DOMESTIC LEGAL AID: THE PUBLIC MEANS OF REDRESS FOR PRIVATE MATTERS

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This commentary presents domestic legal aid as a reflection of the assumptions underlying the public/private dichotomy. It thus broadens the lecture theme to another subject area, suggesting the interrelationship between various aspects of public policy which must be viewed as sharing similar assumptions about public responsibility, private scapegoating and the place of women.

Domestic legal aid offers state-funded legal assistance for family matters: custody and support applications, divorce, property distribution and restraining orders, in particular. In New Brunswick, the jurisdiction on which I am focusing, domestic legal aid constitutes the only form of civil (non-criminal) legal aid available.[1] Even so, domestic legal aid in New Brunswick is limited in its coverage: its availability is primarily limited to persons who have experienced domestic abuse; it offers only limited assistance with respect to division of property; its court social workers, in addition to intake, perform work which might be considered "engaging in the practice of law"; it apparently depends on mediation and consent orders even when a party has experienced abuse; and it is available only in the most superficial way for divorce (since divorce is considered unnecessary). These limitations can be contexualized as systemic sex discrimination because domestic legal aid has historically offered to those who need it — mainly women — less than criminal legal aid has to those who need *it* — mainly men.[2]

The discriminatory nature of the legal aid system can be explained at least in part by careful reference to the so-called "public/private dichotomy". I say "careful" because, while this framework has been of considerable assistance in appreciating women's subordination, it has also been open to criticism on the basis that it has represented only certain women's experience in the private sphere, specifically white middle-class women. These are the *Feminine Mystique* women who, at the time the public/private framework was being formulated, were less likely to work outside the

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[1]Other jurisdictions offer broader civil legal aid programs, although nearly all of them have been subject to cutbacks. In Ontario, the certificate system for family law is subject to "the governing principle" of "protect[ing] the safety of a spouse or child who is at risk, or to protect an established parent/child bond": *Family Law Priorities* issued by the Ontario Legal Aid Plan effective 1 April 1996.

[2]I propose a challenge to the domestic legal aid program under the *Canadian Charter of Rights and Freedoms* on the basis of sex discrimination in access to the legal system in P. Hughes, "Domestic Legal Aid: A Claim to Equality" (1995) 2 Review of Constitutional Studies 203. Mary Jane Mossman has written extensively on the gendered aspects of legal aid: see *e.g.* "Gender Equality and Legal Aid Services" (1993) 15 Sydney L.R. 30.

home than they are today. For poor women, for example, both white and of certain ethnic or "racial" backgrounds, this framework had less power as a *descriptive* framework of their lives, although it did and does have power as an *explanatory* framework of how they are treated by the state and by family law. For women of certain communities, the family has been the site of strength and empowerment (but in a public context of lack of power). Women's power in these communities reflects the fact that men of the community are especially powerless in the public sphere, with high levels of unemployment and sometimes transitory connection to families. The mother-child family unit (with perhaps other extended female members) is of high significance.

It is also correct to say, as Elizabeth Schneider does in "The Violence of Privacy", that the public/private distinction has been overdrawn, that "[t]here is no realm of personal and family life that exists totally separate from the [reach] of the state" and that "[t]he state defines both the family, the so-called private sphere, and the market, the so-called public sphere" so that "'[p]rivate' and 'public' exist on a continuum".[3] There has long been some state involvement in the family arising out of western religious tradition and the commitment to private property. Such involvement includes the definition of the family, issues of consanguinity, rules relating to inheritance, the scope of power of husbands over wives and of fathers — and later, mothers — over children, and the consequences to the man who had the temerity to rape another man's property, the latter's wife. Thus the family — the private sphere — has not been immune from the state. For the most part, the state, when it has intervened, has not done so to favour women, but rather to bolster control by men. It is only recently that the state has ostensibly intervened to protect women and children from the dangers they face in the family, stumbling to find a way to protect women's physical integrity. It has not been long since women were granted their own legal status in the family (their own legal personality or the ability to give their name or nationality to their children, for example). Jane Ursel has termed the state the "contested terrain" because the struggle between the family and the state as the locus of "patriarchal" control of women depends on the extent to which women can use the state to advance equality and the extent to which the state itself maintains the patriarchy.[4]

It seems, moreover, that the contested terrain might be that of the female body: is its use and susceptibility dictated by the family structure or by the state?[5] For

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[3]E.M. Schneider, "The Violence of Privacy" in M. Albertson Fineman & R. Mykitiuk, eds., *The Public Nature of Private Violence* (Toronto: Routledge, 1994) 36 at 38.

[4]J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 2.

[5]*Ibid.* at 4. Ursel talks of this as the struggle between or transition from family patriarchy to social patriarchy. That is, control over women is shifting from being exercised by men in the family to being exercised by the state.

example, though no longer required to bow under the rod wielded literally and metaphorically by her husband, a woman may be required to stoop under the weight of the foetus.[6]

The constitutional principle of "privacy" has not developed in Canada as it has in the United States. There, it underlies the right to contraception and abortion; here, we have been more inclined to pose threshold questions and have determined that the state should stay out of the bedrooms of the nation. We do not want the state in the private sphere all the time, but we do want it there part of the time. We want the state to recognize that private rights, the enjoyment of the private, may require state assistance. We want recognition that a woman's place in the private is integrally related to her position in the public sphere. We want to ensure that the public supports the capacity to end the private relationship.

Given the shadings of the public/private dichotomy, it is therefore important to appreciate the context in which it is used to provide the framework for analysis. Professor Mossman, in her lecture, has used the dichotomy to explore how private responsibility has been used to avoid public responsibility and has used the systemic subordination of women as an explanation of why children do not receive the support that they should. In the legal aid context, the argument goes this way: access to the legal system is crucial to the enforcement of legal rights. To state the obvious, rights by themselves mean little — it is the ability to enforce them which counts. Thus rights to physical integrity or to be recognized as an autonomous person in law are effective only if women can enforce them. In our legal system, the ability to enforce legal rights usually means being able to hire a lawyer. Therefore, questions of legal aid should be characterized as questions about access to the legal system — regardless of whether we are dealing with a criminal or a civil matter. Because of the differential resources allocated to civil and criminal legal aid, there is less access to the legal system to enforce legal rights of particular concern to women than there is to enforce legal rights enjoyed by an accused.

Domestic legal aid is required to assist those without sufficient resources to leave their marital relationships without compromising their legal rights. The reasons women want to leave their marriages may be the same as men's. But women may want to leave for reasons which are less likely to be relevant to men (and probably vice versa). Indeed, the domestic legal aid system in New Brunswick acknowledges that abuse is a reason for wanting to leave. It acknowledges this by making abuse

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[6]The Supreme Court of Canada will hear an appeal from the Manitoba Court of Appeal's decision in "the solvent case" in which the state attempted to apprehend a pregnant woman who sniffed glue in order to protect the foetus: *Winnipeg Child and Family Services* v. *George* (1996), 111 Man. R. (2d) 219 (Man. C.A.). A recent New Brunswick decision, although obviously less of an infringement of women's bodily integrity, may in fact have far-reaching implications: *Dobson* v. *Dobson* [1997] NBJ No. 17 (QL) (N.B.Q.B.) (on appeal to the New Brunswick Court of Appeal). In *Dobson*, a child was granted standing to sue his mother for injuries suffered *in utero* as a result of her allegedly negligent driving.

the eligibility criterion for receipt of domestic legal aid. It does not acknowledge that women may assess their own interests as being met by leaving the matrimonial relationship even when they do not experience abuse. Domestic abuse is now a "bad" thing. In September 1996, the Conservative Government of Ontario announced that it had decided to establish domestic violence courts with specially trained prosecutors, a move which could be seen as a positive development.[7] Significantly, as indicated above, the family legal aid system has been restricted in Ontario to, among others, those who have experienced domestic abuse.

It is significant that the men who abuse are treated the same as the men who fail to pay support: it is their individual problem. If *they* could get their act together, the problem would be solved. There is no doubt that the problem would be reduced. It might also indicate that the days when men who beat their wives or men who avoided paying support were heroes are really over. The problems are treated as a manifestation of individual pathology. Thus the non-paying dads are "deadbeats", the abusive men are, in the terminology of Ontario Attorney General Charles Harnick, "sickos". Not only Mr. Harnick, but the government as a whole, can insulate itself from responsibility for the systemic pattern of domestic violence against women. Similarly, the "deadbeat dads", as Professor Mossman pointed out, are being shouldered with full responsibility for child poverty. The men who fail to pay support are not living up to the proper model of the man who has responsibilities towards his family; hence the televised public service announcement in New Brunswick saying that "a man" pays support. This debate is as much about the failure of men to observe the "new" parameters of the male role as it is about providing children with support.

In New Brunswick, abuse and support issues merge as abused women are ostensibly provided by the New Brunswick legal aid system with the means to leave the abusive relationship. Court solicitors spend considerable time enforcing support orders for women who receive income assistance in order to repay the Human Resources Development Department. The state purports to provide access to the legal system to allow women to end abusive relationships even though in a different context it requires women to re-establish relationships.

Women are still less likely to have sufficient financial resources to hire a lawyer as a result of systemic discrimination. They may not have an independent income because they have remained in the home looking after children — work not recognized as meriting pay because it is a "private" activity. They may not earn enough since their work in the public sphere resembles their work in the private sphere and therefore warrants minimum pay (which nevertheless is more than they get when they do the work at home). Their husbands may control the family finances and may not be inclined to pay "pocket money".

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[7] R. Platiel, "Ontario to set up courts on abuse" *The Globe and Mail* (5 November 1996) A7.

The use of limited legal aid resources to force women to seek enforcement of support orders is a reflection of the focus on "deadbeat dads" which Professor Mossman addressed in her lecture. It illustrates the way in which the domestic legal aid system is entrenched in the "private solution" to "public problem" paradigm. In contrast to the criminal legal aid system which attempts to ensure public funding to defend those accused of crime, domestic legal aid reinforces the idea that family disputes (private disputes) must be handled by private means. Ironically, a person seeking to defend (usually) himself against allegations of having committed a private wrong — domestic abuse — is far more likely to obtain public assistance in doing so than is the person (most often female) who seeks to escape from the same private wrong.

Similarly, abusing women today is seen as a breach of the pact between the state and men who play the state's role in the family. Thus women are entitled to leave abusive relationships and they are far less likely to be told "to try to make it [the marriage] work" than in the past. But, under New Brunswick's system at least, they are not "entitled" to leave on their own terms. They are not prevented from leaving by law, as such, but by the lack of *access* to law which would permit them to shape the terms of their leaving. In cases in which the woman has decided to leave without the impetus of abuse, her decision is one taken in private; she must take private action. The price of her leaving the private sphere if she conforms to the model of the dependent spouse, having fulfilled her responsibilities as a woman to be wife and probably mother, is that she will have to leave on someone else's terms. A woman who admits that she has been or is under someone else's control may obtain the ungenerous assistance of the state. In a province which has established a Family Secretariat to uphold the family, a woman who simply decides that it is in her or her children's best interests to dissolve the family unit is bucking provincial social policy. The resistance by the state to providing public means to enforce private-based rights is a present reminder of how hard it is for women to act autonomously in relation to the family — their "proper sphere".