

IT'S THE LAW OF THE LAND: GENDER AND THE GEOGRAPHY OF HOPE

Donna Greschner

*"What is a human being?
Legal theorists must, perforce,
answer this question:
jurisprudence, after all, is about
human beings."¹*

These two sentences begin an influential article by Robin West, a feminist legal scholar from the United States. Writing in 1988, she states that mainstream legal theory embraces, as an answer, the separation thesis: a human being, whatever else he is, is physically separate from all other human beings. What separates us is both epistemologically and morally prior to what connects us. We are distinct individuals first and then we form relationships.

West argues that the separation thesis is irretrievably and essentially masculine. The cluster of claims that comprise the separation thesis, while perhaps trivially true for men, is patently untrue for women. Women are connected to other human life during at least four recurrent and critical experiences, the most visible and indivisible being pregnancy. West states that the central insight of feminist theory over the last decade is that women are essentially connected, not essentially separate, from the rest of human life. Feminist theory embraces the connection thesis; so too, she argues, should legal theory.

West also argues that this question and its answer have importance for legal theory because jurisprudence is persistently utopian. It represents a constant and usually sincere attempt to articulate a guiding utopian vision of human association. In conventional legal theory, these utopian visions begin with a particular image of a human being. According to West, feminist jurisprudence ought to respond to the utopian images written into law by male law-makers. We ought to correct and improve upon these images, and participate in them as utopian images, not just as apologies for patriarchy.

No one would deny the importance of this challenge. Every feminist legal scholar has accepted the challenge because feminist work is deliberately, openly, and thoroughly aspirational and utopian. West offers much insight and guidance for the task of creating a more inclusive and feminist jurisprudence. However, her analysis calls for two extensions, two further developments.

First, the question "what is a human being" may well be an appropriate and illuminating place from which to criticize the utopian images behind the laws of patriarchy, since malestream legal theory begins with a vision of one individual.

The following article was first presented in Saskatoon in March 1993 as an address which formed part of the University of Saskatchewan's Colloquium Series.

But if our objective is the creation of new utopian images, not just the critique of old ones, then the question's implicit assumption of separateness is troubling. The singularity of the question — what is a human being — assumes individuation. If the connection thesis does

describe women, and if we take women's experiences as seriously as men's, then feminist legal theorists must begin with a question that puts association and connection at centre stage, a question that assumes connection.

Perhaps that question is simply: how do we form human relationships? This formulation takes the fact of relationships as a given, and declares that their formation is a group activity — the pronoun is we, not I. The question involves how people live together, the ways in which they share the same time and space, as reflected in or underlying legal rules. The analysis would proceed from the social to the individual rather than, as West does, from the individual to the social.

My second extension relates to the lack of context in the analysis and guidelines offered by West. She recounts many stories of women's experiences to illustrate the connection thesis. But she does so without regard to the diversity amongst women. As many women have declared lately, the pressing agenda for feminism in this decade is the diversity question. We must pay scrupulous attention to the ways in which race, class, language, culture and sexual orientation shape our bodily experience, our social experience of oppression, and our strategies for liberation.

Feminist theory and practise has begun this task, due to the hard, plodding and often still unappreciated activity and writings within the feminist movement by First Nations and Metis women, by women of colour, lesbians and working-class women. For instance, overcoming the dynamics of racism and promoting cultural diversity have become, finally, legitimate goals, though still not primary ones, of feminist action within the universities.

One missing context, however, one difference absent from discussions in jurisprudence and feminism, is geography. Does the form of human association depend on the place, the landscape, the physical environment? Geographers would answer yes to this question — legal theorists have rarely asked it.

I argue that feminist legal theory ought to answer "yes" as well. The physical environment in which people live is a highly

influential context and variable of human associations. Feminist legal theory must be, literally, grounded. To do so takes the connection thesis one step further — we are not only connected to each other but to the land. It is this lesson which First Nations and Metis women try to teach us, a lesson we continue to ignore at our peril and at risk of our survival.

With these two additions, the challenge posed by West can be restated. The challenge is to articulate utopian visions of human associations in the context of particular places. As my particular place, I choose the West, and not merely because of the fortuitous coincidence of the word "west" naming both a professor and a place.

I choose the West because of its aspirational mythology. For immigrants over four centuries, the West presents the possibility of utopian realization. The land offers wide open spaces, with unlimited opportunities and the potential for progressive change. Optimism marks the spirit and philosophy of the West. Life may be difficult now, but it will get better; the West generates an eternal optimism encapsulated neatly in the phrase "next year country." There will always be a future and the future will always be brighter. Westerners know with enduring, and endearing certainty, that we not only create new worlds out here on the prairies, but that we create better worlds. Wallace Stegner, one of the great writers of the West, eloquently describes this region as the "geography of hope."²

Let us accept that the geography of hope has been true for most immigrant men, and that western laws reflect and advance manifestations of a western brand of utopian vision. What about from the perspective of women? Has the West presented women with the same possibilities for change and freedom, for new communities and visions of equality? Where within the utopian vision of the West, as an ideology and narrative, do we as women find the opportunities for liberation? Or has the western utopian vision been profoundly patriarchal, as Robin West shows with legal theory? In short, what do we see if we engage in a gender analysis of the geography of hope?

Such an analysis of the West will be structured around the law of the land. I use that phrase in at least two ways. First, it covers land law, the rules that govern the ownership, control and use of physical space, what lawyers call real property. It is, of course, tritely true that different types of land generate different sorts of laws because of their respective economic activity. Wheat production calls forth agricultural laws and ore deposits call forth mining laws. The answer to a deeper question appears less obvious. Do different landscapes also nurture different visions of human association, and have they been utopian for women?

Second, the phrase "law of the land" also connotes the fundamental law, the basic or supreme law. This meaning is more clearly expressed in the full phrase "It's the law of the land" — words difficult to mouth without sounding authoritative

and commanding. These are the laws that govern everyone, that determine what the other rules will be and how to make them, the "ground rules" of action. They encompass the rules about the political system, both those contained in ordinary laws and in entrenched constitutional rules. Indeed, the definition of a constitution includes supremacy, that these rules take precedence over others.

If the "geography of hope" does express western mythology accurately, then we ought to see its reflections in the constitutional arrangements, aspirations and arguments made by westerners. Again we need to engender our analysis. Have constitutional structures and positions reflected a geography of hope for women, as well as for men?

In looking at these two types of law, and the myriad of laws between them, I find that the almost automatic response to the question is yes. There is an official story of the West that women take as much pride in as men. This official story seems remarkably compatible with the connection thesis articulated by Robin West, more consistent at least than many other official stories of distinctive societies.

The official story has a cast of strong women who laboured tirelessly for political and economic equality, and for economic and social relationships grounded in the interdependence and connection between human life. They met with less resistance and more cooperation than their eastern sisters, and thus achieved many gains much faster.

Several events comprise the major scenes in this official narrative. On the level of land law, exclusive male control and ownership of land was challenged by homestead laws that gave women a limited but still crucial role in the transfer of land. The move to make the family farm more truly the family's, and not the husband's, took another step forward in the seventies. It was Mrs. Rathwell, a Saskatchewan farm woman, who successfully challenged in the courts the patriarchy embedded in the matrimonial property regime. It was the Saskatchewan legislature, almost twenty years ago, which led the way in enacting more progressive matrimonial property legislation.

At the constitutional level, it was on the prairies that white women first received the right to vote and hold political office. It was five Alberta women who struggled all the way to the Privy Council in London to be recognized as "persons" in the British North America Act, the primary constitutional text. And the Alberta government supported their claim, the only government to do so. The West still sees many political "firsts" for women — the first woman as leader of an opposition party (Sharon Carstairs in Manitoba), the first woman as premier, albeit unelected (Rita Johnson in British Columbia), and most recently the first woman finance minister (Janice MacKinnon in Saskatchewan).

But western mythology perhaps has the greatest hold on our imagination when we consider our economic and social arrangements. Especially in Saskatchewan, we see our cultural traditions as involving close cooperation and community responsibility. We worked together to overcome the hardships of local climate and distant economic dictators. The West gave rise to wheat pools and coops, to public economic ownership in the form of Crown corporations and public social responsibilities in the form of medicare. Even Alberta, the province with the brash rhetoric of rugged cowboy individualism, has a long-standing reality of public ownership. In the 1970's, for instance, Progressive Conservative Alberta had more Crown corporations than New Democratic Saskatchewan.

This mythology springs directly from the land. The prairies may present open skies and opportunities, but the land is also harsh and unforgiving. The best way of surviving, sometimes the only way, is with each other.

So the official story is a proud recitation of hope realized, of opportunities seized, of freedom gained.

But as with all stories, the West has a sub-text, an unofficial story that tells of a much bleaker picture. For instance, in the official story, freedom and social justice come from the land, arise in the country. It is in the country, the rural expanse of the prairies, that cooperation and the form of equality inherent in cooperation, took root. In the country we find the unique mix of community and individualism that forms the basis of western mythology.

In the unofficial story, the country appears much more confining and oppressive than the cities. Consider, for instance, the impossibility of obtaining an abortion in a small Saskatchewan town. In this respect, Saskatchewan is no more liberatory for women than distant Prince Edward Island. This oppression by local community led the Supreme Court to strike down the restrictive abortion law in 1987. Consider also the high incidence of teen-age pregnancies in rural Saskatchewan. As numerous studies have shown, young girls become pregnant more often when they perceive their lives to be without hope, without choices, without any significant chance of improvement. The unofficial story sees less hope for young women here than many places elsewhere.

A recent example of the freedom offered by cities over the country can be found in the controversy about amending the Human Rights Code to include sexual orientation as a prohibited ground of discrimination. Saskatchewan remains one of the few provinces that fails to protect lesbians and gay men from discrimination in employment, housing, and other public arenas of life. The primary source of opposition to the change is small-town and rural Saskatchewan. Every week the Human Rights Commission receives dozens of letters about the amendment, most of them opposed and almost all of those from rural areas. Many letters from opponents spill forth venomous hatred and

dangerous anger toward lesbians and gays. When they cross my desk, I feel the chill of January blizzards. I also have received several supportive letters from lesbians who live in the country. Their lives in small towns involve either secrecy and deception about their sexual orientation, or constant exposure to harassment and deliberate exclusion from community life. Many lesbians would agree with Virginia Woolf's claim that freedom and autonomy for women is found in the cities.

In the official story about Western economic activity, cooperatives have a strong and permanent place. They embody, as an organizational form, the principle of equality — one person, one vote, regardless of wealth.

In the unofficial story, corporations, with their explicit hierarchy and with power determined by wealth, continue to be the primary method of economic arrangements. Even public ownership of resources is achieved through the vehicle of Crown corporations — we have not yet created new vehicles more egalitarian in operation or conceptual design.

Moreover, the corporate structure also pervades administrative agencies, including those established to pursue necessary and progressive social change. I use as my example an agency I know well, the Human Rights Commission. Here is an organization created to promote equality. Yet its structure is corporate in nature. There is a board of directors, namely the commission, a chairperson of the Board, the Chief commissioner, a chief executive officer, the Director of the Commission, and employees organized in a hierarchical manner. This structure has not just grown up through the years by bureaucratic accretion, it is embodied within the legislation and regulations.

Constitutional politics also has an official Western story. It focuses on the need and desire to assert strong control by local communities, in this instance each province, in order to achieve the particular utopian visions generated by the West. Hence the virtually unceasing chorus, since Saskatchewan became a province in 1905, of many political voices calling for enhanced provincial powers. In this vision, the idea of Canada approaches a commonwealth, a somewhat loose collection of separate communities.

The unofficial story tells of disenchantment and distrust of provincial politics. It emphasizes the commonality that westerners, including western women, have with their fellow citizens from sea to sea. The unofficial story supports the abstract, pan-Canadian Charter of Rights and Freedoms, for example, as essential to guaranteeing minimum attributes of citizenship. Westerners resoundingly defeated the Charlotte-town Accord last October. I wonder to what extent the Accord's rejection foretells a greater acceptance of the unofficial story.

A full gender analysis of the geography of hope requires a scrutiny of many fields of legal life. We need to chart further the economic models of corporations and cooperatives, the physical

sites of cities and of country, the constitutional choice of commonwealth or charter.

Today I have drawn merely one line of the chart. Further exploration is necessary if we are to answer the question — how do we form human communities — from a western perspective. We have not yet seen a distinctly western canadian legal theory — but I hope we will soon, and that the theory will respond with as much attention to women's experiences as to men's. The stories of the West are being told again with women's voices. Many scholars across many disciplines are now engendering the mythology of the West. Right here at home, the cooperation between the colleges of law and agriculture has garnered a joint chair and promises to produce rich intellectual fruit. "The law of the land" may yet signify a conversation between land and law, rather than express a command.

I wish to conclude with two points. The first draws upon the cultures of First Nations and Metis women, for whom a discussion of the West as a geography of hope during the past 100 years must seem like a cruel colonial joke.

The objective of feminist jurisprudence is the creation and realization of utopian visions in which everyone participates without subordination or conquest. In order to form such communities, legal theory may need to rethink not only its substance but its method. Laws classify and categorize; many a legal theorist has pointed out that the essence of the legal imagination, at least for a very long time, has been categorization. Like computer logic, legal logic operates on dichotomies, on sets of "either-or" pathways. Lawyers drop human issues into legal boxes for purported resolution.

Consider what laws would be like if the metaphor of method was the circle, not the box; if we thought in terms of circles, not categories; if we took our methodological vision from the circularity of seasons and the limitless possibilities in open skies rather than from the straight lines and fixed sides of man-made boxes. I do not know yet how we would do this, how different our legal methods of conflict resolution would be if we did. I hazard to guess that we would be more inclined toward the warmth of consensus than the war of courtrooms, more likely to continue conversations than to issue commands. Here we have much to learn from indigenous cultures.

Second, I want to return to Robin West and the connection thesis. She also declares loudly at the end of her major work that the connection thesis is not always true for women, just as the separation thesis is not always true for men. Human beings are far too complex to be categorized that neatly. We are all capable of connection with, and separation from, each other. I would add that we all connect to land and place as well, though in what ways, and with what consequences, we do not yet fully understand.

I illustrate that point with the work of two Saskatchewan artists. Here is a short excerpt from Guy Vanderhaeghe's disturbing story about a man's connection to his land, a connection so deep it could bear no sharing with anyone except his son, and which leads to his destruction. The story is called "Home Place," the man is called Gil.

Over the years the MacLean family acquired other holdings but the home place was special. Situated in a valley, it was a mix of rich bottom land and steep, wooded hills. In the spring, down by the river, blizzards of gulls floated in the wake of tractor and disker, pursuing easy pickings, while hawks rode the air high above the lean hills and, shrieking, fell to plunder these lazy storms of white birds. To Gil it had all been beautiful. It was all he had ever wanted, to possess that place and those sights. A day spent away from the farm made him restless, cranky. Returning to it, even after the briefest absence, he acted oddly, dodging through the wires of a fence in his city clothes to wade about in his crop, hands running back and forth lightly over the bearded heads the way another man might absent-mindedly stroke a cat. Or he might suddenly strike off for the hills with all the energy and purpose of someone hurrying off to keep an appointment, tie flying over his shoulder.

His wife used to say: "Gil's gone off to satisfy himself that nobody so much as shifted a cup of dirt on this place when he was away."

What Gil never confided to his wife was that he felt more present in the land than he did in his own flesh, his own body. Apart from it he had no real existence. When he looked in a mirror he stood at a great distance from what he regarded, but with the land it was different. All that he had emptied of himself into it, he recognized.³

And here is a song about a woman's fierce connection to the land, land that gave her everything, especially independence. She represents my grandmother, the grandmothers of many prairie women. The song, of course, is *Grandmother's Song*, by Connie Kaldor.

I was a young girl
When I came to this land
From a country far away
To a language I didn't understand

I worked on a farm
And I married me a man
We got ourselves a homestead
On a section of land

And blow you old winds of time
 You've wrinkled my face with your blowing
 Well you've given me all that I have
 But you've taken away my youth without me knowing

Well we sure had our bad times and our fun
 And we paid all our taxes to the government of old
 Saskatchewan
 I raised up my kids 'till they finally raised away
 And they drop in now and then
 To visit on their holidays

Now they say I'm too old to cook and sew
 And there's an old folks home in town they want me to go
 But I'll stay here on my own 'till that wind blows me away
 I've been through harder times than this
 On less than pension pay

You say that I'm old
 But I've just been through a lot
 And the fact that I've lots of wrinkles
 Just shows how hard I fought

I won't go in, and you hear me
 You can't take me away
 For I've a will, and I've decided
 I'm going to stay

But blow you old winds of time
 You've wrinkled my face with your blowing
 Well you've given me all that I've got
 But you've taken away my life without me knowing.

Donna Greschner, College of Law, University of Saskatchewan,
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1. Robin West, "Jurisprudence and Gender" (1988) 55 U. Chi. L.R. 1.
2. Wallace Stegner, *Where the Bluebird Sings to the Lemonade Springs* (New York: Random House, 1992).
3. Guy Vanderhaeghe, *Things As They Are?* (Toronto: McClelland & Stewart, 1992) 173.

CONSTRUCTING CANADIAN IDENTITIES

Kenneth McRoberts

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3. Speech to Quebec Liberal Convention, 28 January 1968, reported in Ottawa Citizen, (29 January 1968), as quoted in George Radawanski, *Trudeau* (Scarborough: Macmillan — NAL Publishing Ltd., 1978) at 286.
4. "Des provinces ont prié Ottawa de leur imposer le respect du français," *le Devoir* (23 October 1980) 1.
5. Comité pour une politique fonctionnelle, "Bizarre algèbre" (1965) *XX Cité libre*, [Albert Breton, Claude Bruneau, Yvon Gauthier, Marc Lalonde, Maurice Pinard] at 14. Pierre Trudeau reportedly was closely involved in the preparation of the document but did not sign it since he had already entered federal politics.
6. This constitutes a translation of extracts from the French text, as reproduced in *le Devoir* (13 October 1971).
7. Peter Newman, *Toronto Star* (2 April 1966), as quoted in Richard Simeon, *Federal-Provincial Diplomacy: the making of recent policy in Canada* (Toronto: University of Toronto Press, 1972) at 68.
8. Don Peacock, *Journey to Power: The Story of a Canadian Election* (Toronto: 1968), as quoted in Simeon, *Ibid.* at 90.
9. Anthony Careless, *Initiative and Response* (Montreal: McGill-Queen's University Press, 1977) at 177 (emphasis added).
10. See Peter H. Russell, "The Political Purposes of the Canadian Charter" (1983) 61 *Canadian Bar Review*, and Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms," in Alan Cairns and Cynthia Williams, eds, *Constitutionalism, Citizenship and Society in Canada*, Vol. 33, Collected Research Studies, Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
11. For instance, a January 1989 survey found that 69% of Francophone respondents agreed that the Quebec government was justified in restricting the right to erect signs in English or another language so as to protect French; 16% disagreed. ("Francophones et anglophones sont insatisfaits de la loi 178" *La Presse* (23 January 1989) A1).
12. In adopting the Allaire report a party convention did pass amendments specifying that it is only the Senate ("dans sa forme actuelle") that would be abolished and that the *Charter of Rights and Freedoms* would continue to apply in Quebec ("Bourassa choisit d'abord le Canada" *le Devoir* (11 March 1991)).
13. Royal Commission on Bilingualism and Biculturalism, *Preliminary Report* (Ottawa: Queen's Printer, 1965) at 151.