Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law

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Abstract
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Keywords
Family policy; Feminist jurisprudence; Gays–Legal status, laws, etc.; Lesbians–Legal status, laws, etc.; Minorities–Legal status, laws, etc.

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PARADISE LOST, PARADOX REVISITED: THE IMPLICATIONS OF FAMILIAL IDEOLOGY FOR FEMINIST, LESBIAN, AND GAY ENGAGEMENT TO LAW

BY SHELLEY A.M. GAVIGAN*

In this article the author addresses the theoretical and political challenges issued to feminists and feminist scholarship by recent debates and litigation concerning "family" and "family-based" benefits. The argument proceeds in four parts: first, the discussion is relocated within socialist feminist theory. The implications of the qualified pro-family stance in the critiques advanced or influenced by women of colour is considered next, followed by an examination of some proposals to extend the definition of "spouse" and "family" to lesbian and gay relationships. The author is critical of both "critiques" and illustrates with reference to Canadian welfare and immigration law that feminists, lesbians, and gays must be attentive to the complex and contradictory implications of family-based strategies.

Successful ideologies are often thought to render their beliefs natural and self-evident—to identify them with the 'common sense' of a society so that nobody could imagine how they might ever be different. ... On this view, a ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the thinkable.¹

Attacking the family wage is a bit like an atheist attacking god the father. She wants to say that it does not exist, that the false idea that it does exist has evil consequences and that even if it did exist it would not be a good thing.  

I. INTRODUCTION

Theoretical complexities confronting Canadian feminists are not so much new as newly acknowledged. The most recent and most powerful example is the imperative to address racism and its implications in our work, and in our society more generally. Lesbians and gay men also challenge feminists to struggle against homophobia and to unravel the myriad ways heterosexual assumptions and prescriptions inform and deform social relations and social life. Additionally, feminists who problematize questions of class structure and class relations are illustrating that class is a concept and a relation that is inevitably mediated by gender and race relations. Those of us who work in law endeavour to explicate the roles played by lawyers, judges, and legal institutions, and the significance of legal principles and processes in all of this. This is not a modest task.

A serious challenge has been issued by critical scholars, political activists, and lawyers, who are grappling with two difficult and complex issues confronting feminist legal scholarship and feminism more generally: the social and legal marginalization of women of colour, and

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of lesbians and gay men. In particular, feminist criticism of "the family" has been criticized in turn both by scholars and activists, who are analyzing the effects of racism and by those leading the current campaign to extend spousal benefits, if not full family status, to lesbian and gay couples. Indeed, the challenge can be stated succinctly: feminists who adopt a critical stance toward "the family" have been urged to acknowledge and rethink the white, heterosexual privilege apparently implicit in such an analysis.

The heightened visibility of these issues in Canadian law and feminism is timely, as is the necessity to respond to and engage in this important discussion. I propose to do this in four parts. First, I will relocate this particular discussion within socialist feminist theory and practice. Next, I will consider the implications of the qualified pro-family stance in the critiques advanced or influenced by women of colour. I will then take up the argument advanced by others that the family is a site of "heterosexual privilege," as evidenced in part by the current prevailing legislative definitions of "spouse." In the final section, drawing upon a socialist feminist conceptualization of the "family" and familial ideology, I will illustrate, with reference to Canadian welfare and immigration law (notably the legislative definitions of "family" and "spouse"), that feminist analysis and advocacy must both identify and explain the specificity and interconnectedness of gender, race, and class relations.

It is not sufficient simply to discover and declare race, class, and sexual orientation; one must also illustrate and analyze the inequalities that flow therefrom. Despite the insistence by many feminists, including those who are women of colour, of the simultaneous, intersecting or interlocking nature of gender, race, and class inequalities, the image that often emerges is one of discrete compartments in a pyramid of

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oppressions in which gender becomes simply a site of privilege, and class drops out, or worse, becomes a bad attitude—"classism." In this paper, I argue that this layering or compartmentalizing approach to the analysis of social relations obscures more than it reveals. In sum, I raise some questions in an attempt to clarify my own thinking and to contribute to continuing dialogue regarding these issues.

4 M.L. Fineman, in "Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship" (1990) 42 Fla. L. Rev. 25 at 39-40, has issued a note of caution concerning what she regards as a tendency to regard race, class, and sexuality as the only relevant "markers of difference" resulting in a "hierarchy of oppression," which does not address the myriad complexities of women's lives. Again, this is not a new development nor one unique to feminist legal scholarship, as Kathryn Harriss' retrospective article on the rather dispersed state of the British Women's Liberation Movement illustrates. In "New Alliances: Socialist-Feminism in the Eighties" (1989) 31 Feminist Rev. 34 at 37, Harriss argues that in the early 1980s, "[a]n obsession seized the movement for self-labelling and labelling others, not to elucidate debate but to fix a woman somewhere along a predetermined hierarchy of oppressions in order to justify or contest a political opinion by reference to the speaker's identity" [references omitted].

5 It is significant to note that "class" does not drop out in the black feminist work cited supra note 3; however, it is invisible in some of the work inspired by the work of black feminists. See, for example, M. Kline, "Race, Racism, and Feminist Legal Theory" (1989) 12 Harv. Women's L.J. 115; E. Thornhill, "Focus on Black Women!" (1985) 1 Can. J. Women & L. 153; and J. Herbert, "'Otherness' and the Black Woman" (1989) 3 Can. J. Women & L. 269. See also C.A. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" (1991) 4 Yale J.L. & Feminism 13; MacKinnon, ibid. at 18, argues that "in recent critiques of feminist work ... it is worth noting that the fact that there is such a thing as race and class is assumed." Harriss, ibid. at 37 and at 38-39, argues that in the British women's movement the slogan "the personal is political" took on a meaning in which the political became reduced to the personal, and "the coinage of the term 'classism' served to reduce the whole issue of class exploitation to a set of attitudes or prejudices," See also T. Eagleton, "Defending the Free World" (1990) Socialist Registrar 85. Eagleton, at 88, observes that he has not encountered the concept of "classism" outside North America.
II. FEMINISM AND "THE FAMILY"

At the outset, it must be acknowledged that not all feminists adopt a deeply critical stance toward the family. While most acknowledge women's double day of paid and domestic labour, the nature of gender relations revealed by the forms of violence women and children endure, the dimensions of women's sexual subordination, poverty, and inequality in virtually every sphere of life, and so on, only socialist feminists offer an explanation that systematically implicates the nuclear family, and more specifically, familial ideology, in women's subordination in Western capitalist societies. This concern with the contribution of the family to women's oppression has led radical feminists, such as the American legal theorist Catharine MacKinnon, to argue that within socialist feminism,

6 See, for example, Judith Stacey's review of conservative feminists' stance toward the family in "Are Feminists Afraid to Leave Home? The Challenge of Conservative Pro-family Feminism" in J. Mitchell & A. Oakley, eds., What is Feminism? (Oxford: Basil Blackwell, 1986) 219; S.A.M. Gavigan, "Law, Gender and Ideology" in A. Bayefsky, ed., Legal Theory Meets Legal Practice (Edmonton: Academic Printing & Publishing, 1988) 283; and E. Abner, M.J. Mossman & E. Pickett, "No More Than Simple Justice: Assessing the Royal Commission Report on Women, Poverty and the Family" (1990) 22 Ottawa L. Rev. 573. Abner, Mossman & Pickett, ibid. at 603, conclude that the Royal Commission Report rejected the profoundly critical stance toward the family which might have resulted in a more clear understanding of the role of the family in the oppression of women, the need for fundamental structural change for achieving equality goals, as well as the uneven potential of law for securing such aims.

7 In the Canadian literature, D.E. Smith's early work stands out: see, for example, "Women's inequality and the family" in A. Moscovitch & G. Drover, eds., Inequality: essays on the political economy of social welfare (Toronto: University of Toronto Press, 1981) 156. Smith, ibid. at 156, carefully distinguished women's experience based on their class position:

Though it is a serious over-simplification to treat the family as the sole basis of women's inequality, it is the social organization of women's labour in the home and outside, and the relations between the two which are women's inequality, and it will be argued here that the character of inequality and of its history differs in different class settings [emphasis in original].

women are reduced to some other category, such as "women workers," which is then treated as coextensive with all women. Or, in what has become near reflex, women become "the family," as if this single form of women's definition and confinement, which is then divided on class lines, can be presumed to be the crucible of women's determination [references omitted; emphasis added].

For her part, MacKinnon acknowledges that "race and class are deeply imbedded in gender" but suggests that "[w]omen get their class status through their sexual relations with men of particular classes." At best, this notion of women's acquisition of class from men, not peculiar to MacKinnon, makes it very difficult to identify the myriad processes and sites through and in which class and race relations are implicated in women's subordination. At worst, it consigns working class women to their usual invisible place in orthodox Marxism and some feminism.

It would be naïve to suggest that the legacy of what Michèle Barrett now calls the "Marxist/feminist encounter" has led to a complete overhaul of Marxist analysis, or that socialist feminism is an ascendant tendency within feminism more generally. My argument is, however, that it continues to be necessary to identify and link the contribution of familial ideology to the specificity of women's social, economic, and sexual subordination in the current context. This does not lead to a monicausal or "mono-sited" explanation of women's subordination; would that there were but one crucible or linchpin implicated in the construction of women's subordination.

For socialist feminists, the sexual division of labour; the role of the state as a site of patriarchal capitalist relations of power; and the

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8 *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) 12. See also C.A. Mackinnon, "Feminism, Marxism, Method, and the State: An Agenda For Theory" (1982) 7 Signs 515 at 525, in which she characterized the elision in slightly different terms:

Most commonly, women are reduced to some other category, such as "women workers," which is then treated as coextensive with all women. Or, in what has become near reflex, women become "the family," as if this single form of women's confinement (then divided on class lines, then on racial lines) can be presumed the crucible of women's determination [references omitted; emphasis in original].


10 Michèle Barrett's important contribution to Marxist feminist theory (not cited by MacKinnon in the work cited supra note 8) was first entitled *Women's Oppression Today: Problems in Marxist Feminist Analysis*, supra note 7. The most recent revised edition reflects Barrett's less sanguine position: *Women's Oppression Today: The Marxist/Feminist Encounter*, *supra* note 7; see her assessment, *ibid.* at xxiv, of the decline and displacement of (white) socialist feminism: "the voices now most effectively addressing questions of class, inequality, poverty and exploitation to a wider public are those of black women, not white-socialist feminists." Barrett's critical reappraisal of the possibilities of pursuing the Marxist/feminist encounter have continued with her recent book, *The Politics of Truth: From Marx to Foucault* (Stanford, Cal.: Stanford University Press, 1991).
socially-constructed separation of the public and private spheres have been integral to an analysis of women's subordination.\textsuperscript{11} The insistence on the implications of social construction is of fundamental importance: if relations of subordination are socially constructed, it follows that they can be changed.\textsuperscript{12} A vision of and a commitment to social change, to a fundamental transformation of the dominant social, political, and economic order to one based on principles of substantive equality in all areas of life, out of necessity, informs the work of socialist feminists.

The commitment to historical-materialist methodology brings with it an insistence upon historical and cultural specificity, upon changing and different forms of women's oppression and resistance, and an understanding that even in conditions of subordination, women and men are active moral agents who participate in the construction and change of both their experiences and the world.

Socialist feminists have no self-evident point of entry into law and no blueprint is offered here. It is fair to suggest that a socialist feminist presence in legal scholarship is still developing. So far, English Canadian work has concentrated on the feminization of labour and the gendered nature of labour relations;\textsuperscript{13} on research on the law-state relation that takes issue with the trans-historical and universal claims of radical feminist theory;\textsuperscript{14} on analysis of the problematic public/private split entrenched in the Canadian Charter of Rights and Freedoms;\textsuperscript{15} and the equally problematic implications of feminist involvement in Charter


\textsuperscript{12} Marxist Feminist Analysis, supra note 7 at 250.

\textsuperscript{13} See, for example, J. Fudge, “Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour” (1991) 7 J.L. & Soc. Pol'y 73 [hereinafter "Labour Law's Little Sister"];


\textsuperscript{15} Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].
litigation.\textsuperscript{16} It has also focussed on deploying neo-Marxist theoretical tools to illustrate the ideological nature of the state and law, especially family, welfare and child custody,\textsuperscript{17} and contributing more generally to the development of a Marxist theoretical analysis of law.\textsuperscript{18} More recently, socialist feminist legal scholars have begun to examine the intersection of gender, race, and class and the implications of their official invisibility in the areas of violence against women,\textsuperscript{19} refugee law,\textsuperscript{20} and the status of women more generally.\textsuperscript{21} The challenges, possibilities, and implications of postmodernist critiques have also been taken up.\textsuperscript{22} This scholarship is not homogeneous. But, while there is both difference in emphasis and some disagreement between authors, a body of socialist feminist legal scholarship now exists which may be engaged by further work.

Socialist feminists do not address an abstract, ahistorical, transhistorical, or “essential” family in our work. Despite the celebration of

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its naturalness, timelessness, and ubiquity, feminist historians\(^{23}\) have illustrated that the configuration of personal relations that our society has come to understand as the family emerged at a distinct historical and material conjuncture, whose dominance was consolidated over the course of approximately a century.\(^{24}\)

Feminist scholars who have examined the operation of family law historically\(^{25}\) and in the current context\(^{26}\) have illustrated that a dominant model of family has been reproduced and reinforced through law—it is heterosexual and nuclear in form, patriarchal in content. The precise form of the legal supports has not been constant. There have been important shifts away from “pure” patriarchy,\(^{27}\) leading at least one

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The variability of family forms cannot be overstressed; there is no essential ‘family’, but always ‘families’. The work of the Cambridge Group has taught us to differentiate clearly between family and household. Miranda Chaytor’s work on early modern households, in particular, has drawn attention to the ‘fragility and impermanency of most domestic arrangements’. Her work is critically extended by feminist insights and chronicles the differing experience of men and women, children and elders, both within the family and in relation to other institutions. In the early eighteenth century, as Kussmaul notes, no word existed which meant ‘only kin’ within a household; servants, lodgers, visitors, pupils, shopmen or unrelated children might well be included [references omitted].


[a]s we learn more of women’s history we find that the emergence of the dependent form of the family among the working class was far from an abrupt and immediate consequence of the rise of industrial capitalism. ... The dependency of the mother-children unit on the male wage earner emerges rather slowly.


British socialist feminist to argue that, in the transition to and consolidation of capitalist social relations, the legal underpinnings of patriarchy were eroded.  

Dorothy E. Chunn describes this dominant family form:

This model, which remains hegemonic today, is premised upon a conception of ‘the family’ as a particular type of household arrangement—a nuclear unity of husband/father, wife/mother and their children—and, perhaps more importantly, as an ideology based on the doctrines of domesticity and privacy.  

In her study of the formation and operation of early family courts in Ontario, Chunn found that those families that did not fit this model were to be forced to fit, and their familial privacy was readily invaded to accomplish the task. “[R]ecalcitrant families, located primarily among the working and dependent poor, were subject to direct state regulation in the form of ‘socialized’ legal coercion.” She concludes that the early family courts in Ontario worked hard to repair and maintain nuclear family units in danger of disintegration; to buttress the ideology of ‘the family’ among that section of the population most resistant to it using mediation and conciliation if possible and overt coercion as a last resort.  

Closely related to the idea of the family as private domestic haven has been the idea of the family (subsistence) wage, which emerged in Britain and spread to North America during the nineteenth century, and arose in part from trade union demands. With it came the idea and Feminist Struggles” (1991) 2:2 J. Hum. Just. 1 at 5-6.  


29 Supra note 25 at 138.  


In fact the legal obligation to maintain has never been a good guarantee of a married woman’s security, especially if the husband was a low or irregular wage-earner. During the late nineteenth and early twentieth centuries the courts increasingly tried to make the working-class husband live up to his legal obligations in order to prevent the wife coming into the poor law, and middle-class legislators became increasingly aware of and ready to blame the failure of some working-class men to maintain their wives.  

31 Supra note 25 at 144.  

32 Secombe, supra note 24 at 54-55, draws an important distinction between the emergence of the individuated wage form, which he argues was inevitable and an integral part of capitalist development, and the emergence of the ideal of the male breadwinner norm, which was not. Noting that elsewhere in Europe the male breadwinner triumphed later, Secombe, at 54, nonetheless argues that “[t]he British case, in this respect, should be considered as one example of a more
that a working man should earn enough to support his family and "that, ideally, the wife's place was at home, or at least that any wage earning she did was of secondary importance." The struggle for the family wage "was conducted at the expense of the woman worker," and there have been other long-term and far-reaching problems associated with it. It remained and still remains for many, if not most, working-class people an unrealized and unrealizable ideal for which women assumed a double burden of poorly-paid employment, and devalued domestic labour and child care in the home.

It is clear, however, as Jane Lewis also reminds us, that the idea of the family wage was not foisted upon an unwilling or duped working class, including women trade unionists who were mindful of the double burden imposed upon women who worked outside the home. The family wage promised a solution to inadequate wages, marginal subsistence, and grinding hardship. The ideal of the family wage, and the respectability it conferred upon working-class men whose wives "did not have to work" and married women who "did not have to work" outside the home, held out a better, easier life for working-class people. Joan Acker captures the enormity and the complexity of the dilemma, which is no less apt today:


33 Lewis, ibid. at 103; see also J. Acker, "Class, Gender, and the Relations of Distribution" (1988) 13 Signs 473; Barrett & McIntosh, ibid.; and May, ibid.

34 Lewis, ibid. at 106. Acker, ibid. at 481, concludes that the wage gap between men and women "was essential to implementing the ideal of a family wage." Secombe's explanation and criticism, supra note 24 at 54-55, is equally tough:

the complete triumph of the male breadwinner norm in the working class was not a foreordained consequence of capitalist growth, but rather was the outcome of struggle in which an increasingly conservative labour movement ... reacted in a narrow exclusionist fashion to the very real threat which the mass employment of women as cheap labour represented to the job security and wage levels of skilled tradesmen [emphasis in original].

35 Lewis, ibid.: to the extent that the family wage was never realized, women shouldered a double burden of household work and paid employment, and received little assistance from legislation such as national insurance, which assumed female dependency to be the norm.

36 Ibid. at 103-106; Lewis, supra note 30; May, supra note 32; and Acker, supra note 33.
Economic support through the family wage, to the extent that it was achieved for the working class, was the result of conflict, reform, resistance and accommodation occurring in political, trade union, legal, and familial arenas as people tried to cope with the destructive effects of capitalist development and secure for themselves and their families economic survival and a satisfying daily life [references omitted].

The significance of familial ideology was not confined to trade union analyses and wage demands. In Canada, as Jane Ursel and Dorothy E. Chunn have illustrated, it came to inform a sweeping range of legislative initiatives as apparently disparate as child protection and minimum wages:

When ideology failed, the recalcitrant—individuals who would not or could not voluntarily adhere to middle class norms of child-rearing and family life—were subject to legal coercion [references omitted]. During the late nineteenth and early twentieth centuries, federal and provincial governments enacted a spate of criminal and quasi-criminal legislation that was ostensibly applicable to all children and all families but, in effect, targeted the non-middle classes.

The earliest minimum wage legislation in Canada anticipated that women who worked would be single, and certainly not supporters of dependants. More profoundly, commitment to the idea of the patriarchal nuclear family as the exemplary model for the distribution of wages and social benefits became the basis of all aspects of social, economic, and legal posture regarding the “family,” notwithstanding significant historical, regional, and ethnic differences in wage forms in

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37 Acker, ibid. at 485.


39 Chunn, ibid. at 44.

40 McCallum, supra note 13; M. Hobbs, ‘Dead Horses’ and ‘Muffled Voices’: Protective Legislation, Education and the Minimum Wage for Women in Ontario (M.A. Thesis, University of Toronto, 1985); and B. Russell, “A Fair or a Minimum Wage? Women Workers, the State, and the Origins of Wage Regulation in Western Canada” (1991) 28 Labour/Le Travail 59. May, supra note 32 at 278-79, similarly found that at the turn of the century in the United States, “[s]udies of minimum wages for working women did not base minimum subsistence needs upon the possible presence of a family and rarely assumed women would be the financial heads of households,” notwithstanding poverty studies of the same period, which “revealed that an overwhelming proportion of destitute families were headed by women.”

41 The gendered implications of this commitment cannot be overstated. Acker, supra note 33 at 480, argues that the wage relation must be seen as both an essential component of production and distribution, a “gendered phenomenon, gendered for men as well as for women.” Acker, ibid. at 484, notes that other kinship based forms of distribution exist in some places in the United States, notably among African American women’s households; nonetheless, the dominant model that informs distribution either through wages or state benefits is the patriarchal nuclear family model.
actual households.\textsuperscript{42} And, as Chunn has found, "when ideology failed," this model was applied coercively to the very section of the population least able to attain it—the labouring and dependent poor.\textsuperscript{43}

The commitment to the form and content of familial relations expressed in the family wage is not a relic of less enlightened times; the primary responsibility for familial financial support continues to be regarded as personal, private, and intra-familial,\textsuperscript{44} which is no less problematic for poor and working-class women now than it was in the nineteenth century.

III. DISSIDENCE AND DISSONANCE: DIFFERENT FAMILIES?

Feminists, irrespective of perspective, now acknowledge the significance of multiplicity and difference in women's experience. In their recent historical study of the contemporary English Canadian women's movement, Nancy Adamson, Linda Briskin, and Margaret McPhail have drawn on and illustrated socialist feminist praxis. They argue that differences between and among women must be acknowledged:

socialist feminists challenge the use of an un-differentiated category of woman, for despite the commonalities of women's experience, their life circumstances differ considerably on the basis of race, class, and sexual orientation.\textsuperscript{45}

However, the fact of difference, diversity, and the fragmentation of experience does not require that theoretical and practical work succumb to fragmentation as "differences do not by definition mitigate against the possibility of alliance."\textsuperscript{46} However, not all feminists agree that "experience" continues to be a relevant or unifying analytical concept.\textsuperscript{47}

\textsuperscript{42} See Russell's discussion, supra note 40 at 66-69.

\textsuperscript{43} Supra notes 17 and 25.

\textsuperscript{44} For instance, the Family Law Act, R.S.O. 1990, c. F.3, s. 30, provides:

Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

The Family Benefits Act, R.S.O. 1990, c. F.2, operates with a different form of intra-familial premise, as Mossman and MacLean have illustrated, supra note 26.

\textsuperscript{45} Supra note 11 at 103.

\textsuperscript{46} Ibid. at 108. See also Fineman, supra note 4, who makes a similar argument in the context of feminist legal scholarship.

\textsuperscript{47} See, for example, J.W. Scott, "Experience" in J. Butler & J.W. Scott, eds., Feminists Theorize The Political (New York: Routledge, 1992) 22; and Williams, supra note 3.
In other words, the "woman" who appears to have been "constructed" by feminists is not "every woman." Just as Christopher Lasch characterized the patriarchal nuclear family as a "haven in a heartless world," so too some but not all black feminists have argued that the black family may be a bastion against the impact of racist society. The diversity of women's experiences of "family" clearly ground some of the critiques. These arguments on the importance of family have struck a chord with Canadian feminists who have incorporated the anti-racist critiques into their work and used them to interrogate Canadian feminist legal scholarship.

Didi Herman notes that there is no uniformity in the usage of the term "family" since some feminists regard it as an ideological construct and others speak more empirically from their own experiences. There is, of course, no contrived uniformity to be found in the experiences or

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48 C. Smart, "Law's Power, the Sexed Body, and Feminist Discourse" (1990) 17 J.L. & Soc'y 194 [hereinafter "Law's Power"]; and C. Smart, Unruly and Docile Bodies: Women in Reproductive Technology (Department of Sociology, University of Warwick, Coventry, England, 1990) [unpublished] [hereinafter Unru$y and Docile]. This is also expressed in some work as a critique of "feminist essentialism" or "feminist anti-essentialism": see N. Duclos, "Some Complicating Thoughts On Same-Sex Marriage" (1991) 1 L. & Sexuality 31; and Williams, supra note 3.


50 See, for example, Carby, supra note 3; and Cook & Watt, supra note 3 at 56-57. See also bell hooks, who speaks less of family and more of homes made by black women: "Homeplace: A Site of Resistance" in b. hooks, Yearning: race, gender, and cultural politics (Toronto: Between the Lines, 1990) 41. hooks, ibid. at 42, characterizes the very creation of homes as an act of resistance by black women:

We could not learn to love or respect ourselves in the culture of white supremacy, on the outside; it was there on the inside, in that “homeplace,” most often created and kept by black women, that we had the opportunity to grow and develop, to nurture our spirits. This task of making a homeplace, of making home a community of resistance, has been shared by black women globally, especially black women in white supremacist societies.

In this piece, hooks illuminates the struggle to render visible the love, sacrifice, and strength with which black women have nurtured and sustained their children and kin against the odds of a racist society. Perhaps most powerful is her interrogation of the implications of Frederick Douglass' statement that he never knew his mother's care, notwithstanding his own story that when he was a child, she made a twelve-mile journey after work each night, to lie with him as he went to sleep, before her walk back for daybreak, and another day's work in the field. Ibid. at 44-45.

51 See, for example, E.F. White, "Listening to the Voices of Black Feminism" (1984) 18 Radical America 7; and G.T. Nain, "Black Women, Sexism and Racism: Black or Antiracist Feminism?" (1991) 37 Feminist Rev. 1.

52 See, for example, Thornhill, supra note 5 at 159; Kline, supra note 5 at 122; and D. Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall L.J. 769. See also Susan Boyd's thoughtful engagement with this work, supra note 22.

53 Ibid. at 800.
writing of women of colour. For instance, the published work of Aboriginal women resonates of community and nation.\textsuperscript{54}

In the United States, Patricia Hill Collins has suggested that class differences increasingly mediate the life experiences of African-American women; the “commonality” of race, gender, and class oppression “is experienced differently” by middle-class and working-class African-American women.\textsuperscript{55} In English Canadian literature, Toni Williams\textsuperscript{56} and Nitya Duclos\textsuperscript{57} have offered trenchant critiques of essentialism in feminism, and Himani Bannerji\textsuperscript{58} has extended her analysis of the racism of conventional feminism to encompass a critique of a politics of difference.

In my view, what is exposed is how complex and contentious the issue of “experience” is within feminism and how reified the “family.” A powerful injunction reminds us there is no unified “experience” that can be claimed to be a “woman’s”\textsuperscript{59} and, as such, challenges feminist work purporting to speak for all women. However, this is not a completely new issue or struggle for or within feminism. For instance, class relations and class divisions between women, including feminist activists, have figured more prominently in the history of the Canadian women’s movement and elsewhere than is often acknowledged.\textsuperscript{60} As historian Judith Walkowitz has illustrated, the nineteenth-century British middle-class feminist campaign to repeal the contagious diseases legislation to essentially rescue and save prostitutes from the evils and perils of prostitution (particularly aristocratic male vice) was frequently met with the response from working-class prostitutes that, while they too wanted

\begin{footnotes}
\item[55] Supra note 3 at 65.
\item[56] Supra note 3.
\item[57] Supra note 48.
\item[58] Supra note 3.
\item[59] “Law’s Power,” supra note 48; Unruly and Docile, supra note 48; Duclos, supra note 48; Bannerji, ibid.; and Williams, supra note 3.
\end{footnotes}
the odious laws repealed, they did not want to be saved and/or transformed into rescued fallen angels. 61 In other words, feminist reformers were often told that they did not speak for the very women to whom they were committed. Thus, while common cause was made between “respectable” feminists and their vilified working-class sisters, class tensions and antagonisms in this successful campaign were not insignificant. 62 The difficulty with the identification and juxtaposition of apparently differing and divergent experiences is that it can result in the assertion, rather than the interrogation of the nature of these experiences. 63 There appears to be a substitution of one experientially-based feminism for another. 64 And yet, if the significance of “experience” as a relevant analytic concept is to be rethought, as opposed to jettisoned, it needs to be rethought in its entirety. It surely cannot be the case that the lives and familial experiences of one group of women are devoid of contradiction and complexity, whereas others’ lives are characterized only by contradiction and complexity. In my view, the acknowledgement of the partiality of experience and the need to analyze all experience is a helpful way to proceed.

One way to analyze this tension is offered by a Marxist conceptualization of ideology which, as Michèle Barrett once suggested, offers “a reading, rather than a direct translation, of the political meaning of ‘experience.’” 65 The analysis of “experience” through the

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63 Bannerji, supra note 3 at 82 and at 83, while critical of race blindness in feminist theory and practice, has reservations about the implications of the “politics of ‘difference’”:

   In the name of “difference” we tend not to go beyond a rich and direct description of personal experience to a social analysis which will reveal the sameness of social relations that constructs the experience of “white” privilege and “black” oppression.

64 Barrett has suggested that within feminism, the concept of “difference” is used in three different ways: difference as experiential diversity (as in “standpoint” feminism); as positional meaning (as in post-structuralist feminism); and as sexual difference (in feminist work informed by psychoanalytic theory): “The Concept of ‘Difference’” (1987) 26 Feminist Rev. 29.

65 Ibid. at 32. In the Introduction to Marxist/Feminist Encounter, supra note 7 at xvii, Barrett notes that the concept of ideology has been replaced by the terms “discourse” and “subjectivity” in work influenced by Michel Foucault. Barrett, at xviii, while noting the difficulty of transposing “ideology” beyond its original terrain within Marxism to analyze gender issues, is nonetheless reluctant to yield the terrain to “discourse,” but rather to “develop an approach to a theory of ideology that loosens the class basis in favour of a more general idea of domination or power, which can take a variety of forms and agents.” I find her observation, at xix, compelling:

   [F]amilial ideology can have you by the throat in a way that a discourse of familialism is
use of the concept of "ideology" may illuminate the significant dissonance between many (but not all) people's lived experience and the dominant ideology of the family. Despite this dissonance, paradoxically, the ideology of the patriarchal nuclear family provides a prism through which relationships are examined, and the measure against which they are judged, in spite of shifts that indicate the idealized nuclear family household may be becoming increasingly less typical.\(^6\) Hence, the distinction between actual households and the ideology of family households explored by Michèle Barrett and Mary McIntosh in their early collaborative work\(^7\) continues to be imperative, notwithstanding the criticism, including their own self criticism, that they failed to

\(^{66}\) In Statistics Canada, Housing, Family and Social Statistics Division, Target Groups Project, *Women in Canada: A Statistical Report*, 2nd ed. (Ottawa: Statistics Canada, 1990) at 8, Statistics Canada described marriage as "still the most popular form of union" in Canada, but went on to observe that marriage "no longer has the definite character that it once had." Divorces and common law relationships have increased. Struggling with this (perhaps to comfort conservative policy makers), Statistics Canada, *ibid.* at 7, also found that "even as these "non-traditional" living arrangements have evolved, the majority of Canadians still live in a family environment."

Despite the outward appearance of normalcy, these statistical reassurances beg the more important question of the content of familial relations. The most dramatic challenge to the idealized nuclear family arrangement is the increase in women's labour force participation, and concomitant demand for affordable, accessible, quality child care. Thus, the assertion of the prevalence of the form of heterosexual marriages/relationships needs further interrogation. As the Ontario Report of the Social Assistance Review Committee, *Transitions: Report of the Social Assistance Review Committee* (Chair: G. Thomson) (Toronto: Queen's Printer, 1988) [hereinafter Thomson Report] at 92 observed:

> The world of work has not kept pace with the tremendous changes in the composition and nature of families, particularly the changing participation of family members in the labour force. The most obvious and profound change has been in the role of women.

The *Canadian National Child Care Study: parental work patterns and child care needs* by D.S. Lero *et al.*, (Ottawa: Statistics Canada, 1992) at 22 recently confirmed that in 1990 most women (58.5 per cent), even those with young children, were in the labour force or actively looking for work. The study, at 17, also found that the majority of families with preschool-age children were dual-earner families and that "established images of family life no longer match reality."

The Thomson Report, at 92, estimated that by the year 2000 there will be equal numbers of men and women in the labour force. The extent of poverty found in households led by single parent women (85 per cent of all single parent families in Ontario) is as scandalous as it is well documented: see, for example, D.P. Ross & R. Shillington, *The Canadian Fact Book on Poverty—1989* (Ottawa: Canadian Council on Social Development, 1990); and Canada, National Council of Welfare, *Women and Poverty Revisited: a report* (Ottawa: National Council of Welfare, 1990). However, the Thomson Report, at 30, found that:

> even with the many hardships poor women face—including delinquent child support payments, lesser access to contributory pensions, lack of affordable child care, and limited job prospects—only a third of the province's female-headed families require [or perhaps more accurately, receive] social assistance.

\(^{67}\) *Supra* note 7.
adequately identify and analyze the range and diversity of British households. 68

Douglas Hay has suggested that an ideology has both elasticity and generality, and thus "remains a reservoir of belief throughout the society and flows into the gaps of individual protest." 69 The struggles of people who can never fit into the ideal of the nuclear family illuminate, rather than negate, what some feminists identify as the oppressive implications of the idealization and romanticization of the nuclear family; the "reservoir of belief" that it offers sanctuary in a hard world. The "strength, affirmation, and resistance" 70 that women of colour attribute to their often non-nuclear families similarly illustrates that many people (black people, Aboriginal people, poor people of any race) have experienced neither their households as cherished nuclear havens nor the promise of a family or living wage. The denial of family life to black men and women workers in South Africa 71 and often to immigrants 72 and to foreign (most notably, in Canada, female domestic 73 workers in

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68 See, for example, Carby, supra note 3; M. Barrett & M. McIntosh, “Ethnocentrism and Socialist-Feminist Theory” (1985) 20 Feminist Rev. 23; and the ensuing responses principally in succeeding volumes of the Feminist Review.


70 Herman, supra note 52 at 799 [emphasis added].

71 There is currently underway a serious discussion within the African National Congress on whether and, if so, how to reconstruct family law in a democratic, post-apartheid South Africa. See A. Sachs, “The Family in a Democratic South Africa—Its Constitutional Position” (1990) 8 Agenda 40; and A. Charman, “A Response to Albie Sachs: What is the Family?” (1990) 8 Agenda 55.


73 S. Arat-Koç, “Importing Housewives: Non-Citizen Domestic Workers and the Crisis of the Domestic Sphere in Canada” in M. Luxton, H. Rosenberg & S. Arat-Koç, eds., Through the Kitchen Window: The Politics of Home and Family, 2d ed. (Toronto: Garamond, 1990) 81. The requirement that foreign domestic workers live with, that is, in the homes of their employers, invariably means that the domestic worker must come alone. Once in the home of her employer, Arat-Koç suggests that the domestic worker has an ambiguous status. She is neither a wife nor a full-fledged worker with corresponding rights and privileges: “The domestic worker today is like a stranger, ‘being in the family, but not of it.’ She is involved in the work of a house, but not the pleasures and intimacies of a home” [references omitted; emphasis in original]. Ibid. at 86.
the formally non-apartheid world, combined with the policing of poor and Aboriginal people through child welfare and welfare legislation more generally, are only the most obvious examples.

In fact, it would seem that the idealized nuclear family, premised as it is upon assumptions of privatized female dependence and domesticity, is especially problematic for black women in the British and American contexts. Both Hazel Carby and Prathiba Parmar have illustrated that black and Asian women in Britain have long been integrated into the labour force, and that black women are in fact often not dependent upon men. The oral histories of black women in Ontario suggest that this may be the case in Canada as well. Juliet Cook and Shantu Watt in Britain, and Maxine Baca Zinn and Patricia Hill Collins in the United States, have similarly shown how deeply interrelated class and racial inequalities are in black women’s lives and, of course, the lives of their children. These inequalities affect not only the work these women do, but also the work and wages of the men in their lives.

However, the difficulty with black women’s independence is that it is both belied and denied by the state through the premises and definitions of, at the very least, welfare and immigration law. In other words, irrespective of their varied experiences of family, work, and culture, and their often *de facto* independence from men, poor women, including poor visible minority and immigrant women, and even poor lesbians, “cannot ‘opt out’ of” the law, and the legal relations of

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74 Carby, *supra* note 3 at 219-20; and Parmar, *supra* note 3. See also Barrett & McIntosh, *supra* note 68.


76 *Supra* note 3.


78 *Supra* note 3 at 59-65. Collins suggests this is especially true of the post-World War II era in the United States.

79 As Carol Smart and Julia Brophy expressed it in “Locating Law: a discussion of the place of law in feminist politics,” the introduction to J. Brophy & C. Smart, *Women-in-Law: Explorations in Law, Family and Sexuality* (London: Routledge & Kegan Paul, 1985) 1 at 1. With respect to lesbians in poverty, see *Jhordan C. v. Mary K.*, 224 Cal.Rptr. 530 (Cal.App.1 Dist. 1986). This case involved a judicial determination that a man who donated sperm to a lesbian, which resulted in pregnancy and the subsequent birth of a little boy, was a father. However, four years prior to the Court of Appeal’s decision, he had been ordered to reimburse the County of Sonoma for public assistance paid for the child’s support and to make future support payments. *Ibid.* at 533.
enforced dependency. The state's legislatively-expressed commitment to the primacy of "private" responsibility for spousal or child support is nothing less than a commitment to state-enforced patriarchal relations of private male responsibility and female dependence.

This commitment is graphically illustrated in the context of Canadian immigration law where women seeking to immigrate to Canada are required to acquire the status of dependency in the process of being sponsored to Canada by a Canadian citizen or permanent resident, most often a spouse or fiancé. The significance of sponsorship is principally financial: the sponsor undertakes to provide for the immigrant in order to ensure that the latter will not become a burden on the Canadian state. These sponsorship agreements, to which the sponsored immigrant is not formally a party, are designed to ensure private financial support and to limit a sponsored immigrant's access to social assistance. This fact alone may explain why newly arrived immigrant women tend to be employed, in larger numbers than Canadian-born women, in the textile industries—at jobs characterized by low wages, piece work, home work, and virtually unregulated working conditions.

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82 Immigration Regulations, ibid. at s. 43(5)(a). The implication of this requirement for the poor must not be missed. Poor Canadian citizens and permanent residents are less able than more economically advantaged members of the community to sponsor their family members. As Ontario, Advisory Group on New Social Assistance Legislation, Back on Track: First Report of the Advisory Group on New Social Assistance Legislation (Toronto: Advisory Group on New Social Assistance Legislation, 1991) (Chair: A. Moscovitch) [hereinafter Moscovitch Report] noted at 85:

Sponsorship breakdown is by no means the only issue to be resolved. For example, we are also concerned that low-income immigrants to Canada are often unable to reunite their families here because they fall below an established income level. That could mean, for example, that a parent on social assistance could not sponsor a spouse to come to this country when together they might be able to make enough income to get the family off social assistance.

If the marriage ends, or if at an early point in the process the sponsor elects to withdraw the sponsorship, the precarious position of the sponsored immigrant woman cannot be overstated. If the marriage has been the site of violence by her sponsoring spouse, the woman will nevertheless be required to pursue him for support unless she can convince welfare officials that her personal safety is at risk, and that the relationship with the sponsor has really ended. Thus, for many immigrant women in Canada, especially the poor, the opportunity to be independent from their spouses, both in fact and in law, is virtually impossible. The presumption of women’s familial dependence once again finds legislative enforcement irrespective of a woman’s actual wishes, needs, or experience.

IV. THE PROBLEM OF THE HETEROSEXUAL FAMILY FORM: HETEROSEXISM OR HETEROSEXUAL PRIVILEGE?

There are a number of different sources for my next area of concern—the call to legalize and thereby legitimize the lesbian and gay household. A great impetus for current interest in formal recognition may derive, in part, from the devastation of AIDS, as well as the heartbreaking struggles that some gay men have had during, and in the aftermath of, the death of their loved ones. The expression “longtime companion” seems to understate the relationship. And while I find the phrase evocative of a voluntary egalitarian intimacy, one recognizes the perceived or indeed experienced invisibility of even those surviving companions who could be named with the “real” family as survivors.

In Canada, the equality guarantee of section 15 of the Charter has fueled some of the litigation efforts by gay men and lesbians seeking redress for heterosexist discrimination. Indeed, thus far, it seems that the litigants have eked from the courts the concession that sexual orientation may be a protected ground. However, it is the lesbian and gay claim to “family status” that has confounded the courts, troubled some feminists, and bedevilled legislators. In Canada, dissident
Conservative members in the previous Parliament were among the most vocal, and even fashioned themselves into a “family caucus” to demand that a legislated definition of the “traditional family” be added to federal human rights legislation in order to put an end to the audacious claims. At this writing, two cases have elicited the most discussion. In Ontario, Karen Andrews’ courageous and spirited “We are Family” campaign made important gains in the trade union movement. Andrews, armed with the support of a Report of the Ombudsman of Ontario and the Canadian Union of Public Employees, sought to have her partner and their two children considered a family unit under the Ontario Health Insurance Plan. Specifically, she wanted to obtain “dependant coverage” for the other three members of her household. In dismissing her application, McRae J. indicated that his research yielded only definitions of spouse as an opposite sex partner. Writing with a more critical eye, Bruce Ryder amplifies this point:

The amount of legal architecture that has gone into building the ideal family and supporting heterosexuality is staggering—hundreds of pieces of legislation, thousands of regulations, rules, by-laws and judicial decisions. This plethora of government activity promotes the idea that there is only one legitimate sexual identity, only one legitimate family form, and thus ensures that all those people living outside these legally and ideologically created norms are constructed as deviant.

In a case decided by the Supreme Court of Canada, Brian Mossop challenged his employer’s denial of a one-day bereavement leave to attend the funeral of his lover’s father. The terms of Mossop’s employment were governed by a collective bargaining agreement. The

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90 The relevant legislation defined “dependant” as “spouse of an insured person, or (ii) a child of an insured person who is dependent for support upon the insured person [and under 21].” R.R.O. 1980, Reg. 452, s. 1(c); and *Health Insurance Act*, R.S.O. 1980, c. 197, s. 1(a).

91 He had consulted at least four dictionaries and the *Equality Rights Statute Law Amendment Act*, 1986, S.O. 1986, c. 64, which listed thirty-three statutes; no cases on this point were cited in his judgment. *Andrews, supra* note 88 at 587-88.

92 *Supra* note 26 at 47.

agreement’s bereavement leave provision defined immediate family to include, among others, spouse, common law spouse, and father-in-law. The operative definition of common law spouse in Article 2.01 of the agreement was significant to Mossop because, except for the opposite sex requirement, his relationship was a perfect fit:

a “common-law spouse” relationship is said to exist when, for a continuous period of at least one year, an employee has lived with a person of the opposite sex, publicly represented that person to be his/her spouse, and lives and intends to continue to live with that person as if that person were his/her spouse.94

The tribunal which heard his human rights complaint found that the undefined term “family status” in the Canadian Human Rights Act95 included a homosexual relationship, that Mossop had experienced discrimination on the basis of family status, and ordered that the discrimination be corrected by incorporating same-sex couples into the definition of common law spouse relationship in the collective agreement.96 When the government’s appeal was heard by the Federal Court of Appeal, it is fair to say that Marceau J.A. was flabbergasted by the complaint, by the result before the tribunal, and by the indignity done to “the core meaning conveyed by the word” family.97 While the tone of the majority judgment was less inflamed, all members of the bench agreed that Parliament had expressly decided not to prohibit discrimination on the grounds of sexual orientation, that Mossop’s claim to “family status” in this case was a proxy for his real ground (sexual orientation) and, that in any event, “family status” did not include sexual orientation. The victory and subsequent defeat could not have been clearer.98 However, as hailed as the Tribunal’s decision was by Mossop and his supporters, the nature of that initial victory needs to be understood. The distinction between real spouses and common law spouses was accepted, as were the “hoops” through which common law spouses have to jump in order to establish the very existence, not to mention legitimacy, of their relationships.

94 Quoted in Mossop, *ibid.* at 665, per Marceau J.A.
95 *Supra* note 87 at s. 3(1).
96 Mossop, *supra* note 93 at 667.
97 Mossop, *ibid.* at 673, per Marceau J.A.
The pain, the grief, the compelling facts, the obvious discrimination, and judicial subscription to familial ideology are undeniable. Nonetheless, my questions remain: do lesbians and gay men really need a “spouse in the house?” Is the fact that the threshold definition of “spouse” in law as a person of the opposite sex best characterized as an instance, or source, of “heterosexual privilege?” Would this form of legalization of lesbian and gay relationships correct the injustices of a heterosexist society? Is the definition of “spouse” in other respects neutral? Can the social and legal concept of “spouse” be plucked from its heterosexual familial context and dropped into the lesbian and gay context? And, if so, should it?

For the editors of the Harvard Law Review in their recent review of American law (Sexual Orientation and the Law) these questions address non-issues:

Marriage has always been regarded as a central institution in American society. Alongside its strong symbolic meaning to the partners, marriage bestows concrete legal advantages on the couple: tax benefits, standing to recover damages for certain torts committed against spouses, rights to succession, and insurance benefits to name a few [references omitted].

And, “[m]arriage is also constitutionally protected because it promotes familial and social stability” [references omitted]. They confidently conclude that “same-sex marriages are wholly consistent with the theoretical and policy justifications behind the right to marry.” And thereby, they render unthinkable and invisible women and men who are critical of the values ascribed to marriage, who are sceptical of its promised benefits and protections, who are attentive to the historic inequalities of marriage, and who consciously choose not to be spouses. In other words, they resist the apparently irresistible appeal of a dominant ideology of this society, notwithstanding that for some, the alleviation of parental mortification because they are “living in sin”

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99 See Ryder’s thorough review of Canadian law, supra note 26; see also Duclos, supra note 48.

100 Ryder, ibid.


102 Ibid. at 97.

103 Ibid. Although I am sure that they would not embrace the analysis of the Editors of the Harvard Law Review, see also M. Eaton & C. Petersen, “Comment: Andrews v. Ontario (Minister of Health)” (1987-1988) 2 Can. J. Women & L. 416 at 421, where they nonetheless suggest that “[t]he living arrangement between Ms. Andrews and Ms. Trenholm does not substantially interfere with the state’s interest in the political economy of the family unit or in the reproduction of human capital.”
through the absolution of a legal marriage seems a small price to pay for
the promise of familial peace and freedom from parental interference.

As I have suggested above, feminists and lesbians writing with a
feminist perspective tend to be wary in their own analyses. Didi
Herman, for instance, worries that “[b]y appropriating familial ideology,
lesbians and gay men may be supporting the very institutional structures
that create and perpetuate women’s oppression.”104 Herman takes no
comfort from this position:

One could conclude that the response to the experience of oppression cannot lie in a
retreat into family, whatever the form, and certainly not into the discourse of familial
ideology. Our families may be different in that they are not premised on the
subordination of women by men. ... [However] we must also reconcile ourselves with the
reality that for some, families and oppositional familial ideologies are important sites of
resistance and affirmation.105

But, my own questions remain. Is there not more to “the family”
than different familial experiences? And while, as Nitya Duclos also
insists, there is no essential family, and surely no essential lesbian or gay
family106—there is something beyond the sum of contesting dissident
experiences and beliefs, something against which we all are measured.
The premises of “the family” neither begin nor end with the legislated
definition of “spouse.”

This is clearly illustrated when one interrogates the notion of
“heterosexual privilege.” It implies symmetry when asymmetry is surely
a more accurate characterization of spouses in the familial context,107
notwithstanding the contrived formal equality, gender neutrality, and
contractual language of family law legislation. An analysis of the
concept “spouse,” which concludes that it confers privilege is, in my
opinion, too narrow, despite its progressive and critical complexion.
Heterosexual privilege posits a bifurcated gender-neutral dyad of
homosexuality/heterosexuality. It is resonant of anti-discriminatory
language such as in/out, or inclusion/exclusion. Ruth Colker, for
instance, explicitly draws upon the imagery of segregation when she

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104 Supra note 52 at 797.
105 Ibid. at 803-04.
106 Supra note 48.
107 This is inspired by Freeman’s early piece, supra note 25 at 236-238.
characterizes marriage as a restricted club (to which she reluctantly belongs). 108

The focus on the specific contexts of lesbian and gay relationships has paradoxically decontextualized heterosexual relationships. More precisely, it has decontextualized and declawed heterosexism. The analysis must be extended to explain core familial phenomena in our country such as: wife assault and child abuse; the presumed dependency of a woman in need of either social assistance or a job upon a man; the enforced dependency, or poverty, of many sponsored immigrant women; and the terrifying isolation of the battered woman whose first language is not one of the official languages. The dearth of quality and accessible child care and safe, affordable housing; the modicum of economic and physical security for women who leave unhappy or violent relationships; and the different class positions reflected and reinforced in different legislation, must also be explained. The concept of heterosexual privilege does not even begin to do this. It simply cannot cope with the enormity of the family as an ideological construct and, as a result, it is neither a helpful analytical concept nor an accurate descriptive tool.

While there has been a consistent and too long examined reference to a “person of the opposite sex” at the heart of the legal definition of spouse, married women, common law wives, and single mothers have historically been dealt with differently in family and welfare law. Historically and presumptively today, family law legislation restricts the right to matrimonial property to legally married spouses. 109 A resort to the concept of constructive trust is had when a woman’s real trust is betrayed by a common law spouse. 110 In the 1970s, as Mary

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108 “Marriage” (1991) 1 Yale J.L. & Feminism 321. Colker, at 321, collapses the analytical concepts of ideology, coercion, and economic compulsion, in her exploration of “some of the coercive elements of our society that would compel even me, a committed feminist, to marry.” It became clear to her that if she and the man in her life did not marry, “society would treat us and [their hoped for] child coercively.” Ibid. at 323. As an American academic, she could not readily find employment in a Canadian university unless she married her Canadian partner and “became a Canadian.” Ibid. at 323. The United States has “very restrictive immigration rules” and her partner would lose his health insurance. Ibid. Not one amounts to coercion, nor do they in their sum.

109 See, for example, the Family Law Act, supra note 44, Parts I (Family Property) and II (Matrimonial Home), which operate with a definition of spouse as “either of a man and woman who, (a) are married to each other.” Ibid. at s. 1(1).

110 See the landmark case, Pettkus v. Becker, [1980] 2 S.C.R. 834. However, it is important to remember that this case really turned on the woman’s enormous contribution of nineteen years of unpaid labour to the enterprise, and not the significance of her relationship with her common law husband. Paradoxically, this has helped at least one lesbian who, while unable to convince the court
Morton has observed, the ideological climate shifted.\textsuperscript{111} Canadian legislators felt compelled to correct the most obvious inequities—the definition of spouse in many provincial family relations statutes was relaxed for the purposes of child and spousal support.\textsuperscript{112}

Current conventional wisdom is that common law spouses are just like real spouses “in law.” In fact, even the most cursory examination of the legislation and case law in the area of pensions, insurance, and survivor’s benefits reveals that there is no one definition of common law spouse, and no single legislative approach regarding it.\textsuperscript{113} Indeed, pity a surviving common law partner who comes up against a legal, or essentially real, widow for survivor’s benefits under the \textit{Canada Pension Plan}.\textsuperscript{114} For many, access or relegation to the definition of “spouse” is a question of class. As an elderly homeless woman, attempting to establish that her relationship with her deceased “special friend” measured up to the definition of “common law spouse” in the \textit{Canada Pension Plan}, expressed it, “We just loved each other. We

\begin{quote}
that her estranged lesbian partner was either her spouse or parent to her two children (conceived by artificial insemination during their relationship), was nonetheless able to rely upon \textit{Petkus v. Becker} to extract a declaration that she had a beneficial interest in property held in the other woman’s name. See also \textit{Anderson v. Luoma} (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).
\end{quote}

\textsuperscript{111} \textit{Supra} note 17 at 259.

\textsuperscript{112} See, for example, \textit{Family Law Act}, 1986, s. 29, which provides this expanded definition of spouse:

“spouse” means a spouse as defined in subsection 1(1) [see \textit{supra} note 109], and in addition includes either of a man and woman who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or
(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.


\textsuperscript{114} R.S.C. 1985, c. C-8, s. 64. See, for example, \textit{Canada (Minister of National Health and Welfare) v. Szekely} (1983), C.E.B. & P.G.R. 8915 (P.A.B.); and \textit{Canada (Minister of National Health & Welfare) v. Krejnik} (1985), C.E.B. & P.G.R. 8960 (P.A.B.). For a case where the presumption in favour of the legal widow was displaced because the deceased contributor had publicly represented his common law spouse as his “wife,” see \textit{Canada (Minister of National Health & Welfare) v. Leitch} (12 June 1986), Appeal CP 879 (P.A.B.).
planned to marry, but we were always too sick or too poor. We had no fixed address. How do you get married on the street?\textsuperscript{115}

V. THE CASE OF WOMEN IN WELFARE LAW: SPOUSE ON THE LAM OR LOUSE IN THE HOUSE?

For Canadian women, especially sole support mothers on social assistance, the definition of “spouse” has always been relatively relaxed and intrusively enforced. Feminist scholars have illustrated the myriad ways in which the fundamental premises of this area of law have both assumed and enforced women’s dependency upon men.\textsuperscript{116} Not only have poor women been expected to conform to this model of appropriate family life and responsibilities but, to ensure that they were deserving, they have also been historically subjected to legislatively mandated harassment by virtue of the notorious “spouse in the house” rule. Prior to 1987 in Ontario, the courts were fairly routinely presented with appeals from the Social Assistance Review Board (SARB), which required a determination of whether a particular relationship was sufficiently conjugal to warrant the characterization “spousal.”\textsuperscript{117} The Ontario Court of Appeal attempted to define the issue in \textit{Re Warwick}:

\textsuperscript{115} Evidence of Olive Cowan before Review Committee under the Canada Pension Plan, Cowan v. Canada (Minister of National Health & Welfare) (October 1989), unreported decision of Review Committee at 3. The Committee's decision to allow Mrs. Cowan's claim was appealed by Canada Pension Plan and ultimately set aside under the terms of a settlement reached between the parties. This unreported decision is on file with the author.


\textsuperscript{117} See the line of cases from \textit{Re Proc and Minister of Community and Social Services} (1975), 53 D.L.R. (3d) 512 (Ont. Div. Ct.); \textit{Re Warwick and Minister of Community and Social Services} (1978) 21 O.R. (2d) 528 (C.A.) [hereinafter \textit{Re Warwick}]; \textit{Willis v. Ontario (Minister of Community and Social Services)} (1983), 40 O.R. (2d) 287 (Div.Ct.); \textit{Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services} (1985), 51 O.R. (2d) 302 (Div. Ct.) [hereinafter \textit{Re Pitts}]; to \textit{Re Burton and Minister of Community and Social Services} (1985), 52 O.R. (2d) 211 (Div. Ct.).
[m]arriage involves a complex group of human inter-relationships—conjugal, sexual, familial and social as well as economic ... marriage is more than a matter of economics and involves elements broadly described by the words cohabitation and consortium. 118

In Re Pitts,119 the Ontario Divisional Court held that a two-stage inquiry was involved. If there was, in fact, no cohabitation, the inquiry ended. If cohabitation was found, the test developed earlier in Re Warwick was applied.

Welfare advocates have actively resisted and campaigned to prevent the kind of inquisitorial analysis of recipients' personal and sexual lives that has occurred in lesbian and gay cases.120 In 1987, the regulations to the Ontario family benefits legislation121 were amended, reflecting in part this concern. In addition to the now conventional definitions of "spouse," a new definition of "spouse" was introduced: "a person of the opposite sex to the applicant or recipient who has resided continuously with the applicant or recipient for a period of not less than three years."122

An old test was withdrawn: "In determining whether or not a person is a spouse within the meaning of this Regulation, sexual factors shall not be investigated or considered."123

And a new caveat with a new burden was introduced:

Subclause (1)(d)(iv) does not apply to a person who has resided continuously for a period of not less than three years with the applicant or recipient and the applicant or recipient provides evidence to the Director that the economic, social and familial aspects of the

118 Ibid. at 537.
119 Supra note 117 at 308.
120 See Didi Herman's discussion, supra note 52 at 797-99, of the examination-in-chief, cross-examination, and re-examination of Margrit Eichler in Karen Andrews' case [Andrews, supra note 88].
121 R.R.O. 1980, Reg. 318, now R.R.O. 1990, Reg. 366 [hereinafter Regulation 318]; and Family Benefits Act, supra note 44. In the other subsections of the Regulation, as amended by O. Reg. 589/87, s. 1(1), the now conventional definitions of spouse were retained:

(i) a person of the opposite sex to an applicant or recipient who together with the applicant or recipient have declared to the Director or a welfare administrator appointed under section 4 of the General Welfare Assistance Act that they are spouses,
(ii) a person who is required under the provisions of a court order or domestic contract to support the applicant, recipient or any of his or her dependent children,
(iii) a person who has an obligation to support the applicant, recipient or any of his or her dependent children under section 30 or 31 of the Family Law Act, 1986 notwithstanding a domestic contract or other agreement between the person and the applicant or recipient whereby they purport to waive or release such obligation to support [hereinafter Regulation 1(1)(d)(iii)].

122 Regulation 318, s. 1(1)(d)(iv), as am. by O. Reg. 589/87, s. 1(1).
123 Ibid. at s. (1a), as am. by O. Reg. 638/86, s. 1(2).
relationship between the person and the applicant or recipient were such that the continuous residing did not amount to cohabitation.124

These legislative changes to the definition of "spouse" were intended to bring family benefits law more into line with family law principles,125 and to eliminate the automatic presumption that a man’s presence in a house was a fairly reliable marker of a spousal relationship. As long as the man in the house is not the father of the woman’s children, the couple has a three-year grace period before he is deemed to be her spouse. The woman must then provide evidence to satisfy the family benefits officials that the relationship does not warrant the label "spousal." Restricting the consideration of sexual factors was undoubtedly intended to protect the privacy of family benefits recipients; however, as I will illustrate below, this reform has had contradictory results.

Erika Abner’s assessment of this reform is that the position of women receiving family benefits improved only marginally.126 Beyond this, she argues, “welfare administrators appear to expect more from men by way of support than is frequently ordered by judges for support applications under family law provisions.”127 Furthermore, by operation of the presumption of a spousal relationship following not less than three years’ cohabitation with a person of the opposite sex, the onus is placed on a recipient to show that the social, economic, and familial aspects of the relationship are such that it does not amount to cohabitation.

Two recent “spouse in the house” cases decided under the amended Ontario Family Benefits Act and regulations128 will illustrate

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124 Ibid. at s. 1(1b), as am. by O. Reg. 589/87, s. 1(2).
125 This was recommended by the Thomson Report, supra note 66 at 161. Recently, this recommendation has been taken up and extended by the Moscovitch Report, supra note 82 at 87: “We would argue that couples of the same sex should be treated the same way as those of the opposite sex for the purpose of determining a benefit unit for social assistance.” The Moscovitch Report recommended that the Minister of Community and Social Services “press the Attorney General to implement changes in the Family Law Act to extend laws relating to support obligations for couples of the same sex.”
126 Supra note 116 at 54.
127 Ibid. at 50.
128 Family Benefits Act, supra note 44 at s. 20, as am. by S.O. 1989, c. 72, s. 20; and Regulation 318.
the paradox that resulted. In the first, C.B. separated from her husband and moved into her mother’s home with her children. Almost immediately, the mother herself had to move, and C.B. and her children were faced with the task of finding yet another home. Her estranged husband located an apartment for her in a house where he also proposed to live. The SARB, which subsequently heard her appeal, noted that she agreed to the unusual arrangement because of the difficulties in securing affordable and safe housing. She would rent the upstairs unit, while her husband rented the downstairs, to which the landlord had said he would add a kitchen and bathroom. However, the landlord never fulfilled his promise, and consequently the husband had to use his wife’s kitchen and bathroom. Although he had agreed to pay child support, the Tribunal noted that he was seldom working so nothing was paid.

The evidence before SARB was that she had been “emotionally, financially and practically a single parent,” had made all the arrangements for daycare and school, and was regarded in the community as a single parent. She did not have joint meals, food, or entertainment with her spouse, but felt she had no choice but to accept the living arrangement because of the then low vacancy rate and high rents. She was declared by the Director of Income Maintenance to be ineligible as she was living with her spouse within the meaning of the Family Benefits regulations.

C.B. appealed unsuccessfully to the SARB, which found that she had always been honest and straightforward with the family benefits officials, but nonetheless reluctantly held:

while the Board may accept the evidence given by the Appellant that there is no longer a relationship that most people would call spousal between her and this person, the fact that he is the father of both children and has the obligation to support them, makes him her spouse under this legislation.

In another, more recent case, a woman who had been receiving an allowance under the Family Benefits Act as a sole support parent with two dependent children (aged two years and eight months) appealed against a determination by the Director of Income

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130 Ibid. at 3.

131 Ibid.

132 Ibid. at 5.

Maintenance that she had received an overpayment during a period in which the father of her two children had moved back into her home. After the separation, and while she was receiving family benefits, he had moved back in an attempt to reconcile. Her evidence before SAR_B was that she had been near exhaustion and "at that point reconciliation sounded good if only that it might allow her to get a little extra sleep." Within a few weeks, she realized that the reconciliation was not going to work, and she spent the next several months trying to remove him from her home. The relationship during this period was marked by his violence toward her. Approximately two months after her husband, K.S., had moved back in to the house, she called the police but she claimed that they declined to assist. In fact, she said that they told her they could do nothing if his belongings were in the house. Expressing the conflict and contradictions that many women in violent relationships experience, she did not call the police again because, as she explained, his family, "particularly his mother had provided her with a lot of support" and "he was the father of her children," which made it difficult for her to do so. While K.S. was back in the house, he had his own room, paid a modest amount in room and board, and insisted that she pay him five dollars each time she used his car. During the entire period (unlike C.B.'s case), he had continued to pay $500 per month in child support, which had been assigned by the recipient to the Provincial Treasurer. The Board, not surprisingly, found this odd; the recipient responded that if "Mr. K.S. had really been living with her, she would have changed the arrangements so they would have had the money." The Director declared an overpayment for the ten-month period during which K.S. had resisted her efforts to remove him from her home.

The issue before SAR_B was whether she was a sole support parent with dependent children, and hence eligible for an allowance under the Family Benefits Act, or whether she had been living with her spouse and was, therefore, ineligible? As with C.B., the Board found that K.S. fell squarely within the definition of spouse in Regulation 1(1)(d)(iii). Its application seems to be a common sense interpretation of the phrase "living together," and the Board found that during the ten months, they had been living together to satisfy the letter of the Act and regulations.

134 Ibid. at 4.
135 Ibid. at 6.
136 Ibid. at 5.
137 Supra note 121.
Both women found themselves caught, not only by the definition of spouse within the regulations and held to be living with him, but also by the fact that the Board was inhibited by section 1(1)(a) from considering the non-existent sexual relationship and by section 1(1)(b) from considering the dearth of economic, social or familial aspects.\textsuperscript{138} As father of her children with an obligation to support them, he was her spouse; as a result of their poverty, they lived in the same building. As a result, each woman was ineligible to receive family benefits as a single parent mother with dependent children as she was not living separately and apart from her spouse.

For the women without men in their immediate vicinity (in and around the house), the problems attendant with section 8 of the regulations under the \textit{Family Benefits Act}\textsuperscript{139} loom as large. This regulation authorizes the director to reduce a monthly allowance if he or she is not satisfied that an applicant or recipient is making a reasonable effort to obtain support. A recipient or applicant who is a sponsored dependant within the meaning of the \textit{Immigration Act}\textsuperscript{140} is also included within this category.

Recently, the Ontario Divisional Court considered the appeal of a single mother who had been subjected to a Regulation 8 reduction of forty dollars per month because she had refused to make an application for child support.\textsuperscript{141} Her position was that she neither knew nor wanted to know the whereabouts of the father of her little boy as she said he had an alcohol and drug habit, was in and out of jail, and was just generally

\textsuperscript{138} R.R.O. 1990, Reg. 336.

\textsuperscript{139} R.R.O. 1990, Reg. 366, s. 8 [hereinafter Regulation 8]. The section in its entirety provides:

Where the Director is not satisfied that an applicant or recipient is making reasonable efforts to obtain compensation or realize any financial resource that the applicant, recipient, or a beneficiary included or to be included in the recipient’s allowance, may be entitled to or eligible for including, where the applicant, recipient or beneficiary is a sponsored dependent or nominated relative within the meaning of the regulations under the \textit{Immigration Act} (Canada), any compensation or contribution to the support and maintenance of the applicant, recipient or beneficiary that may result from any undertaking or engagement made on his behalf under the said regulations between the Government of Canada and the nominator or sponsor, the Director may determine that the applicant, recipient or beneficiary is not eligible for a benefit or he may reduce the amount of an allowance granted by the amount of the compensation, contribution or financial resource, as the case may be, that in the Director’s opinion is available to the applicant, recipient or beneficiary.

\textsuperscript{140} R.S.C. 1985, c. 1-2. See \textit{Immigration Regulations}, C.R.C., c. 940, s. 41.

\textsuperscript{141} Campbell v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services) (1990), 71 D.L.R. (4th) 765.
“messed up.” Finally, she added that she did not want to “bring him to court because she didn’t want him to have any rights to Joey.”\textsuperscript{142}  O’Driscoll J., writing for the Court, agreed with the Director’s view. The appellant’s view that an application for support would be both fruitless and potentially problematic for her did not absolve her of the obligation to make a reasonable effort to obtain compensation from the father. However, the Court found that there had been no evidence that would justify a conclusion that, even had she undertaken the application, she would have received forty dollars per month in support. Thus, she lost a little and won a little; the matter was sent back to SARB on that point only.\textsuperscript{143}

In a recently published study of the operation of Regulation 8, former family benefits caseworker Kathleen Lawrence has alleged that a disproportionately high number of racial minority family benefits recipients have “Regulation 8 charges” deducted from their allowance.\textsuperscript{144}  She suggests that racial minority recipients are six times more likely than white recipients to experience these charges, which prompted her to file a complaint with the Ontario Human Rights Commission in 1990.\textsuperscript{145}

\textsuperscript{142} Ibid. at 767.

\textsuperscript{143} Ibid.; I understand from Ian Morrison, Director of the Clinic Resource Office, that the appeal on the principal issue was later withdrawn.

\textsuperscript{144} K. Lawrence, “Systemic Discrimination: Regulation 8—Family Benefits Act: Policy of Reasonable Efforts to Obtain Financial Resources” (1990) 6 J. L. & Soc. Pol’y 57. Lawrence’s study involved two caseload reviews conducted in 1988 in one family benefits office, but covering two different geographical areas in Metropolitan Toronto. The first review involved a caseload of 365, of which 311 cases were mothers with dependent children. The remaining fifty-four cases involved the category of single father, dependent father, foster parent, permanently unemployable, and so on. None of the latter group had received Regulation 8 charges. Of the 311 mothers, 210 were identified as “white” and 101 were identified as “racial minority,” which included “Black, East Indian, Oriental, and Native women.” Ibid. at 61. Seventeen of the 311 mothers had Regulation 8 charges against their family benefits allowances: five white mothers and twelve racial minority mothers. Lawrence concluded, \textit{ibid.} at 62, that “[w]hile racial minority recipients comprise only 1/3 of this caseload, they comprise over 2/3 (70.6\%) of the recipients who have Regulation 8 charges brought against them.” She also found, at 63, that “both in absolute and relative terms, racial minorities had higher amounts deducted from their basic grant.” The second caseload review, involving 400 recipients, was not broken down by classification; however, the racial identity of the twenty-one recipients who had received Regulation 8 reductions was noted, and again Lawrence, at 63 and at 66, found that racial minority recipients “were also disproportionately represented”: eight, or 38 per cent, white recipients and thirteen, or 62 per cent, racial minority recipients.

\textsuperscript{145} Ibid. at 62 and at 75-76; see also G. Allen, “Welfare system discriminates on basis of race, study says” \textit{The [Toronto] Globe & Mail} (20 June 1989) A17. The Minister of Community and Social Services rejected the charges of discrimination.
As preliminary as Lawrence's study may be, it again illustrates
that feminists committed to understanding the operation and conditions
of women's subordination must be attentive to not only gender, race,
class, and heterosexism, but to the manner, sites, and sources of their
inter-connectedness. The inter-relationships of gender, class, and race
have to be understood, not only for poor women of colour who are single
parents in need of social assistance, but for all of us. There are no
discrete variables or crucibles, only complex social relations in which the
"family," with all of its ideological baggage, is most clearly expressed.

VI. CONCLUSION

Where is the paradise lost? What paradox is revisited? In this
paper I have revisited socialist feminist work on the family. I have
attempted to illustrate that the analytical and political challenge posed
by diverse experiences of family life strengthens, rather than
undermines, the critique of "the family." I have also suggested that the
struggles of lesbians and gay men for social equality and the elimination
of heterosexist experiences cannot be found in the very bosom of their
provenance. There is of course no clear or obvious way forward.

It seems to me that the conditions of life and, I suppose, law, in
the last several years have given rise to what I regard as the paradox:
progressive movements, disheartened by the cumulative experience of
Reagan, Thatcher, Mulroney, and Bush administrations, devastated by
the immensity of the AIDS crisis, and overwhelmed by the apparent
impossibility of "real" social change, have returned to the "here and
now." The availability and seeming inevitability of legality constrains
our imagination[146] and frames our exchanges. We no longer attempt to
envision different forms of relationships, the transcendence of the
current ideal.

In the current global economic crisis, it surely seems mean-
spirited to deny access to whatever modicum of economic or family-
based benefits available, particularly as the Canadian welfare state
shrinks, relegating ever more responsibility for the social well-being and
welfare of its citizens to the private familial sphere. Nonetheless, I have
attempted here to illustrate the difficulties with a strategy that appears
to offer a self-evident short-term solution. Those of us with our doubts
may encounter the suggestion that we want others to wait for "the

[146] Thanks once again, Judy Fudge.
Do we? It depends. A fundamental transformation of the social order seems as impossible as the rebuilding of the Berlin Wall. And yet, the women’s movement and the trade union movement have sparked important “de-familializing” campaigns, particularly the struggle for universal child care, for women’s access to safe birth control and legal abortion free from spousal hindrance, for equal pay and employment equity, and against family violence. Beyond these have been the campaigns for full participation of the disabled in work and culture, and for the protection and extension of universal health care. None of these struggles has yet been won, but in pressing each and every demand we implicitly chip away at the ideological assumptions regarding the family. Women have a right to good jobs. Children flourish in excellent child care centres. People with disabilities should neither be under de facto house arrest nor consigned to their families for care. Publicly funded, universal health care, not privatized and privately funded home care, is a fundamental, if perilously fragile, social right.

In my opinion, one’s access or entitlement to social benefits, to health care, dental care, long-term disability benefits, and bereavement leave is, in sum, one’s dignity and personal and economic security. It should not, and need not, depend upon being situated in or relegated to a familial relationship. And when this seems impossible, we might remember Antonio Gramsci: while we have “pessimism of the intelligence,” we must have “optimism of the will.” Paradise can be imagined.

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147 As Didi Herman intimates, supra note 52 at 802.

148 See, for example, Luxton & Maroney, supra note 7 at 17, who argue that with establishment of daycare facilities in urban centres in Canada in the 1970s, socialist feminists seized the opportunity to create democratically run centres where children could be cared for “collectively in non-sexist, mixed class and race environments which were sex-positive and encouraged child autonomy” [references omitted]. Virtually simultaneously, they experienced the contradictions of state funding and state regulation, which tended to undermine the more visionary intentions.