BUILDING A BRIDGE TO EQUALITY: A DUTY FOR LAWYERS

It is a tremendous honour to be delivering this lecture, named for Ethel Rebecca Benjamin. It has also been inspiring to learn about Ms. Benjamin's life and history. Born into an Orthodox Jewish family in Dunedin, in 1893 she became the first woman to enrol in a law school in Australasia. The *Female Law Practitioners Act* had been passed in 1896, and on 10 May 1897, Ms. Benjamin became the first female barrister and solicitor in New Zealand. Had it not been for the admission to the bar of a Canadian, Clara Brett Martin, three months earlier, Ms. Benjamin would have been the first female lawyer in the British Empire. But with the time difference, who can be sure?

Yet the path was not easy for either of these pioneer women. Canada's Clara Brett Martin was only able to gain admittance to the Law Society of Upper Canada with the support of some highly influential figures. Similarly, the Otago District Law Society opposed Ethel Benjamin's entry into the legal profession, subjecting her to instances of discrimination, marginalization, and outright exclusion. What is so inspiring is the way in which these women fought through institutional impediments, entrenched in a way that few of us can imagine, to establish successful practices and to advocate on behalf of the rights of women, and other vulnerable groups. Ethel Benjamin served members of the local Jewish community, acted on behalf of women, and became solicitor for the Dunedin branch of the New Zealand Society for the Protection of Women and Children. She was a successful lawyer and business woman who cleared the way for the entry of women into the legal profession.

It is normally at this point that the standard speech begins – the speech that looks at the terrible position of women in the past (and the position was terrible), compares it to our situation today and concludes that, with some polishing left to be done, we have overcome our past. This speech looks to particular legal victories – the *Persons Case,*[1] for example – and to the establishment of legal rights and applauds the progress. This speech is accurate. It is true that we have come a long way, and it is true that the formal recognition of rights is important. But this is not the speech that I intend to deliver tonight.

Tonight I want to issue you a challenge. Aharon Barak, President of the Supreme Court of Israel, has argued that, to ensure the health of modern democracies, it is necessary "to bridge the gap between law and society".[2] While he was speaking of the role of judges in a democracy, I think that precisely the same is required of lawyers if we are to overcome the barriers to gender equality that still exist in our countries and in others. In order to make the law work in a way that will advance meaningful equality, lawyers must actively draw the lived reality of women to the forefront of legal considerations. The law must be infused with women's realities. But even this is not enough. There are certain systemic barriers – certain cultural

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1 *Edwards v. A.G. Canada*, [1930] A.C. 124 (J.C.P.C.).

2 A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 *Harv. L. Rev.* 16, at p. 108.

and social impediments – that stand outside the reach of legal and rights discourse and must be identified and addressed through social activism and public debate. Lawyers must take a leading role in calling attention to these systemic issues and denouncing its most virulent forms in our own cultures and in other countries by using our experience of the law – particularly the limits of the law – to inform and advance social change in aspects of society that the law cannot touch. So my message is simple: I challenge you to become a bridge between law and life.

What does "Equality" Mean?

Before taking up this theme, I want to say a few words about the meaning of "equality". We often speak about this concept, assuming that we all know what it means. However, "equality" is a complex idea that has received vastly different treatment by philosophers and scholars. One concept that initially resonates with many of us is the Aristotelian concept of equality as "sameness": treating like alike. Yet "treating like alike" is just as amenable to eroding true equality as it is likely to advance it. The critical questions are: firstly, who is alike; and, secondly, what constitutes equal treatment? If the answers to these questions take account of true differences and the way that laws affect real life, a substantive, progressive notion of equality capable of embracing difference is produced. Where, however, "likeness" is based on presumed characteristics or legal distinctions and where "equal treatment" simply means that everyone subject to a law is treated similarly by that law, a formal approach to equality is produced. This way of approaching the right to equality suffers from the fact that the right functions only on the surface of things, failing to strip away the veneer of appearances to reveal the true grains of life.

Scholars have suggested a number of other ways of thinking about equality. Professor Margrit Eicher argues that equality is fundamentally about "minimal stratification".[3] She advocates for a functional approach to sex equality that, rather than being focussed on "sameness", is always concerned with reducing the range of differences between the sexes in respect of fundamental dimensions of human life. Marcia Rioux has argued for an outcome-based approach to equality that focusses on well-being.[4] She points out that "[t]his concept of equality incorporates the premise that all humans – in spite of their differences – are entitled to be considered and respected as equals" and "would take into account the fact that the conditions and means of participation may vary for each individual".[5] A number of scholars have adopted a "relational" view of equality, which recognizes that identities are formed through a "web of relationships" and argues that women's experiences in these contexts must be embraced by society before we can achieve gender equality.[6]

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3 M. Eichler, "The Elusive Ideal – Defining Equality", (1988) *Canadian Human Rights Yearbook* 167.

4 M. Rioux, "Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality", (1994) 7:1 *Canadian Journal of Law and Jurisprudence* 127.

5 *Ibid*, at pp. 142-143.

6 See, for example, C.M. Koggel, "A Feminist View of Equality and Its Implications for Affirmative Action", (1994) 7:1 *Canadian Journal of Law and Jurisprudence* 43; and I.M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

I see a common core to these approaches, a core that seems to reflect what is truly essential about equality. Equality must be centrally concerned with recognizing and affirming co-humanity, not achieving sameness. The implication of this recognition is inclusion. In a recent article, Professor Hugh Collins has argued cogently that the aim of equality must be social inclusion.[7] Social inclusion seeks to provide "the opportunity to participate in the mechanisms offered by society through which they may establish meaning for their lives, the connections of a community, and a sense of self-respect".[8] A narrow focus on "sameness", equality of opportunity, or equality of resources cannot achieve this end. To achieve equality in this sense, I believe that social and cultural institutions must become fundamentally inclusionary, thereby allowing individuals to flourish on their own terms – in light of their own capacities, experiences, and commitments – but as a part of a public community. It is with this understanding of equality that I now take up the question of how equality can be advanced by lawyers acting as a bridge between law and life.

Being a Bridge by Infusing the Law with Women's Experiences

The legal recognition of equality between the sexes is a significant social advance. Laws have a communicative effect and linguistic influence in society. They reflect society's commitment to particular ideals – in this case gender equality – and this commitment is made manifest in the basic laws of the country. Law then speaks of this concern for equality in all aspects of society upon which it has influence. In this way, the law is both informed by social norms, and informs social norms. But the law also injects into the public debate a language that is infused with the authority of the state. In conversations and debates about a broad range of issues, people draw upon the language of rights, duties, and freedoms – the language of the law. Law can communicate the basic values of a political community and law can shape social debates. In these respects, legal protections of human and civil rights hold out the promise of tremendous social impact, inside and outside of the courts.

It is, therefore, essential that in its communicative and linguistic dimensions, the law reflects the importance of gender equality. But it is also centrally important that, in its *application*, the law take full account of the lived reality of women's lives. The dangers of not doing so are apparent in a practical sense – the law may not deliver on the promise of equality if it is blind to the context in which the equality must become manifest. But in light of what I have said about the communicative nature of law, the danger is even deeper. If the law is not taking full account of the lives of women, it will offer a skewed image of gender equality and contribute an impoverished language to the public debate. This can perpetuate the inequalities that the law is meant to redress. The obligation becomes clear: to effect real equality, the law must be informed by the reality of women's lives. Let me draw upon cases from the jurisprudence of the Supreme Court of Canada that demonstrate this need to infuse the law with the lived reality of women's lives to deliver on the legal promise of gender equality.

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7 H. Collins, "Discrimination, Equality and Social Inclusion", (2003) 66 *Modern Law Review* 16.
8 *Ibid*, at p. 29.

The first case that I want to speak about is *R. v. Lavallee*.[9] Angelique Lavallee was charged with murder, having shot her common law partner. The classic law of self-defence insisted upon an imminent fear of death and the absence of any other means of self-preservation. The facts of *Lavallee* did not seem to fit these requirements and, therefore, the plea of self-defence did not appear available to Ms. Lavallee. She shot her common law partner in the back of the head as he was leaving the room and she had ample opportunity to leave the relationship. Where was the imminence? Where was the necessity? But this was not the whole story. This killing took place after an argument in which she had been physically abused. He had taunted her with the threat that either she kill him or he would get her. Indeed, she had been subject to frequent and pronounced abuse from this man. A psychiatrist explained that Ms. Lavallee was in a state of ongoing terror and that she suffered from a subjectively perceived inability to leave the relationship. He testified that this killing was the act of a woman who sincerely believed that she would be killed that night.

The issue in *Lavallee* was whether this evidence was admissible. In light of the doctrinal requirements for self-defence, of what relevance was this expert evidence? Justice Bertha Wilson, writing for the majority, held that this evidence was properly admitted and explained:

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".[10]

The historical law of self-defence had, until this point, failed to take account of the situations in which women might find themselves. The expert evidence in this case, however, helped to explain why Ms. Lavallee would have reacted in the absence of an imminent attack – living with the cyclical nature of this violence, she knew that an attack would be coming again and that, when it came, she would not be able to repel it. The evidence also helped to explain why she had not left this abusive relationship – the conditions of "learned helplessness" and "traumatic bonding", as well as environmental factors such as lack of job skills and the presence of children make simply leaving an illusory option for many women in this situation. The Court concluded that, in cases of spousal abuse, even with no obviously imminent threat and an apparent means of escape, self-defence must be available. Evidence about battered-spouse syndrome was essential. Ms. Lavallee was acquitted, and the criminal law became more equitable, because the law was infused with the reality of abused women's lives.

My second example is drawn from family law. In *Moge v. Moge*[11] the Supreme Court of Canada was asked to consider whether, twelve years after dissolution of their marriage, Mrs. Moge was still entitled to receive financial support from Mr. Moge. During the marriage, Mrs. Moge cared for the house and their three children, and worked in the evenings cleaning offices. Following the divorce in 1980, Mrs. Moge continued to work and care for the children. In 1989, the husband was granted an order terminating

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9 *R. v. Lavallee*, [1990] 1 S.C.R. 852.
10 *Lavallee*, *supra*, at para. 38.
11 [1992] 3 S.C.R. 813.

spousal support. The trial judge held that sufficient time had passed for Mrs. Moge to become financially independent and Mr. Moge had supported her long enough. Madam Justice L'Heureux-Dubé observed that the conceptual foundation for Mr. Moge's submissions and the trial judge's decision was a self-sufficiency model of spousal support. If Mrs. Moge was not self-sufficient by this point, Mr. Moge argued, this was no concern of his.

Madam Justice L'Heureux-Dubé held that this view of the purpose of spousal support was too narrow and failed to take account of the realities of marriage. After reviewing the statistics and literature on the "feminization of poverty", Justice L'Heureux-Dubé explained that the self-sufficiency model had "disenfranchised many women in the court room and countless others who may simply have decided not to request support in anticipation of their remote chances of success".[12] Instead of relying on the self-sufficiency model, she noted that "marriage and the family often require the sacrifice of personal priorities by both parties in the interest of shared goals" and that, when addressing spousal support, the focus of the inquiry must therefore be "the effect of the marriage in either impairing or improving each party's economic prospects".[13] As a result, a compensatory model was deemed to be more equitable and Mrs. Moge was awarded support payments. Justice L'Heureux-Dubé's reasoning shows the importance of infusing the law with the lived reality of women's lives:

> Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities.

Because it took account of these inequities arising from the reality of women's lives, the law was able to develop in a way that advanced gender equality.

My argument is that, for legal equality to have meaning, the courts must imagine the world in which the law, and the virtues its stands for, have meaning. As John Gray recently wrote, goods "acquire their meaning and worth from the histories, needs and goals of human subjects and the ways of life to which they belong".[14] The "good" of gender equality is no different. The law cannot remain a system of neat and clean words inscribed upon a sacred parchment. It must be brought to life, infused with experience and reality. Those applying and interpreting legal rules must be prepared to use the law on the ground, in real life. Women's experiences are not external to equality in the law – they are the very substance of equality and must be taken seriously to make legal equality work.

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12 *Moge*, *supra*, at para. 63.
13 *Moge*, *supra*, at para. 43.
14 J. Gray, *Two Faces of Liberalism* (New York: New Press, 2000) at p. 43.

An important aspect of taking women's experiences seriously is also recognizing the complex nature of identity. Many women suffer from inequality not only because they are women, but because they also belong to racial, religious, or economic groups that suffer from discrimination. Yet, as recent scholarship has pointed out, the traditional tools of legal analysis fragment this complex woman, rendering her "capable of being only one thing at a time"; a fragmenting that is "entirely at odds with the concrete life of [the] woman".[15] Human identity cannot be fractured in this way, if the individual is to enjoy social recognition of co-humanity in a way that will lead to true inclusion. So the advancement of equality demands attention not only to women's experience *as women*, but as *black* women, *lesbian* women, or, as in the case of Ethel Benjamin, *Jewish* women.

In order to make the law work in a way that will advance meaningful equality, we must actively draw the lived reality of women to the forefront of legal considerations. In Canada, this kind of effort has expanded the law of self-defense to recognize battered-spouse syndrome; shaped the law of consent;[16] removed needless impediments to employment;[17] and impacted diverse areas of the law in innumerable other salutary ways. This task falls to all lawyers. Informing the law with the reality of women's experiences, rich with all of their complexities, is one way in which we can bridge the gap between law and life.

Being a Bridge by Fighting for Social Change

In the previous section of my speech, I spoke about the necessity of infusing the law with women's realities in order to achieve true legal equality. Yet basic conditions of health, physical integrity, and community inclusion are prerequisites to a society characterized by gender equality. So now I want to suggest that even with a robust and grounded conception of law that takes real account of the lives of women, law alone cannot deliver on social equality. There are structures, deeply imbedded in society, that constitute significant impediments to women's equality. The social conditions must be identified and addressed for law to be relevant and meaningful to a broad range of women. Indeed, without structural shifts, the law can be inaccessible or merely ornamental to those among us who need it most.

As the story of Ethel Benjamin, Clara Brett Martin, and the slow change of women's role in the legal profession tells us, legal equality for women does not translate directly into actual equality. Old ideas die hard. Even in the presence of legal entitlements, liberties, and rights, in the minds of many, women remained, in the past, a fundamentally different kind of human being, with corresponding fundamental limitations. Until recent times, women were seen as fit for domestic roles, fit to serve as secretaries and nurses and other kinds of assistants. They clearly were not seen, however, as up to the big jobs. This exclusionist thinking was buttressed by ingrained attitudes that the primary place of women was in the home with the children. Women

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15 T. Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House," (1995) 10 *Berkeley Women's L.J.* 16, at p.17. See also K. Crenshaw, "Demarginalizing the Intersection of Race and Sex," (1989) *U. Chi. Legal F.* 139.

16 *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

17 *British Columbia v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

who wanted to serve in law, medicine or politics could attempt to do so, but they faced an up-hill struggle against the prevailing attitudes of the day and seldom got to the top. The difficulties they faced led to statements like that of French journalist Francoise Giroud, "Women's problems will be solved when a mediocre woman holds a major job".[18]

Why did the myth of female inadequacy persist so long? Why indeed does it still exert a tenacious power over our deepest attitudes and actions? Why can we not simply acknowledge, as we increasingly do with ethnic minorities, that the biological differences between men and women should not limit their place in society? Why can we not, where women are concerned, move from exclusionary thinking to an inclusive approach? The answers are complex and extend beyond the presence or absence of legal rights. Social and religious norms may sometimes buttress an exclusionary mentality, as may the very structures of our institutions and social organization.

In my last section, one of the examples I used was drawn from Canadian jurisprudence touching upon women's work, and I will use an example from the employment context to make my point here as well. Many offices and workplaces continue to be organized on the Edwardian model of a century past. The family breadwinner (presumptively Papa) is expected to be available for work and travel at any time. This is made possible because the family homemaker (presumptively Mama) devotes her exclusive efforts to the home and family. While the decision to be a domestic care-giver is a noble one for those who choose to pursue this work and can afford to do so, this model no longer fits the reality of modern families, where increasingly both parents must work outside the home to earn the necessary income and both parents are involved with domestic and child-rearing tasks. We are beginning to explore ways to bring our workplace organization into sync with the reality of our lives – day care centres on the jobsite, childcare programs, flex-time and working from home are among the options being explored. So long as we organize our workplaces on Edwardian lines, women will find themselves at best stressed and at worst falling back into the default role of sole domestic care-giver, reinforcing the old attitudes. The choice to work in the home must remain a choice – it must not be a coerced default.

Workplace organization is important. But without shifts in workplace culture, these changes are inadequate. "Why", I recently heard the senior partner of a major firm lament, "do so many women leave the firm after only a few years? They are among the brightest of our young recruits. We invest in them. We give them flex-time. Yet they leave in greater numbers than their male counterparts, usually for another job that entails just as much work. We know where they go but we don't know why."

It would be presumptuous of me to venture an answer to this honest and important query. Many women continue to find workplace culture hostile or at very least, less than comfortable. Sexual harassment was once common and tolerated in the workplace culture; it is now legally and socially taboo. Yet in more subtle ways, female employees may come to feel devalued. Many corporate environments continue to treat women as non-committed professionals and structure the workplace in ways that reinforce

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18 From Lysiane Gagnon column in *Globe*, Canada, weekend of 27-28 January 2003.

child-care and home-making as the domain of women. What is more, female members of the workforce may find fewer role-models and mentors than their male-counterparts. Yet people need support and encouragement to flourish. For all of these reasons, we should not be surprised if women seek more supportive and accepting environments. The lesson is simple. Prohibition is not the only way to exclude. The 'other' in our midst may be excluded or marginalized in systemic and cultural ways that are very real, but that the law cannot touch. These sources of inequality can prevent true advancement in spite of the law.

In countries such as Canada and New Zealand, the exclusion and marginalization of women, once overt, takes more subtle forms nowadays. In many countries, however, the exclusion of women is openly accepted, indeed demanded. When I read of the abject poverty and the horrific living conditions that women in some parts of the world must endure, I despair. Social and cultural institutions, often backed by the law, seem to preclude the development of any meaningful form of equality in a way that finds no parallel in countries like mine.

Like the Edwardian workplace, poverty, taboo, and illness are not readily remedied by the law. These impediments require fundamental shifts in the way we organize societies, the role we ask our governments to play, and the responsibilities of the international community. We must have social changes if the potential of legal equality is ever to be activated. Equality depends on a solid social foundation of health, security, and community, absent which, legal equality offers little promise. At the same time, removing the barriers and attitudes that exclude women can help create that foundation of health, security and community: as women are freed they move swiftly to create wealth and improve the lives of their family and community. This is why many NGOs and aid organizations are now emphasizing education and assistance for women in developing countries.[19] What is going on here? Exactly what I have been discussing. Women's lives and women's experiences are being taken seriously. Exclusionary cultural and social practices are being overridden. Full legal equality cannot lag far behind. And as the inclusionary vision of equality takes root, health, security and community follow. One reinforces the other and momentum builds.

We who work in the law are trained to recognize what we can remedy with the law. We see the power of the law. But we also become attuned to the limits of the law and the existence of social injustice. This is invaluable knowledge. Recognizing the systemic impediments to equality, we as lawyers are well placed to focus society's attention on these issues and to identify the social and political change required to remove these barriers to equality. Similarly, we lawyers have a unique role to play in identifying and seeking to eradicate injustices that reveal themselves when the limits of the law are reached. The Edwardian model of the workplace is an example, but so are the social injustices of rape, torture, poverty, and illness that take place all over the world. If those of us working in service of justice and the rule of law cannot denounce these forms of discrimination and oppression and work to eradicate them, who will? In doing this, lawyers serve as a bridge between law and life, using our experience of the limits of legal justice to advocate for the remediation of social injustice.

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19 See, for example, the U.S. Agency for International Development.

Conclusion: A Duty for Lawyers

If we have not entirely won the war against the exclusion of women, we have fought the first important battles. We have rejected the exclusionary politics that once denied women access to the levers of influence, power and full societal participation. We have more senior female judges, more female university professors, more female practicing physicians than many western countries. Personally, I believe that in my own profession, the law, it is easier for a woman to succeed in Canada than almost anywhere else. Yet despite these achievements – and they are not inconsiderable – we still have terrain to take. Women's equality issues remain very much alive. Statistics Canada and Statistics New Zealand tell us we have not achieved pay equity.[20] And in my country, too few women occupy the highest seats of political office and commerce. A recent poll reflected the fact that women in Canada now hold 6.7% of the highest corporate officer titles.[21] While some might laud that progress, it begs the question – "why not more?"

Politically, while Canada has a female Governor General, Her Excellency Adrienne Clarkson, only 20% of our members of Parliament are women. New Zealand has done much better on this score. In addition to having, at one time, women serving as Prime Minister, Leader of the Official Opposition, Chief Justice, and shortly thereafter, Governor General, 40% of New Zealand MP's are women. But again, why not more?

Finally, and most troubling, violence against women is a persistent problem that the law has not been able to eradicate in either of our countries. In Canada, according to one study, 40% of women report that they have been victims of sexual assault, in one form or another, with 20% of women suffering this violence at the hands of their spouse.[22] In New Zealand, one third of women reported being physically or sexually assaulted by their partner. As a society, we have clearly not internalized the reality of women's lives.

When we look around the world, the battles left to fight are even more apparent. In many places, violence against women goes virtually unchecked. In many places, cultural norms still impose a view of women as inherently less worthy of respect than men. In many places, women receive no protection from the law. What, then, is the path forward?

Some have argued that the duty is primarily one to be borne by women.[23] Justice Bertha Wilson argued that "[i]f women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they *will* make a difference".[24] I agree that women will bring particular experiences and insights to the fore, and in this respect women's participation is essential. It is also important to have women in the law so that legal institutions reflect society and embody the equality for which the law stands. Yet Justice Wilson also recognized that

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20 Statistics Canada, *Average Earnings by Sex and Work Pattern*, based on CANSIM II, table 202-0102. Statistics New Zealand reports that, in 2001, the median income received by women was $14,500, while men received $24,900.

21 Catalyst Census of Women Corporate Officers and Top Earners of Canada, cited in *The Globe and Mail*, 12 March 2003.

22 *Assessing Violence Against Women: A Statistical Profile*, Federal-Provincial-Territorial Ministers Responsible for the Status of Women, 2002.

23 For an overview of some authors that advocated for this view, see B. Wilson, "Will Women Judges Really Make a Difference?" (1990), 28:3 *Osgoode Hall L.J.* 507.

24 *Ibid*, at p. 522.

"it will be a Pyrrhic victory for women and for the justice system as a whole if changes in the law come only through the efforts of women lawyers and women judges".[25] I believe that the time has come for us to seize upon this second point. I think that both men and women have both the capacity *and a responsibility* to engage in the acts of sympathetic imagination and selfless advocacy that are needed to advance equality. This is why I have argued more broadly that all lawyers must serve as a bridge between law and life. All of us – women and men – must imbue the law with a thorough sense of the co-humanity of all people and the need for inclusion. I think of this proposition as a duty, and offer it to you as a challenge. I urge you to infuse the language of legal entitlements, freedoms, and rights with the substance of women's realities. I invite you to identify systemic social and cultural impediments to equality, to denounce them, and to work for their change, even if this takes you outside the ordinary venues of your professional lives. I challenge you to become a bridge between law and life.

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25 *Ibid*, at p. 516.