the categories of persons afflicted and/or not afflicted by the difference, we might be better able to bring the perspectives of these different categories of persons to bear.

(3) The requirement of a causal connection between the change in circumstances and economic dependency ought to be broadly construed so as to appreciate the multiplicity of causal relationships in economic dependency. The courts ought not to be searching for a uni-linear causal relationship, but rather, ought to proceed from an understanding of the interdependence of factors leading to dependency. An appreciation of the interconnection of relationships that mutually constitute economic dependency might be reflected in terms of legal standards in a number of ways. Evidence of a pattern of economic dependence might as an extreme example render the contract void or voidable. It might trigger a rebuttable presumption that the contract is unfair. It might shift the onus of proof to the party seeking to uphold the agreement to satisfy the court that the contract has adequately taken the relationship of dependency into account, and that the contract is thus fair. It might simply trigger a higher level of scrutiny by the courts in evaluating the fairness of the contract. There is a range of options for taking the difference into account, for translating our
concern with the difference of economic dependency into legal criteria for determining the enforceability of the contract.

These suggestions for a broad reading of the test in Pelech are just a beginning. It is only a suggestion of how the problem of economic dependency might be more appropriately handled within the existing law of separation agreements. Although perhaps stretching the approach in Pelech beyond its limits, it remains an attempt to deal with the dilemmas within the confines of the current legal regime. An adjustment of the principles by which the courts enforce or vary separation agreements will go only a very short distance in alleviating the dilemmas of economic dependency in women’s lives. The development of a principled approach to the dilemmas will require a more comprehensive doctrinal reform, involving a rethinking of the more general principles of family law, of principles of property and support, and more generally, of the philosophy of formal equality and economic self sufficiency that underlies the existing regime.

2. Towards an understanding of systemic dependence

The dilemmas that we face only appear insoluble if we fail to expose the unstated assumptions upon which the dilemmas are constructed. And so we must try to expose the unstated assumptions that make the dilemma of economic dependency seem insoluble.

It seems that there are at least two underlying assumptions that may cloud our ability to see beyond the dilemma. The first is that the family ought to be the primary source of financial support for its members. Implicit in the assumption is the norm of the traditional family. The second is that the existing social order is natural and immutable. The dilemma is located firmly within the realm of doctrine, that is, within the principles of family law. Since the social order is understood as natural, neutral and unchanging, the dilemma is understood only as a doctrinal dilemma.

However, if we begin to see the connections between the dilemma at the doctrinal level and the myriad of social relationships which are predicated on and reinforce dependency, if we begin to realize that these are not fixed and intransigent, but socially
constructed and thus reconstructible, we can begin to see that the dilemmas are not insoluble.

The traditional gender division of labour in the family has indeed been instrumental in the creation and recreation of women's economic dependence. Family law has been both predicated upon and played an important role in recreating this traditional division of labour in the family. However, the traditional model of the family, and the law based therein, have not been the only factors in the creation and recreation of this difference. A whole range of social relationships and institutions have been both premised upon and served to reinforce this dependency. From the wage differential between women and men, to the assumption of dependence underlying social welfare benefits, our society has been structured upon this assumption.\textsuperscript{148}

The cycle of dependency will therefore not be broken by an exclusive focus on a restructuring of the family and the principles of family law. We cannot simply change the rules of the game at one level. We cannot tell women that they must fend for themselves, and maintain the rules of the game from the days when women were told to depend on their families.\textsuperscript{149} As we move away from the notion of the traditional family unit as the basic economic unit in society, then we must re-evaluate all the institutions which have been built upon this assumption that "individual economic needs are fulfilled by the family unit, a family unit that includes a wage-earning

\textsuperscript{148} Supra, note 54 and at 328-29.

\textsuperscript{149} Land, supra, note 56 regarding women's claims to maintenance is not reducing economic inequalities because of context of inadequate state support and women's inferior access to jobs and wages. Women's claims to economic support from the family, the state, and the market are all in the process of change, and a woman's claim on one system should not be altered without regard to the strength of her claims on the other systems because all three are closely interrelated; Smart, "Marriage, Divorce and Women's Economic Dependency: A Discussion of the Politics of Private Maintenance," supra, note 29 at 23: "... We should be critical of legislative changes that only tinker with family law to the detriment of women and that are not combined with more progressive changes to our system of state benefits, changes that could provide women, with or without children, with some degree of financial independence from men." Smart, The Ties that Bind: Law, Marriage, and the Reproduction of Patriarchal Relations," supra, note 31 at xiii-xiv: "Family law ... as one area of the law which contributes to the complex processes which reproduce women as economic dependents within marriage and the family."
Both the market and the state must recognize and adapt to the changing demands on women, and the changing reality of women's lives. These institutions must furthermore be sensitive to the transitional stage in which women find themselves.

If we are seriously committed to overcoming this dependency, then we must therefore be committed to a remedial approach which is structural in nature, which recognizes the complex and intricate, interconnected nature of the problem. It is all connected. There are no self-contained remedies that can address the dilemma of dependency, in all its complexity. Breaking the cycle of dependency will require a fundamental rethinking and restructuring of the full range of social relationships and institutions which have been constructed on the premise of women's economic dependency.

In rethinking the relationship between the family, the market and the state, we can perhaps begin by asking who we believe ought to be responsible for dependant persons in our society. Where should the financial burden for non-self sufficient persons lie? In *Pelech* the Court was quite explicit that but for the limited exception, the responsibility for non-self sufficient persons was on the State. The Court, while acknowledging the shifting of responsibility for dependents from the family to the state, failed to acknowledge the reinforcement of the difference through dependence on the state.

Enlarging the possibilities for state assistance to dependent persons, through for instance improved welfare benefits or a guaranteed annual income for housewives might simply create a new version of the dilemma. By recognizing the relationship of dependence, the state might be recreating the difference. Would such recognition of the difference continue to stigmatize those who are attributed as different? Would this attribution of difference simply reinforce the existing imbalance in the distribution of power which have created the relationship of dependency?

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150 Minow, "Consider the Consequences," *supra*, note 44 at 914.

151 *Pelech*, *supra*, note 2 at 270; *Richardson*, *supra*, note 3.

152 *Pelech*, *supra*, note 2 at 270.
Furthermore, we have to inquire into the role of the state in the creation and recreation of women's economic dependency. If the state has been directly implicated in this dependency, through its regulation of the family, the market and the regime of social welfare, can increased reliance on the state be seen as the answer to women's dependency?

The question of who should be responsible for dependent persons in turn raises more broad reaching questions regarding the current model of economic self-sufficiency. We must unearth the unstated assumptions of this model, the assumptions about sameness and difference, about norms and deviance which inform our understanding of this model. The notion of dependency implicates a particular model of self-sufficiency, a model from which the dependent person deviates. We have to ask whether we accept economic self-sufficiency as a normatively desirable objective. More specifically do we accept the male model of economic self-sufficiency as a normatively desirable objective?

The prevailing model of individual economic self-sufficiency involves entering the labour force. The decision in Pelech, and indeed the general approach to family law underlying the current legal regime, endorses this model of economic self-sufficiency, and thus forces particular choices on women. The assumption of individual economic self-sufficiency and the distribution of the family resources upon marital breakdown on the basis of this assumption, sets up an incentive for women to enter the labour market, and attain this self-sufficiency. This model rejects domestic labour and child-rearing as a legitimate choice for women. Women who make these choices risk dependency, and ultimately poverty.

The incentives structured into the legal regime reinforce the devaluation of women's domestic labour, that is, of failing to recognize the labour performed in the home as productive labour. If we are not willing to say that domestic labour and child-rearing are not legitimate choices for individuals in our society, then we must determine how we can secure the legitimacy of these choices. This in turn involves a question of how financial security can be best secured for those individuals who choose this alternative. Are there alternatives to continued reliance on the ex-spouse, or reliance on the State? One suggestion is marriage insurance. Parties could insure against the risk of marital breakdown, or more particularly, of
loss of income as a result of a marital breakdown. At the beginning of the marital relationship, the parties could take out a no-fault policy. The capital accumulated by the insurance premiums would go into a pool, available for others with a similar risk. 153 Such a scheme of marital insurance has a number of potential advantages. It might reduce the financial burden on both the economically self-sufficient spouse and the State, as well as provide women with a degree of economic security which is not at all guaranteed by a continued reliance on their ex-spouses or by a shifting reliance to public welfare assistance. Furthermore, it might serve to both increase and legitimate women's choices. Unlike the decision in Pelech and its model of economic self sufficiency, which forces women to bear the risk of future impoverishment, of choosing to work in the home, and thus, reinforces the devaluation of women's domestic labour, a scheme of marital insurance might allow women to make these choices without the risk of long term dependency. It might provide a means of facilitating real choice for women and legitimating the choices that women make. Moreover, insurance can be seen as relational, as based on the relational self. It involves the pooling of risks and resources, and in so doing, involves seeking one another as mutually implicated and interdependent. It connects the self with others, and the present with the future.

The attempt to increase the choices for women, and to legitimate their choices must not be to the neglect of those women who are attempting to enter the labour market. A whole range of social programmes, from comparable worth programmes to child care facilities, are required to facilitate the entry of women into the labour market, by eliminating the structural barriers women face entering the market, and forcing the labour market to accommodate women's needs, rather than women changing to accommodate the needs of the market.

153 The details of such a policy remain to be worked out. It would, of course, have to be no-fault and ought to be non-profit. It could be modelled on existing state insurance schemes, such as unemployment insurance or workers' compensation schemes. Caution would have to be had in the development of actuarial tables to determine risk and premiums, as the possibilities for structuring in discriminatory assumptions and recreating the dependency may be limitless.
It is well beyond the scope of this paper to comprehensively map out the full range of remedial action required to transcend the dilemma of dependency. Sweeping legislative change is required to restructure the market and the state to allow women to break out of the dependency cycle. My objective has simply been to illustrate the fundamental interconnections between reform in the family, the market and the state, and consequently that focusing exclusively on reform within the family will not solve the dilemma, but may in fact exacerbate the harsh economic reality women experience upon marital breakdown. Economic dependence will not be overcome without structural reform, reform which will require a fundamental rethinking of the nature of the relationship between family, market and the state. \(^{154}\) While there is certainly an institutional limit to the ability of the courts to address the various forms of structural change required to overcome the dilemma of economic dependency, we might at least expect the courts to function within the realm of their institutional capacity and evaluate the different remedial options available with an awareness of the broader structural context of the problems with which they are dealing. The Court in *Pelech* fell far short of such an awareness.

IX. CONCLUSION

"Il ne faut pas avoir peur d'avoir peur."

Helene Cixious

I have tried to unravel the stories told in family law, and particularly in the law regarding the enforcement of separation agreements, of the relationship between self and other, between the individual, family and society. These are not the stories of deeply constituted selves, but selves abstracted from their social contexts and experience. These are not stories of difference but of sameness. These stories fail to appreciate differences across

\(^{154}\) Mossman, "Family Law and Social Welfare," *supra*, note 29 about assumptions underlying the social welfare system being increasingly at odds with the assumptions underlying family law, that is, whereas family law increasingly presumes an obligation on women for self sufficiency, the social welfare system presumes economic dependence. See also Eichler, *supra*, note 77, and Mossman & McLean, "Toward a New Equality," *supra*, note 29.
commonalities – complex and multiple differences which make us all very different individuals despite our commonalities. The stories are not the richly contextual stories that we must tell to deal with the dilemmas that we face. The stories are in effect too simple, and ultimately fail to deliver their promise of happy endings.

I have tried to denaturalize these stories, and to show that it is only if we accept these stories as natural and unchanging that we encounter the dilemmas as unsurmountable. If we approach our dilemmas with a willingness to imagine alternative social relationships and institutions, the dilemmas no longer appear insoluble – challenging perhaps, but not insoluble.

We must begin with stories of difference, and thus with many different stories. We must use our imagination to tell innovative and contextual stories about ourselves and our relationships. Our relationships are all mutually constituting. There are no simple lines of causality which can be drawn. In a complex, interdependent society, in a society in which male domination is complex and multidimensional, in which the multiplicity of relationships of male, and all other forms of domination are mutually constituting and reinforcing, we can never expect to identify a single problem, a single issue, a single cause, which can overcome this domination. While we must of course begin by identifying these factors, we must simultaneously recognize their multiplicity and interrelatedness.

And while it is true that we cannot address everything at once, we must be aware of the fundamental limitations of addressing problems one at a time. In order to act, we must try to have as complete a picture as possible of where we are, how we got here, where we think we might like to go, and how we might get there, recognizing all the while the partiality of our picture. The partiality of our knowledge is such that with every step, we must reevaluate everything we thought we knew.

The conclusions that flow from my discussion are thus not hard and fast, but fluid and perhaps unsettling, particularly for those used to having everything settled at the end. My conclusions seem to be that our dilemmas are complex, our knowledge is partial, and everything is connected. And, from these open-ended and unsettling remarks flow other, perhaps equally open ended and unsettling, remarks. If our dilemmas are complex, then so too must be our solutions. If our knowledge is partial, then we must continue to
seek out a multiplicity of perspectives. If everything is connected, then we must continue to search for the connections.

We must not forget that we are talking about relationships, about relationships between people whose lives matter, and whose lives may be a matter of difference.
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