

# NO MORE THAN SIMPLE JUSTICE: ASSESSING THE ROYAL COMMISSION REPORT ON WOMEN, POVERTY AND THE FAMILY

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*The Report of the Royal Commission on the Status of Women in Canada identified barriers to opportunities for women in a number of different contexts, and made recommendations for changes to improve opportunities for women and to ameliorate their problems. In reviewing the Report's chapters on Family (Chapter IV) and Poverty (Chapter VI), this article assesses its underlying assumptions in the lives of women and men in Canada, and suggests a need to reassess more carefully the usefulness of legal strategies and the impact of family ideologies in designing feminist objectives for the 1990. Although the article is critical of the Report because of its failure to question such underlying assumptions, there is also recognition of the Report's significant contribution in identifying the issues and in encouraging dialogue about equality objectives for women and the appropriate means of achieving them.*

*Le Rapport de la Commission royale d'enquête sur la situation de la femme au Canada a identifié des entraves aux possibilités des femmes dans différents contextes et recommandé des changements pour améliorer les chances des femmes et amoindrir leurs problèmes. Au moyen d'une étude des chapitres sur la famille (chapitre IV) et la pauvreté (chapitre VI), cet article examine les présomptions sous-jacentes du Rapport sur la vie des Canadiennes et des Canadiens et indique qu'il est nécessaire, pour l'élaboration des objectifs féministes des années 1990, de réexaminer plus attentivement l'utilité des stratégies juridiques et l'impact des idéologies concernant la famille. Bien que l'article critique le Rapport parce qu'il ne remet pas en question ces présomptions sous-jacentes, il reconnaît également l'importante contribution du Rapport qui a identifié les problèmes et suscité le dialogue sur les objectifs d'égalité pour les femmes et les moyens appropriés pour les atteindre.*

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## I. INTRODUCTION

The disjunction between what can be and what is has been the driving force of western civilization for as long as we have a collective memory. That women's dissatisfaction was eventually focused into a movement to change their status brings us back to where we began: the urge to hear the voices of our female ancestors who have so long been considered unworthy of being heard.<sup>1</sup>

This statement about the diaries and letters of women in Nova Scotia from as early as 1771 neatly captures the spirit of the REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA two centuries later in 1970.<sup>2</sup> Like the earlier diaries and letters, the REPORT similarly identified the need for societal changes concerning the status of women, and gave moving expression to women's voices, including both those of the members of the Commission and those who gave testimony before them.<sup>3</sup> In responding to the requirements of its Terms of Reference "to recommend what steps might be taken by the Federal Government to ensure for women equal opportunities with men in all aspects of Canadian society",<sup>4</sup> the Commission issued 167 recommendations and provided women with "a vehicle to express their aspirations",<sup>5</sup> aspirations characterized as "elementary human rights and genuine equality".<sup>6</sup> As the REPORT stated in its conclusion:

[Women] require a high degree of resolution to disregard present barriers and to attain the positions which best reflect their ability. But existing structures are not sacrosanct: women must be aware that they are entering a world that can be changed. And men, as they recognize women's claim to equality, may welcome an opportunity to examine Canada's institutions in a new light.

In terms of Canada's commitments and the principles on which a democracy is based, what we recommend is *no more than simple justice*.<sup>7</sup>

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<sup>1</sup> M. Conrad, T. Laidlaw & D. Smyth, *NO PLACE LIKE HOME: DIARIES AND LETTERS OF NOVA SCOTIA WOMEN, 1771-1938* (Halifax: Formac, 1988) at 305-06.

<sup>2</sup> (Ottawa: Information Canada, 28 September 1970) (Chair: F. Bird) [hereinafter REPORT].

<sup>3</sup> The Commission was composed of Florence Bird, Chairman [sic], Jacques Henripin, John P. Humphrey, Lola M. Lange, Jeanne Lapointe, Elsie Gregory MacGill and Doris Ogilvie. The Executive Secretary was Monique Bégin. See Terms of Reference and Appendix of the REPORT, *ibid.*

<sup>4</sup> See Terms of Reference of the REPORT, *ibid.* at vii, which also identified specific topics for consideration by the Commission, "without restricting the generality" of the broadly-stated mandate, including issues such as laws and practices concerning political rights, women and the labour force, education and training, women in the public service, taxation, marriage and divorce, criminal law, and immigration and citizenship.

<sup>5</sup> *Ibid.* at 3.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at 393 [emphasis added].

Twenty years after the REPORT's publication, it is instructive to assess its impact on women and men in Canadian society, and the extent to which its voices, unlike so many of those in the Nova Scotia diaries from 1771, have been "considered ... worthy of being heard".<sup>8</sup>

Such an assessment is, however, not a simple task. It requires us to revisit the REPORT's understanding of the issues and its proposed recommendations, to identify those which have been implemented and those which remain unaddressed, and to try to evaluate the REPORT in terms of both its impact and its vision. Implicit in such a task are a myriad of questions about the assessment process and its criteria. In relation to recommendations which have been implemented, for example, how can we assess the significance of the Commission's REPORT in the implementation process, and what are the criteria appropriate to an assessment of the extent to which recommendations which have been implemented have been "successful"? Similarly, in relation to recommendations which have not been implemented, how should we assess their continued usefulness as well as the reasons for their lack of "successful" implementation? And, assuming that we can confidently identify "successes" and "failures" in terms of the REPORT's recommendations, how should these conclusions influence an overall assessment of the work of the Royal Commission, either in the context in which it was produced in 1970 or more recently from a vantage point in our own time?

Such questions focus attention on the process of social change and the need to identify clearly the criteria adopted for measuring and assessing its role and impact.<sup>9</sup> Significantly, both the terms of reference of the Commission and its recommendations accept (almost without qualification) a primary role for law and legal changes in achieving equality objectives for women and men in Canadian society. Especially in the years since 1970, however, legal scholars have grown more and more skeptical of the usefulness of law's role in achieving substantive

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<sup>8</sup> According to Florence Bird, 92% of its recommendations have been wholly or partially implemented, and she has asserted that "[i]t probably had more of an impact than any other Royal Commission in history." A. Munter, "1970 Royal Commission Report Still Debated by Feminists" *The Ottawa Citizen* (1 November 1990) A1.

<sup>9</sup> The nature of social change has been a major focus of concern for legal academics in recent years, frequently influenced by the concept of paradigm shift in the work of Thomas Kuhn. See T. Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, 2d ed. (Chicago: University of Chicago Press, 1970). See R. Devlin, *Twisting the Tourniquet Around the Pulse of Conventional Legal Wisdom: Jurisprudence and Law Reform in the Work of Robert A. Samek* (1987) 11 DALHOUSIE L.J. 157, for a major assessment of law and social change. See also S. Brickey & E. Comack, *The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?* (1987) 2 CAN. J. OF LAW AND SOC. 97.

social change,<sup>10</sup> and such scepticism has been even more pronounced in the context of legal changes to benefit the status of women. Indeed, Carol Smart has characterized the relationship of women to law reform in the decades since World War II as "running hard to stand still",<sup>11</sup> reflecting both the enormous amount of law reform activity and the paucity of substantive gains for women which have been thereby accomplished. In such a context, the need to assess the REPORT's success in terms of the relationship between legal and social changes raises profoundly difficult questions about appropriate methodology, criteria and perspective.

This essay explores some of these questions in the context of assessing the REPORT's recommendations concerning "Women and the Family" (Chapter IV) and "Poverty" (Chapter VI). These topics, and the REPORT's treatment of them, offer important insights about the role of law in achieving social change and its impact on the lives of women in Canada. The essay begins with an overview of the REPORT's recommendations on the issues of family and poverty in the context of an assessment of the REPORT's assumptions about the nature of law and social change. This context provides the basis for a more extended critique of the REPORT's conclusions in relation to 1) the limits of legal and constitutional principles for assisting poor women, and 2) the pervasiveness of ideology in family law reform, particularly in relation to "new" procedures for resolving family disputes. From these perspectives, it is possible to begin an analysis of the REPORT's conclusions and to assess its accomplishments, both in terms of its vision in 1970 and in terms of the tasks which remain for us twenty years later.

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<sup>10</sup> See, e.g., J.F. Handler, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (New York: Academic Press, 1978); A. Watson, *THE EVOLUTION OF LAW* (Baltimore: Johns Hopkins University Press, 1985); and A.E.-S. Tay & E. Kamenka, eds, *LAW-MAKING IN AUSTRALIA* (Melbourne: Edward Arnold, 1980).

<sup>11</sup> *Feminism and Law: Some Problems of Analysis and Strategy* (1986) 14 INT'L J. OF SOCIOLOGY OF LAW 109 at 116:

It is inaccurate to assert that nothing has changed to improve the position of women. Equally there has been no linear development of progressive legislation. Advances in one area (e.g. equal pay) are mitigated by reactionary measures elsewhere (e.g. employment protection legislation). Similarly the extension of equal treatment under social security legislation has occurred at a time when the value of National Insurance Benefits has been seriously eroded. Finally women's property rights have improved on condition that they are the primary carers of children, and yet at the same time there is a growing challenge to women's rights to sole custody of children on divorce.

## II. WOMEN, POVERTY AND THE FAMILY: THEMES AND CONNECTIONS

### A. *Underlying Themes: Equality and the Ideology of Family*

The starting point for the Commission's REPORT was the equality guarantee in Article 1 of the *Universal Declaration of Human Rights*: "All human beings are born free and equal in dignity and rights."<sup>12</sup> The use of the language of equality was most significant for the Commission's conceptualizing about the status of women in Canada, and for the solutions which it eventually proposed. While openly acknowledging the continued existence of discrimination against women, and the fact that Canada's espoused commitment to sex equality was "far from being realized", the Commission's response asserted (in accordance with its Terms of Reference) that the objective should be "equality of opportunity for everyone" in Canadian society.<sup>13</sup> Not only did the REPORT adopt the language of equality of opportunity, a concept frequently criticized since 1970 in terms of equality objectives for women,<sup>14</sup> but it also used maleness as the standard to which women should aspire; as the Terms of Reference stated, the Commission's task was to make recommendations "to ensure for women equal opportunities with men".<sup>15</sup>

Yet, despite the adoption of an equality of opportunity goal and the use of maleness as the standard for comparison, the principles adopted by the Commission suggested a blend of these objectives, with some recommendations demonstrating more substantive aspects. Basically, the Commission adopted four principles: freedom of choice

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<sup>12</sup> *Supra*, note 2 at xi. See also *Universal Declaration of Human Rights*, GA Res. 217A, 3 UN GAOR Pt 1, UN Doc. A/810 (1948). The REPORT explained, at xi, the impact of this principle as follows:

Canada is, therefore, committed to a principle that permits no distinction in rights and freedoms between women and men. The principle emphasizes the common status of women and men rather than a separate status for each sex. The stage has been set for a new society equally enjoyed and maintained by both sexes.

<sup>13</sup> *Supra*, note 2 at xi.

<sup>14</sup> See, e.g., M. Eberts, *Sex and Equality Rights* in A. Bayefsky & M. Eberts, eds, *EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (Toronto: Carswell, 1985) 183; N.C. Sheppard, *Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms* (1986) 10 DALHOUSIE L.J. 195; M.E. Atcheson, et al., *WOMEN AND LEGAL ACTION: PRECEDENTS, RESOURCES AND STRATEGIES FOR THE FUTURE* (Ottawa: Canadian Advisory Council on the Status of Women, 1984); K. Lahey, *Feminist Theories of (In)Equality* in S. Martin & K. Mahoney, eds, *EQUALITY AND JUDICIAL NEUTRALITY* (Toronto: Carswell, 1987) 71; A.R. Miles, *Feminism, Equality and Liberation* (1985) 1 C.J.W.L. 42.

<sup>15</sup> *Supra*, note 2 at xi and Terms of Reference. The REPORT further suggested, at xii, that "there should be equality of opportunity to share the responsibilities of society as well as its privileges and prerogatives" [emphasis in original].

(about paid workforce participation) for women; shared parenting responsibilities for mothers, fathers and society; special treatment for women in relation to maternity; and interim special treatment measures to overcome the adverse effects of discriminatory practices.<sup>16</sup> The sharing of parental responsibilities by both mothers and fathers, as well as society, appeared to be directed to equality of opportunities for men and women, although it can also be understood as more than an issue of choice and one which requires revision in societal structures to be effective. Both the principles of freedom of choice for women to participate in the paid labour force and recognition of maternity, by contrast, appeared to be directed to equality in the absence of "sameness", that is, equality of outcome in which maleness may or may not be the standard. Moreover, the principle of "interim special treatment measures" to overcome adverse effects of discriminatory practices represented a departure from equality of opportunity goals and perhaps also from the maleness standard. Thus, it might be argued that the four principles adopted by the Commission were not necessarily consistent with its basic goal of equality of opportunity, a concept which places emphasis on individual effort and which does not take into account the impact of systemic barriers within societal structures.

Such a conclusion, however, must take account of the context in which the REPORT was prepared and published. Preceding the sex equality claims in cases like *A.G. Canada v. Lavell*<sup>17</sup> and *Bliss v. A.G. Canada*<sup>18</sup> which interpreted the equality provision of the *Canadian Bill of Rights*,<sup>19</sup> and also discussion of the *Canadian Charter of Rights and Freedoms*<sup>20</sup> and its guarantees of sex equality, the REPORT focused on the identification of practical goals to improve the status of women rather than a detailed analysis of equality in legal and philosophical terms. Indeed, it was this highly pragmatic approach to solutions which (at least in part) led to the lengthy Minority Report of Commissioner John Humphrey, sternly opposing the concept of compensatory treatment completely and the application of the concept of special treatment to women.<sup>21</sup> Viewed in this context, it is clear that the REPORT made

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<sup>16</sup> *Ibid.* at xii.

<sup>17</sup> (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481.

<sup>18</sup> (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.

<sup>19</sup> S.C. 1960, c. 44, s. 1(b), reprinted in R.S.C. 1985, App. III.

<sup>20</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>21</sup> REPORT, *supra*, note 2 at 434-35 and 437-39. With respect to the issue of special treatment, the Minority Report stated:

The principle, although valid, is open to abuse and can work against the real interests even of the group which it is meant to protect. Special treatment for women compared to men comes very near, moreover, to the protective measures to which so many women object. Whatever their situation may be in certain under-developed countries, the present condition of women in this country does not, in my opinion, justify recourse to special treatment.

an important contribution to the equality debate in the years after 1970, a debate which continues to the present time to challenge us both in theory and in practice. In terms of this continuing debate, it is crucial to assess the extent to which equality goals for women, now guaranteed in the Constitution, have potential to make further changes in the status of women in Canada.

The principles enunciated by the Commission also demonstrate the significance of ideas about the family, and the role of women in families. Both in its statement of criteria and principles at the outset, and in relation to individual sections, the REPORT accorded priority to norms declared by the *Universal Declaration of Human Rights* and the U.N. *Declaration on the Elimination of all Forms of Discrimination against Women*.<sup>22</sup> More specifically, the REPORT quoted the *Universal Declaration of Human Rights* at the beginning of both Chapter IV (Family) and Chapter VI (Poverty):

The family is the natural and fundamental group unit of society and is entitled to protection by Society and the State.<sup>23</sup>

...  
Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond his control.<sup>24</sup>

While both of the Articles quoted from the *Universal Declaration of Human Rights* support the importance and well-being of families, it is arguable that (in addition to the use of gendered language), they reflect an acceptance of the norm of a family with a male head-of-the-household; and that it is thus the male head-of-the-household for whom the benefit of family life and freedom from poverty is primarily provided. Such statements about family life were, of course, quite prevalent at the time of the REPORT's publication. Indeed, the 1973 WORKING PAPER ON SOCIAL SECURITY IN CANADA<sup>25</sup> similarly reflected both gendered language and a concept of family which included a male head-of-the-household.<sup>26</sup> In this context, the REPORT was unremarkable at the same time as it failed to question the role of women in families.

Yet, there is also some evidence that the Commission recognized the dichotomy of women's status and their roles within the family

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<sup>22</sup> YEARBOOK OF THE UNITED NATIONS, 1967 (New York: U.N., 1969) at 518.

<sup>23</sup> REPORT, *supra*, note 2 at 225 quoting Article 16.

<sup>24</sup> *Ibid.* at 309 quoting Article 25(1).

<sup>25</sup> Canada, Department of Health and Welfare, 2d ed (Ottawa: Supply and Services, 1973) [hereinafter WORKING PAPER].

<sup>26</sup> According to the WORKING PAPER, *ibid.* at 4-5, Canadians believe that "each should contribute, to the extent *he* is able, to *his* own and *his* family's well-being" [emphasis added].



unit. In acknowledging the poverty of sole-support mothers and of single elderly women (for whom no male head-of-the-household existed), for example, the REPORT implicitly recognized "families" apparently excluded from the norm created by these international documents. At the same time, however, the REPORT's focus on measures to make such poor households more like those which were "normal" reinforced the basic norm of the family, while obscuring the disparate economic impact of traditional familial roles on men and women.<sup>27</sup> In this way, the REPORT's recommendations failed to question the systemic barriers created for women by the ideology of the family.

The adoption of equality of opportunity goals and international law norms espousing the ideology of the family as the fundamental basis for the Commission's REPORT significantly influenced both its definition of the problems and the kinds of remedies it proposed. In the context of family life and poverty issues, moreover, the REPORT generally failed to note important theoretical connections between them, a failure which prevented the Commission from considering proposals dependent on the links between them. In relation to recommendations about "private" re-ordering after divorce, for example, the REPORT made no connection to its clear recommendation for a guaranteed annual income. To further assess the significance of the REPORT, therefore, it is necessary to review its recommendations about poverty and about family life, and then to explore some connections between these recommendations and the underlying principles of the REPORT. To this we now turn.

## B. *Poverty Issues*

The Commission's REPORT recognized poverty as a significant aspect of women's lives in Canada, although it noted that the situation of poor women was "an unexpectedly significant finding" in the Commission's investigation. The Commission concluded that:

- (a) probably, in total, more women than men are poor, (b) there are specific groups of women, such as sole-support mothers, who are extremely poor, and (c) while discrimination and the lack of supporting social institutions cause hardship among women at all income levels, they cause greatest distress among women who are poor.<sup>28</sup>

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<sup>27</sup> There has been a large amount of literature on this topic. See, e.g., N. Mandell & A. Duffy, eds, *RECONSTRUCTING THE CANADIAN FAMILY: FEMINIST PERSPECTIVES* (Toronto: Butterworths, 1988); M. Eichler, *FAMILIES IN CANADA TODAY: RECENT CHANGES AND THEIR POLICY CONSEQUENCES* (Toronto: Gage, 1983); B. Thorne & M. Yalom, eds, *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* (New York: Longman, 1982); M.A. Glendon, *THE NEW FAMILY AND THE NEW PROPERTY* (Toronto: Butterworths, 1981); L.J. Weitzman, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (New York: Free Press, 1985); P. McDonald, ed., *SETTLING UP* (Sydney: Prentice-Hall of Australia, 1986).

<sup>28</sup> REPORT, *supra*, note 2 at 309.

This chapter of the REPORT provided an analysis of the nature of poverty ("Poverty is to be without sufficient money, but it is also to have little hope for better things. It is a feeling that one is unable to control one's destiny, that one is powerless in a society that respects power"<sup>29</sup>), and the particular impact of poverty on women, both in family units and alone. The REPORT also documented the extent and nature of poverty for three especially vulnerable groups of women: sole-support mothers, elderly women, and Indian, Métis and Eskimo women, in addition to describing poignantly the plight of women in traditional poor families:

Poverty affects all members of a family, but often it is the wife and mother who is subject to greatest stress. It is her immediate responsibility to cope with crowded, inadequate housing and limited budgets. Frequently she gives priority to the needs of her husband, who must present a suitable appearance to the outside world, and to the children, whose future depends on the care she can give them. Her needs come last, and she may be the last person in the family to receive medical or dental care, to have new clothing, or to enjoy any recreation or interests outside her home.<sup>30</sup>

In such descriptions, the REPORT has arguably given poverty a female face, one which has not diminished over the past two decades. According to the National Council of Welfare, "[t]he shocking fact ... is that the proportion of women among Canada's poor" did not change noticeably in the decade of the 1980s,<sup>31</sup> and that both elderly women and single-parent families headed by women remained vulnerable to poverty "for reasons almost totally beyond their control" — child care responsibilities, labour market inequities, marriage breakdown and widowhood.<sup>32</sup>

In the face of such developments, it may be significant that the Royal Commission REPORT in 1970 made only four recommendations directed specifically to the problem of women and poverty. The REPORT recommended the establishment of hostels and counselling services for "transient girls and women" (No. 134); increases in the amount of the Guaranteed Income Supplement to meet the poverty line, adjusted to the cost of living index (No. 136); and the establishment or expansion of friendship centres to provide services to Indian, Métis and Eskimo people (No. 137). None of these recommendations challenged systemic sex discrimination or the basic economic problems faced by poor women. Only the fourth recommendation — to pay a guaranteed annual income to heads of one-parent families with dependent children (No. 135) — seemed to be a significant departure from current programs,

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<sup>29</sup> *Ibid.* at 311.

<sup>30</sup> *Ibid.* at 313.

<sup>31</sup> Canada, National Council of Welfare, *WOMEN AND POVERTY REVISITED* (Ottawa: Supply and Services, 1990) at 1.

<sup>32</sup> *Ibid.* at 2.

and such a proposal has reappeared more recently in the idea of the child benefit recommended in the report of the Social Assistance Review Committee in Ontario.<sup>33</sup>

The paucity of recommendations about women and poverty in the REPORT may appear initially puzzling. According to the Commission, a concerted effort was made to curtail the number of such recommendations to avoid stigmatization of the poor and to ensure a broad level of public support for services needed by women, rich and poor alike.<sup>34</sup> Regardless of the merits of such a strategy in 1970, such an approach must be assessed now in terms of options available to women living in poverty in Canada and the extent to which other strategies may be more useful. Such an issue necessarily raises the question of the significance of the *Charter* and constitutional litigation as a means of redressing women's poverty, an issue which is canvassed more fully below.

### C. Family Issues

The Commission's REPORT identified a larger number of issues concerning women and family. In relation to marriage, the REPORT recommended that legislation be enacted establishing 18 years as the minimum age for marriage (No. 102) and permitting a married woman to have an independent domicile (No. 105), a passport in her own name or her married name at her discretion (Nos 103 and 104); and that the *Indian Act*<sup>35</sup> be amended so that an Indian woman, on marriage to a non-Indian, might retain her status and transmit Indian status to her children (No. 106). Except for the recommendation to raise the age of marriage, most of these proposals have been implemented, although not always in just the way envisaged by the Commission.<sup>36</sup>

In relation to divorce, the REPORT recommended that divorce be available following a one-year separation (No. 113) and that provincial and territorial legislatures establish Family Courts (No. 111) with an assessment branch dealing with the assessment and payment of alimony and maintenance (No. 112). The REPORT also recommended legislation to provide for maintenance of children over 16 years old in relation to "educational needs" (No. 114) and that ceilings on maintenance awards be abolished (No. 110). Finally, three recommendations were directed

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<sup>33</sup> Ontario, Community and Social Services, TRANSITIONS: REPORT OF THE SOCIAL ASSISTANCE REVIEW COMMITTEE (Toronto: Queen's Printer, 1988) [hereinafter TRANSITIONS].

<sup>34</sup> REPORT, *supra*, note 2 at 331.

<sup>35</sup> R.S.C. 1970, c. I-6. [R.S.C. 1985, c. I-5].

<sup>36</sup> See, e.g., H. Penner, BACKGROUND PAPER: BILL C-31, AN ACT TO AMEND THE INDIAN ACT (Ottawa: National Association of Women and the Law, 1988); D.L. Hawley, THE ANNOTATED 1990 INDIAN ACT (Toronto: Carswell, 1990) for an overview of the reform of the status of Indian women.

to achieving equality between spouses through amendments to provincial laws (No. 108) and the federal *Criminal Code*<sup>37</sup> (No. 109) to ensure that husbands and wives were equally liable to provide support for a spouse and children, and in relation to matrimonial property. In relation to the latter issue, Recommendation No. 107 provided:

[W]e recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources.<sup>38</sup>

As is evident in the wording of this recommendation, the REPORT strongly reinforced the idea of equality within the family unit, apparently without regard to systemic barriers to economic equality for men and women in society generally. Indeed, while most of the REPORT's recommendations concerning arrangements at divorce have been implemented since 1970, the fact that women's poverty has not declined in the same period raises a serious question about the utility of family law reform as a means of overcoming systemic inequality in marriage and divorce arrangements.<sup>39</sup>

The REPORT also focused on parental responsibilities in terms of child care arrangements and reproduction. The recommendations included suggestions about sliding scale fees for day care based on the means of parents (No. 115). In terms of overall structures, moreover, the REPORT recommended that provinces pay at least 80% of day care centre costs (No. 116), that the *National Housing Act*<sup>40</sup> be amended to facilitate loans for creating day-care centres, *et cetera* (No. 117), and that the federal government and the provinces cooperate in enacting a national Day-Care Act (No. 118). There was a recommendation for the creation of provincial Child Care Boards (No. 119) and one supporting the establishment of an advisory service at National Health and Welfare (No. 120). In spite of the plethora of recommendations

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<sup>37</sup> R.S.C. 1970, c. C-34 [R.S.C. 1985, c. 46].

<sup>38</sup> *Supra*, note 2 at 246.

<sup>39</sup> Margrit Eichler has commented on the tendency to try to solve the poverty of divorced women and children through higher support awards and better enforcement, approaches which individualize "what is, in fact a social problem". As she has suggested:

If, then, further reform of the family law is proposed as a solution to the problem of female and child poverty, we must ask ourselves what this *avoids* doing: namely asking for a comprehensive reform of the income security system, and of the overall economic structure such that poverty in general (whether subsequent to a divorce or not) is eradicated.

See C. Schmitz, "Family Law Can't Solve Divorce Poverty?", *The Lawyers Weekly* (28 September 1990) 14.

<sup>40</sup> R.S.C. 1970, c. N-10 [R.S.C. 1985, c. N-11].

in this area, however, there has been a noticeable lack of success in implementation, at least by contrast with the recommendations concerning arrangements at divorce. Significantly, perhaps, the day-care recommendations require more fundamental restructuring of family relations, and as between families and society; by contrast, the divorce recommendations treat the members of family units as individuals. In such a context, serious questions must be raised about the nature of families and the roles of family members, particularly women.

This conclusion is reinforced by an examination of the recommendations concerning reproduction. While the REPORT suggested a need for systematic and accessible birth control information (Nos 121 and 122) and family planning services (No. 123) and for amendments to permit sterilization (Nos 124 and 125), it also made clear recommendations for women's choices in relation to abortion:

[W]e recommend that the Criminal Code be amended to permit abortion by a qualified medical practitioner on the sole request of any woman who has been pregnant for 12 weeks or less;

...

[W]e recommend that the Criminal Code be amended to permit abortion by a qualified practitioner at the request of a woman pregnant for more than 12 weeks if the doctor is convinced that the continuation of the pregnancy would endanger the physical or mental health of the woman, or if there is a substantial risk that if the child were born, it would be greatly handicapped, either mentally or physically.<sup>41</sup>

The failure to implement the REPORT's recommendations concerning abortion arguably reinforces the extent to which these recommendations challenged family ideology, and the role of women in family units. Moreover, the recommendations concerning sole-support parents, suggesting a need for community supports (No. 128) and the abolition of affiliation orders in providing entitlement to welfare (No. 129), might be seen as strengthening the rationale for state control of abortion as it confirms "familial" units, albeit without a male head-of-the-household. In the context of these recommendations, and as part of the process of assessing their relative "success" or "failure", it is thus critical to explore the nature of family ideology and its impact on the process and substance of reform efforts.

This critique of the REPORT's chapters on poverty and family, therefore, focuses on two underlying elements of these chapters: the limits of equality litigation in the context of women and poverty, and the nature of family ideology in shaping the roles and expectations for men and women in family life. In exploring these themes, moreover,

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<sup>41</sup> *Supra*, note 2 at 286-87. Note that there were a number of "Separate Statements" appended to the REPORT. For dissenting views, see J. Henripin, at 422-23, and D. Ogilvie, at 431. See also E.G. MacGill, at 429, who suggests that "abortion should no longer be regarded as a criminal offense but as a private medical matter between patient and doctor".

the connections between them, and the relationships between issues of poverty and of family for women will also become more evident. In this way, we hope to suggest how our future efforts to change the status of women — “no more than simple justice” — may be accomplished.

### III. WOMEN, POVERTY AND THE FAMILY: RE-THINKING THE CONTEXT

#### A. *Poverty and the Limits of Equality Theory*

The Royal Commission's REPORT and recommendations focused on a commitment to equality of opportunity and change through law. After identifying the factors which contribute to the phenomenon of women's poverty, the commissioners theorized that it would be possible to change these factors through active legal intervention. However, there is increasing and compelling evidence that women's poverty has not decreased in the intervening twenty years; rather, it has increased. Was the Commission fundamentally misguided in its approach? Has equality of opportunity been tried and found wanting? Has change through law been tried and found wanting? Why, in spite of all our good intentions, is women's poverty and their children's poverty on the increase?

Any examination of the nature of women's poverty must begin with an analysis of the broad issue of women's access to money. In our society, there are three means for women to obtain money: long-term state assistance, marriage to a breadwinner spouse, and paid employment.<sup>42</sup> The REPORT addressed the need for long-term state assistance by recommending a guaranteed annual income; this recommendation has remained unimplemented.<sup>43</sup> The REPORT made numerous recommendations respecting women's employment; many of these have now been implemented. However, as will be discussed below, these changes have not made a significant difference to the material condition of women's lives.

This section of the paper analyzes why the REPORT's recommendations have failed to produce significant change, by examining the process of change through constitutional litigation. It is appropriate to focus on this particular attempt at “change through law” both because constitutional challenges have been presented to women as a potent source of change, and because the equality rights provisions of the

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<sup>42</sup> T.S. Dahl, *WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE* (London: Oxford University Press, 1987) at 111-29.

<sup>43</sup> Families with children receive small amounts through the income tax system in the form of refundable and non-refundable child tax credits.

Constitution directly engage the question of the efficacy of a vision of equality of opportunity.

This section of the paper suggests that attempts to change the material conditions of women's lives through constitutional challenges are likely to produce minimal results. The results will be minimal because constitutional challenges will produce very few results along two of the three critical axes of women's access to money: employment and government transfers. Any change on the employment axis will be limited because of the difficulty inherent in the public/private distinction and because of the courts' difficulty in fashioning appropriate remedies. Any change on the transfer axis will be limited because of the difficulty in fashioning an appropriate remedy and because of the courts' definition of equality. Moreover, on both axes, any remedy is necessarily limited by a definition of equality of opportunity which adopts a male model with respect to the distribution of societal goods.

1. *Statistical Evidence of Change: One Step Forward and Two Steps Back*

Poverty can be analyzed in several different ways. The first is to determine the *measurement* of poverty, in other words the line under which a person's or family's income qualifies them as poor.<sup>44</sup> The second is by raw *statistical* data: how many people or families are poor, by categories which include sex, age, number of children, geographical location, and employment status. (The poor may be classified as being either the working poor or the non-working poor). Third, it may be analyzed by an examination of the *depth* of poverty, in other words how long a period any one person or family remains poor and how often that person or family cycles between poverty and non-poverty. Finally, it may be analyzed by an examination of the *poverty gap*, that is, the amount needed to bring a person or family up to the poverty line.

All indicators suggest that single women with children face a substantial risk of poverty. Four in ten female-headed families are poor, compared to one in ten male-headed families.<sup>45</sup> Women make up a larger proportion of the low-income population than of the population as a whole. The greatest percentage of poor children under the age of 16 (61.8%) live in a female-headed family.<sup>46</sup> The number of single-parent families in Ontario has grown significantly in the past 20 years;

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<sup>44</sup> See D.P. Ross & R. Shillington, *THE CANADIAN FACT BOOK ON POVERTY* 1989 (Ottawa: Canadian Council on Social Development, 1989) [hereinafter *FACT BOOK ON POVERTY*] for a discussion of the different ways of measuring poverty. For the purpose of our analysis the method of measurement is not important.

<sup>45</sup> National Council of Welfare, *POVERTY PROFILE 1988* (Ottawa: Supply and Services Canada, 1988) at 19 [hereinafter *POVERTY PROFILE*].

<sup>46</sup> *Ibid.* at 28.

from 1969 to 1987 they increased by 241%, and from 1981-87 they increased by 41%. They are the next largest single poor group, after the disabled, and they have grown faster than any other part of the provincial welfare caseload.<sup>47</sup> The number of poor female-headed single parent families in Canada has grown from 19% in 1973 to 27% in 1986.<sup>48</sup>

There is very little information on the depth of poverty or on the circumstances which lift people out of poverty. TRANSITIONS, the report of the Social Assistance Review Committee, noted that the average length of time spent on social assistance by employable recipients was about seven months; single parents, by contrast, averaged three to four years.<sup>49</sup> However, single mothers were more than twice as likely to return to benefits as were disabled persons — the report noted a 27% recidivism rate, which appeared to be increasing.<sup>50</sup> Thus, while we can speculate on the ways in which people can lift themselves above the poverty line, there is very little hard data which demonstrates how they do so.

Finally, an examination of the poverty gap reveals that female-headed single-parent families in 1986 recorded the largest poverty gap. They were closely followed by two-parent families. The elderly had the smallest gap.<sup>51</sup> All of the above tends to indicate that women and their children bear a substantial risk of becoming poor, of being very poor, and of finding great difficulty in lifting themselves from poverty. Taking into account our perception of these problems in the 1990s, let us turn to the recommendations of the REPORT.

## 2. *Why Are Women Poor?*

The Commission identified a number of factors which contributed to women's poverty. These included lower levels of education for women generally, poorer health (in particular, the effects of childbearing on women), housing, and lack of employment. These were identified as a treadmill for women:

[T]here is a strong inter-relationship between many of these aspects of poverty. Each contributes to the next: the lack of education to the lack of a job; the lack of a job to poor housing and ill health.<sup>52</sup>

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<sup>47</sup> TRANSITIONS, *supra*, note 33 at 30-31 and 37.

<sup>48</sup> FACT BOOK ON POVERTY, *supra*, note 44 at 46.

<sup>49</sup> *Supra*, note 33 at 32. "[F]or the majority of recipients, social assistance fills a temporary need in response to a particular life crisis", *ibid.* at 35. Unfortunately, we don't know where women go; however, we do know that they constitute a significant proportion of the working poor. See *ibid.* at 263-65 for further discussion of the length of time spent in poverty.

<sup>50</sup> *Ibid.* at 264. For a thorough descriptive analysis of this issue, see P.M. Evans, A DECADE OF CHANGE: THE FBA CASELOAD, 1975-86, RESEARCH DOCUMENT NO. 42 (Toronto: Social Assistance Review Committee, 1987).

<sup>51</sup> FACT BOOK ON POVERTY, *supra*, note 44 at 54.

<sup>52</sup> REPORT, *supra*, note 2 at 319.



The REPORT's analysis is similar to that of the Canadian Council on Social Development, which identified a critical link between poor education and low income: "[N]othing more sharply distinguishes poor households from non-poor households than their respective levels of education".<sup>53</sup> Significantly, however, the Council's report also identified both job creation and wages and conditions of work as essential features of an effective anti-poverty policy. Ross and Shillington focused on two factors in particular; "the inability of employment growth to keep pace with new household formation" and the poor performance of minimum wages across the country.<sup>54</sup> Thus, there are simply not enough jobs to go around, and those jobs which pay only the minimum wage will not lift a family out of poverty. However, the FACT BOOK ON POVERTY concluded that an anti-poverty strategy should not focus on reducing government transfers; without transfers, the depth of poverty would be considerably greater.<sup>55</sup>

By contrast, the REPORT did not address the effect of market forces on the creation of women's poverty. To the extent that it did so, it assumed that change through law would substantially improve women's position within the work force. For the REPORT, poverty was an individual phenomenon, not a matter of structural inequity. In this context, it is appropriate to turn to the issue of employment to see if women's position in the labour market has changed and, if so, how.

### 3. *Women and the Labour Force*

At least in 1990, it may be important to consider what sorts of employment opportunities are available to women who want to escape the poverty trap. All the available evidence indicates that women's employment is characterized by a very high degree of job "ghettoization" and low pay.<sup>56</sup> Women are still concentrated in the low-paid, unattractive jobs where productivity and recognized skills tend to be low.<sup>57</sup> As a cheap and flexible labour pool, therefore, women workers are essential to the economic structure.<sup>58</sup>

Moreover, this pattern has not changed despite very significant shifts in the kinds of jobs being created. In examining the majority of new jobs created during the period 1975-80, for example, Pat and Hugh Armstrong concluded that there was still significant occupational segregation, to the point that women competed with women and men

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<sup>53</sup> FACT BOOK ON POVERTY, *supra*, note 44 at 92.

<sup>54</sup> *Ibid.* at 91.

<sup>55</sup> *Ibid.*

<sup>56</sup> See P. Armstrong & H. Armstrong, *THE DOUBLE GHETTO: CANADIAN WOMEN AND THEIR SEGREGATED WORK*, rev'd ed. (Toronto: McClelland and Stewart, 1984) c. 2.

<sup>57</sup> *Ibid.* at 201.

<sup>58</sup> *Ibid.* at 202.

with men. Further, service work accounted for a high percentage of part-time jobs for women; part-time jobs were increasingly found in those industries where women were concentrated, and the demand for women workers, especially part-time workers, continued to increase. Moreover, there was a tendency for full-time jobs to be created in occupations where men worked while part-time jobs were created in occupations where women worked.<sup>59</sup>

How do these patterns affect poor women and, in particular, women who have fallen into the social-assistance safety net? "There is abundant evidence which suggests that single mothers, before, during and following periods of social assistance, work in jobs which are badly paid, unstable and offer little chance for career advancement."<sup>60</sup> Indeed, there is some evidence that the recent and vast growth in the service sector in the United States is directly attributable to the availability of poor women, who form a labour force "continually endowed with marginal characteristics".<sup>61</sup> The jobs available to women are incompatible with the eradication of economic dependence and industries "most responsible for employment growth pay a wage rate that absolutely requires the recipient of those wages to find additional resources in order to support a family above the poverty level".<sup>62</sup> Taking account of all these factors, Pat and Hugh Armstrong concluded that:

[W]omen workers are essential to the economic structure in that desegregation of the labour force would require fundamental changes in those sectors that rely on a cheap and/or flexible labour force supply. It is therefore in the interest of many employers to maintain the division of labour by sex.<sup>63</sup>

Consider again the interrelationship between market forces and poverty. In Canada, a fully employed minimum-wage worker with a spouse and child in a large city would earn, in 1986, only 46% of the poverty-line income. Even if both spouses worked at minimum wage, they would earn only 92% of the poverty-line income.<sup>64</sup> While it is unclear how many women receive minimum wage, there is very strong

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<sup>59</sup> P. Armstrong & H. Armstrong, *A WORKING MAJORITY: WHAT WOMEN MUST DO FOR PAY* (Ottawa: Supply and Services Canada, 1983) at 233-41.

<sup>60</sup> P.M. Evans & E.L. McIntyre, *Welfare, Work Incentives, and the Single Mother: An Interprovincial Comparison* in J. Ismael, ed., *THE CANADIAN WELFARE STATE: EVOLUTION AND TRANSITION* (Edmonton: University of Alberta Press, 1987) 101 at 115.

<sup>61</sup> J. Smith, *THE PARADOX OF WOMEN'S POVERTY: WAGE-EARNING WOMEN AND ECONOMIC TRANSFORMATION* in B. Gelpi, N.C.M. Hartsock, C.C. Novak *et al.*, eds, *WOMEN AND POVERTY* (Chicago: The University of Chicago Press, 1986) 121 at 130.

<sup>62</sup> *Ibid.* at 137.

<sup>63</sup> *Supra*, note 56 at 201-02.

<sup>64</sup> *FACT BOOK ON POVERTY*, *supra*, note 44 at 91.

evidence that women are concentrated in low-wage industries and part-time work, areas where minimum-wage levels are likely to be quite prevalent. Thus, real change to the material conditions of women's lives would require substantial restructuring of the conditions of women's waged work.

The point of this analysis is that the changes in the pattern of women's employment in the past twenty years have not been "successful" in changing women's poverty. Despite the enactment and enforcement of anti-discrimination laws and other measures to encourage women's meaningful participation in the workforce, women have not been able to find relief from poverty in employment.

#### 4. *The Equality Dimension: the Public/Private Distinction and Remedial Power*

Can the factors which create or perpetuate women's poverty be changed through constitutional litigation? Can these factors be changed through a reliance on equality doctrine generally and equality of opportunity more specifically? In the context of paid employment and government transfers, this analysis offers a pessimistic answer to these questions. There are essentially three reasons for this pessimism. Two are structural reasons flowing from the very nature of the *Charter*: the public/private distinction and the limited remedies which courts are prepared to fashion. The third reason is ideological and is embedded in the problems created by a reliance on the idea of equality of opportunity.

Section 32 provides that the *Charter* applies both to the Parliament and government of Canada and to the legislature and government of each province. This has generally been interpreted to include legislation, regulations and administrative activity by government. There is still a grey area where it is unclear whether the *Charter* applies to non-governmental agencies which receive government funds and to activity which appears private on its face but which is governed by common law jurisprudence. But if we consider again the problems women face in the labour force, it is clear that a court would be asked to order one or all of the following: 1) more full-time jobs, 2) better wages and conditions of work, 3) a higher minimum wage, and 4) fewer women in the service sector (or alternatively, service-sector employment which is stable and provides a wage sufficient to lift a family out of poverty). Given that any of these matters (with the possible but unlikely exception of the minimum wage) are clearly private and outside the scope of the *Charter*, it is unlikely that any would even reach a court for consideration. Thus, one avenue for change, the constitutional challenge, remains closed to women.<sup>65</sup>

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<sup>65</sup> For more extensive discussion on the public/private distinction, see 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.

Even in those circumstances where courts are prepared to make decisions (that is, where a matter is clearly in the public realm), they have not exercised broad remedial powers. These cases include those where citizens have challenged their access to government benefits, where citizens have asked the courts to relieve a disadvantage occasioned by impecuniosity or where the courts have been asked to create a new category of beneficiary under particular legislation.<sup>66</sup> While the courts have in two cases required the government to extend benefits to new categories of recipients, they have generally been unwilling to require government expenditure to support the goals of a social welfare state.<sup>67</sup> This ideology is best summarized in *R. v. King*: "Public funding of day-care facilities is a social problem which is beyond the reach of the court."<sup>68</sup> If such a social program, so critical to women's access to money, is beyond the reach of the courts, there is a demonstrable limitation on the efficacy of constitutional litigation on behalf of women.

### 5. *Equality of Opportunity*

What is equality of opportunity? Why does adherence to a vision of equality of opportunity mean so little for women? What kind of equality would satisfy the needs of this particular disadvantaged group? What would it look like in concrete terms, not in the abstract? Our focus thus moves from structural questions concerning the possibilities of constitutional litigation to the application of theories of equality to the distribution of societal goods. Walzer has identified a number of social goods to be distributed, which may include membership in society, security and welfare, education, free time, and hard work. He argues that there is no *a priori* method of distribution of such goods:

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<sup>66</sup> See, e.g., *Bregman v. A.G. Canada* (1986), 57 O.R. (2d) 409, 33 D.L.R. (4th) 477 (C.A.), where the Court refused to create a new category of persons eligible for benefits under the *War Veteran's Allowance Act*; and *Reference Re Family Benefits Act (N.S.)*, Section 5 (1986), 75 N.S.R. (2d) 338, 26 C.R.R. 336 (C.A.), where the Court upheld a challenge to the section of the *Act* which provided benefits to women but not to men.

<sup>67</sup> These two cases are *Tetreault-Gadoury v. Canada Employment and Immigration Commission* (1988), 88 N.R. 6, 23 C.C.E.L. 103 (F.C.A.), where the Court held that the section of the *Unemployment Insurance Act* which disentitled persons over the age of 65 from receiving benefits was of no force or effect; and *Schachter v. Canada* (1988), 52 D.L.R. (4th) 525, 20 C.C.E.L. 301 (F.C.T.D.), *aff'd* [1990] 2 F.C. 129, 66 D.L.R. (4th) 635 (C.A.), where the Trial Court issued (and the Appeal Court upheld) a declaration which effectively extended certain benefits to natural fathers.

<sup>68</sup> (1988), 64 O.R. (2d) 768 at 774, 50 D.L.R. (4th) 564 (C.A.). This case involved a prosecution of a day care for failure to obtain a license. The parents argued that they were thoroughly satisfied with the service provided, and that there were few day care services available to them. The Court dismissed the appellant's appeal from conviction.

"[D]ifferent social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves — the inevitable product of historical and cultural particularism".<sup>69</sup>

Equality of opportunity has been defined as the assertion that "each man should have equal rights and opportunities to develop his own talents and virtues and that there should be equal rewards for equal performances".<sup>70</sup> The concept of equality of opportunity has often been described in terms of a race: everyone is able to line up at the race of life, without impediment, and the best man wins. Contrast this theory with equality of result, which is clear: everyone gets the same distribution of the goods at issue.

However, as Schaar points out, the formula for equality of opportunity is more accurately described as: "[E]quality of opportunity for all to develop those talents which are highly valued by a given people at a given time ... [C]ommitment to the formula implies prior acceptance of an already established social-moral order".<sup>71</sup> Thus, equality of opportunity carries with it its own limitations: it allows and even promotes the continuation of substantial and powerful inequalities because the state is not expected to provide equality of opportunity where the skills at issue are not highly valued. This is the crux of the dilemma which women face: the social-moral order accepts that the "hard work" which women typically perform is not valued. Thus, women are not able to develop their talents outside the realm of hard work, that is, outside the realm of work that is dirty, unpleasant, and generally shunned. Equality of opportunity offers rewards on a male model; as very few women are able to take advantage of this model, very few women receive the rewards which equality of opportunity purports to offer.

In more concrete terms, the essence of equality for women would mean that they would face no greater economic liability than would a man; that they would not experience unjust distributions of money, time, and work.<sup>72</sup> Such an approach would mean that there would be a corresponding increase in the amount of "hard work" and decrease in the amount of leisure time, which men experience. Reliance on constitutional litigation, therefore, to improve women's position, would require that judges engage in a wholesale redistribution of societal resources. These resources would not be limited to money or other government benefits but would include, for example, leisure time. As

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<sup>69</sup> M. Walzer, *SPHERES OF JUSTICE* (New York: Basic Books, 1983) at 6.

<sup>70</sup> J. Schaar, *Equality of Opportunity and Beyond* in J.R. Pennock & J.W. Chapman, eds, *NOMOS IX EQUALITY* (New York: Atherton Press, 1967) 228 at 229.

<sup>71</sup> *Ibid.* at 230.

<sup>72</sup> See Dahl, *supra*, note 42 at 182-83.

sympathetic as courts may be to the plight of an impoverished individual, they are unlikely to step out of their institutional role to engage in a wholesale redistribution of these resources.

### *B. Women, Family and Ideology*

In the twenty years since the publication of the REPORT, Canada has witnessed an historically unprecedented flurry of legislative reform with respect to the laws of marriage, divorce and "the family" at both the provincial and federal levels. Every province has undertaken at least one attempt, and in some cases several attempts, to reform regimes determining the division of property between spouses upon divorce, the enforcement of child support and maintenance and the principles of child custody decision-making.<sup>73</sup> At the federal level, the reform of divorce legislation begun in 1968 was extended in 1986 by the new *Divorce Act, 1985*<sup>74</sup> which reduced the grounds for divorce from a series of "fault-based" circumstances to the ground of breakdown of the marriage, while at the same time lowering the time period for establishing marital breakdown by reason of separation from three years to one. Principles for determining spousal support and child custody and access were also included in this legislative reform.

As has been suggested, the influence of the findings and recommendations of the REPORT on the specific forms of legislative change in these areas is difficult to determine. However, it is arguable that the REPORT provided the backdrop (if not the starting point) for Canadian feminist activism during the past two decades and that it reflected the predominant use of liberal feminist concepts in providing theoretical underpinnings for an agenda of feminist reform. In such a context, the REPORT is an important part of any process of assessment of the accomplishments and failures of the "second wave" of feminism in Canada.

This section focuses on an assessment of the successes or failures of the REPORT's analysis and recommendations with respect to women and the "family", particularly in the context of marriage and divorce. It is suggested that unexamined assumptions and theoretical shortcomings found in the REPORT led to the formulation of recommendations which, in some cases, did little to improve the substantive conditions of the lives of Canadian women and which, in other cases, have in fact led to the exacerbation of the difficulties and dilemmas which women face both within the family during marriage and outside its traditional confines upon divorce. Although this analysis focuses on

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<sup>73</sup> For instance, in Ontario, family law legislation has undergone two revisions since the publication of the REPORT: the *Family Law Reform Act*, R.S.O. 1980, c. 152 and the *Family Law Act, 1986*, S.O. 1986, c. 4.

<sup>74</sup> S.C. 1986, c. 4.

the recommendations about divorce, much of it can be applied to the remaining recommendations of the chapter on the family.<sup>75</sup>

In assessing the historical significance of the document to the Canadian women's movement, it is necessary to identify and evaluate the theoretical and ideological perspectives of the REPORT and the substantive consequences of that perspective for the social and economic position of women and their families in 1990. The goal of such a process is to understand both the strengths and weaknesses of the REPORT's approach, so as to facilitate the development of new feminist theoretical perspectives and practical agendas for the decades to come.

### 1. *The Nuclear Family as a Starting Point*

Taking as its starting point its Terms of Reference that Canadian women must be guaranteed "equal opportunities with men in all aspects of Canadian Society",<sup>76</sup> the REPORT identified and examined difficulties facing women within traditional and "transitional" family structures during marriage as well as upon the dissolution of marriage. At the outset, the REPORT identified the "family" as a unit of social organization which functions "in every known culture ... to meet the basic human needs of the individual",<sup>77</sup> also acknowledging, however, that these basic human needs can be met in "[n]ew family styles and patterns".<sup>78</sup> Nonetheless, the REPORT assumed throughout, both implicitly and explicitly, that the dominant and perhaps most appropriate family form for meeting these needs is the nuclear family, a unit most often understood to comprise a husband and economically dependent wife living with their children, biological or adopted.<sup>79</sup>

The centrality of the nuclear family form in Canadian public policy was evidenced in the Commission's concern that deviations from the dominant family form caused personal, social, and economic difficulties for women and children. As the REPORT noted, for instance, changing expectations with respect to women's roles within the family, particularly the rising number of women employed outside the home, placed women at a disadvantage in terms of prestige and independence when they chose to work in their homes raising children.<sup>80</sup> At the same time, the REPORT noted that rising divorce rates<sup>81</sup> were leaving increasing numbers of women to fend for themselves and their children, "without ever having been prepared for such an eventuality".<sup>82</sup>

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<sup>75</sup> See *supra*, text accompanying note 12 and following.

<sup>76</sup> REPORT, *supra*, note 2 at vii.

<sup>77</sup> *Ibid.* at 225.

<sup>78</sup> *Ibid.* at 226.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at 228-29.

<sup>81</sup> *Ibid.* at 225.

<sup>82</sup> *Ibid.* at 229.

In the face of such concerns, the REPORT identified the unequal division of labour within the family as an obstacle to women's equality, particularly as regards the care of children, concluding that "many former ways of doing things within the family must change"<sup>83</sup> in order to remove that obstacle. To this end, it proposed that change was needed "in the laws governing marriage, the mutual obligations of husband and wife, and the dissolution of marriage through divorce"<sup>84</sup> and further, "in the legal control the state exercises over such matters as birth control and abortion".<sup>85</sup>

## 2. *Ideas About Equality*

In some sense, the REPORT's recommendations with respect to marriage and divorce can be understood as specific responses directed at the two obstacles which the Commission found in the way of women's equality: personal prestige and economic independence. Recommendations such as those which would allow a woman to obtain her passport in her own name rather than that of her husband<sup>86</sup> and to maintain or acquire independent domicile<sup>87</sup> reflect the former goal, while those seeking the removal of "ceilings" on child support orders<sup>88</sup> and the provision of support enforcement services through the Family Courts,<sup>89</sup> the latter. As well, in keeping with its stated equality goals for men and women, the REPORT recommended that legislation should reflect the "equal partnership" of marriage<sup>90</sup> and hence, that women who were financially able be required to support their spouses and children post-divorce on the same terms as men.<sup>91</sup>

In the context of the 1990s, of course, some of these recommendations reflect fundamentally different kinds of equality objectives: formal as contrasted to substantive. Moreover, although it is difficult to assess the success or failure of formal legal changes which have been implemented in terms of their effect on the "prestige" of women, it has been the conclusion of many feminist legal commentators that formal equality is a necessary, but insufficient, step toward the achievement of substantive equality for women.<sup>92</sup> Yet, in its own time, the

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* at 230.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 235.

<sup>87</sup> *Ibid.* at 237.

<sup>88</sup> *Ibid.* at 251.

<sup>89</sup> *Ibid.* at 252.

<sup>90</sup> *Ibid.* at 246.

<sup>91</sup> *Ibid.* at 249.

<sup>92</sup> See, e.g., A.R. Miles, *Feminism, Equality, and Liberation* (1985) 1 C.J.W.L. 42, especially at 64-68.



Commission's attempts to enhance women's status with such recommendations should not be ignored since it is clear that there was some recognition that such achievements must be accompanied by substantive goals. In such a context, however, an assessment of the value of the substantive changes recommended is infinitely more difficult. For, even though a number of the REPORT's recommendations for substantive equality have been implemented over the past two decades, the puzzling fact is that they have not often led to the results expected by the Commission and by women in Canada who have pressed so hard for their implementation.

For instance, to the extent that the relative poverty of women and their dependent children upon divorce was identified as a problem by the REPORT, it is not at all clear that support enforcement has provided a resolution, even in those provinces which have enacted legislation of the kind envisaged by the REPORT.<sup>93</sup> Although such legislation has effected some improvement in the number of women who actually receive court-ordered child support from fathers,<sup>94</sup> the 1980s have nevertheless witnessed a seemingly inexorable march into poverty for single women who are the heads of families; a significant proportion of these women have been cast into poverty following divorce.<sup>95</sup> Overall, there is evidence that the experience of Canadian women and men at divorce is not unlike the pattern identified in United States

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<sup>93</sup> See M. Eichler, *FAMILIES IN CANADA TODAY: RECENT CHANGES AND THEIR POLICY CONSEQUENCES*, 2d ed. (Toronto: Gage, 1986) at 371, where the author points out that support-enforcement legislation will not "solve the problem of financial need when payments are simply too low to allow one to live in dignity". Eichler also points out at 370 that:

[O]ne study which looked at recently separated mothers from the Hamilton-Wentworth, Burlington, and Brantford area found that of those cases in which husbands had been ordered by the court or had committed themselves to make payments (the highest percentage reached was 73 percent), 38 percent had agreed to pay or been ordered to pay between \$1 and \$99 for one child per month, and another 42 percent were committed to between \$100 and \$149 (i.e., 80 percent of those fathers who were committed to pay paid less than \$150 per month for a child in 1978)... Another study found that in British Columbia, monthly awards made between 1976 and 1978 averaged approximately \$71 per month.

<sup>94</sup> *Ibid.* at 370.

<sup>95</sup> *Ibid.* at 248-49.

research: women experience a 73% decrease in their standard of living post-divorce, while men experience a 42% increase.<sup>96</sup>

This outcome is, to some extent, the result of child support orders which do not fully meet the needs of sole support mothers. However, the economic problems of women with dependent children now seem so profound that it is no longer possible to expect that they will be resolved merely by tapping the pocketbooks of individual men.<sup>97</sup> Employment structures in which women are "ghettoized" into low-paying jobs, the demands of the "double shift" of employment and child care which often force women into part-time work or prevent career advancement, and the apparent intractability of the problem of lower pay for women even when they do the same work as men, are but a few of the factors which cannot be resolved by higher child support payments and strict enforcement procedures.<sup>98</sup>

Principles of equality and gender neutrality such as those advocated by the REPORT with respect to mutual spousal support obligations and the recognition of marriage as an equal partnership did, in fact, find their way into "family" legislation in the 1980s. For instance, the preamble to Ontario's *Family Law Act, 1986* states:

Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.<sup>99</sup>

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<sup>96</sup> Extensive Canadian data is not available currently. However, Eichler, *ibid.* at 249 points out that:

[S]mall-scale studies suggest that the situation in Canada is quite comparable. Manitoba is widely regarded as the province with the best enforcement maintenance payments. (This may change with the coming into force of federal enforcement legislation.) A study conducted by the Manitoba Advisory Council on the Status of Women (1985) documents the results of maintenance decisions in 1981 and in 1983-1984 in that province. It demonstrates gross inequities similar to those found in California. Richardson (forthcoming) notes that 95 percent of female-headed solo-parent families in New Brunswick are receiving social assistance. On the basis of the knowledge that is presently available, there is therefore no reason to believe that the situation in Canada would be better than the situation in California.

<sup>97</sup> See *supra*, note 39.

<sup>98</sup> See, e.g., Eichler, *supra*, note 93 at 187-226; P. Armstrong, *LABOUR PAINS: WOMEN'S WORK IN CRISIS* (Toronto: Women's Press, 1984); Armstrong & Armstrong, *supra*, note 59; V. Novarra, *WOMEN'S WORK, MEN'S WORK: THE AMBIVALENCE OF EQUALITY* (London: Marion Boyans, 1980); M.A. Mason, *THE EQUALITY TRAP* (New York: Simon and Schuster, 1988).

<sup>99</sup> S.O. 1986, c. 4.

This principle of gender equality is, moreover, reflected in various sections of the *Act*, including provisions for the equalization of assets upon separation or divorce and mutual spousal and child support obligations. As well, the new *Divorce Act, 1985*, reflects a similar principle in its provisions for spousal and child maintenance and in provisions for the determination of child custody.<sup>100</sup> The impact of such reforms, however, has been far from uniformly positive.

### 3. *Custody and Support*

In the area of child custody, for instance, most legislation assumes that a child's mother and father are similarly situated ("equal") vis-à-vis their parenting ability, particularly in terms of employment prospects and abilities, financial power (due to the "equalization" of family assets) and child-care experience, unless it can be proved otherwise. However, assuming equality where there is none has in practice led to the obscuring of the "gender specific realities of family life for men and women",<sup>101</sup> that is, a higher standard of parenting expected of women as compared to men<sup>102</sup> and the lower income-earning capacity of women.<sup>103</sup> Since, historically, less has been expected of men in terms of parenting, any involvement in childcare on the part of fathers has often been unduly valued by the courts. As well, when the lower income-earning capacity of women in general is not considered, a particular woman's inability to adequately support her children has been seen as a negative attribute of that woman as compared to the father. Indeed, a woman's "choice" to work outside the home has been seen as a lack of commitment to her parenting role, while men's work commitments remain evidence of dedication to the life of the family.<sup>104</sup>

In the area of spousal support, as well, principles of "equality" have been utilized to impose time limits on support provided to women

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<sup>100</sup> S.C. 1986, c. 4. See also *Children's Law Reform Act*, R.S.O. 1980, c. 68, s. 24(2).

<sup>101</sup> S.B. Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in C. Smart & S. Sevenhuijsen, eds, *CHILD CUSTODY AND THE POLITICS OF GENDER* (London: Routledge, 1989) at 126.

<sup>102</sup> See, e.g., Boyd, *ibid.* See also L. Girdner, *Child Custody Determination: Ideological Dimensions of a Social Problem* in E. Seidman & J. Rappaport, eds, *REDEFINING SOCIAL PROBLEMS* (New York: Plenum, 1986) 165.

<sup>103</sup> See P. Armstrong & H. Armstrong, *Women, Family and Economy* in Mandell & Duffy, eds, *supra*, note 27, 143 at 163-64:

Although many more [women] are in the labour force, most are still segregated into women's jobs at women's wages... In 1982, the average earnings of women who were employed full-time were just 64% of those of full-time male employees ... If fringe benefits are included, the wage difference between full-time employed women and men has been increasing...

<sup>104</sup> See Girdner, *supra*, note 102.

after separation or divorce on the basis that women are equally capable of supporting themselves and need not remain economically dependent on their spouses.<sup>105</sup> The application of such principles has obscured the fact that women are, in reality, differently situated from men in that they are statistically less able to command high or even adequate wages for the reasons outlined above.

No doubt, these were not consequences which the members of the Commission expected. With the benefit of experience, hindsight, and the leaps and bounds made in the last twenty years in feminist social and legal theory, these results are more easily predictable now than they would have been in 1970. Nevertheless, it is not unfair to suggest that a theoretical structure and an analysis of the family which took more careful account of the complexity and specificity of women's oppression within the family, as well as the contradictory and ideological nature of law, might have yielded more useful recommendations. Most significantly, the REPORT's acceptance of normative descriptions of the family as prescriptive blocked a more critical posture which might have revealed the place of traditional family forms and familial ideology in the reproduction and reinforcement of women's oppression.

#### 4. *Family Ideology*

The concept of familial ideology has been used to explain the ways in which normative descriptions of the family have been defined and perpetuated. By appealing to "common sense" and to views of the "natural" tendencies of human beings to seek the fulfillment of emotional needs and childbearing and rearing functions within the nuclear family configuration, the legal system and other social institutions (including the Commission) have contributed to the production of dominant familial ideology. These systems of ideas tend "to assert [their] own completeness and timeliness ... maintained by emotional commitments which may justify selective consideration of empirical evidence".<sup>106</sup> It has been pointed out that such ideologies have a certain "elasticity" which make them seem to be the product of an individual's own mind and experience, with a concomitant "generality" which enables them to remain "a reservoir of belief throughout society and

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<sup>105</sup> See, e.g., *Pelech v. Pelech*, [1987] 1 S.C.R. 801, 7 R.F.L. (3d) 225; *Caron v. Caron*, [1987] 1 S.C.R. 892, 7 R.F.L. (3d) 274; *Richardson v. Richardson*, [1987] 1 S.C.R. 857, 7 R.F.L. (3d) 304.

<sup>106</sup> S. Gavigan, *Law, Gender and Ideology* in A. Bayefsky, ed., *LEGAL THEORY MEETS LEGAL PRACTICE* (Edmonton: Academic Printing and Publishing, 1988) 283. While it is believed that family relations meet people's needs for love and intimacy, nevertheless, the family is and has been a site of frequent physical and sexual violence and psychological abuse, particularly for women and children. Though statistics regarding the incidence of "family violence" belie descriptions of the idealized family, yet the power of idealized images frequently results in disbelief in factual evidence.

[to] flow into the gaps made by individual acts of protest".<sup>107</sup> Thus, "real" emotional, economic and social needs of individuals are reflected in familial ideologies which at the same time operate to obscure the ways in which "real" families often fail to meet these needs. Such ideologies both reproduce and reinforce the sexual division of labour and resulting patterns of women's social and economic inequality.

Feminist studies of law as it relates to the family have increasingly attempted to take into account the ways in which familial ideologies have influenced the shape of legislation and of social policy<sup>108</sup> and have pointed out that such ideologies have obscured the ways in which people actually shape and organize their social and personal lives. In this analysis, law (both through legislation and judicial interpretation and decision-making) is implicated as well in reproducing and reinforcing familial ideologies. Through an examination of "the subtle processes ... by which legal doctrine, and judicial interpretation and decision-making"<sup>109</sup> contribute to women's subordination, feminists have been able to indicate both the limits of law for achieving social change and its potential transformative capacities.<sup>110</sup> Socialist feminist theories of women's oppression and law have attempted to identify the links between familial ideologies and women's material reality through an examination of women's role in the relations of production and reproduction under capitalism as well as through analysis of the ideologies linked to such relations.<sup>111</sup> For example, Boyd has pointed out that "many aspects of family ... legislation can be understood in terms of the mediation, coordination and balancing of productive and reproductive relations in society".<sup>112</sup> It has been proposed as well that reforms in family law over the past century represent the efforts of the state "to maintain and enforce, where necessary, the privatization of the costs of reproduction"<sup>113</sup> in the face of the declining ability of the traditional family patriarch to control the resources necessary to ensure the survival of his family. In making women the juridical equals of men and in the enactment of legislation which provides inadequately for "dependent" women and children, the state has not alleviated the

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<sup>107</sup> D. Hay, *Property, Authority and the Criminal Law* in D. Hay *et al.*, eds, *ALBIONS'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (New York: Pantheon, 1975) 17 at 55.

<sup>108</sup> See, e.g., S.B. Boyd, *Child Custody, Ideologies and Employment* (1989) 3 C.J.W.L. 111 especially at 113-14 and n. 15.

<sup>109</sup> Gavigan, *supra*, note 106 at 293-94.

<sup>110</sup> See, e.g., Gavigan, *ibid.*; Boyd, *supra*, notes 101 and 108.

<sup>111</sup> See, e.g., M. Barrett, *WOMEN'S OPPRESSION TODAY: THE MARXIST/FEMINIST ENCOUNTER* (London: Verso, 1988).

<sup>112</sup> Boyd, *supra*, note 101 at 127.

<sup>113</sup> J. Ursel, *The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada* in J. Dickinson & R. Russell, eds, *FAMILY, ECONOMY AND STATE: THE SOCIAL REPRODUCTION PROCESS UNDER CAPITALISM* (Toronto: Garamond Press, 1986) 150 at 177.

social structural inequalities which relate to women's subordination. Higher child support awards and strict enforcement procedures are proposed as the solutions to the feminization of poverty rather than the provision of adequate welfare benefits, a guaranteed annual income or proactive employment measures which would change the structure of the Canadian labour force.

Yet, women's relation to law and the state is not so simple. For, while legislation has controlled and regulated reproduction, women's sexual behaviour and the care of children, and welfare legislation has reproduced and reinforced women's dependence on men, nevertheless, women have sought and obtained state intervention to control the violence of men within their households;<sup>114</sup> to ameliorate conditions of poverty and provide for the subsistence of themselves and their children through the provision of welfare<sup>115</sup> and the enforcement of men's maintenance obligations,<sup>116</sup> and to take control over the conditions of reproduction.<sup>117</sup> Hence, the very unevenness of result which characterizes the engagement of the women's movement with social change through legislation provides evidence of the complex and contradictory response of law to women's demands. Law may then be seen as a potential site of struggle for the fulfilment of those demands, yet in a much more limited way than that envisaged by the Commission.

The identification of such potential with respect to certain issues remains, of course, a difficult task and is dependent on a clear theoretical framework for analyzing the specific nature of women's inequality and the formulation of concrete political goals which recognize identified limits. In its understanding of the implications of women's role in the family and of the role of the "traditional" family and familial ideology in the reproduction of women's oppression, the REPORT fell seriously short of the mark. The Commission itself fell prey to the ideological positions of social scientists who, though at times critical of the effects of modern family life, nevertheless clung to the belief that the family must survive, "as they 'know of no people who have succeeded for long in dissolving the family or replacing it'".<sup>118</sup> The REPORT did note that "the Women's Liberation Movement, the New Feminists and other similar groups"<sup>119</sup> viewed the family as "an unjust and outdated arrangement for modern human beings",<sup>120</sup>

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<sup>114</sup> As a result of women's activism, many provinces have acted to encourage the arrest and prosecution of men who assault their partners.

<sup>115</sup> See, e.g., L. Gordon, *What Does Welfare Regulate?* (1988) 55 Soc. RESEARCH 609.

<sup>116</sup> See, e.g., Ursel, *supra*, note 113.

<sup>117</sup> See, e.g., S. Gavigan, *On "Bringing on the Menses": The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law* (1986) 1 C.J.W.L. 279.

<sup>118</sup> REPORT, *supra*, note 2 at 226.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

and further, that feminists such as Margaret Benston had identified "the complete breakdown of the present nuclear family"<sup>121</sup> as a concomitant of the structural changes necessary for the "liberation of women".<sup>122</sup> Yet it rejected the profoundly critical stance toward the family which might have resulted in a more clear understanding of the role of the family in the oppression of women, the need for fundamental structural change for achieving equality goals, as well as the uneven potential of law for securing such aims.

#### IV. WOMEN, POVERTY AND THE FAMILY: THE PAST AS PROLOGUE?

As this analysis demonstrates, a current assessment of the recommendations of the Royal Commission REPORT must take account of more recent challenges to our fundamental understanding of the structure of poverty and the ideology of family. In doing so, the connections between women's labour force activity and economic insecurity are better revealed, along with the ways in which roles are shaped and defined for men and women within marriage and in relation to parenting responsibilities. With the benefit of hindsight, it seems inevitable that we are critical of the REPORT's acceptance of equality of opportunity goals and its failure to appreciate, and to challenge, the constraints of the nuclear family in terms of real choices for women.

Perhaps more significantly, the REPORT's formal separation of issues of poverty and of family in relation to Canadian women masked the connections between them; connections which have only increased in the twenty years after the REPORT. In research studies conducted both in Canada<sup>123</sup> and elsewhere,<sup>124</sup> the poverty experienced by women (and children) at marriage breakdown, in stark contrast to the relative affluence of men, has been documented repeatedly. As marriages end and families are "reconstituted" in great numbers, the alleviation of women's (and children's) poverty is eliminated only by (re)marriage. Thus, just as marriage masks women's economic insecurity while divorce reveals it more plainly, the connections between poverty and family create demonstrable challenges for ideas of gender equality which take economic security into account. As Isabel Marcus has suggested, the social construction of gender roles has been reflected in all legal reforms concerning marriage and divorce. Indeed, in her view,

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> See M.L. McCall, J.P. Hornick & J.E. Wallace, *THE PROCESS AND ECONOMIC CONSEQUENCES OF MARRIAGE BREAKDOWN* (Calgary: Canadian Research Institute for Law and the Family, 1988).

<sup>124</sup> See *supra*, note 27.

"[g]ender free or even gender neutral divorce law in a gendered society is an oxymoron."<sup>125</sup> On this basis, the pessimistic conclusion for the 1990s is that poverty and family are unified issues for women, not separate and discrete chapters as the REPORT characterized them.

Yet, even as we are critical of the REPORT's analytical framework and the limits of the principles it adopted, we must also recognize the significant contribution of the REPORT, in its own time, as part of the process of reconceptualizing both our objectives and the means of achieving them. In beginning to identify the problems and in attempting to articulate solutions, the REPORT made a significant impact on ideas about women, family and poverty in ways which have enabled us to search for better solutions and more useful means ever since. As Gerda Lerner suggested in the context of feminist history:

[I]n preserving the collective past and re-interpreting it to the present, human beings define their potential and explore the limits of their possibilities. We learn from the past not only what people before us did and thought and intended; we also learn how they failed and erred.<sup>126</sup>

Yet, what of the future? In the context of our critique of law and its limits in relation to poor women, it is necessary for us to devise legal strategies which are connected to efforts to accomplish social change, and to avoid thinking of law as the only, or even the most useful tool, for challenging the status quo.<sup>127</sup> As well, in the context of our critique of family ideology, we must reconceptualize our ideas of individualism and community, and both recognize and articulate the ways in which family structures impact differently on women and men in terms of their roles as individuals and within communities.<sup>128</sup> In doing so, we are engaged in nothing less than a fundamental restructuring of law and gender and redefining both our objectives and ourselves.

In such a reconceptualizing, Susan Moller Okin has recently suggested that the family needs to be a "just institution" and that we need to address ourselves to new theories of justice which no longer "neglect women and ignore gender".<sup>129</sup> Ironically, almost twenty years

<sup>125</sup> I. Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York* (1987) 42 U. MIAMI L.R. 55. See also M. Fineman, *Implementing Equality, Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce* [1983] WISC. L. REV. 789.

<sup>126</sup> THE CREATION OF PATRIARCHY (New York: Oxford University Press, 1986) at 221.

<sup>127</sup> See, e.g., C. Smart, *FEMINISM AND THE POWER OF LAW* (London: Routledge, 1989).

<sup>128</sup> See, e.g., M.J. Mossman, *Individualism and Community: Family as a Mediating Concept* in A.C. Hutchinson & L. Green, eds, *LAW AND COMMUNITY: THE END OF INDIVIDUALISM* (Toronto: Carswell, 1989) 205.

<sup>129</sup> JUSTICE, GENDER AND THE FAMILY (New York: Basic Books, 1989) at 170-71.



after the Royal Commission REPORT, and in spite of many changes in our ideas about women, family and poverty over time, such an aspiration is very similar to that proposed by the REPORT's reforms in 1970: "no more than simple justice". In this respect, the REPORT's aspiration is the same as ours. What is different may be our recognition that justice for women is not so simple after all.

