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CAN LAW CHALLENGE THE PUBLIC/PRIVATE DIVIDE? WOMEN, WORK, AND FAMILY*

by
Susan B. Boyd†

This article addresses the key elements of the public/private divide which predominates in western societies such as Canada. In particular, its ideological effects in constructing gendered divisions between state regulation and family relations, and between work and family are traced. The history of the divide is outlined, with attention to its differential operation according to race, class, and other social relations of power. Efforts to shift the divide through law are traced and its intransigence is demonstrated by reference to socio-economic studies. Case studies of feminist efforts to shift the divide through litigation and through legislative reform are used to illustrate both the pervasiveness of the divide, and the tension between short term and long term strategies to deal with its consequences. It is concluded that although law alone cannot shift the embedded nature of the public/private divide, and extra-legal strategies are required, neither can law be abandoned as a site of struggle.

La loi peut-elle abolir la distinction entre les domaines public et privé? Les femmes, le travail et la famille

Le présent article esquisse les éléments clé de la distinction, qui prédomine dans les sociétés occidentales comme le Canada, entre les domaines public et privé. Il trace notamment les effets idéologiques de cette distinction, qui crée des oppositions basées sur les sexes: relations de travail réglementées par l'État d'une part, rapports familiaux de l'autre. L'auteure fait l'historique de la distinction en se concentrant sur ses effets, qui varient selon la race, la classe et d'autres rapports de force sociaux. Elle trace les efforts faits pour l'abolir par des moyens juridiques et en démontre la persistance en se référant à des études socio-économiques. Des études de cas sur les efforts des féministes pour faire abolir la distinction par le litige et par la réforme législative servent à illustrer, d'une part la ténacité de la distinction, et d'autre part la tension entre les stratégies à court terme et celles à long terme pour mitiger ses conséquences. L'auteure conclut que, si la loi toute seule ne peut changer la nature systémique de la distinction public/privé, de sorte que des stratégies extra-légales sont également nécessaires, la loi ne doit toutefois pas être abandonnée comme site de la lutte.

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A key contribution of feminism to epistemological inquiry, and one of the most disturbing to the status quo, is the challenging of concepts previously taken for granted. A primary example is provided by the challenges that feminists have brought to the public/private divide that characterizes dominant western ways of thought. This divide denotes the ideological division of life into apparently opposing spheres of public and private activities, and public and private responsibilities. It can be used to describe various phenomena such as the distinction between state regulation and private economic activity (the market). In this article, I primarily address the versions of the public/private divide that correspond to the perceived divisions between state regulation and family relations, and between work and family, that are embedded within dominant Canadian society.¹

In recent years, many feminists have turned their attention away from issues of the public/private divide and its relationship to the social construction of family and work, and towards questions of language — for instance, whether there is a feminine language that we can discover² — as well as towards inquiries about the ways that female bodies are disciplined in modern societies.³ These important issues reflect the influence that postmodernism, poststructuralism, and discourse analysis have had on feminism and legal studies. But in exploring these issues, fundamental questions of how daily work and family relations are regulated and negotiated may be overlooked. In a sense these latter questions are old ones for feminists, and it is frustrating that, despite considerable efforts to challenge the work/family divide, the situation almost seems worse today than it was two decades ago. Yet these fundamental issues concerning the ways in which lives are regulated cannot be overlooked, particularly when examining the role that law plays in the organization of, and resistance to, gendered power relations.

In this article, I review the key elements of the public/private divide which predominates in liberal and legal thought, and trace some of their effects. I also review feminist efforts to shift the divide through litigation and legislative reform, mainly in the realms of work and family relations. The differential impact of the divide and its operation according to race, class, and other social relations of power are pointed out. Finally, I raise questions about the legal efforts to transform the public/private divide to date, arguing that they remain imprisoned within the ideological framework of the public/private divide, despite their challenges to the boundaries of the divide. I point to the complexity of developing strategies that both take

1 Others have called the latter phenomenon the “division of labour by sex” or the “sexual division of labour”. See P. Armstrong & H. Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work*, 3d (Toronto: McClelland & Stewart Inc., 1994) [hereinafter *The Double Ghetto*].

2 H. Cixous & C. Clement, *La jeune née* (Paris: Union Générale d'Éditions 10/18, 1975); L. Irigaray, *Ce sexe qui n'en est pas un* (Paris: Les Édition de Minuit, 1977); X. Gauthier, “Existe-t-il une écriture de femme?” (1974) 58 *Tel quel* 95.

3 E. Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press Books, 1987); Z.R. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press Ltd., 1988); N. Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989).

account of women's gendered locations at present and facilitate more broadly-based social change.

WHAT IS THE PUBLIC/PRIVATE DIVIDE?

A considerable body of literature now exists on the Public/Private Divide.⁴ Essentially the argument runs this way. Over the past two centuries, with accelerated industrialization of western capitalist societies, peoples' lives have increasingly been divided into public and private spheres at both material and ideological levels. With the growth of the welfare state, and increased and more visible regulation of family life by state and law, has come a parallel assertion of the need for the privacy of the home. Whereas households previously constituted units of production with both men and women (and often people who might now be regarded as "non-family" members) participating in work within these units, the spheres of home/family and paid work became physically and conceptually more separate in the 19th and early 20th centuries.⁵ The timing of the transition depended on the geographical region, the level of industrial development, and so on. This phenomenon and these spheres were highly gendered, although clearly women and men travelled in and out of both spheres.

If, for discussion purposes, the two spheres are separated conceptually (although in practice the relationship is more fluid), gender-based patterns can be detected. Men have been present in greater numbers in the public sphere of paid work, particularly after the protective legislation of the 19th and early 20th centuries,⁶ and also tend to dominate this sphere. In the "private" sphere of family, on the other hand, although women tend to be held responsible for tasks in this sphere such as childcare and domestic labour, they do not dominate in the sense of being able to exercise authority.⁷ Indeed, research on violence against women (and children) shows that

4 See e.g. J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall L.J.* 485 [hereinafter "The Public/Private Distinction"]; R. Gavison, "Feminism and the Public/Private Distinction" (1992) 45 *Stanf. L. Rev.* 1; L.K. Kerber, "Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History" (1988) 75 *J. of American History* 9; K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld, 1985); F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv. L. Rev.* 1497 [hereinafter "The Family and the Market"]; C. Pateman, "Feminist Critiques of the Public/Private Dichotomy" in S. Benn & G. Gaus, eds., *Private and Public in Social Life* (London: Croom Helm, 1983) 281; M. Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 18 *J.L. & Society* 448; J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992); E. Zaretsky, *Capitalism, the Family and Personal Life* (New York: Harper & Row, 1976).

5 See K.L. Anderson, "Historical Perspectives on the Family" in Anderson et al., *Family Matters: Sociology and Contemporary Canadian Families* (Toronto: Methuen, 1987) 21. Anderson also points to literature dispelling the myth that in former times, Canadians lived in two-generation settings, or that the family was free from hierarchy and exploitation along gender lines. See also N. Mandell, "Family Histories" in N. Mandell & A. Duffy, eds., *Canadian Families: Diversity, Conflict and Change* (Toronto: Harcourt Brace, 1995) 17.

6 See e.g. Ursel, *supra* note 4 at 88-96.

7 A. Duffy, "Struggling with Power: Feminist Critiques of Family Inequality" in N. Mandell

there is something about the private sphere that seems to allow male violence to occur there, too often with impunity.⁸ Masculinity is constructed in terms of public sphere indicators of economic and material success, as well as heterosexual power; whereas femininity is constructed in terms of sexual objectification — the capacity to be the object of men's sexual desire and to ensure that their needs are met, in the private sphere and arguably also the public.⁹ As Mandell puts it, "the gradual separation of the private and the public led to a new emphasis on masculinity as measured by the size of their pay cheques" whereas women were subject to the "ideological cult of domesticity".¹⁰

In actual practice, the dividing line between the two spheres is wiggly, slippery, and impossible to draw, especially when differences among groups of women along such lines as class and race are taken into account. For example, some paid work is done in the home, notably by women,¹¹ and some women have worked in both market and family, often at the same time.¹² In fact, some authors have dismissed the conceptual utility of the public/private divide as a result of its indeterminacy.¹³ The indeterminacy of the dividing line is, however, due to the fact that it is not a real line, but rather an ideological construct¹⁴ that is created and reproduced through state action and that often shifts. It does have some material basis or "element of truth", as do all ideologies: for example, with industrialization did come the notion of "going out to work". However it shifts in response to economic changes, and factors such as race and class. For example, women of colour have been "permitted" to be present in the sphere of paid work to a greater extent than white middle class women.¹⁵ First Nations societies may not

& A. Duffy, eds., *Reconstructing the Canadian Family: Feminist Perspectives* (Toronto: Butterworths, 1988) 111.

8 54% of women have experienced some form of unwanted or intrusive sexual experience before the age of 16. 27% of women have experienced physical assault in the context of an intimate relationship. The Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence—Achieving Equality* (Ottawa: Minister of Supply and Services Canada, 1993). See also M.A. Fineman & R. Mykitiuk, eds., *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (New York/London: Routledge, 1994); J. Pahl, ed., *Private Violence and Public Policy: The Needs of Battered Women and the Response of the Public Services* (London: Routledge and Kegan Paul, 1985).

9 See M. Lynn & E. O'Neil, "Families, Power, and Violence" in Mandell & Duffy, eds., *supra* note 5, c.9.

10 Mandell, *supra* note 5 at 35.

11 *The Double Ghetto*, *supra* note 1 at 53, 61.

12 Ussel, *supra* note 4.

13 C. Cox, "Anything Less is not Feminism: Racial Difference and the W.M.W.M." (1990) 1(2) *Law and Critique* 237; K. Goodall, "'Public and Private' in Legal Debate" (1990) 18 *Int'l J. of Sociology of Law* 445; F.R. Elliot, "The Family: Private Arena or Adjunct of the State" (1989) 16 *J.L. & Soc.* 443; N. Rose, "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 *J.L. & Soc.* 61. Joan Acker has noted the problem of working from conceptual dualisms such as the public/private divide, "The Problem With Patriarchy" (1989) 23 *Sociology* 235 at 239.

14 See e.g. T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991); S.A.M. Gavigan, "Law, Gender and Ideology" in A. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printing and Publishing, 1988); A. Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 *L. & Society Rev.* 11.

15 D.E. Roberts, "Racism and Patriarchy in the Meaning of Motherhood" (1993) 1 *American University J. of Gender and the Law* 1 at 17-22.

have been organized along the lines of the public/private divide at all.¹⁶ These facts do not detract, however, from the *dominant* construction of the world in terms of public and private, a construction from which many deviate in actual practice.

As well, the two spheres exist not so much in opposition to one another, but rather *in connection with* one another.¹⁷ What is conceptualized as the public sphere of law and social policy has a great deal to do with how private lives are structured and experienced. For example, only those “private” relationships that are recognized by state and law receive state-provided legitimation and benefits, and are left in “privacy” to regulate internal affairs as long as they continue to conform to the norm.¹⁸ In turn, ideologies related to “private lives” in families inform the content of (public) laws and social policies.¹⁹ For example, familial ideology has influenced social welfare law, a field often regarded as “public” law.²⁰ As Judy Fudge puts it, “[t]he family and the market do not constitute autonomous spheres with discrete forms of regulation, but rather reproduction and production are interrelated in complicated and contradictory ways which change over time.”²¹

Something about the power that men have derived from dominance in the public sphere — even though for many men, this dominance does not actually accord them much power or control over their work — means that they have, until very recently, been deemed legally to be head of the household in heterosexual families.²² Indeed, in some of their reports and publications, Statistics Canada still considers the male spouse in families consisting of married couples as the head of the household, regardless of the income earned by each spouse.²³ Men have exercised considerable power in the household domain, over both women and children. As well, there is something about the way the public sphere is organized — arguably along the lines of a presumed male lifestyle — that *relies* on a particular way of organizing the private sphere.²⁴ The very ability of men to function freely in the public sphere of paid work assumes that someone else, usually a woman, performs their domestic labour: preparing their food, cleaning their

16 See J. Koshan, “Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women” in S.B. Boyd, ed., *Challenging the Public/Private Divide* (Toronto: University of Toronto Press) [forthcoming].

17 F. Olsen, “The Myth of State Intervention in the Family” (1985) 18 *Mich. J.L. Reform* 835 [hereinafter “The Myth of State Intervention”]; Rose, *supra* note 13.

18 See e.g. “The Public/Private Distinction”, *supra* note 4 at 511; “The Myth of State Intervention”, *supra* note 17.

19 See D.E. Chunn, *From Punishment to Doing Good* (Toronto: University of Toronto, 1992) [hereinafter *From Punishment to Doing Good*]; Ursel, *supra* note 4.

20 See M.J. Mossman & M. MacLean, “Family Law and Social Welfare: Toward a New Equality” (1986) 5 *Can. J. Fam. L.* 79 at 95-100. See also S.A.M. Gavigan, “Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law” (1993) 31 *Osgoode Hall L.J.* 589 at 616-623.

21 “The Public/Private Distinction”, *supra* note 4 at 488.

22 See generally C. Pateman, “Patriarchal Confusions” in *The Sexual Contract* (Cambridge: Polity Press, 1988) at 19-38 [hereinafter *The Sexual Contract*].

23 See Statistics Canada, Household Surveys Division, *Income Distributions by Size in Canada, 1993* (Ottawa: Statistics Canada, 1994), cat. no. 13-207, 35.

24 S. Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989) at 110-133.

house, and, perhaps most importantly, raising the next generation of labourers through their reproductive labour.

Some men (and increasingly some women) earn enough money to be able to purchase some of these services in the market — e.g. housekeepers — but normally the social reproductive function of raising children is expected to be done by the man's female partner (heterosexuality being assumed under this model). Notably, however, labour that is viewed as "women's work" or domestic labour tends to command lower compensation than that viewed as "men's work", even if it is performed by a formally recognized employee (such as a childcare worker or housekeeper).²⁵ "While women may be absent from the top-paying jobs, they obviously dominate the bottom. Nearly three-quarters of those in the ten lowest-paid jobs are women, and they are the majority of workers in six out of the ten lowest-paid jobs."²⁶ As well, women do most of the "caring" work in the labour force, such as health services, child care, and social welfare.²⁷ The gendered work aspect of the public/private divide thus reproduces itself also within each of the two spheres, with women performing "women's work" that is relatively undervalued in each sphere.

Thus, women's unpaid or underpaid labour in the domestic sphere supports the ability of men to enter the labour force, work long hours, be uninterrupted by telephone calls concerning the domestic sphere, and so on. In fact, Carole Pateman has argued that the sexual contract between men and women — under which women apparently voluntarily agree to play these and other related roles — supports the ability of men to succeed in the public sphere and in turn to dominate it.²⁸

The role that law plays in constructing the public/private divide was clearer in the 19th century when, for example, women were constrained from entering high profile public sphere professions such as law and medicine. The justification given by many judges for excluding women from the professions was that women's place was in the home caring for their husbands and children.²⁹ These justifications tended to romanticize the lives of women in the private sphere, underestimating the labour performed there, and sentimentalizing women's work and roles in the family. Justice Bradley's well-known statement in *Bradwell v. Illinois* in which Myra Bradwell's application for admission as an attorney in Illinois was dismissed, provides a good example:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity

25 D.S. Lero & K.L. Johnson, *110 Canadian Statistics on Work and Family* (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 38 [hereinafter *110 Canadian Statistics*].

26 *The Double Ghetto*, *supra* note 1 at 44, 46.

27 Statistics Canada, Household Surveys Division, *Labour Force Annual Averages 1991* (Ottawa: Statistics Canada, 1992), cat. no. 71-220, A-3.

28 *The Sexual Contract*, *supra* note 22.

29 See T.B. Dawson, ed., *Women, Law, and Social Change: Core Readings and Current Issues*, 2d ed. (North York: Captus, 1993) at 47-73.

and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.... It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.³⁰

In reading these judgments, one would think that no work was done in the home, which in turn exacerbates the perceived divide between work and family. The justifications also asserted a particular form of womanhood as normative, which tended to be white, delicate, of a certain class, protected, and nurturing.

In fact, race and class interrupt the generality of the statement that women were constrained from entering the public sphere. Women of classes and races "other" than those of men in the professions, for example black women who were slaves in Canada and the United States and working class women,³¹ were not visible in the judgments that excluded women from the professions.³² These women were expected to work, and indeed, to do heavy work at times. Many working class women and women of colour worked in both public and private spheres. They often took in boarders and did sewing, laundry, and cleaning for other women. Indeed their labour either in the homes of women of the middle and upper classes, or for the households of these women, supported the ability of middle and upper class women to be viewed as "protected" in the private sphere. Their labour also supported the ability of middle and upper class women to participate in limited ways in the public sphere, creating the new welfare state, engaging in charitable works, and so on.³³

Gendered dynamics thus were cross-cut by racialized and class-based social relations, so that overly generalized statements about the "experience" of women in the public and private spheres cannot be made. The experience of some women who live in communities and cultures that do not operate along these lines, such as First Nations women, may not be comprehensible at all in terms of the public/private divide. Extended family

30 (1872), 83 U.S. (16 Wall.) 130 at 141-2 quoted in *id.* at 51-2.

31 See e.g. A. Davis, "The Legacy of Slavery: Standards for a New Womanhood" in Davis, *Women, Race and Class* (New York: Vintage Books, 1983); Mandell, *supra* note 5 at 28-31; M. Minow, "Forming Underneath Everything That Grows: Toward a History of Family Law" (1985) *Wisconsin L. Rev.* 819; Roberts, *supra* note 15.

32 It is significant that men of colour and First Nations men were also kept out of the professions for some time; the phenomenon of exclusion was not based on gender alone. See J. Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia" in J.P.S. McLaren & H. Foster, eds., *Essays in the History of Canadian Law: Volume VI, British Columbia and the Yukon* (Toronto: Osgoode Society, 1995), 508.

33 See e.g. *From Punishment to Doing Good*, *supra* note 19; Ursel, *supra* note 4; M. Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada 1885-1925* (Toronto: McClelland & Stewart, 1991) at 29-30.

structures were supported by an economic infrastructure that was based on reciprocity, sharing, and production for the subsistence of the community.³⁴ Nonetheless, at the level of *dominant* ideologies, a particular model of female behaviour was reproduced through law and held out as normative. The ideological power of this model in constructing social and legal policies is relevant to women of all classes and races, although its impact varies according to class, race, and other factors such as sexual orientation.³⁵

In terms of constructing the private sphere, not only did 19th century public authorities fail to intervene to prevent or criminalize violence against women and children in families, but husbands were accorded significant "privatized" power by laws on marriage and family relations. Married women's legal personalities were largely dissolved into that of their husbands. The chastising by husbands of wives and children by violent measures was condoned.³⁶ Until very recently, and arguably still, this logic — that the private sphere of family relations should not be interfered in by law or state — significantly impeded efforts to eradicate violence against women in the home. Until the sexual assault law reforms of the early 1980s, a man was legally able to rape "his" wife.³⁷ By its very refusal to enter the private sphere to address problems of power abuse, law and state left an unequal power dynamic in place.³⁸ When law and state did interfere, all too often it was to try to enforce or re-establish "correct" gender relations in families viewed as being "deviant", often poor families or immigrant families,³⁹ as well as First Nations families.⁴⁰ In addition, until the late 19th century, upon marriage women lost certain rights to property, thereby curtailing their ability to be economically independent.⁴¹ Since some of these impediments did not apply to single women, the central place of marriage and family in women's unequal status is clear. An example is that many jobs that were open to single women, such as teaching, were lost to them if they got married, until well into the twentieth century.⁴²

34 See e.g. R.G. Bourgeault, "Race, Class and Gender: Colonial Domination of Indian Women" in J. Vorst et al, eds., *Race, Class, Gender: Bonds and Barriers* (Toronto: Society for Socialist Studies & Garamond, 1991); T.D. Gupta, "Families of Native Peoples, Immigrants, and People of Colour" in Mandell & Duffy, eds., *supra* note 5, 141 at 145; P.A. Monture, "Reflecting on Flint Woman" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) at 356.

35 See S.B. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 *Can. J. Fam. L.* 79 at 100-102.

36 C.B. Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage" (1986) 31 *McGill L.J.* 264.

37 S.C. 1980-81-82-83, c.125, s.19 was an amendment to the *Criminal Code* which eliminated spousal immunity for offenses of sexual assault [now R.S.C. 1985, c.C-46, s.278].

38 See "The Myth of State Intervention", *supra* note 17.

39 See e.g. *From Punishment to Doing Good*, *supra* note 19; Valverde, *supra* note 33 at 104-128.

40 P.A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3(1) *C.J.W.L.* 1; M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 *Queen's L.J.* 306.

41 See M. McCaughan, *The Legal Status of Married Women in Canada* (Toronto: Carswell, 1977).

42 A. Prentice et al., *Canadian Women: A History* (Toronto: Harcourt Brace Jovanovich, 1988) at 130, 232. Note that before the mid-19th century, this was not so. See also 224 regarding the federal bureaucracy.

Many may say that the picture, painted above, is no longer valid; that it only described life until perhaps the 1970s, but since then these “legislated” gender roles have diminished; use of daycare has increased, men are sharing the domestic load, and so on. However, the statistics and studies are not unequivocal. In the next part, I argue that the public/private divide between state and family, and work and family, is not qualitatively different than that described above. It has shifted and been obscured by the increasing participation of women in the labour force, increasing unemployment of men, the fragmentation or casualization of the labour force in the name of “flexibility”, the increased regulation of family relations, and increasing frustration of everyone with life in the late 20th century. But it lives on.

LEGAL CHANGES TO GENDER-BASED ASSUMPTIONS REGARDING PUBLIC AND PRIVATE

Many efforts have been made over the course of this century to change law’s role, both in impeding women’s ability to enter the labour force and in relegating women to a somewhat powerless position within the family, despite their key functions there. Formal barriers to entry into the labour force were largely eliminated for women by the mid-20th century, partly as a result of women’s participation in the labour force during World War II.⁴³ Human rights legislation guaranteed that discrimination would not occur in employment on the basis of sex and age.⁴⁴ Less formal barriers such as attitudes that women were not suited to certain jobs were tackled through employment equity and affirmative action,⁴⁵ an approach reinforced by section 15(2) of the *Canadian Charter of Rights and Freedoms*.⁴⁶ Assumptions that women should be paid less than men for the same jobs, due to the view that they were merely earning a bit of extra money to supplement a husband’s income, were tackled through equal pay legislation.⁴⁷ Assumptions that typically female jobs such as secretarial work should be paid less than typically male jobs such as janitorial work were tackled through pay equity schemes.⁴⁸ Maternity leave was instituted to offer women the oppor-

43 *Id.* at 295-317. War time opportunities for women broke down formal barriers, and in fact some of the early equal pay legislation emerged in the 1950s. Although there were strong pressures exerted on women in the post-war period to (re)assume traditional roles, more women were pursuing work in order to maintain a standard of living in an increasingly consumer-focused society. See 314.

44 See W.S. Tamopolsky, *Discrimination and the Law in Canada* (Toronto: Richard De Boo, 1982) at 29.

45 *Employment Equity Act*, R.S.C. 1985 (2nd Supp.), c.23. See also *Action Travail des Femmes v. Canadian National Railway Company* [1987] 1 S.C.R. 1114.

46 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c.11.

47 The first such legislation was the *Ontario Female Employees Fair Remuneration Act*, S.O. 1951, c.26. In 1956, the federal government and Manitoba passed legislation in 1956; Alberta in 1957 and N.B. in 1961. Quebec was recalcitrant until 1975. See T.B. Dawson, ed., *Relating to Law: A Chronology of Women and Law in Canada* (North York: Captus, 1990) at 63. See C.J.N. Kates, “‘Identical or Substantially Identical’: Bell Canada and the Struggle for Equal Pay 1967-1976” (1990) 4 *C.J.W.L.* 133.

48 *Pay Equity Act*, S.N.B. 1989, c.P-5.01; *The Pay Equity Act*, C.C.S.M. c.P-13 (1985); *Pay Equity Act*, R.S.N.S. 1989, c.337; *Pay Equity Act*, R.S. P.E.I. 1988, c.P-2; *Human Rights Act*, S.B.C. 1984, c.22. s.7(1); *Ontario Employment Equity Act*, S.O. 1993, c.35.

tunity to bear children without losing jobs.⁴⁹ Not only is maternity leave in place, but now parental leave can be taken by fathers or shared with mothers.⁵⁰ These changes have been partial and erratic across Canada in their introduction and effect; they have been controversial; and it is not clear that they have been effective for all women.⁵¹ They may have mainly benefitted women who were already relatively privileged by their race or class status.⁵² Nevertheless, they constitute a serious challenge to assumptions that women should not be in the paid labour force.

Law has also been invoked to deal with power issues in the private sphere. A key feminist slogan, "The Personal is Political" has symbolized the calls for attention to be paid to the private or personal sphere and to address by law and other forms of state intervention the abuses that prevail within that sphere. Challenges to the dividing line between public and private have been heeded to some degree. Sexual abuse, rape, and child abuse — gendered patterns previously hidden in the private sphere — have all entered public discourse in a visible, if still problematic, fashion over the past two decades.⁵³ In addition, family laws have been changed to diminish patriarchal and heterosexist expectations that women should be the homesteaders and men should bring home the bacon. Some effort has been made through matrimonial property laws to compensate married women for their hitherto invisible and uncompensated labour in the private sphere. Married or cohabiting women and men owe reciprocal duties of support to one another. In 1994, Ontario even considered including same sex couples in some parts of its family law, a proposal that seemed to rid family law of gender-based (and heterosexist) stereotypes.⁵⁴ This proposal was defeated, however, when put to a free vote in the legislature. More married women and women with young children are in the labour force than ever before in history.⁵⁵ The discourse of child custody laws has been changed to encour-

49 *Canada Labour Code*, R.S.C. 1985, c.L-2, am. 1993, c.42, s.26.

50 *Canada Labour Code*, R.S.C. 1985, c.L-2, s.204-206.1, as am. S.C. 1993, c.42, s.26; *An Act to Amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, S.C. 1990, c.40, ss.14 & s.9.

51 See e.g. P. Evans & N. Pupo, "Parental Leave: Assessing Women's Interests" (1993) 6 *C.J.W.L.* 402; J. Fudge, "Litigating Our Way to Gender Neutrality: Mission Impossible?" in J. Fudge & P. McDermott, eds., *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto, 1991) at 60; P. McDermott, "Pay Equity in Canada: Assessing the Commitment to Reducing the Wage Gap", *id.* at 21.

52 For example, the wage gap appears to have almost closed for women and men with university degrees, in contrast to the gap that still exists for the general population of full time workers. Other barriers may however exist. Aboriginal people, visible minorities and people with disabilities suffer much higher unemployment rates. See E. Beauchesne, "Women university grads earn 'just as much' as men" *Vancouver Sun*, (5 October 1994) A9.

53 See J.V. Roberts & R.M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto, 1994).

54 Ontario Bill 167, the Equality Rights Statute Amendment Law, 1994; Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (Toronto: Government Publications, 1993). See S. Boyd, "Expanding the 'Family' in Family Law: Recent Ontario Proposals on Same Sex Relationships" (1994) 7 *C.J.W.L.* 545 [hereinafter "Expanding the 'Family'"]; B. Cossman, "Same-Sex Couples and the Politics of Family Status" in J. Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996), 223.

55 69% of mothers of children under 6 worked outside the home in 1991: Statistics Canada

age the participation of men in children's lives more than traditionally has been the case.⁵⁶

These legal changes have had contradictory effects, and certainly not always positive ones, for women.⁵⁷ As well, certain groups of women who may have experienced excessive state regulation of their families in the past (such as black women and First Nations women) or who may fear it (such as lesbians), may not cherish the sometimes over-simplified calls by mainly white feminists for intervention by state officials such as the police into the family.⁵⁸ But the challenge to the ideological division between public and private is clear. As Fudge has pointed out, the contextualized approach to equality which has characterized at least some of the legal changes mentioned above requires the rejection of liberalism and the public/private divide in their pure forms.⁵⁹

WORK AND FAMILY IN THE CURRENT CONJUNCTURE

An examination of the current social and economic context enables an examination of the extent to which the above legal changes in the realms of work and family have fundamentally challenged the dominance of public/private ideology. Stress levels are high amongst workers today generally⁶⁰ and it seems to be single mothers and employed women in heterosexual couples with children who are most stressed. Women in their middle years must often care for elderly parents, sometimes in addition to childcare responsibilities.⁶¹ Although men are not unscathed by these phenomena, the burden of a "double day" of domestic labour and labour force work is borne primarily by women. Some commentators have constructed a crisis in how family and work are being negotiated and others advocate a return to "family values", without necessarily recognizing the gendered nature of that call, or the way in which it invokes heterosexuality as normality.⁶² Others locate the

(1993) *The Daily* (2 March 1993); cited in L. Duxbury & C. Higgins, "Families in the Economy" in M. Baker, ed., *Canada's Changing Families: Challenges to Public Policy* (Ottawa: The Vanier Institute of the Family, 1994) at 29.

56 See e.g. *Divorce Act*, R.S.C. 1985, c.3 (2d Supp.), ss.16(10), 17(9) (maximum contact); see S.B. Boyd, "Child Custody Law and the Invisibility of Women's Work" (1989) 96 *Queen's Quarterly* 831; M.A. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991), 79-169.

57 See D.E. Chunn, "Feminism, Law, and Public Policy: 'Politicizing the Personal'" in Mandell & Duffy, eds., *supra* note 5, 177; M.J. Mossman, "'Running Hard to Stand Still': The Paradox of Family Law Reform" (1994) 17 *Dalhousie L.J.* 5 at 32.

58 See e.g. Cox, *supra* note 13; Koshan, *supra* note 16. For a more complex intersectional analysis of violence and women of colour, see K.W. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" in Fineman & Mykitiuk, eds., *supra* note 8, 93-118. For a very insightful analysis of the relationship between feminist legal theory and an understanding of intra-lesbian violence, see M. Eaton, "Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence" in Fineman & Mykitiuk, eds., *supra* note 8, 195.

59 "The Public/Private Distinction", *supra* note 4 at 497.

60 C. Higgins, L. Duxbury & C. Lee, *Balancing Work and Family: A Study of Canadian Private Sector Employees* (London: National Centre for Management Research and Development, 1992).

61 *The Double Ghetto*, *supra* note 1 at 122-5 (the sandwich generation).

62 An extreme example was provided by Roseanne Skoke, Liberal MP from Nova Scotia, who made extremely homophobic comments in the House of Commons in 1994. She rational-

problem in the inability of the workplace to accommodate those workers who have family responsibilities.⁶³ The debate too often seems to go back and forth between the two spheres of "family" and "work" without recognizing the gendered interconnections between them.

These phenomena connected to the stress of negotiating the demands of work and family are highly gendered. Women encounter more barriers to entry into the labour force, especially particular sectors. Although the rate of their labour force participation is clearly up,⁶⁴ due to economic necessity as well as choice, considerable barriers still exist. Not least of these is the problem of locating quality childcare that is affordable. The rising numbers of women in the labour force reflect entry into industries and occupations that are characterized by low pay, low recognized skill requirements, low productivity, and low prospects for advancement.⁶⁵ Women take more time out of the labour force than men due to family responsibilities.⁶⁶ Women still earn only 71.8 cents for men's \$1.00 when full-time/full-year workers are studied,⁶⁷ and women work part-time at a highly disproportionate rate.⁶⁸ Women are also still mainly employed in female job ghettos, generally working *for* men. Women's work is segregated in the public sphere in a manner that parallels the way that it is constructed in the private. Men are self-employed more than women although the rate of female self-employment is on the rise.⁶⁹ However, female self-employment is complex, and on a closer examination not necessarily as positive as it seems.⁷⁰ The studies are also clear that although there is now a slightly higher rate of male participation in childcare and domestic labour in heterosexual households, women remain overwhelmingly responsible for these tasks.⁷¹ In fact,

ized these comments by her defence of "Canadian and Christian morals and values" and "the inherent rights and values of our Canadian families": Tu Thanh Ha, "Dissident Liberals Fight Bills on Gays" *Globe and Mail* (28 September 1994) A1.

63 S. Alvi, *The Work and Family Challenge: Issues and Options* (Conference Board of Canada, 1994) at 11.

64 In 1994, over half (52%) of all women aged 15 and older were in the Canadian paid labour force, up from 42% in 1976. They constituted 45% of the total paid labour force in 1994, up from 37% in 1976: Statistics Canada, *Women in Canada: A Statistical Report*, 3d ed. (Ottawa: Statistics Canada, 1995), cat. no. 89-503E at 64, Table 6.1.

65 *The Double Ghetto*, *supra* note 1 at 15.

66 E.B. Akyeampong, "Absenteeism at Work" (1992) 25 *Canadian Social Trends*, cat. no. 11-008E, 26 at 26. Also, recently there has been an increase in the time that women take off for family reasons; the time that men take off has remained relatively static. See E. Akyeampong, "Absences from Work Revisited" *Perspectives on Labour and Income* (Statistics Canada, 1992).

67 110 *Canadian Statistics*, *supra* note 25 at 6. It is much lower when non full-time workers are taken into account.

68 N.Z. Ghalam, *Women in the Workplace*, 2d ed. (Ottawa: Statistics Canada, 1993), cat. no. 71-534E, Table 1.8, 21; A. Duffy & N. Pupo, *Part-Time Paradox: Connecting Gender, Work and Family* (Toronto: McClelland & Stewart, 1992).

69 In 1991, 9.4% of women and 18.7% of men were classified as self-employed, *The Double Ghetto*, *supra* note 1 at 53.

70 Armstrong and Armstrong point out that self-employment is often contract work. Women end up doing the same kind of work that they perform as employees, but often have lower pay, less job security, and fewer fringe benefits. Few employ other workers. See *The Double Ghetto*, *supra* note 1 at 53.

71 Ninety-five per cent of women with children under 5 years of age provide primary child care on a daily basis, compared to 69% of men. In dual-earner couples in which both parents were employed full time, the majority of wives (52%) retained all of the respon-

women do two-thirds of the unpaid work in Canadian society.⁷² Overall, it appears that women are negotiating the public/private divide of work and family at a more feverish rate than men, and have not become equal in the public world of paid work.

In addition, there are considerably more single mothers than single fathers and single mothers are disproportionately represented among the poor than are single fathers, which means that children who are living with them are poor too.⁷³ In other words, the oft-mentioned "child poverty" is inextricably linked to women's poverty in Canada and other western industrialized states.⁷⁴ Those single mothers who try to re-enter the labour force or education encounter sometimes insurmountable barriers due to lack of childcare, low wages, and so on.⁷⁵

Even in the relatively privileged legal world, women lawyers are leaving the practice of law, citing the impossibility of meeting the expectations of their firms and fulfilling their responsibilities at home. Studies of the British Columbia and Alberta bars also show that there are negative economic and professional consequences associated with a woman's decision to have children, which are visited less often on male lawyers who have children.⁷⁶ In 1993, the Canadian Bar Association Task Force *Report on Gender Equality in the Legal Profession* (hereafter the "Wilson Report") identified these problems and associated them mainly with the culture that surrounds work in the legal profession.⁷⁷ This culture has been shaped by male lawyers and predicated on their work patterns, which assume that they do not

sibility for daily housework (some of which is related to childcare), while 28% had most of the responsibility. Equal sharing of housework was reported in 10% of these families, and in the remaining 10%, the husband had all or most of the responsibility: *110 Canadian Statistics*, *supra* note 25 at 8. Armstrong and Armstrong point out that in many of the time-budget studies, these types of figures do not take account of the constant responsibility that caregiving of children involves: *The Double Ghetto*, *supra* note 1 at 114.

- 72 Women account for 2/3 of volunteers providing care or companionship and 3/4 of those preparing or serving food: D. Duchesne, *Giving Freely: Volunteers in Canada* (Ottawa: Statistics Canada, 1989). See also L. Barr, *Basic Facts on Families in Canada, Past and Present* (Ottawa: Statistics Canada, 1993) 24. Women working outside the home spend 3.2 hours/day on average over a seven day week on household work; men spend 1.8 hrs. G. & N. Zukewich, "Women in the Workplace" in (1993) 28 *Canadian Social Trends* at 6. Women are estimated to be responsible for roughly 2/3 of the dollar value of unpaid household work, accounting for \$13,000 per person worth of work annually per woman, compared to \$7,000 per man: C. Jackson, "The Value of Household Work in Canada, 1986" in *Canadian Economic Observer*, (Ottawa: Statistics Canada, 1992) Cat. No. 11-010, Section 3.1.
- 73 24.4% of single fathers live below the poverty line, while 61.9% of single mothers do: The Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa, 1994) at 87.
- 74 For a recent American analysis, see M.A. Fineman, *The Neutered Mother, the Sexual Family, and other Twentieth Century Tragedies* (New York: Routledge, 1995).
- 75 C. Baines et al., eds., *Women's Caring: Feminist Perspectives on Social Welfare* (Toronto: McClelland & Stewart, 1991) at 180-188.
- 76 See e.g. J. Brockman, "Leaving the Practice of Law: The Wherefores and the Whys" (1994) 32 *Alta L. Rev.* 116-180 [hereinafter "Leaving the Practice"]; "Resistance by the Club" to the Feminization of the Legal Profession" (1992) 7 *Can. J.L. & Soc.* 47 [hereinafter "Resistance by the Club"]; "Bias in the Legal Profession: Perceptions and Experiences" (1992) 30 *Alta L. Rev.* 747; "Gender Bias in the Legal Profession: A Survey of Members of the Law Society of British Columbia" (1992) 17 *Queen's L.J.* 91.
- 77 Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability*, (Ottawa: Canadian Bar Association, 1993) 65.

have significant family responsibilities. The ideological aspects of the public/private divide whereby workers are supposed to be able to rely on a woman at home who will take charge of domestic responsibilities, freeing the worker to go "out" to work, underlie this culture.⁷⁸

The Wilson Report suggested various types of workplace accommodation such as alternative work schedules and assistance in childcare. It then made some controversial proposals on billing procedures in private practice, including a recommendation that law firms set realistic targets of billable hours for women with childrearing responsibilities, pursuant to their legal duty to accommodate. It also suggested that the reduced target of billable hours should not delay or affect eligibility for partnership nor affect normal compensation.⁷⁹ It is not surprising that reaction to these proposals has been heated and mixed,⁸⁰ because they challenged the legal profession at a number of levels, including the monopoly that some lawyers have over legal work. Those who have jobs in the current highly competitive market must do more and more work in order to be paid well, thereby perpetuating a workaholic culture. While this dynamic is not difficult only for women, it has particular implications for women in a society where caregiving and labour remain gendered. It is also necessary to consider the relationship between this phenomenon in the professions and other, lower paid, forms of work that women do.⁸¹

78 *Id.* at 67-68. Among other things, the Wilson Report found that:

- a) the proportion of responsibility borne by women lawyers for their children is almost double that borne by male lawyers;
- b) women lawyers are much more likely to rely on paid child caregivers than male lawyers – by a ratio of three to one;
- c) conversely, male lawyers can count on a spouse or spousal equivalent to be responsible for child care at a rate of approximately three times the spousal assistance available to women;
- d) these different levels of responsibility are reflected in the amount of time spent on child care: women lawyers spend more than double the time as men on child rearing tasks;
- e) many more women report child rearing responsibilities as a reason for leaving practice;
- f) although both men and women lawyers report stress as a result of competing demands of career and childcare, women report negative material effects in form of loss of income or reduced career opportunities;
- g) women felt that the fact they had children resulted in the questioning and testing of their commitment at work more than men.

79 *Id.* at 99.

80 See K. Keating, "Touchstones for Change: A Review" (1993) 51 *Advocate* 843. For a response, see M. Buckley, "Touchstones For Change: A Response" (1993) 51 *Advocate* 853. And N. Verbrugge, "Letter: Re: Gender Issues in the Legal Profession: A Synopsis" (1994) 52(5) *The Advocate* 788; M. Wentz, *Globe and Mail*, Commentary, (27 August 1994) A2; N. Friday, "Special Status for Lawyers Raising Families? Objection!" *Globe and Mail* (28 September 1994) A24. And response by T.G. Heintzman, President, CBA, "Letter to Editor: No Special Treatment" *The Globe and Mail* (5 October 1994) A21. See also D. Pothier, "A Comment on the Canadian Bar Association's Gender Equality Task Force Report" (1993) 16 *Dalhousie L.J.* 484; M.J. Mossman, "Touchstones for Change: Equality, Diversity and Accountability" (1994) 7 *C.J.W.L.* 238. Modified versions of these recommendations on billing were approved by the CBA Council in 1994: Standing Committee on Equality, *Touchstone* (September 1994), 1.

81 See generally R. Pringle, *Secretaries Talk: Sexuality, Power and Work* (London: Verso, 1988).

FEMINIST INTERVENTIONS IN LITIGATION AND LEGISLATIVE REFORM: REINFORCING THE PUBLIC/PRIVATE DIVIDE?

The previous section showed that gendered dynamics related to the public/private divide have not been shifted fundamentally by the seemingly extensive legal changes to employment and family laws. In this part, I review some examples of feminist engagement with both litigation and legislative reform in the family and work realms. The objective is to highlight the intransigence of the public/private divide, its impact on feminist strategies, and the complexities of developing strategies that both take account of women's oppression in the current system *and* challenge the public/private divide at a material level.

Litigation:

Despite the fact that some feminist research on the public/private divide, work, and family, has made its way into litigation and caselaw, it has not succeeded in challenging the material underpinnings of the public/private divide.⁸² Indeed, many initiatives in this realm are informed by the public/private divide, a fact which is not surprising, given that ideological frameworks are difficult to escape. I shall give two examples from litigation that reached the Supreme Court of Canada in the 1990s.

The first example is the *Symes* case⁸³ on the deduction of childcare expenses under the *Income Tax Act*.⁸⁴ In that case the evidence of Dr. Patricia Armstrong, a prominent sociologist who has done perhaps the most important work on women and work in Canada,⁸⁵ was fundamental to the argument of self-employed lawyer Elizabeth Symes in her challenge to the tax treatment of childcare expenses. At the trial level Symes argued, relying heavily on Armstrong's expert evidence, that lack of childcare was a significant impediment to women's participation in the labour force.⁸⁶ Therefore women should be able to deduct childcare expenses as a business expense under the *Income Tax Act*. This argument ultimately failed at the Supreme Court of Canada because the majority of judges (all the men on the court; with all women on the court dissenting) decided that even if it were true that women bear the social costs of childcare, it could not be shown that women actually *pay* for childcare and therefore should receive a tax deduction as a business expense. Mr. Justice Iacobucci said: "Unfortunately, proof that women pay social costs is not sufficient proof that women pay child care expenses."⁸⁷

82 J. Fudge has written on this topic in the context of *Charter* litigation of the 1980's: "The Public/Private Distinction", *supra* note 4.

83 *Symes v. Canada (Minister of National Revenue)* [1993] 4 S.C.R. 695 [hereinafter *Symes* (S.C.C.) cited to S.C.R.].

84 *Income Tax Act*, R.S.C. 1985, c.I-5, ss.9, 18(1)(a).

85 See *The Double Ghetto*, *supra* note 1; P. Armstrong, *Labour Pains: Women's Work in Crisis* (Toronto: The Women's Press, 1984); P. Armstrong & H. Armstrong, *Theorizing Women's Work* (Toronto: Garamond Press, 1990) [hereinafter *Theorizing Women's Work*].

86 *Symes v. Canada (Minister of National Revenue)* [1989] 3 F.C. 59; [1989] 1 C.T.C. 476; 89 D.T.C. 5243; 40 C.R.R. 278; 25 F.T.R. 306.

87 *Symes* (S.C.C.), *supra* note 83 at 765.

Symes' argument, and in particular Pat Armstrong's expert evidence, was a significant effort to challenge the public sphere to expand its funding of childcare and to relate this topic to women's work generally. It presented a forceful challenge to the notion that childcare is a private concern to be regarded as a personal choice, contained and paid for solely within the private sphere of family. Instead it should be publicly recognized through the tax system, which delivers public subsidies for certain activities.

However, Symes' strategy was equally problematic in a number of respects.⁸⁸ All reveal the inadequacy of her argument in addressing the problematic structures of paid work and family responsibilities. Alternatively, perhaps they reveal the limits of law's ability to change these structures. Even if Symes had succeeded, her win would only have benefited the self-employed — both men and women — who are the only taxpayers who can deduct business expenses. In 1991, only 9.4% of women were classified as self-employed in Canada, whereas 18.7% of men were.⁸⁹ As well, the case tended to obscure another significant gender issue in the childcare scenario: professional women like Symes often rely on childcare by nannies, many of whom are women of colour from other countries allowed into Canada mainly for the purposes of performing private childcare, often under exploitative conditions (e.g. living in employers' homes).⁹⁰ Often, these women must leave their own children behind in their home countries in order to take jobs of caring for the children of other women. Symes' success would have offered only a band-aid to place over the difficulty that some (mainly professional self-employed) women have in negotiating the work/family conflict. It would have left the public/private divide more or less intact, in failing to challenge the assumption that childcare is essentially an individual rather than a societal concern and the sometimes exploitative solutions to this individualized responsibility.

Another example of feminist research influencing case law is provided by the *Moge* case on spousal support decided by the Supreme Court of Canada in 1992.⁹¹ This case involved a woman's claim that her ex-husband, who had lived apart from her for many years, should continue to pay spousal support to her under the *Divorce Act*.⁹² LEAF (the Women's Legal Education and Action Fund) successfully intervened in this case to show the systematic undervaluing of women's domestic labour and childcare in the private sphere, and to connect this phenomenon to the "feminization of poverty" — the fact that women are disproportionately represented among

88 See B. Cossman, "Dancing in the Dark" (1990) 10 *Windsor Y.B. Access Just.* 223; N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's L.J.* 179; A. Macklin, "Symes v. M.N.R.: Where Sex Meets Class" (1992) 5 *C.J.W.L.* 498; C.F.L. Young, "Child Care and the *Charter*: Privileging the Privileged" (1994) II(1) *Rev. Const. Studies* 20; C.F.L. Young, "Child Care: A Taxing Issue" (1994) 39 *McGill L.J.* 539.

89 *The Double Ghetto*, *supra* note 1 at 53, citing Statistics Canada, *The Labour Force* (cat. 71-001), Table 13, February 1992.

90 See A. Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 *McGill L.J.* 681.

91 *Moge v. Moge*, [1992] 3 S.C.R. 813.

92 *Divorce Act*, R.S.C. 1985, c.3 (2d Supp.), ss.15, 17.

the poor in Canada.⁹³ LEAF then presented a substantive equality analysis for continued spousal support, based on the premise that Zofia Moge should be compensated for the socio-economic inequities she had endured as a result of the gendered division of labour. The Supreme Court of Canada responded positively and checked a problematic trend in support law during the 1980s, which was to use support law to encourage self-sufficiency and a clean break between spouses rather than to compensate for economic disadvantages suffered due to the assumption of unpaid labour (usually by women) in the private sphere.⁹⁴ The trend towards clean break theory had meant that support either was not awarded, or was terminated within a couple of years after separation or divorce in an effort to *make* women independent. This problematic trend had illustrated the way that family law reforms in Canada since the 1970s had assumed rather too quickly that women were now equal to men and could achieve economic self-sufficiency at more or less the same rate as men. The *Moge* case was significant in its recognition that this was just not so, as was the Supreme Court of Canada decision in *Peter v. Beblow* that built on *Moge* in the development of constructive trust doctrine in the context of property claims by unmarried cohabitants.⁹⁵ Ability to enter the public sphere and “succeed” in it is still highly gendered and this problem seems resistant to being legislated away. The Supreme Court of Canada decision in *Moge* went some way towards recognizing the connections between gendered inequalities in both private and public spheres.

However, in another sense, the *Moge* case problematically reinforced the ideological division between public and private economic responsibilities. The net result of the decision ordering Mr. Moge to pay \$150 per month to a woman he had not lived with for 20 years was that responsibility for women’s poverty should rest wherever possible with a man with whom they have had a recognized relationship. In other words, responsibility for the costs of social reproduction and for economic hardship remains privatized, and the gendered relations of dependency are thereby reinforced.⁹⁶ Attention is not shifted towards more effective ways of alleviating female (and child) poverty. This result is partly due to the practical inability of judicial decision-making to shift fundamentally the way that resources are allocated in society. The seemingly positive result for women on the face of the case

93 Almost 62% of female lone-parent families lived below the low income cut-off in 1991, up from 60.6% in 1990. See Statistics Canada, *Income Distributions by Size in Canada, 1991* (Ottawa, 1992), cat. no. 13-207, 17-18, 22. See also *Women and Poverty Revisited*, A Report by the National Council of Welfare (1990).

94 See M. Bailey, “*Pelech, Caron and Richardson*” (1989-90) 3 *Can. J. Fam. L.* 615; C.J. Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act* 1985 (Part I)” (1990-91) 7 *Can. Fam. L.Q.* 155.

95 [1993] 1 S.C.R. 980.

96 See S.B. Boyd, “(Re)Placing the State: Family, Law and Oppression” (1994) 9 *Can. J.L. & Soc.* 39 for elaboration. See also A. Diduck & H. Orton, “Equality and Support for Spouses” (1994) 57 *Modern L. Rev.* 681 at 700-701. A recent article by Colleen Sheppard points out as well the role of immigration law and policy in reinforcing the economic dependence of women in the family, and the impact of discrimination based on race and sex on employment opportunities. (It is often overlooked that the Moges were an immigrant family.) “Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*” (1995) 12 *Can. J. of Fam. L.* 283, especially at 322-328.

was illusory. On the one hand, with the Supreme Court of Canada "possessing" the field of the feminization of poverty, it appeared that (one arm of) the state had taken measures to deal with this problem, thereby diminishing attention to it by other public policymakers. On the other hand, this approach helped to set the stage for other privatizing initiatives in public policy, such as the child support guidelines recently announced by the federal government.⁹⁷ Seen in this light, the Supreme Court's decision in *Moge* does not appear to be as progressive for women in the long term, despite the feminist philosophy that informed it.

Legislation

Feminists have also intervened in the arena of legislative reform to try to enhance the legal value attached to women's domestic and childcare labour. It is here that many of the contradictions of challenging the public/private divide emerge. As mentioned, some people, including some feminists, have successfully advocated the introduction of child support guidelines, which would regulate the amount of child support owed by non-custodial parents (mainly men). These initiatives, while they may alleviate somewhat the financial difficulties of many custodial mothers, also tend to enhance the privatization of responsibility for children.⁹⁸ Researchers in the United States have shown that privatized remedies particularly disadvantage black women and single mothers.⁹⁹ It has also been pointed out that the redistribution of wealth between male and female spouses after separation or divorce is of limited effect in dealing with difficult economic circumstances. Moreover, this system cannot deal with female poverty as a whole because the majority of poor women are either in intact two-parent relationships or are lone-parents due to widowhood or ex-nuptial birth.¹⁰⁰ The question is whether family law initiatives such as these are worthwhile pursuing in the short term, despite the ideological problems associated with them. Given the government's apparent commitment to initiatives such as child support guidelines, the short term question may be whether to try to shape them, or to abdicate this terrain of struggle.

Child custody law provides an interesting terrain on which to consider this question of short term versus long term strategies. Feminists recently entered the legislative reform debates on child custody and access law, arguing that women's reproductive labour is undervalued by gender neutral developments in the area. In its response to the Department of Justice's March 1993 document, *Custody and Access: Public Discussion Paper*, the Canadian Advisory Council on the Status of Women (hereinafter "CACSW") stated that child custody and access determinations were not

97 These guidelines were announced on March 2, 1996. See Canada, *The New Child Support Package: Budget 1996* (Ottawa: Department of Supply and Service, 1996).

98 J. Pulkingham, "Private Troubles, Private Solutions: Poverty Among Divorced Women and the Politics of Support Enforcement and Child Custody Determination" (1994) 9 *Can. J.L. & Soc.* 73.

99 A.H. Beller & J.W. Graham, *Small Change: The Economics of Child Support* (New Haven: Yale University Press, 1993).

100 M. Eichler, "The Limits of Family Law Reform or, the Privatization of Female and Child Poverty" (1990) 7 *Can. Fam. L.Q.* 59.

only “private” negotiations between seeming equals (parents), but also reflected and reinforced social inequities and social stereotypes that disadvantage women.¹⁰¹ These inequities included some of those outlined earlier in this article, such as the lack of publicly-funded childcare and the sexual division of labour in heterosexual families. The CACSW concluded that the legal system must take into account women’s *current* positions of disadvantage — and their currently disproportionate responsibility for childcare — in order to be fair. If it ignored such positions of disadvantage, law would reinforce the status quo of inequality.

In terms of strategy, the CACSW recommended that “newly fashionable models” such as “parenting plans” not be adopted due to their potential to ignore, and thereby perpetuate, the systemic discrimination that women already face, just as joint custody may do.¹⁰² Instead, the CACSW recommended that a primary caregiver presumption be adopted as the “most effective means to ensure continuity and quality in the nurturing of children and to reduce the power inequities between women and men during custody ‘negotiations’.”¹⁰³ Under this presumption, the parent who had assumed primary responsibility for the caring and nurturing duties related to children in the past (often the mother) would be presumed to be the preferred custodial parent when custody was in dispute. Women who deviate from the idealized norm of middle-class, white, heterosexual, physically and mentally “able” mothers would, it was argued, be treated more equitably under this type of law because the best interests of children would not be determined on the basis of improper assumptions about who constitutes a “good” mother or an “unfit” mother.¹⁰⁴

In recommending that a primary caregiver presumption be adopted, the CACSW built on feminist work on child custody law, which in turn builds on an analysis of the sexual division of labour and the relationship between public and private spheres that shows that women’s caregiving labour is undervalued.¹⁰⁵ This type of feminist work, which often culminates in a strategy for valuing primary caregiving labour in custody law, has been criticized for endorsing a legalistic and individualized strategy to a problem that is much more systemic in nature. This strategy is also criticized for its tendency to reinforce the problematic trends to rely on the private provision of financial support noted above. For instance, Jane Pulkingham argues that

101 Canadian Advisory Council on the Status of Women, *Child Custody and Access Policy: A Brief to the Federal/Provincial/Territorial Family Law Committee* (1994) at 3 [hereinafter CACSW]. (The CACSW was abolished by the federal government in spring of 1995.) See also National Association of Women and the Law, where an emphasis on primary caregiving is proposed but not a presumption *per se*: National Association of Women and the Law, *Response to Custody and Access: Public Discussion Paper* (Ottawa: NAWL, January, 1994).

102 *Id.* at 4. For a more detailed description of such trends, see S.B. Boyd, “W(h)ither Feminism? The Department of Justice Public Discussion Paper on Custody and Access” (1995) 12(2) *Can. J. Fam. L.* 331.

103 CACSW, *supra* note 101 at i.

104 *Id.* at 4.

105 See e.g. C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989); S.B. Boyd, “Child Custody, Ideologies, and Employment” (1989) 3 *C.J.W.L.* 111; M. Fineman, “Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking” (1988) 101(4) *Harv. L. Rev.* 727.

this strategy “will entrench an essentialist gender based division of labour, further privatizing domestic and financial responsibilities that will exacerbate women’s unequal position”.¹⁰⁶ She urges “a more profound questioning of the way in which the issues have been constructed, primarily by feminist legal scholars who...largely ignore any historical materialist conception of social reproduction”.¹⁰⁷ She also takes issue with the notion that maternal custody is jeopardized in the realm of child custody law and practice¹⁰⁸ and prefers a shared parenting approach (which she distinguishes from joint legal custody).¹⁰⁹ She uses the language of “special rights” to describe the types of arguments made by substantive equality feminists, who point out that legal provisions that assume that women and men are similarly situated ignore the reality of women’s disadvantaged social and economic position, thereby exacerbating it.¹¹⁰

There are many problems that can be raised with the primary caregiver presumption, including its propensity to assert a new normative model of mothering that some women cannot measure up to, and the CACSW Brief does raise many of them. The question is whether this strategy, or others such as child support guidelines, are defensible in the short term to deal with the problems that many women face in the custody realm. Pulkingham’s identification of the privatizing effect of many family law trends, including many feminist proposals, is apt. The state is “ostensibly in the business of ‘making fathers pay’ in order to reduce pressure on the public purse and, coincidentally, to alleviate the financial hardship of custodial mothers and their children”.¹¹¹ The difficult issue is how to engage with law in the current conjuncture on women’s behalf, without losing sight of longer term objectives, such as enhancing public or social responsibility for the costs of reproduction and caring. Pulkingham’s strategy — although unclear — seems to be to leave the gender neutral approach intact in custody law and to make extra-legal changes to the public and private spheres that ultimately may enhance meaningful shared parenting between men and women, and collective responsibility generally. The question is what to do until these changes occur.

Pulkingham is correct that maternal custody and motherhood themselves are implicated in the processes that structure women’s current dependency.¹¹² However, it does not necessarily flow from this analysis that an acknowledgement in law of the current gendered nature of caregiving should be avoided. Many feminists who argue the primary caregiver emphasis share Pulkingham’s concern with the parallel development of enforced dependency of women and children on ex-spouses for economic

106 Pulkingham, *supra* note 98 at 76.

107 *Id.* at 76. While this allegation is correct for much feminist legal literature, it is not correct in terms of several of the authors she criticizes, such as Carol Smart and Julia Brophy.

108 *Id.* at 89.

109 *Id.* at 87; 93-94.

110 *Id.* at 87. This type of language is currently being used to attack affirmative action measures for disadvantaged groups such as women, blacks, and aboriginal peoples in the United States and in some parts of Canada.

111 *Id.* at 85.

112 *Id.* at 95.

support. They are, however, concerned about hanging women out to dry until a more collective system of childcare and income maintenance is achieved. This more collective system is an unlikely scenario in the near future given the neo-liberal (conservative) ideology that currently dominates the political scene in Canada and other western industrialized countries.¹¹³ As Abner, Mossman, and Pickett have said, “women’s relation to law and the state is not so simple”.¹¹⁴ Women have relied over the past century on the state and on law to ameliorate some conditions of their lives, in the short term, while also often recognizing that law has had long term negative repercussions in reinforcing the conditions of oppression, including the public/private divide.

Pulkingham refers to the public/private divide in her analysis, arguing that feminist arguments in favour of the primary caregiver presumption advocate a withdrawal by the state from the “private” sphere: “Despite the fact that the feminist movement has pointed to the artificial separation of public and private realms, a device that serves to perpetuate women’s subordination, calls for the primary caregiver presumption appear to be perilously close to suggesting that relationships *within* the family are and should remain off-limits to social intervention.”¹¹⁵ In support, she notes that some feminist authors have pointed to the relative incapacity of law to radically restructure familial relationships related to the care of children.¹¹⁶ These authors have not, however, argued that law should, or indeed could, abdicate the field of custody determination. Rather, as Pulkingham herself then goes on to show, the point is that law *always* regulates the private sphere of family in some way; the question is how. Law is not capable on its own of transforming gendered social relations related to childcare responsibility, and gender-based parental roles have demonstrated considerable inertia to initiatives such as parental leave.¹¹⁷ Given this problem, a neutral law on custody may exacerbate law’s tendency to overlook women’s caregiving labour. A better use of law, at least in the short term, may be to create a mechanism, such as the primary caregiver presumption, that potentially can recognize and value that labour more effectively than the current system. While the primary caregiver presumption has many problems

113 See J. Brodie, *Politics on the Margins: Restructuring and the Canadian Women’s Movement* (Halifax: Fernwood Publishing, 1995).

114 E. Abner, M.J. Mossman & E. Pickett, “No More Than Simple Justice: Assessing the Royal Commission Report on Women, Poverty and the Family” (1990) 22 *Ottawa L.J.* 573 at 602.

115 Pulkingham, *supra* note 98 at 91; oddly, she suggests in a footnote that this line of thought is characteristic of radical feminism. Yet, while some radical feminists are separatists, those radical feminists who deal with law tend to be particularly critical of the state’s absence in the private sphere, in terms of dealing with violence against women, pornography, and so on. Socialist feminists *tend* to have a more nuanced approach to the state, noting its contradictory character and its potential as a site of struggle. See S.B. Boyd & E.A. Sheehy, “Feminist Perspectives on Law: Canadian Theory and Practice” (1986) 2 *C.J.W.L.* 1 at 13-18.

116 See e.g. S.B. Boyd, “Potentialities and Perils of the Primary Caregiver Presumption” (1990) 7 *Can. Fam. L.Q.* 1; J. Brophy, “Custody Law, Child Care and Inequality in Britain” in Smart & Sevenhuijsen, eds., *supra* note 105, 217.

117 See N. Iyer, “Some Mothers Are Better Than Others: A Re-Examination of Maternity Benefits” in S.B. Boyd, ed. *Challenging the Public/Private Divide* (Toronto: University of Toronto) [forthcoming].

attached to it, it may be a better means of informing the best interests of the child standard in the current context than the open-ended approach that now prevails.

Overall then, feminist interventions in the family law reform arena have often, somewhat perversely, reinforced aspects of the public/private divide. In particular, privatized (familial) responsibility for childcare and associated costs of social reproduction has been reinforced. While this ideological problem is serious, it is not clear that these feminist initiatives should be abandoned. Rather, they must be accompanied by other strategies that challenge the privatization trends now dominating Canadian social policy.

CONCLUSION: THE CHALLENGE

In order to draw the themes of this article together, I now return to the question of why the gendered divide between public and private is so entrenched. Why, for example, is the gendered nature of caregiving and domestic labour so difficult to shift through legal change? Why are feminist strategies so often imbued with aspects of public/private ideology?

Although feminist activists and lawyers have challenged aspects of the public/private divide and its gendered nature, the way that society is organized materially along the lines of public and private has not been fundamentally challenged by litigation or legislative reform.¹¹⁸ Laws have encouraged women to enter the labour force and men to share domestic labour, or at least pay for it more at the point of separation or divorce. But can law, on its own, persuade human beings to change their behaviour in this fundamental kind of way? The factors leading women to assume more responsibility for caring roles in the private sphere (and the public for that matter) are deeply embedded in social and economic structures — in the material relations of production and reproduction.¹¹⁹ Changing law *alone* will not shift these structures, although such changes may be important in the immediate politics of gender relations in any one instance. Legal changes that do not effectively ameliorate women's oppression may in fact highlight the need to deal with social and economic structures. Changing law alone has sometimes caused very serious problems for women, for example in the custody field. It is not clear that neutral statutory provisions that apparently encourage men to share domestic and childcare labour will work well before a more fundamental transformation of the material relations of society is achieved.¹²⁰ In addition, many of the challenges to law have accepted a couple-based, heterosexual model of family as the norm, a norm against which many fail to measure up and that forms part of problematic social and economic structures.¹²¹

The public sphere has opened to women without changing itself much

118 "The Family and the Market", *supra* note 4, has shown that most law reforms designed to deal with family and work have in fact ended up reinforcing the public/private divide. See also "The Public/Private Distinction", *supra* note 4.

119 See *Theorizing Women's Work*, *supra* note 85.

120 See Boyd, *supra* note 56 and Fineman, *supra* note 56.

121 "Expanding the 'Family'", *supra* note 54.

and without corresponding changes being made to support the private sphere which remains responsible for the costs of reproduction. Many forms of work, including the legal profession, are still being run on a male and ethnocentric model, which assumes — among other things — that the private sphere needs of men (and now women) are being met by someone else. Who is going to clean the house and care for children if adults in a family work full-time in the paid labour force? At present women continue to perform this labour to a greater extent than men in heterosexual couples. That “choice” appears to make sense, since women take time off work to care for newborns and their own bodies, and men tend to earn more on average, so there is little incentive for men to take time off. The norm of full-time work also exacerbates that “choice”. In the case of wealthier couples, people may be hired and paid to clean their houses and care for the children. But these models only work for two-parent families and for couples who can afford either the option of having one non-earning partner or purchasing caregiving labour from a third party. The difficulties faced by single mothers and by couples who experience unemployment cannot begin to be addressed by these options.

One of the paradigmatic examples of a group that is constructed as a drain on the social welfare system in current debates is single mothers on welfare.¹²² The message seems to be that those who have been reliant on social welfare must find a way to enter the public sphere of paid work, and pay their own way. In order to relieve the public of responsibility for social welfare, people are told to get into the public sphere of paid work. How they are to manage their “private” responsibilities or indeed find these jobs remains unresolved. It is no wonder that those who do hold paid jobs in the Canadian economy experience tremendous stress and spend more and more hours per day handling paid work and private responsibilities; while those without paid work are increasingly marginalized and constructed as “dependent” on society.¹²³

At a larger level, a retrenchment of the role of the public is occurring, in the sense of providing state support for responsibilities that can be constructed as “private” — especially “caring” functions¹²⁴ — as governments try to deal with the deficit and the public debt.¹²⁵ Indeed, this example is illustrative. Who or what are governments cutting and is it gendered? Governments are cutting social services, welfare, unemployment insurance, education, health care, and all areas where women dominate as consumers and very often as workers.¹²⁶ The difficulties in arguing for more collective

122 See Government of Canada, *Improving Social Security in Canada: A Discussion Paper* (Ottawa: Ministry of Supply and Services, 1994) at 20-21 [hereinafter *Improving Social Security*]. However, even people who claim unemployment insurance are now being constructed as undeserving.

123 See generally, B. O'Hara, *Working Harder Isn't Working: How We Can Save the Environment, the Economy, and Our Sanity by Working Less and Enjoying Life More* (Vancouver: New Star Books, 1993).

124 C.T. Baines, P.M. Evans & S.M. Neysmith, “Caring: Its Impact on the Lives of Women” in Baines, ed., *Women's Caring*, *supra* note 75, 11.

125 See *Improving Social Security*, *supra* note 122.

126 See Brodie, *supra* note 113.

social responsibility for children and income maintenance are therefore multiplied.

Ultimately, how can the debate be shifted? Analysis of the public/private divide literature indicates that the answers lie in a much more fundamental reworking of the ways that the two spheres interact, and changing the way that the public sphere currently relies on “free” or underpaid labour, usually female, in the private sphere. As Evans and Pupo put it, “women’s inequality in the home and in employment are inextricably linked.... The problem is the distinction made between work and family policy, and between equality at work and equality at home.”¹²⁷ The private sphere is stretched about as far as it can go, yet the gendered nature of childcare labour in that sphere is underrated and undervalued. The privatization trend evident in Canada may ultimately be doomed, although it currently appears inevitable. Care for dependent people such as the sick and the elderly is increasingly being removed from the public sphere and relegated (again) to the already overtaxed private sphere of women.¹²⁸ Either the model of full-time work must change, or the public sphere must assume more responsibility for fundamental social responsibilities such as childcare, or probably both.

In some sense, the controversial Wilson Report recommendations on legal billing¹²⁹ challenged the model of full-time — or rather overtime¹³⁰ — work to change. The angry responses to this recommendation reflect a number of things, but perhaps most fundamentally the way that economic interests are entrenched in a (male) model of work that has been facilitated in the past by female unpaid labour in the home. Perhaps a better question to ask — and many women lawyers have asked it — is why encourage only women to bill fewer hours? The accommodation approach of the Wilson Report, if used on its own, reinforces the difference approach to women that historically has all too often resulted in the reinforcing of women’s place in the “private” sphere. Options are possible that give all lawyers incentives *not* to work such outrageous hours; to share work more; to develop lives outside work; to care for their own children, or other peoples’ children if they do not have their own. The Wilson Report laid groundwork for moving in this direction while rightly highlighting the need also to recognize women’s currently disproportionate responsibility for domestic labour. However, in concentrating mainly on “accommodating” women, the Report failed to recognize the radical potential in its own analysis. The challenge for social and legal policy now is to try to achieve this type of radical potential in different fields of work, rather than falling back on traditional models that embody the public/private divide and the gendered, classed, and racialized social relations connected to it.

In trying to reframe strategies related to law, it is necessary to avoid dichotomizing the public and private spheres. As we have seen, the two are

¹²⁷ Evans and Pupo, *supra* note 51 at 407.

¹²⁸ See P. Armstrong, “Restructuring the Public and Private: Women’s Paid and Unpaid Work” in S.B. Boyd, ed., *Challenging the Public/Private Divide* (Toronto: University of Toronto) [forthcoming].

¹²⁹ *Supra* note 78.

¹³⁰ See Pothier, *supra* note 80.

interconnected in a complex manner. It is not possible to advocate only a shifting of the “solution” to the public sphere, for example, as this sphere too is infected by familial ideology and by privatization. Nor can women in the “private” sphere be abandoned to seemingly progressive gender neutral strategies in legal realms such as custody law before gendered relations in the private sphere are shifted. Changing legal ideology alone cannot fundamentally challenge the material relations underlying familial ideology and the ideology of the public/private divide. Yet law cannot be abandoned as a site of struggle that women must often rely on in the short term, while also seeking extra-legal material change in the longer term. In a time of apparently shrinking resources, it is ironically the case that feminist strategies must increasingly be deployed at multiple levels to resist the ways in which the public/private divide has influenced gender-based social organization.