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Book Review: Privatization, Law, and the Challenge to Feminism, by Brenda Cossman and Judy Fudge (eds)

PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM
EDITED BY BRENDA COSSMAN & JUDY FUDGE (TORONTO:
UNIVERSITY OF TORONTO PRESS, 2002) 493 pages.¹

BY DOROTHY E. CHUNN²

Proliferating literature on Keynesian welfare states from the 1970s onward reveals considerable agreement that a fundamental reordering of western liberal democracies has occurred. In Canada, as elsewhere, however, mounting evidence attests to the markedly differential effects of globalization and restructuring.³ *Privatization, Law, and the Challenge to Feminism* is another compelling confirmation that the impact of social change depends on where one is situated.

In their "Introduction,"⁴ Judy Fudge and Brenda Cossman draw on

¹ Many thanks to the members of Susan Boyd's Feminist Legal Studies seminar (Spring 2003) for helping me to work through some of the issues raised in this book.

² School of Criminology, Simon Fraser University.

³ See Joe Hermer & Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002); National Council of Welfare, *Welfare Incomes 2002* (Ottawa: 2003), online: Government of Canada <<http://www.ncwcnbcs.net/htmldocument/reportwelfinc02/Welfare2002.htm>>; and Statistics Canada, *Income of Canadian Families* (2001 Census: analysis series) (Ottawa: 2003), online: Statistics Canada <<http://www12.statcan.ca/english/census01/products/analytic/companion/inc/pdf/96F0030XIE2001014.pdf>>.

⁴ Judy Fudge & Brenda Cossman, "Introduction: *Privatization, Law, and the Challenge to Feminism*" in Cossman & Fudge, eds., *supra* note 1, 3.

political economy and feminist analysis to develop a comprehensive theoretical overview of the profound and uneven impact of the neo-liberal turn in Canada, focusing specifically on the role of law in, and the challenges to, feminism posed by the (re)formation of the social and gender orders. They make three main arguments. First, “privatization”—a “tectonic shift in public policy” that entails the restructuring of government activities to “emulate market norms”⁵—is the harbinger of a change in state form from Keynesian to neo-liberal. Second, the shift in state form requires the concomitant restructuring of the Keynesian gender order that is important for feminists to analyze. Third, as a “crucial mechanism for mediating shifts in state power” in liberal states, law is central to the “privatization project” that involves a shift in power relations whereby the state “intervene[s] in social reproduction on new terms.”⁶

Fudge and Cossman locate the impetus for the “privatization project” in the crisis of capital accumulation during the late 1960s when the costs of social reproduction associated with the Keynesian gender order, based on a “male breadwinner-female homemaker” family model, increasingly hindered capital accumulation. The solution was to privilege production—for instance, free trade leaves capital “structurally freer” than ever from the costs of social reproduction—and to transfer state responsibility for provision of goods and services to the market, the family, and the not-for-profit sector.⁷

The links between privatization, feminism, and law outlined by the editors are addressed in each of the subsequent case studies that, in turn, are organized under three broad headings, thereby lending thematic unity to the book. The chapters in Part I, “Reproducing the Market,” underscore the consequences of women’s historical exclusion from, or restricted inclusion in, paid labour for contemporary Canadian women. Judy Fudge⁸ examines the legal regulation of women’s employment in the federal public service from 1908 to 2001, tracing a trajectory that begins with exclusion and ends with the current backlash against equity. Her case study demonstrates the cumulative effects of women’s subordinate position vis-à-vis men in paid labour and the predictably contradictory impact of legal reforms aimed at redressing women’s inequality. Most recently, for example, “legal norms of substantive equality” that were institutionalized

⁵ *Ibid.* at 4.

⁶ *Ibid.* at 30.

⁷ *Ibid.* at 23-24.

⁸ Judy Fudge, “From Segregation to Privatization: Equality, the Law, and Women Public Servants, 1908-2001” in Cossman & Fudge, eds., *supra* note 1, 86.

in the federal public service by the early 1980s and that increased the proportion of women, have been undercut by the accelerated “feminization” of employment norms, including wage reductions and an increase in the proportion of temporary positions.⁹

Lisa Philipps¹⁰ illustrates the key role of tax law in liberal states in shifting resources towards accumulation or reproduction. Historically, it has reinforced women’s subordinate position in paid labour by helping to (re)produce “a gendered economy” in which unpaid, caregiving work is “private and non-economic” and women’s economic welfare is “the private concern of individual men.”¹¹ Neo-liberal reforms linked to privatization, such as income tax cuts, have exacerbated this historical tendency of the tax system to impose the costs of social reproduction on women by shifting resources towards accumulation and a minority of primarily male high-earners. Tax law has thus contributed to “the creation and regulation of a more market-oriented and more unequal society.”¹²

Mary Condon¹³ addresses similar issues in her examination of the pension privatization debate in Canada. The always “strong private dimension” to pensions has been strengthened by recent, ostensibly gender neutral regulatory developments that de-emphasize the “public good” and redistributive elements of state or public pension provision, and shift the emphasis “within the privatized sphere from collective to individual responsibility for providing benefits.”¹⁴ However, women are much more likely than men to have no experience of paid employment or to have engaged in non-standard employment, leaving most ill-positioned to meet the new expectation that they will engage in self-governance to ensure their old age security as opposed to relying on a “family wage.”

Part II, “Producing the Social Body,” shifts attention to the ways in which “private,” familial responsibility for social reproduction has been intensified and (re)formed under neo-liberalism. Brenda Cossman¹⁵ looks at “reprivatization” in the context of the changing relationship between

⁹ *Ibid.* at 122.

¹⁰ Lisa Philipps, “Tax Law and Social Reproduction: The Gender of Fiscal Policy in an Age of Privatization” in Cossman & Fudge, eds., *supra* note 1, 41.

¹¹ *Ibid.*

¹² *Ibid.* at 83.

¹³ Mary Condon, “Privatizing Pension Risk: Gender, Law, and Financial Markets” in Cossman & Fudge, eds., *supra* note 1, 128.

¹⁴ *Ibid.* at 136.

¹⁵ Brenda Cossman, “Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project” in Cossman & Fudge, eds., *supra* note 1, 169.

family and social welfare law in Ontario and the contradictory implications of neo-liberal and neo-conservative visions for the regulation of the family. She emphasizes that the “privatization of the costs of social reproduction” is not new in Canada, but current “reprivatization” and “familialization” strategies are increasing demands on families “to support their own.”¹⁶ While neo-conservatism remains strong, the neo-liberal vision seems dominant in the law reforms—recognition of same-sex spouses in family law, forcing “deadbeat dads” to pay child support, and helping welfare recipients become self-reliant worker-citizens—that are contributing to the creation and legitimation of a new gender order.

Audrey Macklin¹⁷ examines similar issues in her analysis of immigration policy. In the current context, privatization is a selective, uneven process and female migrants are both instruments and objects of privatization strategies. Some women are admitted as “low” skill, temporary workers to perform the labour of social reproduction in Canadian families. Others continue women’s history of admission as spousal dependants under family reunification regulations that inscribe the “breadwinner-homemaker” model of family. However, recent reforms to these regulations have hit women hard by creating a “precipitous decline”¹⁸ in the family category of immigrants. Concomitantly, massive cuts to immigrant services have intensified the historical responsibility of immigrant women for the social reproduction of both their own families and their ethno-cultural community.¹⁹

In Part III, “The Self-Reliant Citizen: Social Health and Public Order,” the focus shifts again to the gendered implications of neo-liberal conceptions of market-based citizenship in the areas of health and child welfare. Joan Gilmour²⁰ traces the “creeping privatization,” buttressed by discourses of unaffordability and individual responsibility, that significantly reduced social responsibility for reproducing a healthy population in Ontario and Canada during the 1990s. While the public health care system has always funded private service providers, extensive legislative, regulatory, and policy changes that facilitated further privatization, including selective uninsuring of services, were implemented with little

¹⁶ *Ibid.* at 170-71.

¹⁷ Audrey Macklin, “Public Enterprise/Private Member” in Cossman & Fudge, eds., *supra* note 1, 218.

¹⁸ *Ibid.* at 248.

¹⁹ *Ibid.* at 259.

²⁰ Joan M. Gilmour, “Creeping Privatization in Health Care: Implications for Women as the State Redraws its Role” in Cossman & Fudge, eds., *supra* note 1, 267.

public consultation and were often presented as a means of improving the public system. Disproportionately represented among patients, health care workers, and unpaid caregivers, women are “inordinately affected”²¹ by the increasing emphasis on private provision and payment for health care, both in terms of personal access to care and as paid and unpaid caregivers.

Roxanne Mykitiuk²² also analyzes the growing emphasis on the self-regulation of health under neo-liberalism and, in particular, the gendered effects of the relationships among privatization, the “new genetics,” and reproduction. With the proliferation of new technologies, reproduction is now both an attractive investment site and an increasingly public process. Although the Canadian state has strongly promoted the production and dissemination of genetic knowledge through the legal constitution of new forms of property and opportunities for accumulation, its failure to regulate the use of genetic technologies in the context of procreation has facilitated the construction of a “new active citizen responsible for her own risks” and intensified the already “unequal burden of social reproduction.”²³

In the final chapter, Dianne Martin²⁴ looks at contemporary “child-saving” and the re-regulation of marginal youth under neo-liberalism, focusing on Alberta and Ontario. Welfare cuts have created an increasingly visible youth presence on city streets, evoking a punitive response that reflects a coincidence of interests between a “law and order”-oriented criminal justice system and reformers who see coercive strategies as the only way to attain “some measure of social justice.”²⁵ Quasi-criminal laws aimed at “child prostitutes” primarily target and construct girls and young women as both offenders who threaten public order and innocent victims of predatory men. The child prostitution “crisis” fuels a “marketing campaign” selling “crime control” and “individualized solutions to complex social issues.”²⁶

Overall, this is an ambitious collection—unique in its scope, diversity, and analytical framework. Much of the literature and research on contemporary social change is theoretical, non-legal, or focused on one topic area such as social welfare. The editors’ decision to adopt a case study

²¹ *Ibid.* at 270.

²² Roxanne Mykitiuk, “Public Bodies, Private Parts: Genetics in a Post-Keynesian Era” in Cossman & Fudge, eds., *supra* note 1, 311.

²³ *Ibid.* at 350-51.

²⁴ Dianne L. Martin, “Both Pitied and Scorned: Child Prostitution in an Era of Privatization” in Cossman & Fudge, eds., *supra* note 1, 355.

²⁵ *Ibid.* at 356.

²⁶ *Ibid.* at 362.

approach allows the presentation of detailed, stand-alone socio-legal analyses of change over time in a range of substantive areas and institutional sites. As a result, the book gives readers the big picture with respect to the interplay between different levels of state and forms of law, and their respective roles in restructuring, globalization, and neo-liberal governance.

As neo-liberalism takes shape in Canada, the book also gives the reader a picture that highlights the complexity of shifting relationships between public and private, as well as self-regulation and coercion. The contributors collectively challenge a “hydraulic” model of social change as the simple replacement of the status quo by something entirely new. Their conceptualization of the links between public and private, self-regulation, and coercion in terms of continuities, as well as differences between Keynesian and neo-liberal states, is significant since a key continuity is the centrality of the state (and law) under neo-liberalism. Although discursively “disappeared,” the state remains pivotal in the re-ordering of liberal democracies, changing, not reducing, its regulatory role²⁷ and sometimes intensifying coercion and familialization simultaneously.²⁸ Neo-liberalism, then, is about a reformation of the divide between the public and the private, not a sudden elimination of the state as a significant player in the shaping and mediation of social relations.

Another strength of this book is the illumination of the contradictions that beset neo-liberal governance in Canada and elsewhere and their gendered implications. While providing ample evidence of the “downside” of globalization and restructuring for women, the contributors clearly demonstrate that (neo-liberal) reforms not only reinforce the status quo but also sow the seeds of change. For example, many of the chapters illustrate how privatization generates policies that both intensify and erode gender. The emerging “new gender order” is thus “a central challenge for the privatization project.”²⁹ As feminist economists point out, this new order is ultimately “unsustainable”³⁰ because it rests on the irreconcilable assumptions that women will engage in full-time paid labour and continue to do the majority of the ever-increasing, unpaid work of social reproduction.

Some contributors also identify intra-gender contradictions

²⁷ See Philips, *supra* note 10 at 45; Cossman, *supra* note 13 at 136; and Gilmour, *supra* note 20 at 275.

²⁸ Martin, *supra* note 24 at 355.

²⁹ Cossman & Fudge, *supra* note 4 at 4.

³⁰ Philips, *supra* note 10 at 62.

generated by neo-liberal legislation and policies that are particularly important for feminists to address. Several chapters point to the intersection of gender and class that is reflected in the increasingly similar labour market experiences of women and men. Although for most, convergence reflects men's downward mobility under neo-liberalism,³¹ for a minority, convergence is the result of women's upward mobility into professional, academic, and business careers. As a result, recent changes to tax law³² and pension policies benefit affluent women as well as men and are creating a "growing polarization in the positions of richer and poorer women."³³ In the immigration context, familialization strategies generate multiple contradictions. Bringing racialized women from the "south" to Canada as temporary domestic workers, for instance, obviously conflicts with the feminist goals of publicly funded daycare and home care for the elderly.³⁴ Nonetheless, the policy accommodates both the immediate needs of primarily white, middle class women in the "north" for child and elder care, and the desires of would-be immigrants who need to provide financial support for their families at home and see possible permanent residence as a reward for devalued labour.

Another noteworthy feature of this book is the contributors' attentiveness to the uneven relationship between the discursive and the material in the ascendancy of neo-liberalism. Discursive relations are (re)formed in, but not determined by, a particular material context and vice versa. In some areas of law, discursive shifts in the direction of neo-liberalism have not necessarily been reflected in practices. In others, changes in material and discursive relations seem more closely linked. What seems clear is that discourses can be, and have been, invested with different meanings in the context of globalization and restructuring. Thus, the discourses of "choice" and "equality" that second-wave feminism (and other social movements) used with some success from the 1960s to the 1980s became increasingly unusable through the 1990s as neo-liberals and neo-conservatives (re)negotiated the meanings of these discourses in every institutional site, including law.³⁵

Nonetheless, contradictions abound. Neo-liberal discourses of "choice" and equality have not completely displaced feminist ones. In the late 1990s, for instance, both the Canadian Human Rights Tribunal and the

³¹ Fudge, *supra* note 8 at 111-12.

³² Philips, *supra* note 10 at 52.

³³ Condon, *supra* note 13 at 160.

³⁴ Macklin, *supra* note 17 at 228.

³⁵ Mykitiuk, *supra* note 22 at 318-19.

Federal Court upheld substantive equality with respect to pay equity for women public servants. In a neo-liberal climate, however, these decisions generated a discursive “backlash” that constructed pay equity as “unfair” to other workers and taxpayers, and the increase in women’s wages as proof that “feminist demands had gotten out of hand.”³⁶ Similarly, the discourses of “choice” and (formal) “equality” continue to have political and legal currency for some historically marginalized groups. Lesbian and gay reformers have invoked rights discourse with marked success since the 1990s to secure legal recognition of same-sex relationships,³⁷ culminating with the recent legal and pending political recognition of same-sex marriage. Arguably, however, lesbians and gay men are just catching up to other groups in terms of legal rights and have yet to experience the downside of formal equality.

Happily, and in contrast to many analyses of neo-liberalism, this book is not restricted to exposé and deconstruction. Detailed attention to the implications of neo-liberal ascendancy for feminist strategizing leaves readers with hope rather than fatalism. Emphasizing that there is no single “blueprint” for change,³⁸ the editors and the other contributors present and assess an array of legal and non-legal strategies. They concur that while it is important to retain the Keynesian emphasis on redistributive goals, the Keynesian welfare state is gone,³⁹ and feminists must engage with the changes wrought by restructuring or globalization and develop new strategies to resist and (re)form neo-liberalism.

Although the inherent limitations of (legal) reform strategies present a huge challenge to feminists, law clearly remains a site for feminist struggle. Litigation is an important “defensive strategy”⁴⁰ and also can form the basis of political or public mobilization, albeit certain forms and types of law may be more fruitful than others in resisting neo-liberalism.⁴¹ Law is an important arena for discursive contestation as well. Feminists need to assess possibilities and means of appropriating neo-liberal and neo-conservative discourses to their own ends.⁴² Ultimately, however, working out feminist solutions means sticking to the always “slow and difficult path

³⁶ Fudge, *supra* note 8 at 124.

³⁷ Cossman, *supra* note 15 at 181-82.

³⁸ Judy Fudge & Brenda Cossman, “Conclusion: Privatization, Polarization, and Policy: Feminism and the Future” in Cossman & Fudge, eds., *supra* note 1, 403.

³⁹ *Ibid.* at 416.

⁴⁰ *Ibid.* at 408.

⁴¹ Gilmour, *supra* note 20 at 292-305.

⁴² Cossman, *supra* note 15 at 213-14; Mykitiuk, *supra* note 22 at 351.

of truth telling, coalition building, and equality-enhancing efforts.”⁴³

I have one quibble with this impressive collection that stems from my own recent thinking about (re)privatization. The centrality of such a dichotomous concept flies in the face of the contributors’ carefully nuanced analyses and seems problematic in several ways. First, (re)privatization suggests a much greater degree of social responsibility for health, (child) welfare et cetera, in Keynesian states than ever existed. Given women’s primary responsibility for social reproduction historically, it seems more accurate to say that neo-liberalism erases even the slight and contingent support for families or women under Keynesianism through an intensification of individual, “familial” responsibility. Second, (re)privatization obscures the ways in which the neo-liberal state has reconfigured, not eliminated, its role and contributions to social welfare. Tax and pension reforms greatly enhance the social subsidization of a minority at the same time as health and welfare reforms sharply reduce state contributions to social reproduction of the majority.⁴⁴ Third, (re)privatization hides the extent to which neo-liberalism entails a reordering of the *relationship* between coercive and self-regulation. In liberal, capitalist states, law always acts both as a facilitator of market or self-regulation and as a coercive means of regulating the marginal or non-compliant. An increased emphasis on individual self-governance and, simultaneously, on state coercion is characteristic of the “authoritarian,” neo-liberal state.⁴⁵

In sum, (re)privatization reinforces the idea of a real line between public and private, and also implies that “the private” per se is always bad for women. This is one of the many issues with important theoretical and practical implications for feminists to consider as we regroup and develop new strategies under neo-liberal governance. Fortunately, the contributors to *Privatization, Law, and the Challenge to Feminism* have provided us with a rich resource for the rethinking, planning, and struggles that lie ahead.

⁴³ Martin, *supra* note 24 at 399.

⁴⁴ See Mimi Abramovitz, “Everyone is Still on Welfare: The Role of Distribution in Social Policy” (2001) 46 *Social Work* 297.

⁴⁵ See Claude Denis, “‘Government Can Do Whatever It Wants’: Moral Regulation in Ralph Klein’s Alberta” (1995) 32 *Can. Rev. Soc. & Anth.* 365.