YES, VIRGINIA THERE IS FEMINIST LEGAL LITERATURE*

A survey of some recent publications

Women and the Law

by Susan Atkins and Brenda Hoggett
Basil Blackwell, 1984
234 + i-vi pp ISBN 0-85520-181-9, $78.95 (bound)
ISBN 0-85520-180-0, $23.95 (paper)

Women in Law: Explorations in Law, Family and Sexuality

by Julia Brophy and Carol Smart (eds)
London, Routledge and Kegan Paul, 1985
219 + i-x pp ISBN 0-7102-0607-0, $67.95 (bound)
ISBN 0-7102-0259-8, $20.95 (paper)

Canadian Journal of Women and the Law

(1985) Volume 1, No. 1, available from CJWL,
323 Chapel Street, Ottawa, Ontario K1N 7Z2
269 + i-x pp ISBN 0-920853-79-X (set)
ISBN 0-920853-83-1 (Vol.1); twice yearly; approx. A$75 p.a.

Gender, Sex and the Law

by Susan Edwards (ed)
London, Croom Helm, 1985
222 pp ISBN 0-7099-0938-1, $59.95 (bound)
ISBN 0-7099-0967-5, $26.95 (paper)

The State, the Law and the Family: Critical Perspectives

by Michael D.A. Freeman (ed)
London, Tavistock, 1984
318 + i-xi pp ISBN 0-422-79080-X, $27.95 (paper only)

Sexual Divisions in Law

by Katherine O'Donovan
London, Weidenfeld and Nicholson, 1985
242 + i-xii pp ISBN 0-297-78664-4, $56.95 (bound)
ISBN 0-297-78665-2, $38.95 (paper)

Women, the Law and the Economy

E. Diane Pask, Kathleen E.Mahoney and Catherine A. Brown (eds)
Toronto, Butterworths, 1985
393 + i-xix pp ISBN 0-409-98865-0, $44.45 (paper only)

The Ties that Bind: Law, Marriage and the reproduction of patriarchal relations

by Carol Smart
London, Routledge and Kegan Paul, 1984
273 + i-xiv pp ISBN 0-7100-9832-4, $24.50 (paper only)

The law is one of the last areas of academic work to have for so long withstood the scrutiny of feminists. Whereas in the last two decades, feminist scholarship has provided important insights and new ways of seeing to the humanities and social sciences, legal scholarship has proceeded in apparent ignorance of, and with blissful disregard to, the concerns of women generally, and feminist modes of analysis in particular.

But that situation has finally changed. In particular, 1986 was a significant year for the feminist project in law, both in Australia and elsewhere. The publication of this issue of the journal records the meeting of over 200 women and some men at a one day conference in March, 1986 at Macquarie University, focussing on feminist legal issues. In April, 1986, the theme of the annual meeting of the European Conference on Critical Legal Studies in London was "Feminist Perspectives on Law". That conference is documented in a special double issue of the International Journal of the Sociology of Law published in November, 1986 (see Graycar:1986b). In July, 1986, a large conference on Feminism and Legal Theory was held in Madison, Wisconsin, and it is hoped that those papers will soon be published. Back in Australia, La Trobe University's Department of Legal Studies hosted a colloquium on Law, Gender, Power in September, 1986. The fact that these meetings have taken place in Australia, in Britain, in the United States (and the list is intended to be representative, not exhaustive) demonstrates the timeliness of taking stock of the contributions of feminist scholarship to published work on law. As if charged by a need to make up for lost time (at least by comparison to other academic disciplines) the past few years have seen an almost frenetic proliferation of published feminist

legal work from different jurisdictions and from different political and theoretical standpoints. Despite the diversity of the literature, a common purpose or project can be discerned throughout – *viz.*, to attempt an understanding of the relation of law to the oppression of women. With the benefit of the insights gained through feminist political campaigns and feminist research in other parts of the academy, feminist legal workers and researchers have turned their attention to a wide range of concerns about women and the relationship of legal doctrines and practices to a system of gender relations in which women continue to remain dependent, subordinate or, simply, "other".

The aim of this brief survey of some recently published feminist legal literature is primarily to provide information about new developments outside Australia. It is of necessity a selective project. It is not intended to be exhaustive, nor has it been considered possible to provide a comprehensive analysis of this new and important field. The books discussed here are predominantly British, but two recent Canadian publications have also been included, as they will be of interest to Australian readers. No attempt has been made here to deal with the prolific literature from the United States or from Europe. That project would require a separate article to do it justice.[1]

The material included in this review ranges over a number of different subject matters, and applies a variety of approaches and methodologies to what is, at its base, a common project. The important shared characteristic of most of the monographs and collections dealt with here is that they all, to lesser or greater extent, move beyond the first tentative recognitions that somehow the law has done very little to advance the situation of women. Some of these hesitant moves manifested themselves in what can best be described as a "women and law" mode, which has rarely addressed the structural basis of women's oppression and the relation of law to that oppression. Instead, that work has tended to focus on particular areas of doctrine seen as relevant to women, usually within the framework of the traditional subject matters of law, such as family law and criminal law.

Carol Smart's *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984) helps to locate the work documented in this review and the shifts which have taken place within the debate by recounting some of that earlier exploratory work and in the process demonstrating clearly its limitations.

Smart points out that while the nature of law and its relation to a given social formation is currently an issue of debate and enquiry, particularly within Marxist schools of thought "...such debates have consistently given priority to issues of social class and related economic and political forms of domination. Such analyses have not conceded the equal significance of sexual oppression to their general thesis" (p.13). Whilst Smart expressly rejects the view that "every study of law should

be a study of women and law or patriarchal relations and law", she does argue that

> analyses which attempt to make general statements about the nature of law and the relationship of law to the social order cannot justifiably exclude gender oppression whilst pertaining to account for class oppression. Social class is contaminated by gender divisions; it cannot simply be separated out and treated discretely (p.14).

Smart then looks at the relationship between patriarchal relations and law, noting that

> the role of law in reproducing, creating or obscuring sexual inequality, and the potential of law to relieve women's oppression, has occupied feminists and social reformers for decades *(ibid.)*.

After reviewing the work of important nineteenth century theorists such as Harriett Taylor, J.S. Mill and Friedrich Engels, Smart identifies the tendency in more recent work that addresses itself to the nature of law as such to depict it and its enforcement as sexist, based around a recognition that the judiciary is largely male. She quotes Karen DeCrow from the U.S. as saying,

> then as now, the rights of women were interpreted in the courts by men, and usually by men who had been raised in the male supremacist tradition (De Crow 1974:187, cited by Smart 1984:16).

Smart sees the problem with this approach as being

> that it appears to presume that courts operate 'fairly' and in an unbiased way towards other litigants (i.e. men). It also seems to presume the possibility of a juridical structure which could be uncontaminated by other social institutions and values (p.16).

Perhaps the best example of this genre is Sachs and Wilson's *Sexism in Law* (1978)[2]. Smart is critical of their analysis of the all male character of the judiciary which, in combination with its class background, purports to provide a sufficient explanation for the operations of law in relation to women. In Smart's view, this work fails to distinguish between legal regulation and male control and she cites others who fall into the same trap (e.g. Edwards:1981).

Smart poses the problem facing feminists in trying to analyse the law and its relationship to patriarchal structures as

> how to appreciate the full complexity of the law while at the same time locating a political responsibility on actors in the present and yet without reducing the law to a simple exercise of male power (p.18).

She identifies three main problems with the abovementioned approach which simply treats law as serving the interests of men:

> First, it treats law as an entity unto itself.
>
> Secondly,
> the conspiracy thesis...presumes a readily identifiable set of male interests which can be unambiguously served. Finally, to assert that the law serves the interests of men ignores the impact of the class structure which mediates the consequences of legislation (pp.19-20).

Aside from these three problems, Smart warns us against overemphasising the significance of law as an agency of regulation.

> The law ... does not simply reflect "public opinion" (itself a controversial concept), it is part of the production of consensus around such issues as the importance of law and order, the sanctity of private property and the sacred nature of the family (p.21).

She concludes:

> the law can therefore be understood as a mode of reproduction of the existing patriarchal order, minimising social change but avoiding the problems of overt conflict (pp.21-22).

Smart endorses the view that legislation regulating such areas as marriage, property and the sexual division of labour secures the continuation of specific forms of patriarchal relation involving the subordination of women, but with two provisoes:

> The first is that I do not regard law as an homogeneous entity but as a collection of practices and discourses which do not all operate together with one purpose. The second is that legal practices cannot simply be read off from the stage of economic development of capitalism... I shall tend to reject general theories on law and patriarchy in favour of less deterministic accounts of specific legislative changes in relation to family structures and dominant sexual practices. The purpose of the following chapters is therefore to document in some detail the complexities and contradictions of the practice of law as it relates to the ongoing oppression of women...it is an attempt to construct a feminist account which avoids oversimplification

> and conspiracy and allows fully for the "contradictions" and "subtleties" that Sheila Rowbotham has identified as essential to any analysis of women's oppression (pp.22-23).

The remainder of the book is divided into Part II, "Historical Issues", where Smart canvasses the history of family law in England, in separate chapters entitled "Marriage, divorce and the family in the 1950s", "Family legislation and social change in the 1960s", "Judge made law in the 1960s", "Family law after the decade of reform" and "Progress and regress in the 1970s"; and Part III, "Practical issues". Part III documents Smart's empirical work in the magistrates' courts in Sheffield, where she studied the attitudes of solicitors, magistrates and other legal personnel in their treatment of family law cases within their jurisdiction. Chapter 7, "Doing the research: practices and dilemmas" looks at the politics of research from a feminist perspective.

In the concluding chapter, "Law, policy and feminism", Smart presents a basis for discussions on "how feminists might like to see family law changed, if indeed we think there is any purpose in engaging with law at all" (p.220). Importantly, Smart points out that the ideas in this chapter flow from discussions within the women's movement and notes that the chapter, and indeed the book itself, could not have existed without that process. This is an important allusion to a central feature of the feminist project, and one which distinguishes it from non-feminist scholarship, for feminism is as much grounded in political practice as it is in theory. Methodologically, feminist work is characterised by the extent to which it is formulated through the collective insights and experiences of women, a feature notably absent from other forms of analysis, including critical scholarship. Accordingly Smart warns us that what follows by way of

> conclusion is not a statement of what feminist policy *should* be, it is a drawing together of ideas which will hopefully provoke discussions about what feminist policies *might* wish to include *(ibid.)*.

But before raising these issues, Smart considers it important to answer her own question of whether feminists ought to engage with law at all. Whilst acknowledging that law may not be a primary sphere, and that other areas equally warrant our attention, Smart maintains that

> the law is a valid arena for critique and reform because law both celebrates and sustains a particular family form, it privileges marriage over all other relationships (including parenthood) and it consequently constitutes a major obstacle to any fundamental change to the organisation of our domestic lives (p.221).

Further, the law intervenes directly into our personal lives, despite the traditional stance on the "private" nature of the family and the supposed disdain for intervention into the domestic sphere. Smart confronts head on the myth that law does not operate on the "private": on the household, sexual relations and so forth. Precisely because it does exactly that, whilst simultaneously constructing an ideology which obscures its operation in those areas, feminists need to look particularly closely at the assumptions which underlie legal rules and practices in order to challenge those assumptions and modify their effects. Smart acknowledges that engaging with law and offering proposals for legal reforms might be viewed as a reformist stance, a label with somewhat derogatory connotations. "Certainly feminists do not want to ameliorate existing conditions just to make patriarchal structures more tolerable and long-lived" (pp.222-223).

In terms of strategy, Smart points out that we are often forced to engage in debates in a manner which precludes feminist approaches. This is because the current political climate forces us to direct our energies into trying to maintain the limited gains that women have achieved, rather than looking at alternatives. The need to respond reactively necessarily places us within a reformist framework. She uses the example of maintenance to demonstrate the problem. If we pose the question, "should individual husbands support their ex-wives after divorce?", there is no appropriate feminist answer. This is because on the one hand, it is a basic feminist tenet that women should be financially independent - therefore, dependence on men, either during or after marriage, is problematic. But equally, feminists have argued for recognition of the value of domestic work, as this work benefits both individual men and the state. Accordingly, both should compensate women for the benefits received from that labour. Within the existing framework of debate, the two propositions appear irreconcilable. Smart says this is *precisely* because the original question was framed outside feminist priorities.[3] And, very few policy questions are conceptualised in feminist terms. Pornography is another example, where the choices can appear to be either supporting the subordination of women or forming alliances with anti-feminist crusaders of the Jerry Falwell, Phyllis Schlafly, Mary Whitehouse or Fred Nile variety.

Smart concludes this section:

> ...clearly one aim of feminist policy must be to establish and promote a well-defined third alternative so that issues of policy and law can begin to be conceptualised differently and feminist policies can be made available to a wider audience (p.224).

Smart then canvasses various proposals to modify existing family law and practice. These are summarised as,

> the legal recognition of a wide range of household units, a comprehensive system of state benefits to end women's economic dependence on men, the disaggregation of family units so that individuals can claim benefits and tax allowance in their own rights, and the retention of private law (albeit transformed) for the resolution of certain domestic conflicts (p.235).

She believes that the label "family" law carries with it an undesirable ideological encumbrance which suggests that it "...can only be applied to 'properly constituted families' and which ignores other types of households". She prefers domestic law or household law. To go with this, she proposes the establishment of "household tribunals", to have both a judicial and advisory role.

In conclusion, Smart notes that, for a variety of reasons, it is opportune to seek these sorts of reforms now. Divorce, and related questions are high on the public agenda in Britain (the same is true in Australia where the Australian Law Reform Commission is enquiring into matrimonial property and reviews of maintenance and social security provision to families are also underway).[4]

> Clearly a feminist policy on the household which aimed to deconstruct the ideological family and to demote the heterosexual marriage couple from its privileged position in law would not only be concerned with divorce law. However this is a most useful starting point because it is at the moment of breakdown that the structures of inequality in marriage and the family become public issues. It is possible for feminist policy to capitalise on this moment and to expose the oppressive structures of the patriarchal family (p.240).

The significance of Smart's book is first, that it transcends the "women and law" mode of earlier work which, as she notes in her own critique, often has a tendency to locate "the problem" in the "sexism" of particular male actors in the legal world. Secondly, as a strategic intervention, it affirms the value of engaging with law reform while simultaneously demonstrating that the existing framework of debate does not currently contain a clear slot for a feminist position. The recognition of this is itself important. In more recent work, Smart has developed her views on strategy (Smart 1986), through her notion of the 'uneven development of law' which "both facilitates change and is an obstacle to change" (Smart 1986:117). Law is not a unity, not simply a tool of patriarchy or capitalism *(ibid.)*. Smart believes that the

> concept of uneven development has a particular importance in relation to a feminist analysis of law and social change because of the position occupied by law in popular consciousness and

> hence in political movements like the Women's Liberation Movement (1986:119).

In a political climate of backlash against progressive movements in general and demands on the state by women in particular, the value of work like Smart's is in providing an agenda for strategic interventions. The same cannot be said of Atkins and Hoggett's *Women and the Law* (1984). Though it does not actually focus on the "sexism" of male actors, neither does it go very far towards locating the role of law in constructing, and maintaining oppressive gender relations. This is not to suggest that it set out to do so, and failed. Rather, the book is a clear example of what Smart and others would describe as the "Women and Law" mode. Despite the authors' express statement in the introduction (p.1) that this is not a textbook, the book is written and organised in a way which would make it a very useful text in a course of the same name. It focuses upon areas of law traditionally perceived as significant for women, and, in scholarly fashion provides us with a wealth of information about relevant (English) statutory and case law pertaining to family law, criminal law, in particular, sexual offences, regulation of prostitution, abortion, etc. A chapter entitled "breadwinners and dependants" raises important questions about such matters as the law's response to assumed roles within households and its failure to recognise the economic value of domestic work.

Chapter 9, "The Welfare State: Social Security and Taxation" spells out the way in which these systems have the effect of defining the financial relationships between husbands and wives in the absence of detailed obligations in private law. Atkins and Hoggett move slightly beyond the women and law mode when they tie together issues arising from women's unequal participation in the paid labour force and the problem of the valuation of domestic work with the assumptions underpinning the state benefits and taxation systems. But for most of the book these connections, and their common sources, whilst noted, are taken no further and the focus remains instead on laws such as the English Sex Discrimination Act and the Equal Pay Act which move some part of the way towards formal legal equality. Atkins and Hoggett make it clear in such parts of the book as Chapter 9, that women's relation to law is more fundamentally problematic than the approach described would indicate, but both the form and the content of the book for the most part eschew the more difficult issues. Even the division of the book into the subject matters of areas of law traditionally seen as women's issues serves to assume their pertinence to women whilst at the same time ignoring the centrality of gender relations to the very construction of those categories (e.g. "private" and "public" law.)

The "public/private" split is the central focus of the other significant monograph recently published in England, Katherine O'Donovan's *Sexual Divisions in Law*. Her thesis is that

> ...it is the split between what is perceived as public (and therefore the law's business) and private (and therefore unregulated) that accounts for the modern legal subordination of women (Foreword, p.x).

O'Donovan's book charts new ground in law for attempting to unravel and thereby expose the relationship between legal doctrines and practices and the construction of beliefs about gender, within a unified theoretical framework. She points out that the domestic sphere has been assumed to be private and unregulated. It is, of course, within that sphere that women and their concerns are located within law. But she lucidly demonstrates the falsity of this assumption. The boundary between the regulated and the unregulated is not quite so clear given her use of the term private to mean "non-regulation; an absence of law" (p.81). O'Donovan implicitly invokes Lasch's "Haven in a Heartless World" metaphor (Lasch:1977) to show how the ideology of the family, and the private, domestic sphere combine to disguise the form of regulation that takes place within that site. In her view, the way in which the notion of "state intervention" is used

> ignores the influence of state policy in areas which impinge on the private. Policies on employment, welfare, housing, education, medicine, transport, production, planning, crime, in fact on almost everything influence family life. How could it be otherwise? The whole fabric of the personal life is imprinted with colours from elsewhere. Not to acknowledge this, and to pretend that the private is free, leads to a false analysis (p.15).

Earlier, when referring to the ideological resort to the terminology of "intervention" and "regulation", she perceptively notes:

> a deliberate policy of non-intervention by the state may mask a passing of control to informal mechanisms...It can be argued that non-intervention by law may result in the state leaving the power with the husband and father whose authority it legitimates indirectly through public law support as breadwinner and household head. A deliberate policy of non-intervention does not mean that an area of behaviour is uncontrolled (pp.7-8).

O'Donovan uses as the testing ground of her thesis the very same areas of doctrine as Atkins and Hoggett, viz., family law, employment law, state benefits and taxation, yet her book goes further than theirs, precisely because of the placing of this discussion squarely within the analytical framework of the public/private divide.

The book is about sexual divisions, though O'Donovan correctly notes that the relevant distinctions flow more from gender than biological

sex (she elaborates this distinction at pp.xi - xii of her foreword). There are a number of oppositions evident: aside from the central public/private split, O'Donovan opposes the notions of "community" and "individualism", basing this on Tönnies' *Gemeinschaft/Gesellschaft* distinction. At times this approach is not entirely successful. For example, invoking the notion of "community" in the context of matrimonial property appears to lead her inexorably to a position which supports community of property regimes, a position which has been subject to trenchant criticism from feminists in Australia.[5]

In common with other feminist writers before her (see, e.g. Olsen:1983), O'Donovan calls for the collapse of the public/private divide. Identifying the market with the public sphere O'Donovan concludes that

> If equality is to be taken seriously measures which deal only or primarily with the market place will not be enough. Nor is individualism the answer. A more fundamental answer is given by those who advocate the reuniting of the public and the private, which would no longer be split but part of each other (p.180).

O'Donovan does not attempt a real conclusion. In an afterword, O'Donovan reiterates her argument that "rights based liberalism...fails tc recognise the morality of communitarian values." It is not enough tc recognise values of family responsibility, care and obligation. "It is in their extension to the public sphere that transcendence will be achieved" (p.206).

Transcending the boundaries of the public/private divide is a monumental task and O'Donovan does not presume to suggest how we embark upon that venture. This is an ambitious work, more so than Smart's. Where the latter takes tentative steps towards looking at forms of practices and discourses which perpetuate women's oppression, O'Donovan attempts to locate the entire problem within one single theoretical framework. The argument is not at all times compelling, not least because in the attempt to collapse the public/private distinction, O'Donovan creates other divisions and dichotomies (see Graycar 1986a). And, there is a sense in which the strategic is subsumed within the quest for a global account. This is where Smart's work is of most value. Whilst there is clear resort to a theoretical framework it does not attempt to construct a theory of women's oppression through law, focussing instead on particular strategies. The task of constructing one global theory may not be possible. Some would argue that to seek to do so is a quintessentially patriarchal form of scholarship (see, for example Lahey 1986). Despite these concerns, *Sexual Divisions in Law* is a very important book, because it places those concerns squarely on the mainstream legal agenda. And, while we may not be convinced of the coherence of the thesis, it provides a foundation for future feminist

work, which would have been more difficult before O'Donovan's painstaking, and, at times, revelatory treatise.

The other recent contributions to feminist legal scholarship all take the form of collections of papers and essays either in book or journal form and, accordingly, do not provide us with the theoretical breadth of either Smart's or O'Donovan's work, or the doctrinal coverage of Atkins and Hoggett.

The first of these is *The State, the Law and the Family: Critical Perspectives*, edited by Michael Freeman. It is a collection of papers from the 1983 workshop for law teachers at London's Institute of Advanced Legal Studies. The book is a refreshing contribution to family law scholarship which, for too long, has taken place in a virtual theoretical vacuum. The book's subtitle is "Critical Perspectives" and most, though not all, of the contributions are critical accounts of the subject matters with which they deal. The major contribution of the collection as a whole is that it demonstrates that "family law" is not somehow a discrete area, standing outside the realm of state policy and labour market concerns. This point is made most explicitly by the papers in Part 1: "Women, the state and the law". The remainder of the book is divided into Part 2:" Children, the state and the law", Part 3: "After divorce: picking up the pieces" and Part 4: "Future prospects".

The contributions in Part 1 are all important for deconstructing some of the myths which provide the assumptions upon which debates around family law take place. For example, Jan Pahl looks at the allocation of money within the household and points out:

> The idea that the household is a unit and that those who bring money into the unit will share it with other household members has had the effect both of creating the idea of the single breadwinner who will bring home and share the "family wage", and also of providing few remedies for dependants who do not receive their share of the household income (pp. 37-38).

Pahl's work is similar to Australia's Meredith Edwards (1981, 1984, 1985) and is singularly significant. The assumption that households are economic entities which share their resources equitably has always been considered fundamental to much of the policy discussion surrounding social security and taxation. More recently, the importance of looking behind this assumption has been acknowledged by the Australian Review of Social Security.[6] If the entire basis of aggregating income for the purpose of determining entitlement to social security pensions and benefits rests on assumptions about how married couples or other forms of household behave, we need to look very closely at evidence telling us exactly what *does* happen. Pahl, and in Australia, Edwards, challenge the notion that households all fall within stereotyped economic parameters.

Related to this is Carol Smart's point in chapter 1 that in looking at divorce law and policy we learn more about what happens during marriage, something frequently ignored as irrelevant; private; not the law's business (p.22). Smart, referring to her work with Sheffield solicitors and magistrates, documented in *The Ties That Bind* (1984), notes that what the magistrates and solicitors fail to perceive, and what is absent from recent debates on maintenance, is that the problems of divorce stem from the problems of marriage "...There is a continuity from marriage to divorce because the sexual division of labour that is celebrated as natural and desirable during marriage is precisely the basis of the main conflict upon divorce" *(ibid.)*. Smart concludes that the advent of widespread divorce has made the concealed poverty of women in the family visible.

> It is this structural economic inequality in marriage the law has failed to address and that has now become popularly reinterpreted as an indication of the parasitical nature of divorced or separated women. It is absolutely essential therefore that the concept of "alimony drone" should be recognized as a process of blaming women for their economic inferiority, and not as a new category of women created by an unduly biased family law (pp.11-12).

One of the most difficult issues facing feminists in current family law debates is whether private maintenance obligations should be imposed. That is, on the breakdown of marriage, should ex-husbands be required to continue to support their wives, or should there be a "clean break", a severing of all ties, leaving women to try their luck within the labour market or, if that fails, to fall back upon the state through the provision of income maintenance. Carol Smart's concern that the way this question is posed often precludes a feminist response has been noted above. But Hilary Land attempts a response in chapter 2. In her view,

> Basing a woman's claims to maintenance on her husband, on the ground that she has a right to compensation for a reduction in her earning capacity or the right to some return on her investment in her husband's earning capacity and occupational pension rights seems to me, as a feminist, to be far more attractive in principle than claims to maintenance based on defining a woman as a dependant (pp.30-31).

Land acknowledges that this is not a complete answer to women's maintenance as there will not always be sufficient money to support one, let alone two households. But, she believes that such a strategy

> might draw attention to the differential impact marriage has on men's and women's earning opportunities and capacities, and might begin to lead to a reappraisal of the value of the work women do within marriage. At the very least it would require

> that this be acknowledged and would raise the question of the extent to which men as individuals benefit and hence should pay, compared with the benefits to wider society. This leads back to the issue of the state's share of responsibility to provide benefits and services to support children, the sick and the infirm (p.31).

Each of these three contributions reminds us that the usual formulation of the "problem" of divorce takes place in a vacuum which fails to acknowledge the insidious and entrenched inequality between men and women. Many would argue (see, e.g. Barrett and McIntosh 1982) that "the family" and its social construction as a private zone constitutes the principal site of women's oppression. By their different approaches, Pahl, Smart and Land, have demonstrated the impossibility of engaging in thoughtful debate about family law without addressing this issue.

Freeman's own contribution on domestic violence follows that path. Freeman "argue[s] that the legal system is a cultural underpinning of patriarchy" (p.51). And, in almost subversive fashion, Freeman suggests that:

> The debate about violence against women needs to be removed from deliberations about strategies for social, including legal, intervention and placed firmly within the arena of sexual politics. Violence by husbands against wives should not be seen as a breakdown in the social order, as orthodox interpretations perceive it, but as an affirmation of a particular sort of social order. Looked at in this way domestic violence is not dysfunctional; quite the reverse, it appears functional. But violence against women must not be viewed as an abstract, unproblematic concept. Nor can it be taken out of its historical context and perceived as some kind of trans-historical activity. It must be considered in a particular cultural context (p.52).

Freeman maintains that women not only are, but are supposed to be dependent and to lack power and control over themselves (p.57). This is particularly the case for married women who are defined in legal institutions in terms of marriage, a matter clearly illustrated by fiscal policies and social security arrangements, which affect the economic dependence of women at every turn.

> The woman's place is in the home and this "cult of domesticity" is supported throughout in the tax and social security systems (p.58).

It is within this context that Freeman argues that domestic violence must be located. Most accounts of the phenomenon tend to privatise it, either by its location within individual pathology, or as an individual

response to the stresses caused by straitened economic circumstances. Both explanations individualise the problem. But in Freeman's view, domestic violence can only be successfully challenged in conjunction with a challenge to the legal system's commitment to a patriarchal ideology.

> It is this which must be challenged if violence against women is to diminish and ultimately to cease. It is a challenge for which resistance can be expected for the stakes are high and there are considerable vested interests in the status quo. Success is important for through it will come improvements of the position of women in the home, in the economy and in society in general (p.72).

Part 1 of this book concludes with a paper by Katherine O'Donovan, "Protection and Paternalism", in which the highly contentious "equality/special treatment" debate is applied to the field of protective industrial legislation. She reviews arguments for and against special rules based on ideas about protection of women, and points out that the "notion of protection implies inequality and weakness, a power imbalance which the law is to rectify by its intervention on behalf of the weaker party" (pp.80-81).

O'Donovan then canvasses the explanations for policies of protection. Those in favour of protective legislation argue either that women lack judgement about their best interests, or focus on inequalities between women and men arising out of the division of labour and disparities in power. But counter arguments suggest that protection reinforces inequality, with the effect that "submission by, and control of, the protected is the outcome...". In this debate, "[r]ules concerning men are taken as the norm and where special treatment or protection is provided for women this is regarded as deviation, and often as a favour" (pp.81-81).

After a thorough review of the case law, from the U.S. decision of *Muller v Oregon* ((1908) 208 US 412) to the recent English case law, and a review of the liberal political framework within which this debate takes places, O'Donovan concludes that

> We need a new language in which to elaborate claims that persons make upon one another in the private sphere and in which these can be translated into the public sphere. As yet the conclusion is limited to the observation that it is possible within the liberal tradition, and despite its acceptance of the public-private division, to project a model of rights which recognizes heterogeneity (p.88).

There are real difficulties with the "equality"/"special treatment" debate. Aside from the mere form of the question, which is essentially dichotomised, MacKinnon (1985) has demonstrated that both "equality" and

"special treatment" paradigms involve masculinist standards - the first because, if used to mean "gender-neutral", actually means making women like men; the second because it recognises, in difference, a difference *from* men. MacKinnon prefers posing the question of gender as a question of dominance, rather than difference.

Part 2 of the Freeman book is concerned with children, the state and the law, with contributions on child protection and children and care issues in the U.K., the Netherlands and France. Part 3: "After divorce: picking up the pieces" looks at financial issues around maintenance and matrimonial property, while Part 4: "Future Prospects" looks at arguments about the establishment of a Family Court and the general issue of dispute resolution in family conflicts.[7] The final chapter, Anne Bottomley's "Resolving Family disputes: a critical view" raises concerns for feminists about the too ready acceptance of the "flavour of the month": conciliation or mediation. Bottomley cautions that informal mechanisms have been the subject of critique for two basic reasons. First, they can tend to mask (and thereby perpetuate) inequalities of power in the relationship between the parties.

> Secondly, despite being presented in terms of neutrality and objectivity the mediator may be the purveyor of a particular pattern of beliefs that would tend to favour a particular resolution to which the parties give their formal agreement (p.295).

Bottomley looks at the different types of conflict in issues and warns us that one which is frequently ignored is the structural aspect of conflict: the conflict between the interests and needs of women and men.

> To ignore such structural conflict is merely to reproduce an existing power relationship and not in any way to mitigate or challenge it. Women's needs, the consequence of their continuing position of disadvantage in society, their lack of bargaining power *vis-à-vis* individual men, and the conflation of their rights with their role as mothers, make them particularly vulnerable in conciliation procedures. Those of us who see the family as the site of women's oppression must necessarily be highly critical of any social policy that holds as its core familial ideology and uses the "welfare" of children as its major access point (p.298).

In a fitting conclusion to the Freeman collection, Anne Bottomley notes:

> It is still the case that work produced by academic lawyers too infrequently addresses the basic questions of familial ideology, the relationship between the public and the private and fails to

> adopt a more positive approach to thinking in jurisprudential terms (p.301).

Whilst this is true of some of the contributions to the book, those dealt with here all explicitly or implicitly attempt to address those questions of familial ideology.

The same can be said of most of the contributions to the Brophy and Smart collection, *Women in Law: Explorations in Law, Family and Sexuality* (1985). In an introduction, the editors canvass the history of feminist engagement with law, pointing out that not only is it not a new phenomenon but 19th century campaigners faced similar problems of both principle and strategy to those faced by feminists today (p.2). Arguments in the 1860s and 1870s for married women's property rights met with the response that the family would be destabilised. If one thing has been learned from these campaigns around the vote and other similar issues it is that formal legal equality is not the end of the struggle (p.3). If it were, it would be difficult to argue that we should continue to engage with law, as formal legal equality has largely been achieved. The point is made here, as it is in Smart's monograph dealt with above, that

> law is not in fact a unity, organised with the specific purpose of oppressing women, although clearly that is how it may be experienced...It is possible to find contradictions both in law and legal practice, and between legal agents, which cast doubt upon the existence of a male, legal conspiracy. Our argument is that it is important to distinguish between the law and the effects of law and legal processes in order to identify the contradictions which allow space for change (p.17).

Their analysis takes women, rather than law, as the starting point, pointing out that whatever the language used, the *effect* of law is never gender neutral *(ibid.)*. Part 1 of the book focuses on legal ideology and legal practice in the areas of prostitution, violence against women, child custody and the criminal justice system. In Part 2, Elizabeth Kingdom is wary of using "rights" as the focus for our campaigns, while Anne Bottomley addresses the potential dilemma raised by the shift to informal justice, canvassed above in relation to her contribution to Freeman's the *State, Law and Family* collection. The final contribution is an account of a round table discussion amongst members of the Rights of Women (ROW) Family Law Subgroup, a collective of women legal workers and other women interested in law who discuss the importance of engaging in campaigns around family law, and some of the campaigns that they have been involved in, including the very significant "Beyond Marriage" conference organised by ROW in 1982 which is still viewed in feminist circles in England as the single most significant event in changing the framework of debate around family law. In the words of the subgroup:

> ...what has been most important for us in conferences like "Beyond Marriage" has been a recognition of the need to develop coherent ideas that link together our responses to individual campaigns, so that we do not seem to be simply negative, but as slowly building an alternative which is actually very difficult for us to conceptualise, but we believe it very necessary (p.203).

I do not intend to canvass the individual contributions, except for one by Mary Eaton, but that is not to suggest that they do not warrant close reading. Julia Brophy's article on child custody is particularly noteworthy and Elizabeth Kingdom's article on "rights" discourse warrants careful reading. It is an interesting collection, containing a significant balance of empirical and theoretical work. Chapter 6, Mary Eaton's, "Documenting the defendant: placing women in social enquiry reports" is a refreshing critique of the currently fashionable myth that women are "treated better" by the criminal justice system. This insidious "fact" is accepted as a truism in much contemporary criminological debate.[8]

Eaton studied the practices of probation officers responsible for preparing social inquiry reports on court defendants and concludes that the "advantage" accorded women is related not to sex, but to marital status. So women located within traditional familial roles may do better, but women who venture outside the accepted socially constructed framework may not. She found that social inquiry reports describe individuals in terms of their relationships in past or present family life (p.122) and argues that the practices of probation officers serve to disadvantage women by their endorsement of a model of family life which involves the oppression and exploitation of women. Whilst familial ideology is clearly central to the practices of probation officers, Eaton stresses that these

> gender roles are part of a model of family life which is shared by other members of the court and recognised as a means of social control...it is important to recognise that this model is implicit *throughout* court procedures and not just at the stage of social inquiry reports (p.135).

She concludes:

> Gender divisions are reinforced by the ideology of family life which permeates judicial discourse, and it is only by appreciating this covert role of the court that we can fully appreciate the way in which judicial processes disadvantage women. By accepting, uncritically, the dominant model of the family, the court endorses a sexual division of labour by which women, because of their sex, are defined as different and unequal (p.138).

Work like Eaton's is essential in countering the backlash accounts of women's "better" treatment by the criminal justice system. It also makes the important connection between what goes on in the criminal courts and the much broader structural issue of familial ideology which, it is essential to recognise, operates outside "family law" as that concept is usually narrowly defined.

In its contribution, the ROW subgroup, whilst centrally concerned with family law, also recognises that family law does not operate in a vacuum. Nor is it sufficient to view it as concerned solely with the adjudication of individual disputes about custody, property etc. Instead, the members recognise the essentially public context within which these disputes occur. In their view, "any strategy for change has to be taken on three fronts, in relation to employment, and in state benefits, and in family law" (p.189)

The last of the British collections to be discussed here is a collection of papers gathered under the title of *Gender, Sex and the Law* (1985), from a workshop organised by the U.K. Women Law teachers group in 1983.

Each of the articles, though concerned with different areas of law, focuses on what is described in the introduction as "women's special status and women's debilitated status" which, it is argued,

> stem from a common ideology, from a belief in an essentialist biological and physiological incapacity which spans not only assessment of physical capability but also mental capacity. In law women have been, or so lawmakers proclaim, protected because of these differences, or excluded and exempted (p.1).

The stated object

> involves consideration of the specificity of women's experience as wives, mothers, childbearers, as women, as plaintiffs, defendants, appellants or as victims *(ibid.)*.

To this end, articles cover such topics as the legal ascription of sex (dealing with the infamous April Ashley case *Corbett v Corbett* [1971] P. 83 and Australia's own *C v D* (1979) FLC 90-636) custody and maintenance; the politics of maternity; women and employment (including a discussion of pregnancy and employment); women and immigration and nationality issues, and gender justice: defending defendants and mitigating sentence.

One particularly interesting article is Linda Luckhaus's "A Plea for PMT in the Criminal Law". Luckhaus acknowledges the problematic aspects of arguing for special treatment for women based on alleged

hormonal factors (see also Allen 1984), but nonetheless concludes that there is limited space for a plea for PMT in the criminal law

> firstly, because it may provide a lifeline for female offenders who cannot avoid incarceration by any other means, and secondly, because in rejecting the defence, we may be throwing the proverbial baby out with the proverbial bathwater (p.178).

Hilary Allen is more sanguine about the benefits offered women by a P.M.T. defence or plea in mitigation. She argues that accepting these decisions "could have retrograde ideological effects by reinforcing a conception of women as inherently irresponsible and unstable", they may create precedents "which justify discriminatory treatment of women in employment, education, political life" and they place women "under the insidiously patriarchal control of the medical establishment". She argues that each of these implications emerges from a single source:

> the reference to *female biology* as providing both a basis for explanations of women's behaviour and a legitimation of practices which discriminate against women (Allen 1984:29).

A problem of collections of this kind is that, with one article on each of a number of disparate topics, there is little scope for actual debate within the covers of the book. If the two pieces by Luckhaus and Allen could be published in the one volume, it would facilitate debate on one of the most problematic issues to have confronted feminist strategists for a long time.

In the same year as the English women law teachers focussed their attention on issues of biology, in Canada a group of women academic and practising lawyers met to discuss Women, the Law and the Economy. The collection of papers published under that title (Pask, Mahoney and Brown (eds.) 1984) is a record of those proceedings and include the text of a foreword by Gloria Steinem. The papers range over the broad topics of women in the workplace, negotiating employment benefits, income supplementation, consumer transactions, the economics of divorce, tax reform, implications of the charter of rights, and women and the law: implications for future study.

The quality and breadth of the contributions varies enormously, ranging from straightforward description of various Canadian legal provisions to more theoretical works. An example of the latter is Kathleen Lahey's rigorous and enlightening contribution to the tax debate. Lahey provides a lucid feminist critique of the assumptions which underlie personal income taxation regimes which transcends the immediate Canadian context. She demonstrates that

> Contemporary tax policy analysis has grown up out of a system of thought which has made certain assumptions about economic

> relationships, economic cause and effect, and women as a class. These assumptions have a pervasive and profound influence on taxation rules and taxation practices, ranging from the structure of gender-conscious provisions like the various dependency exemptions...to seemingly genderless provisions (p.278).

Her paper argues, as Smart does in relation to family law debates, that the "debate" leaves no room, within its own parameters, for feminist analysis. For this reason, Lahey tells us that in looking at the role of women in the Canadian economy, pointing out connections between stereotypes of women and the very structure of economic theory, then relating that analysis to the Canadian tax system before finally examining the arguments concerning choice of tax unit, she is deliberately adopting an oblique approach to the topic of the personal tax unit because she has become

> convinced that the very structure of established (male) thought prevents women from fully appreciating the extent to which all economic institutions devalue women (p.279).

In her opinion,

> to discuss the tax unit issue within the framework of analysis that has been developed by mainstream scholars is to choose between models that *all* devalue women *(ibid.)*.

Under the heading "Women in economic theory", Lahey discusses the economic debate surrounding women's domestic labour: concluding, not surprisingly, that that work is of the highest possible value. She canvasses the various attempts to ascribe value to that work, most notably, the opportunity cost and market cost approaches, and notes that the opportunity cost approach reflects precisely the same distortions that depress women's wages in the market in the first place[9] (p.288).

After noting the inadequate basis of the Canadian equivalent of the dependent spouse rebate, Lahey falls short of calling for its abolition "for...these provisions are an extremely important component of the home-centred worker's compensation package" (p.291). This despite her recognition that in Canada the spousal exemption is small, and worthless to low income families, that it confirms that husbands do indeed command their wives' non wage productive labour and that wives do not directly benefit: it is the supporting spouse only who can claim such benefits.[10]

Somewhat controversially, in the light of the more commonly expressed feminist position,[11] Lahey suggests that a strict individual model tax unit would be a step in the wrong direction for home centred workers (p.300). A serious concern to eliminate inequities should require policy makers to return to first principles (p.301). She proposes a

refundable credit which, she argues, would generally neutralise the choice between non wage and wage labour, which will result in equity gains between home centred and wageforce women workers. It would also bring women's economic power into line with their actual economic contribution relative to men. Finally, it would "form a focus for the continuing debate over the question of whether Canada's [or any country's] economy can "afford" to pay women a wage that reflects their contribution to the economy" (pp.301-203).

She concludes:

> Only by challenging the social programs that men urge for women and by challenging the larger system of thought within which those programs are formulated can we reach beyond such a self-defeating view of the meaning of the women's movement. In the context of the debate over the tax unit, such a challenge means that we cannot take traditional concern over equity between families seriously until we have resolved the issue of equity between women and men. And the first step in such a program is to seek out and affirm the importance of the economic contributions made by *all* types of women workers, not just those who earn money incomes (p.303).

This collection is a timely reminder that women's concerns about legal rules and practices transcend "women's issues". For too long, women's (and feminists') interest in analysis of law has been tolerated, but only to the extent that women keep to their rightful, private sphere. So whilst it is expected that women will write about issues directly related to women and children, it would be surprising to find a section on tax reform in a "women and law" book. It may just be that the women and law mode has finally been relegated to its rightful place: it has served as an important building block in the quest for feminist analysis, but it is a mode which must be transcended if broader questions about the role of law in the construction and maintenance of gender relations are to be addressed. Only by asking those questions will it be possible to transform the existing framework of debate.

Transformation is Mary Jane Mossman's aim in her paper, "Otherness and the Law School", in the first issue of the *Canadian Journal of Women and Law* (1985). She points out that the law school curriculum reflects the state of the published literature: women and law courses are common (in Canada, at least), but feminist perspectives have to date had very little impact on the law school curriculum. "In law school courses as in life, man is the central figure and woman is the Other" (p.214). Whilst she welcomes any attempts to scrutinise gender issues within the law school, and notes that good work has come out of such courses over the last decade or so, Mossman notes that women and law courses may not be successful in creating gender equality in the law school for a number of reasons.

> Typically, they have limited enrolments (usually about twenty students), and those students are already somewhat aware of the maleness of legal standards and values. Moreover, the very existence of such courses may operate to dissipate efforts to create more gender equality in the law school as a whole. Such courses may also operate to stigmatise the students who are enrolled in them, thereby reinforcing the idea of women as Other (p.214).

Mossman concludes, after outlining her experience of the Law, Gender, Equality course at Osgoode Hall Law School, that:

> The challenge for feminism in law schools is to transform the normative tradition of law so that what law now recognises as "Otherness" is seen as central to an understanding of law and society (p.218).

The Canadian Journal of Women and the Law contains one of the most sustainedly high quality collections of feminist legal scholarship yet published. This bilingual journal has been in the pipeline since 1982 and the thought and planning which has gone into it shows. Overall, English contributions outnumber those in French, but each article has an abstract in the other language to assist those amongst us who are not bilingual.

Articles canvass women's struggles to practise law, "Feminism, Equality and Liberation", the social location of sexual difference, the establishment of Canada's first women's prison, "Equality Rights and Law Reform in Saskatchewan", "Equality, Affirmative Action and the Charter of Rights", "Focus on Black Women" and "Compulsory Heterosexuality, Lesbians and the Law: the case for Constitutional Protection".

In an article entitled "On Equality and Language", Katherine de Jong argues that "the shape and meaning of language are no more random than are the shape and meaning of law, and that both language and law simultaneously reflect and continue to affect the status of women" (p.120).

One of the most innovative pieces is Christine Boyle's "Sexual Assault and the Feminist Judge". Boyle establishes her framework at the outset: she makes it clear that this is not a utopian piece, but assumes the existence of the current criminal justice system (p.93). It also assumes that it is possible for a feminist to function within that system (p.94). Instead of attempting to discuss a "feminist sexual assault law in a feminist criminal justice system in a feminist state", Boyle chooses instead to "discuss the methodology of a feminist judge who inhabits the *status quo*" *(ibid.)*.

After some initial discussion of the new Canadian sexual assault law - sexual assault is defined as being any kind of touching of a sexual nature without consent (p.97) - Boyle points out that the meaning of sexual is not explicitly defined in the new legislation and indeed, remains somewhat unclear. This is exemplified by the case she discusses *Chase v R* (1984) 40 CR (3d) 282 (New Brunswick Court of Appeal).[12] There the defendant was accused of grabbing a woman by the arms, shoulders and breasts saying: "Come on dear, I know you want it". The issue was whether this was a sexual, or merely a simple assault. The court concluded that secondary sexual characteristics were not included within the meaning of sexual. First, it was argued, if breasts are sexual so are men's beards. Secondly, erogenous zones are not necessarily sexual "lest a person be liable for stealing a goodnight kiss" (p.100).

Boyle points out that, as to the first reason, such an analysis is *inter alia*, "devoid of any sense that gender is of significance in understanding the problem of sexual assault" *(ibid.)*. She suggests that the lack of understanding of the materiality of gender is caused by an apparent lack of knowledge of how women experience reality. In other words, women's experience is ignored, since, as Boyle correctly notes, a woman would consider the touching of her breasts in this context to be a sexual assault (pp.100-101). And, on the second point, the court appears to have characterised an unconsensual kiss as a mischievous attack, instead of a trespass to the person, or assault. This both trivialises women's consent and, simply, mis-states the law.

So how would a feminist judge approach the question?

> She would try to utilize the collective experience of women. Since the basic feminist method is still the consciousness raising process, the judge would need to talk with other women to learn how they experience the world (p.102).

Boyle then refers to interdisciplinary research on women and their experience, using the example of the well known work of Carol Gilligan (1982). Following this approach, a feminist judge would avoid propositions that are abstracted to the level that they are gender neutral when she is dealing with an area in which gender is significant (p.102).

After some further analysis of the reasoning [*sic*] in this case, and the possible ways in which a feminist judge might have gone about her task, Boyle concludes that there is no one feminist answer to the question of what *sexual* means (p.106).

Boyle considers it fairly certain that feminist judges do not and would not base their decisions on the protection of male interests. They would treat gender as material when it is material (though Boyle recognises that as feminist analysis is not monolithic, we may not agree on when it is material).

For Boyle, the question 'when is gender material?' "is one of the biggest and most important constitutional, legal, political, economic, social, and personal issues of our time" *(ibid.)*.

It follows from this that the adoption of gender-neutral forms in areas such as sexual assault, abortion, pornography, prostitution and others is fundamentally defective. Boyle concludes by stating that whilst these areas that she explicitly mentions are of considerable interest to feminist scholars, it is her feeling "that there are many other areas in which the materiality of gender is as yet unobserved because these areas have not yet been explored by feminists. That exploration is a massive project" (p.107).

Here I would suggest that Boyle is being somewhat modest. Her review of two Canadian remedies texts (Boyle:1985b) provides a real model for future feminist contributions to legal scholarship. Refreshingly, there she has moved out of the areas that she herself has noted are most frequently of concern to feminist scholars and has critiqued books on damages and injunctions and specific performance from the point of view of how those books deal with women, (if at all). It is almost a subversive piece, as she turns on its head the style of writing which purports to be "normal, value-free, neutral, objective analysis of the law", contrasting this with the "polemical, overtly political writing that comes under such headings as Women and the Law, Critical Legal Studies and Economics and the Law" (1985b:429).

Boyle tellingly demonstrates that, since women and our legal problems scarcely appear in these books, they are specialised, not general books. Yet they (wrongly) make a claim to universality. "In other words, 'Men and the Law' is tolerable as an area of intellectual activity, but not if it is masquerading as 'People and the Law' " (1985b:430-431).

In this simple sentence, Boyle succinctly captures an important aim of the feminist project in legal scholarship. It is to put gender onto the agenda for debate; to create a body of legal scholarship which neither excludes women nor adopts male forms of analysis which purport to be gender neutral but are nonetheless gendered in their exclusion of women.

The difficulty still remains as to how, in our law schools and other places of work, to shift that focus from men and the law to people and the law, without falling into the trap of "otherness" that too easily follows from addressing ourselves to women and the law. But that exploratory project is well under way. The books and journals mentioned in this review are by no means the only published contributions to feminist legal scholarship. The vastness of the project is to some extent demonstrated by the fact that two Canadian academics have recently compiled a bibliography, containing over 250 references to both published

and unpublished Canadian feminist perspectives on law (Boyd and Sheehy 1986).

The works reviewed here, despite their different subject matters and standpoints all share a common concern to bring to law a perspective informed by considerations of gender. Whilst the individual authors may come from a range of different feminist positions, basically spanning liberal, socialist and radical feminisms, they illustrate the centrality of a gendered approach as the common ground of feminism. They also teach us that agreement on the appropriate form of feminist politics is not a condition precedent to questioning the role played by law in gender relations.

Another common aspect of the work discussed here is that almost all of it is exploratory. Most of these works share a concern to set an agenda or assist in constructing frameworks for future campaigns and further research on law, informed by feminist perspectives. Implicitly or explicitly, they join Catharine MacKinnon in setting "an agenda for theory" (1982); in working "toward feminist jurisprudence" (1983).

It is too early yet to know whether this recent proliferation of feminist insights can fundamentally change both the nature of legal scholarship and the ways in which law and legal practices operate. Kathleen Lahey (1986) reminds us of the limitations of theory, as it has come to be understood, to the feminist project:

> [f]eminist theory struggles to remain experiential; when it grows only through abstraction or through telling, it ceases to be grounded in experience and ceases to be "feminist" theory.
>
> Feminist epistemology contemplates a multiplicity of consciousnesses, of moments of knowing, of theories, and of strategies. One role of theory is therefore to translate moments of knowing into strategies for real action.
>
> Implicit in the process of feminist scholarship, then, is a rejection of dualism, a rejection of polarized thinking at all points along the consciousness-theory-strategy continuum. Theory is revealed as yet another embodiment of consciousness, strategy is revealed as an extension of consciousness, and scholarship emerges as an attempt to affect and support consciousness in the same way as the consciousness raising process.

Lahey goes on to caution:

> If feminist consciousness raising is taken seriously as a way of opening up the possibilities for moments of knowing, then its implications for the nature of feminist theory (and for feminist legal scholarship) are explosive. Not all feminists are comfortable with such an openended agenda, however. It is difficult to break radically with the (male) traditions of scholarship; it is even more difficult to make oneself vulnerable by openly exploring non-dualistic ways of thinking in print. For those who feel some commitment to the scholarly life, to make oneself that vulnerable is highly dangerous; it can be professional suicide.

Despite Lahey's pessimism, I hope that this review has demonstrated that, however doubtful the existence of Santa Claus may be, when our women students ask whether there is any work about law which documents *their* experiences, and sceptical male academics ask their women colleagues for bibliographies, the answer to both is, "Yes, Virginia, there *is* feminist legal literature", and, like the equally mythical Topsy, it just keeps on growing.

Regina Graycar

Endnotes

* I would like to acknowledge the assistance of Sarah Pritchard, Ann Riseley, Chris Ronalds and, most particularly, (the late) Victoria Fisher, all of whom made helpful comments on earlier drafts. Sarah also undertook essential research. The title is adapted from the editorial reply to eight year old Virginia O'Hanlon by Francis P. Church, published as an editorial in the New York Sun in 1897, under the title "Is there a Santa Claus?" and concluding "Yes, Virginia, there is a Santa Claus".

1. In particular, the European material is less readily accessible to Australian (or English speaking) audiences, though some of the Scandinavian writers publish in English (see eg. Stang Dahl and Snare (1978). The special issue of the International Journal of the Sociology of Law, which contains papers from the 1986 "Feminist Perspectives on Law" conference presents some of this material in English.

   As noted in the text, the U.S. material is vast and prolific. Some examples include MacKinnon (1982, 1983, 1984); Olsen (1983, 1984, 1985, 1986); Menkel-Meadow (1985); Polan (1982); Taub and Schneider (1982); Du Bois, Dunlap et al (1985); Scales (1981, 1986); Minow (1985). This is in no way intended to be exhaustive, or even necessarily representative. There are a number of journals specialising in this area: see, for example, the Harvard Women's Law Journal, now in its 10th year, and the more recent Law and Inequality, the Berkeley Women's Law Journal and the Wisconsin Women's Law Journal.

2. For a detailed critique of this book, see Elizabeth Kingdom "Women in Law" (1980) 4 m/f 71.
3. I am indebted to Ann Riseley for the following comment made on a draft of this paper which I include, but don't attempt to answer here:

> But does the present debate, in its non-feminist formulae, not reflect the gender based economic relations in current society? If so, would feminist framed debates suffer from abstraction from outside present realities?

Since writing this review, I have tried to address this question in "Towards a Feminist Position on Maintenance", see Graycar (1987).

4. See Australian Law Reform Commission (1985). The Social Security Review, established in December 1985 has released fourteen background/discussion papers to March, 1987, and three issues papers. The Maintenance Secretariat released a discussion paper in October, 1986, entitled "Child Support: A discussion paper on child maintenance". For comments on the latter, see Earle and Graycar (1987), Heron (1987), and Graycar (1987).
5. See my more extensive review of this book, Graycar (1986a) and see also, for critiques of that position, Cox (1985), and Shiff and MacIlhatton (1985).
6. "Another related issue is whether or to what extent family assistance should be used to offset any unequal distribution of income within the family. Policy makers and researchers have often tended to assume that income being received by the breadwinner is equally shared with spouse and children. An Australian study on financial arrangements within families found, however, that while in the majority of families financial management and control was shared, in a substantial minority of cases income was not fairly distributed between family members" (Edwards 1981 quoted in Harding 1986:9)
7. Some of the other contributions in this book are dealt with in more detail by Riseley (1985).
8. For an Australian critique of "these anti-feminist assumptions which pass for research into the etiology of female crime" (see Howe 1986).
9. It is interesting to note that Meredith Edwards, in her work on the tax and social security systems in Australia, undertakes a similar exercise (see Edwards 1984).
10. In Canada, as in Australia, wives (here, the gender neutral "dependent spouse", which includes de facto spouses) have no access to the resulting tax benefit - there is no legal basis whatsoever for calling it their own.
11. Compare this with the approach of e.g., the London Women's Liberation Campaign for Legal and Financial Independence and Rights of Women 1979.
12. The decision has been appealed to the Supreme Court of Canada.

References

Allen, H. "At the Mercy of her Hormones" (1984) 9 m/f 19.

Atkins, S and Hoggett, B. Women and the Law (1984) Basil Blackwell, Oxford.

Australian Law Reform Commission Matrimonial Property Law (1985) Discussion Paper No. 22.

Barrett, M and McIntosh, M. The Anti-Social Family (1982) Verso (N.L.B.), London.

Bottomley, A. "Resolving Family Disputes: a critical view" in The State, the Law, and the Family (ed.) M.D.A. Freeman (1984), Tavistock, London.

Bottomley, A. "What is happening to family law? A feminist critique of conciliation", in Women in Law (eds) Julia Brophy and Carol Smart (1985).

Boyd, S.B and Sheehy, E. "Canadian Feminist Perspectives on Law" Paper presented to European Conference on Critical Legal Studies, Feminist Perspectives on Law: Theory and Practice, April 3-5 1986, London.

Boyle, C. "Sexual Assault and the Feminist Judge" (1985a) 1 Canadian Journal of Women and the Law 93

Boyle, C. Book Review (1985b) 63 Canadian Bar Review 427.

Brophy, J. "Child care and the growth of power: the status of mothers in child custody disputes" in Women in Law (eds) Brophy, J and Smart, C. (1985) Routledge & Kegan Paul, London.

Brophy, J and Smart, C. (eds) Women in Law: Explorations in Law, Family and Sexuality (1985) Routledge and Kegan Paul, London.

Cabinet Sub-Committee on Maintenance Child Support: A discussion paper on child maintenance (1986) A.G.P.S., Canberra.

Cox, E. "Matrimonial Property Scuttled" (1985) 10 Legal Service Bulletin 192.

de Crow, K. Sexist Justice (1974) Vintage Books, New York.

De Jong, K. "On Equality and Language" (1985) 1 Canadian Journal of Women and the Law 119.

Du Bois, E.C., Dunlap, M.C., Gilligan, C.J., MacKinnon, C and Menkel-Meadow, C.J. "Feminist Discourse, Moral Values, and the Law - A Conversation" (1985) 34 Buffalo Law Review 11.

Dworkin, A. "Against the Male Flood: Censorship, Pornography and Equality" (1985) 8 Harvard Women's Law Journal 1.

Earle, J and Graycar, R."A New Dependence" Australian Society, (February 1987) 37.

Eaton, M. "Documenting the defendant: placing women in social inquiry reports" in Women in Law (eds) Brophy, J and Smart C. (1985) Routledge & Kegan Paul, London.

Edwards, M. "Financial Arrangements within Families" Social Security Journal (December 1981) 1.

Edwards, M. The Income Unit in the Australian Tax and Social Security Systems (1984) Institute of Family Studies, Melbourne.

Edwards, M. "Relevance of economic analysis for feminists" (1985) 1 Australian Feminist Studies 55.

Edwards, S. Female Sexuality and the Law (1981) Martin Robertson, Oxford.

Edwards, S. (ed.) Gender, Sex and the Law (1985) Croom Helm, London.

Freeman, M.D.A. "Legal Ideologies, patriarchal precedents, and domestic violence" in The State, the Law and the Family (ed.) Freeman, M.D.A. (1984) Tavistock, London.

Freeman, M.D.A. (ed.) The State, the Law and the Family: Critical Perspectives (1984) Tavistock, London.

Gilligan, C.J. In a Different Voice: Psychological Theory and Women's Development (1982) Harvard University Press, Cambridge MA.

Graycar, R. "Review of Sexual Divisions in Law by Katherine O'Donovan" (1986) 11 Legal Service Bulletin 132 (1986a).

Graycar, R. "Feminism Comes to Law - better late than never" (1986b) 1 Australian Feminist Studies 115.

Graycar, R. "Towards a Feminist Position on Maintenance" (1987) 30 Refractory Girl (forthcoming).

Harding, A. "Assistance for Families with Children and the Social Security Review" Background/Discussion Paper No. 4 Social Security Review (1986) D.S.S., Woden, A.C.T.

Heron, A. "Child Support - Making Fathers Pay?" (1987) 12 Legal Service Bulletin 17.

Howe, A. "Equal Justice for Women Prisoners - Why settle for Less?" (1986) 29 Refractory Girl 20.

Kairys, D. (ed.) The Politics of Law (1982) Pantheon Books, New York.

Kingdom, E. "Women in Law" (1980) 4 m/f 71.

Kingdom, E. "Legal recognition of a woman's right to choose" in Women in law (eds) Brophy, J and Smart, C. (1985) Routledge & Kegan Paul, London.

Lahey, K.A. "The Tax Unit in Income Tax Theory" in Women, the Law and the Economy (eds) Pask, E.D., Mahoney, K.E and Brown, C.A. (1985) Butterworths, Toronto.

Lahey, K.A. "...until women themselves have told all they have to tell..." (1986) Osgoode Hall Law Journal (forthcoming).

Land, H. "Changing women's claims to maintenance" in The State, the Law and the Family (ed.) Freeman, M.D.A. (1984) Tavistock, London.

Lasch, C. Haven in a Heartless World (1977) Basic Books, New York.

London Women's Liberation Campaign for Legal and Financial Independence and Rights of Women "Disaggregation Now! Another Battle for Women's Independence" (1979) 2 Feminist Review 19.

Luckhaus, L. " A Plea for PMT in the Criminal Law" in Gender, Sex and the Law (ed.) Edwards, S. (1985) Croom Helm, London.

MacKinnon, C.A. "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 Signs: Journal of Women in Culture and Society 515.

MacKinnon, C.A. "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs: Journal of Women in Culture and Society 635.

MacKinnon, C.A. "Not a moral issue" (1984) 2 Yale Law and Policy Review 322.

MacKinnon, C.A. in Du Bois, E.D. et. al. "Feminist Discourse, Moral Values and the Law - A Conversation" (1985) 34 Buffalo L Rev 11.

Menkel-Meadow, C. "Portia in a Different Voice" (1985) 1 Berkeley Women's Law Journal 39.

Minow, M. "Forming Underneath Everthing that Grows: Towards a History of Family Law" [1985] Wisconsin Law Rev. 819.

Mossman, M.J. "Otherness and the Law School: A comment on Teaching Gender Equality" (1985) 1 Canadian Journal of Women and the Law 213.

O'Donovan, K. "Protection and Paternalism" in The State, the Law and the Family (ed.) Freeman, M.D.A. (1984).

O'Donovan, Katherine Sexual Divisions in Law (1985) Weidenfeld and Nicholson, London.

Olsen, F.E. "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harvard Law Review 1497.

Olsen, F.E. "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 University of Texas Law Review 387.

Olsen, F.E. "The Myth of State Intervention in the Family" (1985) 18 Michigan Journal of Law Reform 835.

Olsen, F.E. "The Sex of Law", paper presented at the European Conference on Critical Legal Studies, Feminist Perspectives on Law: Theory and Practice, April 3-5, 1986, London.

Pahl, J. "The allocation of money within the household", in The State, the Law and the Family (ed.) Freeman, M.D.A. (1984) Tavistock, London.

Pask, E.D., Mahoney, K.E and Brown, C.A. (eds) Women, the Law and the Economy (1985) Butterworths, Toronto.

Polan, D. "Towards a Theory of Law and Patriarchy" in The Politics of Law (ed.) Kairys, D. (1982) Pantheon Books, New York.

Riseley, A.C. "Book Review of The State, The Law and the Family (ed.) Freeman" (1985) 8 U.N.S.W.L.J 227

Sachs, A and Wilson, J.H. Sexism and the Law (1978) Martin Robertson, London.

Scales, A.C. "Towards a Feminist Jurisprudence" (1981) 56 Indiana Law Journal 375.

Scales, A.C. "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale Law Journal 1373.

Shiff, D and MacIlhatton, S. "Review of For Richer for Poorer by J. Scutt and D.Graham" (1985) 10 Legal Service Bulletin 29.

Smart, C. The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations (1984) Routledge and Kegan Paul, London.

Smart, C. "Marriage, divorce and women's economic dependency: a discussion of the politics of private maintenance" in The State, the Law and the Family (ed.) Freeman, D.A.M. (1984) Tavistock, London.

Smart, C. "Feminism and Law: Some Problems of Analysis and Strategy" (1986) 14 International Journal of the Sociology of Law 109.

Stang Dahl, T and Snare, A. "The Coercion of Privacy: a feminist perspective" in Women, Sexuality and Social Control (eds) Smart, C and Smart, B. (1978) R.K.P., London.

Taub, N and Schneider, E.M. "Perspectives on Women's Subordination and the Role of Law" in The Politics of Law (ed.) Kairys, D. (1982) Pantheon Books, New York.