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BACKLASH AND THE CONSTRUCTION OF LEGAL KNOWLEDGE: THE CASE OF CHILD CUSTODY LAW

by
Susan B. Boyd*

This article argues that legal knowledge is socially constructed rather than “given” and that law reform and legal change represent struggles over meaning and over desired norms. When struggles over legal norms arise between groups that have unequal power in society, analysis of the process must consider the relationship between knowledge creation and power. The article first reviews literature on ‘backlash’ or resistance to progressive social and legal change. It then explains why, as producers of legal knowledge, law schools must ensure that students understand that law is not a neutral set of norms, but rather a site of struggle over social meanings. A case study is then offered of how backlash discourse has influenced the construction of legal knowledge in child custody law reform. This part argues that gendered power relations influence both the ways in which statistics and social science studies are invoked in law reform processes and the direction of law reform itself.

I. INTRODUCTION

Every year, in their teaching evaluations of my large family law course, a number of students complain about what they believe to be a disproportionate emphasis on non-legal and social science material and a lack of attention to the “real” law contained in cases and statutes.¹ Some also identify a disproportionate emphasis in the course on gender, sexual orientation, race and Aboriginal people. On the other hand, others write that they appreciate the location of family law in its social context and a few say that they would have appreciated a *stronger* feminist approach and a focus on groups that have been historically disadvantaged under the law. I am certain that my course and my pedagogical technique could use improvement—every year I revise the materials, hoping for better results, and I adjust my approach in the classroom. But I have come to believe that the comments on the evaluations represent a larger issue: a struggle over the construction of legal knowledge. Many students expect that a law course will teach them “the rules” and so they experience considerable frustration when they find—especially in an area of law such as family law that is riddled with discretion and indeterminacy—that the boundaries between law and society, law and morality, law and politics and law and other disci-

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¹ Law 359, Family Law, University of British Columbia Faculty of Law. The two volumes of course materials include many cases in addition to some contextual material and secondary literature. Statutes relevant to family law take up a third volume of materials.

plines are not always discernible.² Despite the disruption of traditional legal knowledge over the past two decades by discourses such as feminist legal theory, critical race theory and critical legal studies, law students quickly learn that legal positivism is paradigmatic within legal education—at least legal education within law schools.³ When law students encounter courses that attempt to introduce social context into as many areas as possible and that challenge the notion of law as a “self-referential system” that is capable of producing “right answers,”⁴ they feel that they are being asked to do work that is extraneous to the task of learning law as a system of rules. They have a sense that law as a discipline is being inappropriately expanded. Arguably, there is a growing sense of entitlement to resist such expansions—a backlash of sorts.

This article offers a basic argument that legal knowledge is socially constructed rather than “given” and briefly considers the pedagogical implications. I illustrate the importance of developing a framework for understanding the ways in which legal knowledge is constructed by reference to a particular area (child custody law). This area reveals the significance of power struggles in the creation of legal knowledge, as well as the relevance of “backlash,” or resistance to social change. The article has been influenced by discussions within the UBC Hampton project on “The Challenge of Change: Law as Discipline” about the changing nature of legal knowledge and related challenges to legal education. It has also sprung partly out of a Social Sciences and Humanities Research Council of Canada (SSHRC)—funded research project on resistance to feminist-inspired legal and social change.

In the collaborative research project funded by SSHRC, I am examining (with four other scholars) law reforms that have been made over the past three decades in the fields of child custody, child support and equity policies in universities.⁵ The struggles over these reforms provide case studies of the social construction of legal knowledge and the relationship between social knowledge, legal knowledge and power. By providing a careful study of how the changes to law and policy came about, we want to determine to what extent those who resist such changes are justified in saying that feminists now control the law reform agenda, that legal change has

2 M. Thornton, “Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same” (1998) 36:2 *Osgoode Hall L.J.* 369 at 372.

3 *Ibid.* Legal education offered in university programs that do not award LL.B. degrees, such as the legal studies programs that previously existed at La Trobe University in Australia and still exist at Carleton University in Ottawa, arguably escapes some of the pressures of the ‘professional’ law teaching programs: I. Duncanson, “The Ends of Legal Studies” (1997) 3 *Web J. Curr. Leg. Issues* 1, online: Web Journal of Current Legal Issues Ltd. <<http://webjcli.ncl.ac.uk>> (last modified: 28 June 2000); N. Sargent, “Laboring in the Shadow: A Canadian Perspective on the Perils and Possibilities of Legal Studies” in I. Duncanson, ed. *Legal Education and Legal Knowledge*, Special issue of *Law in Context* (1991) 9:2 *Law in Context* 65.

4 Thornton, *supra* note 2.

5 This is a SSHRC-funded research project under the Women and Change Strategic Theme. The Principal Investigator is D. Chunn, and co-investigators are C. Young, H. Lessard, R. Menzies and myself. The project title is *Feminism, Law, and Social Change in Canada, 1967-97: (Re)Action and Resistance*.

gone too far in empowering women and that special rights are being given to women. We have nicknamed the project our “backlash” project, even though we have discovered that serious concerns have been raised about invocation of the term “backlash.”⁶ My focus in the project is mainly on the family law issues and in particular child custody law. I am interested in whether child custody law is appropriately characterized as an area of law that is biased against men, a claim that has achieved considerable currency in recent years.

Each of these two projects takes up the question of the social construction of legal knowledge, albeit in different ways. In the first part of this article, I briefly review some of the literature on “backlash” and resistance to progressive social and legal change. My objective is to make the point that, far from representing a neutral process of norm-creation, law reform and legal change generally represent a struggle over meaning and over desired norms. In the next part, I explain why it is so important to consider how legal knowledge is shaped. The construction of legal knowledge is not straightforward. When the struggle over legal norms arises between groups that are unequal in society, it is essential that any analysis of the process take account of the relationship between knowledge creation and power. This insight has been bolstered in recent years by literature that has emerged from post-structuralism. I also explain why, in the context of legal education, it is crucial that students gain an appreciation of the socio-political context of legal change and legal discourse. As producers of legal knowledge, law schools hold a particular responsibility to ensure that students and those entering the legal profession understand that law is not simply a neutral set of norms, but, rather, a site of struggle over social meanings.

In the second half of the article, I offer examples of how backlash discourse—in particular that generated by fathers’ rights groups in Canada—has influenced the construction of legal knowledge in law reform processes concerning child custody and access. I attempt to show that it is impossible to understand any process of law reform without taking account of its social and political context and the struggle over the creation of legal knowledge. Specifically, I examine the process and hearings of the Special

6 See D. Herman’s critique of the concept of ‘backlash’: *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago & London: The University of Chicago Press, 1997) in her “Afterword: Thoughts on Backlash and Utopia” at 194-200; J. Newson, “‘Backlash’ Against Feminism: A Disempowering Metaphor” (1991) 20:3/4 *Resources for Feminist Research* 93. My preliminary reaction is that backlash has a certain currency and resonance for those engaged in progressive struggles and so I have chosen to use it for the time being as a form of shorthand. However Newson’s concerns are valid: the term “backlash” tends to focus our attention away from the reality of women’s advancement and toward resistance to it, thereby generating effects that are emotionally and politically disempowering. As well, it diminishes attention to women’s agency and generates a perception of women being in the position of “victims.” It diminishes our ability to analyze and recognize the social dynamics and ongoing nature of resistance and opposition; instead we tend to think that opposition to progressive struggle comes out of thin air and without the possibility of anticipation. Finally, the use of “backlash” obscures the fragile nature of feminist influence on legal discourse: H. Lessard, “Farce or Tragedy? Judicial Backlash and Justice McClung” (1999) 10:3 *Const. Forum* 65.

Joint (Senate and House of Commons) Committee on Child Custody and Access of 1998. During this process, fathers' rights groups fairly successfully set the agenda by asserting that gender bias in this field operates against fathers, not mothers and by asserting the crucial need for the "children of divorce" to have contact with fathers. I then critically examine these assertions, first, by looking at how the fathers' rights advocates invoked statistics regarding custody awards and second, by pointing to the conflicting evidence in social science studies about the benefits of maximum contact between children of divorce and fathers. This part also shows how social context is often invoked in legal processes and shows that the ways in which it is invoked are not necessarily "neutral" or free from power relations. I show that it would be risky not only to assume that law is autonomous from social context, but also to assume that law can be read in light of social context in an uncomplicated manner. Thinking about legal knowledge as a social construction and thinking about how law in turn constitutes a form of social knowledge is a complex task.

II. BACKLASH: RESISTANCE TO PROGRESSIVE SOCIAL AND LEGAL CHANGE

Backlash is a word that cropped up frequently at the end of the 1990s. Feminists were certainly not the only ones to invoke it. Jeffrey Simpson of the *Globe and Mail* has written about backlash against changes, such as the Nisga'a deal, that are intended to redress the operations of colonialist policies in relation to First Nations people in Canada.⁷ We see evidence of backlash in action in the media and elsewhere. Recently there have been challenges to the Supreme Court of Canada for using its discretion under the Canadian Charter of Rights and Freedoms and for responding to the claims that groups such as women and lesbians and gay men have made in the name of equality.⁸ Madame Justice L'Heureux-Dubé's speech in October, 1999 at a Queen's University Faculty of Law Conference on Relationship Recognition and same sex partners prompted a *National Post* editorial calling on her to recuse herself from any future cases dealing with same sex relationships.⁹ When this stance of the *National Post* is read against the reaction earlier in 1999 to L'Heureux-Dubé J.'s judgment in the *Ewanchuk* case,¹⁰ it is perhaps tempting to imagine that backlash—or resistance to progressive social and legal change—is a new and increasing phenomenon.

Yet scholars have been talking about backlash against progressive social change for quite some time, showing that resistance to change has existed throughout history, albeit taking different forms at different times. Walby

7 J. Simpson, "The Cost of Expectations" *The Globe and Mail* (29 October 1999) A19.

8 R. Knopff & F.L. Morton, "Ardour in the Court" *The Globe and Mail* (7 April 2000) A15. Madam Justice R. Abella responded to these challenges in a keynote speech at a conference at Osgoode Hall Law School: "The case for a strong court" *The Globe and Mail* (13 April 2000) A15. See S. Alberts, "Class-Action Suit Threatened Over Suffering by Children of Divorce" *The National Post* (20 July 1999) A7.

9 "Supreme Bias" *The National Post* (25 October 1999) A15.

10 See Lessard, *supra* note 6.

argues that “backlash” is a recurring feature in the history of feminism: “Feminist successes have often met, not only with resistance, but with renewed determination by patriarchal forces to maintain and increase the subordination of women.”¹¹ She points out that backlash often focuses on “the family,” an observation that is particularly pertinent to my interest in the politics of the family and social change and child custody and support law. For instance, the husband-free women of the suffrage movement were portrayed as unnatural because they did not engage in sex with men: “Thus as women won demands on a political level, they were faced with increasing pressures to marry and engage with men at a sexual level, and this undercut the independence which women had been developing.”¹² Susan Faludi has also argued that, in the United States, there has been pressure on women to return to the home, to get married and stay married, to raise babies and to look after their husbands.¹³ Even if Faludi overlooks the ways in which women are also entering the public sphere of work, but in a subordinated manner,¹⁴ a significant aspect of backlash discourse focuses on the damage that feminists have supposedly wrought on the family.

Although backlash processes have existed over a significant period of history, it nevertheless appears that backlash to social change has become more organized and analytically sophisticated in recent years and therefore difficult to combat.¹⁵ In the family law field, groups that resist progressive changes have utilized rights discourse and, indeed, have employed the language of (in)equality that was developed by feminists to understand women’s disadvantage under the law. For example, fathers’ rights groups argue that men experience gender bias against them and in favour of women in the family law system. They therefore argue that they should acquire more legal rights to children. Moreover, backlashers “tap into people’s basic concerns about social stability.”¹⁶ It is easy for this invocation of people’s fears to occur in the context of family law reform, where emotional buttons are particularly easy to press,¹⁷ especially when children are involved. Fathers have been able to position themselves as a disadvantaged group in the family law system *and* they have been able to position themselves as advocates on behalf of children’s welfare or best interests. Mothers are viewed, despite their protests and arguments to the contrary, as

11 S. Walby, “‘Backlash’ in Historical Context” in M. Kennedy, C. Lubelska & Val Walsh, eds., *Making Connections: Women’s Studies, Women’s Movements, Women’s Lives* (London: Taylor & Francis, 1993) 79 at 79; J. Saltzman Chafetz and A.G. Dworkin, “In the Face of Threat: Organized Antifeminism in Comparative Perspective” (1987) 1 *Gender and Soc.* 33.

12 Walby, *ibid.* at 84. See also L. Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present* (New York: William Morrow and Company, 1981); S. Jeffreys, *The Spinster and her Enemies: Feminism and Sexuality 1880-1930* (London: Pandora, 1985); Chafetz & Dworkin, *supra* note 11.

13 S. Faludi, *Backlash: The Undeclared War Against Women* (London: Chatto & Windas, 1992).

14 Walby, *supra* note 11 at 86.

15 O. Hankivsky, *Resistance to Change: Exploring the Dynamics of Backlash* (London: Centre for Research on Violence Against Women and Children, 1996) 9.

16 *Ibid.* at 9.

17 *Ibid.* at 10.

having benefited from the system and as selfishly asking for more for themselves (not for their children). As Carol Smart has said, "While *fatherhood* now represents equality (an element of the higher moral reasoning) and *welfare* represents the interest of the child or weakest member, *motherhood* represents some atavistic, pre-new enlightenment claim which would drag us back into selfish emotion and a satisfaction of the sense rather than a meeting of objective needs."¹⁸

Thus, the legal system and the process of law reform constitute sites of struggle for power over the definition of appropriate parenting rights after separation or divorce. Some authors have suggested that current child custody law trends reinforce a version of the traditional patriarchal family even after adults separate: the mother may be able to separate from her partner but she is held responsible for ensuring that children retain or develop a relationship with their father.¹⁹

III. LEGAL KNOWLEDGE AND LEGAL EDUCATION

I now turn to the relationship between the backlash theme, the construction of legal knowledge and the changing nature of legal education. In child custody law, the case study of this article, the best interests of children is the operative legal principle. Its content has shifted over time and variations on the themes of joint custody and shared parenting have emerged as the preferred law reform options in many western countries such as England, Australia and, increasingly, Canada. Lawyers and legal policy-makers need to understand the social and political underpinnings of these legal concepts. These discourses and law reforms—this legal knowledge—have not arisen out of nowhere, but are the product of political struggles over issues such as the roles of mothers and fathers, the gendered nature of caregiving, where children should live after separation or divorce, who should pay for expenses related to those children and so on.

Many legal realists, critical legal scholars, law and society scholars, critical race scholars and feminist legal scholars have shown that the institutionalized conception of legal knowledge as primarily a positivist conception limits our ability to adequately understand the operation of law. Rather than limiting our understanding of law to the technicalities of the rules, and rather than divorcing legal theory from legal practice, it is crucial that we focus on the processes of construction of the meaning of law.²⁰ Moreover, any claim that law operates autonomously from other social

18 C. Smart, "The Legal and Moral Ordering of Child Custody" (1991) 18:4 *J.L. & Soc.* 485 at 499; emphasis in original.

19 D.M. Bourque, "Reconstructing the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10:1 *Can. J.L. & Soc.* at 1; S.B. Boyd, "Is There an Ideology of Motherhood In (Post) Modern Child Custody Law?" (1996) 5 *Soc. & Leg. Stud.* 496.

20 This part of my paper has been influenced especially by A. Parashar's chapters "Introduction" at 1 and "Feminism in Indian Legal Education" at 89 in A. Dhanda & A. Parashar, eds., *Engendering Law: Essays in Honour of Lotika Sarkar* (Lucknow: Eastern Book Company, 1999).

institutions is no longer plausible. The connections between law and other social institutions—such as the family—must, therefore, be traced. Law derives its meaning from the intersection and interaction of various social systems, including law itself. As Parashar puts it,

The task of legal analysts therefore must be to unravel how various levels of meanings are constituted institutionally. The single most important point for any legal theory therefore is the acceptance of the idea that meaning—including legal meaning—is constructed rather than pre-existing and simply waiting to be discovered.²¹

Parashar has pointed out that an understanding that law is connected to other social institutions can lead to a defeatist attitude that law is a limited instrument in achieving progressive social change or that legal change is unimportant and that what is really needed is wider societal change. However, it is not possible—nor would it be wise—to disengage from the law.²² Therefore, it is crucial to develop a body of legal scholarship and an approach to legal education that posits the social construction of the meaning of law as a central question and asks students to critically examine the assumptions upon which law or law reform rest. Moreover, as we challenge legal knowledge, we simultaneously and connectedly need to challenge the processes through which we develop intellectual communities, including through legal education.²³ Parashar argues that post-structuralist theory has given us the central insight that all knowledge is constructed and that knowledge and power are symbiotic.

Applying these insights to the field of child custody law, an understanding of the processes of resistance to social and legal change (or backlash) can help us to appreciate some of the processes through which fathers' rights discourse has captured the imagination of the public, the media and, very likely, some lawmakers. In turn, this discourse has an impact on the construction of legal knowledge in this field. Even if the more extreme views of the fathers' rights groups are not endorsed by lawmakers, these views are taken into account in establishing any middle ground, or compromise, for law reform initiatives. Lawyers and others who work in these fields of law need to understand the historical reasons why feminists make certain arguments at particular points in time, why fathers' rights groups make other arguments and why certain arguments (often those of the fathers' rights groups, appealing to traditional notions of family) may have

21 Parashar, *supra* note 20 at 11. See also D. Bell & E. Edmonds, "Students as Teachers, Teachers as Learners" (1993) 9:8 *Mich. L.R.* 2025 at 2038 et seq., critiquing the legal positivism of H.T. Edwards in "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 9:1 *Mich. L.R.* 34.

22 Parashar, *supra* note 20 at 11.

23 A.P. Harris has argued that the process of building a community (in her context, a critical race community) is linked to, and is as crucial as, the process of engaging in the intellectual work of critically analyzing the relationship between race and law: "Building Theory, Building Community" (1999) 8:3 *Soc. & Leg. Stud.* 313. Harris argues that the lessons of feminism might prove instructive in this process.

more purchase in the public imagination than others. Otherwise they may falsely assume that all knowledges are equally persuasive in the creation of legal norms.

In many areas of law—but especially in child custody law—judges are given considerable discretion to make decisions under statutes that lay out general principles. For example, the “best interests of the child”—a notoriously indeterminate concept—is the paramount principle that guides child custody decision-making. This type of law is particularly susceptible to influence by dominant ideas of a particular period. In the past, judges often relied on common sense notions of what was best for children in making their decisions. Sometimes these common sense notions were sexist and/or highly moralistic. For instance, a mother who had committed adultery or who was lesbian might lose custody of a child even though she had consistently been the primary caregiver of a child.²⁴ Some have suggested that if judges were educated with feminist knowledge about the roles of women and caregiving patterns, they might make decisions that were more reflective of actual conditions in society (such as the predominant female responsibility for child care) rather than relying on biased or moralistic views.²⁵ In Canada we have developed judicial education programs that attempt to make judges aware of the social context within which they make their decisions.²⁶ In effect, these initiatives attempt to make lawyers, judges and law reformers more aware and self-reflective about the processes through which social knowledge is incorporated into law and also about which forms of social knowledge are more powerful. Some law school educators similarly attempt to weave social context and discussion of power relations into family law courses.²⁷

However, social knowledge is not necessarily received “objectively” by students, lawyers or judicial decision-makers. The reactions of my family law students provide some evidence of this point. Moreover, as I suggest in the next section, feminist knowledge does not operate on a level playing field with other bodies of knowledge, at least in the child custody context.

IV. INCORPORATING SOCIAL KNOWLEDGE INTO LEGAL KNOWLEDGE: A NON-LEVEL PLAYING FIELD

Feminist arguments in the field of custody and access law often appear to be regressive in their emphasis on looking at the past relationships of parents and children, asking questions such as which parent has been pri-

24 K. Arnup, “‘Mothers Just Like Others’: Lesbians, Divorce, and Child Custody in Canada” (1989) 3:1 *C.J.W.L.* 18.

25 Parashar, *supra* note 20 at 100-103.

26 T.B. Dawson, “The National Judicial Institute Social Context Judicial Education Project: A Retrospective and Prospectus,” Discussion Paper for A Judicial Education Consultation with Judges, Academics and Community Leaders, Aylmer, Québec, June 20-21, 2000. Available at the National Judicial Institute, 300-161 Laurier Avenue West, Ottawa, Ontario K1P 5J7.

27 For example M.J. Mossman at Osgoode Hall Law School & B. Cossman at the University of Toronto Faculty of Law. See S.B. Boyd, “Teaching Policy Issues in Family Law” (1989) 8 *Can. J. Fam. L.* 1 at 11.

marily responsible for caregiving of a child and arguing for some legal recognition of the burdens of caregiving.²⁸ In contrast, fathers' rights arguments often appear to be future-focused and enlightened in their supposed emphasis on what is best for children, their focus on sharing parenting and so on. Fathers' rights groups have often invoked social science studies that appear to show that children will benefit after separation or divorce from contact with both parents. Since children tend to live primarily with their mothers after parents separate, this point really implies that contact with fathers is necessary. Although the social science studies are divided on this point and identify important caveats, the dominant discourse on the subject effectively links contact with fathers to the well-being of children. For instance, in a recent article in *Law Now*, an Alberta lawyer stated, without caveats, "It is axiomatic that a child benefits from continued contact with both parents and those extended family members who are interested in that child's wellbeing."²⁹

It is instructive to examine how this argument is constructed and sustained by fathers' rights groups and how they have established a voice in law reform fora. In the recent debates on reform of child custody and access law, these groups (with names such as Fathers for Justice, Family of Men, Fathers are Capable Too (FACT), New Vocal Man Inc.) captured the attention of the public, the media and some law reformers by arguing that gender bias has operated against fathers and by linking their concerns about gender bias to the interests of children. A Special Joint (Senate and House of Commons) Committee on Child Custody and Access held public consultations during 1998 and wrote a report entitled *For the Sake of the Children*.³⁰ The Committee was set up, in the first place, as a response to the complaints of fathers' rights groups about the 1997 reforms to child support. At that time, the federal government introduced child support guidelines, eliminated taxation of child support payments in the hands of the custodial parent and strengthened child support enforcement mechanisms.³¹ These changes were widely perceived to be a response to feminist arguments and to favour custodial mothers, despite the fact that the federal government had been discussing child support guidelines for some years and that there is disagreement among feminists about whether child support guidelines are a reform that will address effectively the poverty of women and children.³² Some feminists argue that guidelines may have the

28 See S.B. Boyd, "Custody, Access, and Relocation in a Mobile Society: (En)Gendering the Best Interests Principle" in D.E. Chunn & D. Lacombe, eds., *Law as a Gendering Practice* (Toronto: Oxford University Press, 2000) 158.

29 G. Andreiuk, "Reforming the Framework in Which Custody and Access Decisions are Made" (2000) 24:5 *Law Now* 19 at 21.

30 Special Joint Committee on Child Custody and Access, *For the Sake of the Children, Final Report* (Ottawa: Public Works and Government Services Canada, 1998).

31 Federal, Bill C-41, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act*, 2d Sess., 35th Parl., 1996, (passed May 1997).

32 C.F.L. Young, "Tax, Child Support and Equality: It Should All Have Been So Simple" (Opening Plenary, Canadian Law and Society Association Conference, 1 June 2000) [unpublished].

effect of depressing the quantum of child support awards;³³ others argue that a broader, less privatized approach to child support is required.³⁴

As the Introduction to *For the Sake of the Children* states, these child support law reforms passed through the Senate Committee only when the Hon. Allan Rock, Minister of Justice at the time, agreed to strike a parliamentary committee consisting of Senators and Members of the House of Commons to study issues related to custody and access. One Senator in particular, Anne Cools, was vocal in her insistence that the stories told by non-custodial fathers be taken into account. She became a public advocate on behalf of the fathers' rights groups that appeared before the Committee, arguing for shared parenting, against a focus on male violence against women, for penalties for mothers who appeared to make false allegations of abuse and so on.³⁵ These arguments were based on an assumption that gender bias in the courts is experienced mainly by fathers.

In the final report of the Special Joint Committee, the section on "Gender Bias in the Courts"³⁶ focused entirely on fathers' experience of gender bias: "many witnesses expressed the view that judges still operate on the presumption that mothers are better parents."³⁷ No reference was made to mothers' experiences of gender bias, the undervaluing of their primary caregiving, the overlooking of domestic abuse by the courts and so on. Nor was Canadian academic literature on these subjects cited.³⁸ The section, consisting of only two paragraphs, concluded with quotations from Wayne Allen of "Kids Need Both Parents" alleging that "it is not unusual to find that the custodial parent is using the child as a weapon in the matrimonial warfare and is sabotaging the access visits" and arguing that courts should start with the assumption that "continued involvement of both parents in the child's life is the desired goal."³⁹ This quote promotes a view of custodial mothers as manipulative and selfish, as well as a view that a norm of shared parenting in legislation would empower fathers and solve these problems. Yet statements such as these are not supported by the research. Studies show that most custodial mothers (and mothers do have custody of children more often than fathers) would like to see more participation by

33 Canada, National Association of Women and the Law, *The Child Support Guidelines: NAWL [National Association of Women and the Law] Response to Amendments to the Divorce Act and the Working Draft of the Federal Child Support Guidelines* (Ottawa: National Association of Women and the Law, 1996).

34 M.J. Mossman, "Child Support for Our Children?: Re-thinking 'Public' and 'Private' in Family Law" (1997) 46 *U.N.B.L.J.* 63.

35 See N. Bala, "A Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the Divorce Act" (1999) 16 *Can. J. Fam. L.* 163; M. Laing, "For the Sake of the Children: Preventing Reckless New Laws" (1999) 16 *Can. J. Fam. L.* 229; B. Diamond, "The Special Joint Committee on Custody and Access: A Threat to Women's Equality Rights" (1999) 19:1&2 *Can. Woman Stud.* 182. Senator Cools was the first black woman appointed to the Senate, in 1984: T.B. Dawson, *Women, Law and Social Change*, 3rd ed. (North York: Captus Press Inc., 1998) at 120.

36 *For the Sake of the Children*, *supra* note 30 at 15-16.

37 *Ibid.* at 15.

38 The literature includes Boyd, *supra* note 19; Bourque, *supra* note 19; M. Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision-Making" (1997) 14:1 *Can. J. Fam. L.* 31.

39 *For the Sake of the Children*, *supra* note 30 at 16.

fathers in their children's lives, not less.⁴⁰ Still, a key recommendation of the Special Joint Committee was that "shared parenting" should replace the concepts of "custody" and "access" in the Divorce Act⁴¹ and other family laws. The Government of Canada endorsed this reform direction and also suggested that unwarranted allegations of abuse must be strongly condemned.⁴²

The omission of arguments by women's groups in the gender bias section of the report must be placed in the context of the Joint Committee's mandate, itself the subject of a power struggle initiated by Senator Cools. The mandate was:

{T}o examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize *joint* parental responsibilities and child focused parenting arrangements based on children's needs and best interests.⁴³

The wording of the mandate differed somewhat from the original wording proposed and strengthened the emphasis on *joint* parenting arrangements. This shift in focus resulted from an amendment moved by Senator Cools on October 28, 1997 and adopted by the Senate.⁴⁴ The original mandate, contained in a motion of Senator Pearson, seconded by Senator Carstairs, read as follows:

{T}o examine and analyze issues relating to parenting arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize parental *responsibilities* rather than parental rights and child-focused parenting arrangements based on children's needs and best interests.⁴⁵

Thus, from the start, the Committee was oriented towards a preference for joint parenting arrangements and the link between joint parenting and the interests of children was already assumed. The original mandate would not have made this assumption, but left open a determination of what parenting arrangements and responsibilities might be more child-centred.

Joint custody has long been a central plank of the political platform of

40 For a review of the literature, see Laing, *supra* note 35 at 261-64; D. Perry et al., *Access to Children Following Parental Relationship Breakdown in Alberta* (Calgary: Canadian Research Institute for Law and the Family, 1992) at 37ff.

41 *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3.

42 Department of Justice Canada, Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access: Strategy for Reform (Ottawa: Department of Justice, May 1999), online: Department of Justice Canada <<http://canada.justice.gc.ca/en/dept/pub/cca/sjcarp02.html>> (last modified: 10 May 1999).

43 *For the Sake of the Children*, *supra* note 30 at 1 (emphasis added).

44 Special Joint Committee on Child Custody and Access, *Journals of the Senate in For the Sake of the Children, Final Report* (Ottawa: Public Works & Government Services Canada, 1998) at x.

45 *Ibid.* at ix (emphasis added).

fathers' rights advocates. When the Canadian *Divorce Act* was revised in the mid-1980s, these groups lobbied hard for a presumption in favour of joint legal custody.⁴⁶ Although they were ultimately unsuccessful, the discourse of joint custody became increasingly influential. During the child custody law reform debates of the 1990s, it remained a key argument of the fathers' rights groups, but was often rendered as "shared parenting" rather than joint custody. Feminists and women's groups were quick to point out the gendered impact of most joint custody arrangements: mothers tend to retain most responsibility for child care labour, whilst fathers gain the ability to make or veto decisions concerning the child.⁴⁷ Once a joint custody arrangement is in place, it becomes much more difficult for a parent with primary physical care of a child (usually a mother) to exercise discretion in relation to their children or to make decisions in relation to their own lives, such as relocation to another geographical location. As Anne Marie Delorey put it, the "increasing acceptance of joint legal custody ... focuses on the legal right *to control* women and children rather than the legal obligation *to care* for children."⁴⁸

Most critics have no objection to joint or shared parenting arrangements made through voluntary agreement of the parents. Yet some authors have suggested that joint physical custody may not meet the needs of children, especially young children who need stability and continuity and round-the-clock caretaking.⁴⁹ For most, the concern lies with imposed joint custody arrangements. They point out that policy-makers and law reformers have inappropriately jumped to the conclusion that joint physical custody is the optimal way of ensuring that children benefit from the maintenance of relationships with both parents after divorce. Social scientists who have studied the adjustment patterns of "children of divorce" have, by and large, not recommended imposition of joint physical custody.⁵⁰ As well, Maccoby and Mnookin have concluded that "joint legal custody is neither the solution to the problem of maintaining the involvement of divorced fathers, nor a catalyst for either increasing or softening conflict in divorcing families."⁵¹

Despite this evidence from the social sciences indicating caution about the use of joint custody as a presumptive legal norm, fathers' rights groups argue that it would achieve two goals. First, it would eliminate bias against fathers in the legal system and, second, it would be beneficial for children. For instance, one group said in its oral submission to the Special Joint Committee: "Right now, there is a gender bias in favour of women in the

46 House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, Nos. 32-50 (11 June 1985 – 23 October 1985). A.M. Delorey, "Joint Legal Custody: A Reversion To Patriarchal Power" (1989) 3:1 *C.J.W.L.* 33.

47 Delorey, *ibid.*

48 *Ibid.* at 44. See also Smart, *supra* note 18 who draws a distinction between *caring about* and *caring for* children, a distinction that often falls along gendered lines.

49 M.A. Mason, *The Custody Wars: Why Children are Losing the Legal Battle, and What We Can Do About It* (New York: Basic Books, 1999) at 63.

50 A. Harvison Young, "Joint Custody as Norm: Solomon Revisited" (1994) 32 *Osgoode Hall L.J.* 785 at 789.

51 E.E. Maccoby & R.H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge, Mass.: Harvard University Press, 1992) at 289.

family court system.”⁵² This perception of bias against fathers and the emphasis on the crucial need for contact between children and fathers are arguably misplaced, as I hope to show.

Nevertheless, many members of the public, many family lawyers and much of the media have accepted that fathers do experience gender bias in the legal system and that contact with both parents always promotes the best interests of children after separation or divorce of the parents. Thus, the social knowledge that influences law reform is potentially distorted, which, in turn, means that legal knowledge is unlikely to be neutral or objective. A deeper analysis of the social context within which child custody law operates and the social science studies on the children of divorce assist in deconstructing these assumptions. I will first examine the relationship between statistics and the perception that fathers are unfairly treated in the legal system. I will then briefly examine the relationship between social science studies on the children of divorce and the notion that maximum contact between children and both parents post divorce is beneficial for all children.

A. Statistics on Divorce and Child Custody Awards

Until recently, statistics on child custody and access in Canada have been notoriously poor and incomplete.⁵³ These statistics have been used by fathers’ rights advocates to bolster their argument that fathers are discriminated against in the legal system. The data on which they are based are collected, in the main, by the Central Divorce Registry of the Department of Justice from courts in each province and territory. The Central Divorce Registry then releases the data to Statistics Canada for processing and release. This means that statistics are available only for custody assignments that are made in the context of a divorce, thereby excluding separations of married parents who choose not to pursue a divorce and separations of common law couples. As well, the figures are available only for those custody assignments that are made or affirmed in a court order, thus excluding arrangements negotiated less formally. The statistics do, however, include negotiated arrangements that are rubber-stamped by a judge (consent orders).

Despite the flaws, the figures do not indicate the dire scenario of discrimination against men that was painted by the fathers’ rights groups. In 1998, mothers received sole custody in approximately 59.5 per cent of custody awards included in divorce court orders, fathers in approximately 9.5

52 Parents Helping Parents Submission, Special Joint Committee on Child Custody and Access, *Proceedings of the Special Joint Committee on Child Custody and Access* (Ottawa: Public Works and Government Services, 1998) [hereinafter *Proceedings*], online: Parliamentary Internet <<http://www.parl.gc.ca>> (last modified: 10 August 2000) at 1 May 1998.

53 The release of data from the National Longitudinal Survey of Children and Youth (NLSCY) has changed this situation to some degree, as I explain below. See N. Marcil-Gratton & C. Le Bourdais, *Custody, Access and Child Support: Findings From the National Longitudinal Survey of Children and Youth* (Presented to the Child Support Team, Department of Justice Canada, 1999). Most groups that presented to the Special Joint Committee in 1998 relied on the older data.

per cent and joint custody was awarded in approximately 30.5 per cent of cases.⁵⁴ These most recent statistics available show that joint custody awards have risen significantly since 1994, when they were at 20 per cent. The statistics do not indicate to what extent joint physical custody, as opposed to joint legal custody, is being awarded. Nevertheless, it seems clear that the legal system has been responsive to calls for joint custody awards and that fathers are getting some form of custody in about 40 per cent of cases that are dealt with one way or another in court.

In addition to the Statistics Canada data, a more indepth study of 1478 divorce files in 1988, conducted and published by the Department of Justice, examined a sample of cases in St. John's, Montréal, Ottawa and Saskatoon. Interviews were conducted with some parties.⁵⁵ That study found that in 43.5 per cent⁵⁶ of cases where fathers requested sole custody and were the petitioner, they received it. As well, they received joint custody in 8.7 per cent⁵⁷ of these cases. The study also found that joint custody was more likely to be the outcome when there was a level of dispute requiring third party negotiation or court involvement.⁵⁸ Central Divorce Registry Data showed that, in 1986, joint legal custody was more than twice as likely when fathers rather than mothers were the petitioner.⁵⁹

Given the fact that in the vast majority of heterosexual households the mother remains primarily responsible for child care, the "success rate" of fathers in legal applications for custody is arguably quite good. Any suggestion that the courts are biased against fathers is diminished further when one realizes that the statistics above include consent orders—in other words, cases where parents agree to an arrangement without a court-imposed order.⁶⁰ These figures give us little qualitative data about the process through which custody awards are reached, whether custody arrangements were contested and what the details of the awards are. As Marie Abdemalik has pointed out, the statistics are "somewhat misleading and certainly cannot capture or reflect a range of important issues. For example, to say that mothers receive sole custody in 74.6% of cases does not reflect the quality or extent of sole legal custody awarded."⁶¹ Increasingly,

54 Canada, Statistics Canada (Health Statistics Division), *Divorces, 1998, Catalogue No. 84F0213XPB* (Ottawa: Statistics Canada, 1999) at 24 - 27.

55 Canada, Department of Justice, *Evaluation of the Divorce Act. Phase II: Monitoring and Evaluation* (Ottawa: Bureau of Review, 1990) [hereinafter *Evaluation of the Divorce Act*].

56 *Ibid.* table 4.20 at 103.

57 *Ibid.* table 4.20 at 103.

58 *Ibid.* at 105.

59 *Ibid.* table 4.20 at 103. A Pilot Project of the Department of Justice, Law Reform Division, looked at custody and access determinations for separations and divorces in Hamilton and Hull. In 86 per cent of these cases, sole custody was awarded, and in 9 per cent of cases joint legal custody was awarded, and in 5 per cent of cases, split custody was awarded. One couple received joint physical custody. Mothers were the sole custodial parents in 91 per cent of cases. Canada, Department of Justice Canada, Research and Statistics Division, Desmond Ellis, Ph.D. *Technical Report - Custody, Access and Child/Spousal Support: A Pilot Project* (Department of Justice Canada, 1995).

60 *Evaluation of the Divorce Act, supra* note 55 at 104-105.

61 M. Abdemalik, "Best Interests of the Child?" *Contemporary Canadian Post-Separation Custody and Access Issues* (M.A. Thesis, Department of Sociology and Anthropology, Simon Fraser University 1999) [unpublished] at 58.

sole custody awards include terms and conditions that limit the terms and authority of sole custody, resulting in a form of joint guardianship even if the mother, in strict legal terms, retains sole custody.⁶² The qualitative terms of custody awards may thus restrict mothers' rights more than is immediately apparent.

The recent analysis of data on children's family history and custody from the National Longitudinal Survey of Children and Youth (NLSCY) has provided information on separations of non-married as well as married parents.⁶³ In Canada, generally, parents reported that they either had a court order, or were in the process of obtaining one, in only 48 per cent of cases. Resort to the legal system was higher for parents who had divorced and higher where parents said that living arrangements and visiting rights were a source of tension. Thus, it seems that courts may be receiving a greater percentage of the "hard" cases, whereas consensual arrangements may be organized extra-judicially in the main. In court-ordered custody arrangements, close to 80 per cent of children under the age of 12 were placed in their mother's custody, 7 per cent in their father's and 13 per cent in a shared physical custody arrangement. The figures shifted as children grew older. Children of common law unions and younger children were more likely to be in their mothers' custody, as were children where no court order existed. Few children covered by court orders for shared physical custody actually shared residence with both parents. The NLSCY data thus offers more nuance but confirms that mothers retain responsibility for children in most cases where parents separate. It remains unclear whether fathers are discriminated against, or whether orders reflect the social realities of gendered patterns of caregiving.

Despite the partial nature of Canadian statistics on custody and access, these figures are used by scholars and by fathers' rights advocates to bolster an argument that the legal system is biased in favour of mothers and against fathers.⁶⁴ For example, the central hypothesis of Millar and Goldenberg is that, since the legal standards by which child custody determinations are guided have changed over time (*i.e.*, paternal presumption, to tender years doctrine, to best interests of the child principle), court awards of custody should also have changed. They thus predicted that "outcomes would show assignments first primarily to the father, then to the mother, and currently more equally to the mother and father, as well as increasingly to some form of joint custody."⁶⁵ Instead, based on statistics, the authors find that mothers are still far more likely to receive custody than fathers. They then explore briefly various reasons for this discrepancy that have been raised by feminists. For example, they discount the notion that fathers do not press for custody of children, based on the 1988 Department of Jus-

62 Boyd, *supra* note 28; Bourque, *supra* note 19.

63 Marcil-Gratton and Le Bourdais, *supra* note 53.

64 See *e.g.* J. Pulkingham, "Private Troubles, Private Solutions: Poverty Among Divorced Women and the Politics of Support Enforcement and Child Custody Determination" (1994) *Can. J. L. & Soc.* 73.

65 P. Millar & S. Goldenberg, "Explaining Child Custody Determinations in Canada" (1998) 13:2 *Can. J. L. & Soc.* 209 at 214.

tice study which found that although few custody disputes go to court, custody is disputed (initially) in "upwards of 90 percent" of divorce cases.⁶⁶ They then address the notion that custody awards to mothers may be "a function of factors associated with the sex of the parent which also serve the best interests of the child."⁶⁷ If this is not true, and they attempt to show it is not, then, they say "it would be tantamount to claiming that decisions overwhelmingly in favour of women would be due to nothing but their gender, and this would be sexist."⁶⁸

Millar and Goldenberg discount feminist arguments that custody awards reflect the fact that women tend to be primary caregivers of children far more than men, regardless of whether they are employed and regardless of whether they are living in intact families or have separated or divorced from the other parent.⁶⁹ They cite the incidence of women in the labour force, including working single mothers, and suggest that women are spending less time in the home. They add, in an effort to take account of women's responsibility for the second shift: "It also appears that, despite the efforts of many working mothers to put in a 'second shift,' mothers in paid employment outside the home spend less time in child-care related activities than those not employed outside the home."⁷⁰ They acknowledge that working mothers put in more hours in child-care related activities than working fathers, but argue that the underlying gap in gender roles is decreasing over time. Millar and Goldenberg also suggest that "divorce may reduce the amount of time available for the children, in the struggle to overcome the decrease in income experienced by both parents."⁷¹ Therefore, they say, the fact that "women are being awarded custody of their children in overwhelming numbers and at rates increasing over time, compared to men"⁷² is not explained by women's primary caregiving responsibilities.

Millar and Goldenberg also mention the "breastfeeding factor": "Breast feeding is likely to occur in the first year or less of a child's life, and so this issue may be moot for the vast preponderance of cases."⁷³ They overlook

66 *Ibid.* at 217. The Department of Justice report actually states that "upwards of 90 per cent of separation and divorce cases apparently involve, initially, some degree of dispute and the potential, therefore, to be a contested case." *Evaluation of the Divorce Act, supra* note 55 at 49. Statistics Canada reports that in 1998, out of a total of 37,851 children in divorces where custody orders were made, husbands applied for custody of only 9,257 children, in contrast to wives who applied for custody of 24,282 children; husbands and wives were joint applicants in relation to 4,312 children, *supra* note 54. It seems, therefore, that mothers press for custody of children more often than fathers.

67 Millar & Goldenberg, *supra* note 65 at 217.

68 *Ibid.*

69 Statistics Canada has found that women still take disproportionate responsibility for domestic labour and child care: K. Marshall, Statistics Canada, "Employed Parents and Division of Labour" Cat. No. 75-001-XPE (1993) Winter 5:3 *Perspectives on Labour and Income* 23; K. Marshall, Statistics Canada, "Dual Earners: Who's Responsible for Housework?" (1993) Winter *Canadian Social Trends* 11; C. Silver, Statistics Canada, "Being There: The Time Dual-Earner Couples Spend With Their Children" (2000) Summer *Canadian Social Trends* 26.

70 Millar & Goldenberg, *supra* note 65 at 218.

71 *Ibid.* at 218.

72 *Ibid.* at 218-219.

73 *Ibid.* at 219.

the complex ways in which women's primary responsibility for children is structured and reinforced through gendered relations in society, not only by breast feeding, but also by factors such as workplace structures and access to parental leave.⁷⁴

When they turn to nurturing, rather than identifying the actual extent of participation by men in their children's lives,⁷⁵ Millar and Goldenberg describe studies showing that custodial fathers are just as nurturing as custodial mothers. In the next section on "Gender and Parenting Abilities," they point out, again, that there are "few genuine differences in abilities by gender" and these "are not significant factors in the ability to parent, any more than they are significant factors in the workplace."⁷⁶ In other words, if women want to have equality in the labour force, they must give fathers "equal rights" over children. Millar and Goldenberg say: "some would argue that gender differences do not affect a woman's ability in the workplace, but, at the same time, make her superior in the home. This double standard is difficult to defend."⁷⁷ Yet feminist critics of fathers' rights interventions in the family law field rarely argue that men are incapable of nurturing or good parenting. Rather they argue that for a variety of complex socio-economic reasons, fathers rarely devote themselves to parenting in the way that mothers do. Most women would prefer that men engage in more parenting labour, but achieving this result is easier said than done due to economic and social impediments.⁷⁸ It is therefore inappropriate to introduce laws that overlook women's primary caregiving. Millar and Goldenberg also suggest that "assigning custody primarily to mothers produces less desirable outcomes than a more gender balanced approach,"⁷⁹ citing a stud⁸⁰ indicating that children of single mothers are at increased risk regardless of the poverty level of the family.⁸¹

Having concluded that social science studies provide no reason for custody awards to mothers in greater numbers than fathers, Millar and Goldenberg turn to the legal system. They find that although sole custody awards to mothers declined slowly until 1986, a "sharp and consistent increase" began in 1987, despite the gender neutral language of the *Divorce Act, 1986*.⁸² They note that the Canadian *Charter of Rights and Freedoms* was introduced in early 1982 and that, although it "provides both sexes equal

74 N. Iyer, "Some Mothers Are Better Than Others: A Re-examination of Maternity Benefits" in S.B. Boyd ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168.

75 For example M. Eichler, *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) at 75.

76 Millar & Goldenberg, *supra* note 65 at 220.

77 *Ibid.* at 221.

78 Iyer, *supra* note 74.

79 Millar & Goldenberg, *supra* note 65 at 220.

80 Canada, Statistics Canada, *Growing Up in Canada: National Longitudinal Survey of Children and Youth, Catalogue No. 89-550-MPE96001* (Ottawa: Statistics Canada, 1996).

81 Millar & Goldenberg, *supra* note 65 at 220.

82 They fail to point out or realize that most custody legislation, and certainly the first federal Divorce Act of 1968, R.S.C. 1970, c. D-8. had been gender neutral well before the 1986 Act.

benefit of the law,"⁸³ it had not had a perceptible effect on custody outcomes. Millar and Goldenberg feel that the rise in number of female judges during the 1980s was too small to explain the continuation and (they argue) rise in maternal custody awards.

Having failed to find any other explanation for continued sole custody awards to mothers, Millar and Goldenberg turn to judicial education, finding that the first seminars on gender issues for the judiciary began in the mid 1980s, focusing on "how the legal system is unfair to women."⁸⁴ They cite two feminist articles on custody in *Equality and Judicial Neutrality*, a collection of papers from an early conference directed towards education of judges.⁸⁵ They say that one chapter "argues reasons why working women should receive custody, but does not extend this argument to working men."⁸⁶ In so doing, they take a simplistic formal equality approach that ignores the way feminist arguments were grounded in a discussion of the unequal sexual division of labour and child care in families under which women continued to bear the primary burden of family and home care, even if they were employed.⁸⁷ The authors conclude that the possibility that judicial education is "teaching sexism may be a concern"⁸⁸ and suggest that material presented to the judiciary should reflect "the realities of child-custody determinations in Canada and the current state of social science evidence concerning gender roles and gendered abilities to parent children."⁸⁹ Presumably, they believe that their own article represents the "truth" in these matters and should be used in the construction of legal knowledge. They conclude that:

Fathers who wish to parent their children post-divorce today face a situation similar to women entering the workforce only a few decades ago. As in that case, change for fathers and their children will come slowly, and with much resistance, unless proactive measures and political action are undertaken.⁹⁰

A number of these arguments were presented orally on April 29, 1998 to the Special Joint Committee by Paul Millar and the President of the Men's Educational Support Association, thus entering the law reform discourse.⁹¹

Fathers are thus portrayed as victims of a legal system that has been biased against them and is even more so now that judicial educators have apparently been misled, presumably by feminists, into believing that the

83 Millar & Goldenberg, *supra* note 65 at 221.

84 *Ibid.* at 223.

85 S.B. Boyd, "Child Custody and Working Mothers" in K.E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 168; J. McBean, "The Myth of Maternal Preference in Child Custody Cases" in K.E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 184.

86 Millar & Goldenberg, *supra* note 65 at 223.

87 Young, *supra* note 50.

88 Millar & Goldenberg, *supra* note 65 at 224.

89 *Ibid.*

90 *Ibid.*

91 Men's Educational Support Association Submission to the Special Joint Committee on Child Custody and Access (29 April 1998), *Proceedings*, *supra* note 52.

legal system is unfair to women. The argument has come full circle and feminists are implicitly portrayed as using poor research skills and propaganda that, in turn, has had a direct impact on decision-making in the courts. The complex relationship between law and social change and the difference between what law says and how it operates in practice are not fully developed by Millar and Goldenberg. Yet these authors set themselves up as neutral and objective scholars who rely on statistical facts in contrast to allegedly biased feminist scholars. To the extent that the legal system and academia give credit to "scientific" social knowledge, it may be more likely that social science articles that appear to rely on cold, hard data will be incorporated into legal knowledge. It is, therefore, important that students and those involved in the creation of legal knowledge through law reform adopt a critical approach when assessing such studies.

B. Social Science Studies: What is Good for Children of Divorce?

In addition to custody statistics, fathers' rights advocates invoke other social science studies in their presentations and submissions. In this part, I focus on the ways in which fathers' rights groups support their argument that children of divorce will suffer if they do not have frequent contact with their fathers. This argument is significant because the idea that maximum contact with fathers is crucial has been taken up not only by the Special Joint Committee but also by many law reformers and the media. It is also evident in many judicial decisions. The force of the idea is reflected in the trend towards shared parenting—which works from an assumption that both parents should have equal rights after separation unless one proves otherwise.⁹² This apparently benign idea has achieved a level of common sense knowledge that is, in fact, belied by the social science research in the field. Some researchers have called into question the assumption that maintenance of a relationship with an access father is the most important factor in positive outcomes for children.⁹³ The research shows generally that continuing contact with each parent is only one factor associated with positive outcomes for children of divorce. A recent Canadian review of social science research in this field has indicated that other key factors are a well-functioning custodial parent and avoidance of parental conflict.⁹⁴ As is obvious, the three factors (continuing contact, a well-functioning custodial parent and avoidance of parental conflict) can sometimes come into con-

92 In recommending shared or joint custody, G. Landolt, National VP of REAL Women said: "The mother may be the primary caretaker, but the father should have equal involvement with regard to medical concerns, education, health. The father should play a vital role in the child's life." (1 April 1998), *Proceedings*, *supra* note 52.

93 J.W. Ellis, "Caught in the Middle: Protecting the Children of High Conflict Divorce" (1996) 22 *N.Y. U. Rev. of L. Soc. Change* 253 at 259-61. See also L.B. Silverstein & C.F. Auerbach, "Deconstructing the Essential Father" (1999) 54:6 *American Psychologist* 397.

94 See M. Bailey & M. Giroux, *Relocation of Custodial Parents: Final Report* (Ottawa: Status of Women Canada, 1998) at 43-58 for a review of the social science literature, online: Status of Women Canada <<http://www.swc-cfc.gc.ca/publish/research/reprmt-e.html>> (last modified 08 May 1998).

flict with one another, yet an emphasis on the importance of contact seems to prevail. Perhaps more striking is the fact that research at the prestigious Center for the Family in Transition in the United States, with which the renowned Dr. Judith Wallerstein is associated, has found that the factors associated with good outcomes for children in post-divorce families include:

- (1) a close, sensitive relationship with a psychologically intact, conscientious custodial parent; (2) the diminution of conflict and reasonable cooperation between the parents; and (3) whether or not the child comes to the divorce with pre-existing psychological difficulties.⁹⁵

Moreover, “[t]here is no evidence in Dr. Wallerstein’s work of many years, including the ten and fifteen year longitudinal study, or in that of any other research that frequency of visiting or amount of time spent with the non-custodial parent over the child’s entire growing-up years is significantly related to good outcome in the child or adolescent.”⁹⁶

In light of these research results, it is surprising that the emphasis on maximum contact has been so pronounced in recent Canadian custody and access law and in the recent law reform process. In the 1996 Supreme Court of Canada case on child custody and relocation,⁹⁷ one of the intervenors, the Children’s Lawyer, ignored the contradictory results in social science studies and stated: “It is now widely assumed to be self evident that it is in the child’s best interests to ensure the access parent’s involvement in the life of the child.”⁹⁸ Even though another intervenor, the Women’s Legal Education and Action Fund (LEAF), carefully deconstructed various myths and assumptions about access, such as the benefits of maximum contact, showing that these benefits are highly contingent on circumstances,⁹⁹ its points were largely ignored by the Supreme Court.

Similarly, the Special Joint Committee Report stated that “a great deal of the professional literature about children and divorce concludes that it is in the child’s best interests to have continuing contact with both parents after divorce,” identifying the only exception as when the child experiences violence by one parent toward the child or other parent.¹⁰⁰ The Committee recommended that the *Divorce Act* be amended to add a Preamble with the principle that divorced parents and children are entitled to a close and continuous relationship with one another.¹⁰¹ Several other recommendations

95 J.S. Wallerstein & T.J. Tanke, “To Move or Not to Move – Psychological and Legal Considerations in the Relocation of Children Following Divorce” (1996) 30 *Fam.L.Qtlly.* 305 at 311.

96 *Ibid.* at 312.

97 *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177, 134 D.L.R. (4th) 321 (S.C.C.)

98 *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177, 134 D.L.R. (4th) 321 (S.C.C.) (Children’s Lawyer of Ontario’s factum) (Unpublished) at para. 21-22.

99 *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177, 134 D.L.R. (4th) 321 (S.C.C.) (LEAF’s factum (the Women’s Legal Education and Action Fund)) (LEAF 1996: 469-491).

100 *For the Sake of the Children*, *supra* note 30.

101 *Ibid.*, Recommendation 2.

bolstered this principle without significant caveats. The Government of Canada Response to the Special Joint Committee, while somewhat more cautious, nevertheless endorsed the view “that the family law system must discourage the estrangement of parents from their children.”¹⁰² It stated that “[a] great deal of the literature in this area concludes that children’s well-being and development can be detrimentally affected by a long-term or permanent absence of a parent from their lives.”¹⁰³

The subtext of the assertion that maximum contact between child and non-custodial parent is crucial is that mothers, with the assistance of family law, have deprived children of their fathers and that this situation has been highly detrimental to the mental health of children as well as fathers. This position is rarely stated in such clear terms, at least by lawyers. But some fathers’ rights groups are quite clear about the subtext:

One of the problems we’re facing is that, before a judge, before the bench, we absolutely have to prove that we are good fathers or that we were good fathers, whereas the mother doesn’t have to prove anything at all. The mother’s mere allegations [of violence] are sufficient for a judge to take custody away from the father or limit his access.¹⁰⁴

This group also stated that “[f]alse accusations of violence made by mothers against fathers in the context of a break-up are increasingly becoming the standard divorce method used by women to deprive men of shared custody or access.”¹⁰⁵

Some groups referred specifically to the social science research on children of divorce to illustrate the damage that children may suffer if deprived of their fathers. The National Foundation for Family Research and Education stated that “[r]esearch has demonstrated that infants who develop secure attachments to both parents ... function more competently at older ages than infants who develop only one or no secure attachments.”¹⁰⁶ Interestingly, the fathers’ rights groups often referred not to the studies of “children of divorce,” which offer conflicting evidence, but, rather, to studies of children raised in single-parent families, especially female-headed single parent families. The Statistics Canada report, *Growing Up in Canada*, was often invoked by the fathers’ rights groups in their submissions to the Special Joint Committee. For instance, the National Shared Parenting Association or NSPA (Saskatchewan) stated that the report showed that:

[H]igh rates of criminal conduct and poor academic performance—very key indicators of emotional difficulty and low self-esteem amongst young peo-

102 *Government of Canada’s Response*, *supra* note 42.

103 *Ibid.*

104 Groupe d’entraide aux pères et de soutien à l’enfant, Submission to the Special Joint Committee on Child Custody and Access, April 3, 1998, *Proceedings*, *supra* note 52.

105 *Ibid.*

106 National Foundation for Family Research and Education Submission to the Special Joint Committee on Child-Custody and Access, (8 June 1998), *Proceedings*, *supra* note 52.

ple—exist amongst the children of divorce. That in itself is proof that something is wrong with the current system.¹⁰⁷

They also argued that the cost of sustaining single parent (read single mother families) was very high, whereas single-father families are doing well.¹⁰⁸ The suggestion was made that it is more economically efficient for children to live with fathers than with mothers. Most such groups then argued that a presumption in favour of joint custody or shared parenting must be incorporated into the *Divorce Act*.

One highly contested argument that fathers' advocates repeatedly make is that the phenomenon of woman abuse has been overstated and over-emphasized in Canadian studies. For example, F.E.D.-U.P. argued in its April 3, 1998 presentation to the Special Joint Committee on Custody and Access, based on an article in the *Winnipeg Free Press*, that women hit men as often as men hit women. These groups contest the Violence Against Women Survey conducted by Statistics Canada at the request of the Canadian Department of Health in 1993 that showed the systemic nature of male violence against women.¹⁰⁹ The groups underplay the point that, although men can, of course, be the objects of abuse as well as women, there is no question that women are the most frequent victims of abuse and the most severely affected.¹¹⁰

Fathers' rights groups also often argue that women are the primary physical abusers and neglecters of children.¹¹¹ These arguments appear to be made in order to defeat the arguments of women's groups that woman abuse should be taken into account in custody and access decision-making and that children who witness abuse of their primary caregiver—usually their mother—suffer emotional trauma from this experience.¹¹² Some

107 National Shared Parenting Association Submission to the Special Joint Committee on Child Custody and Access, (30 April 1998), *Proceedings, supra* note 52. See also, e.g. Groupe d'entraide aux pères et de soutien à l'enfant Submission to the Special Joint Committee on Child Custody and Access, (3 April 1998), *Proceedings, supra* note 52; Women for United Families Submission to the Special Joint Committee on Child Custody and Access, (29 April 1998), *Proceedings, supra* note 52; FatherCraft Canada Submission to the Special Joint Committee on Child Custody and Access, (1 June 1998), *Proceedings, supra* note 52.

108 FatherCraft Canada Submission to the Special Joint Committee on Child Custody and Access, (1 June 1998), *Proceedings, supra* note 52.

109 The Canadian Panel on Violence Against Women, *Changing the Landscape: Ending violence: Achieving Equality: Final report* (Ottawa: Minister of Supplies and Services, 1993) (Co-chairs: P. Freeman Marshall & M. Asselin Vaillancourt). A more recent study by Statistics Canada shows that women are subjected to far more severe and more frequent assaults than men: Canada, Statistics Canada, *Family Violence in Canada: A Statistical Profile, Catalogue No. 85-224-XIE* (Ottawa: Statistics Canada, 2000) at 22; M. Philp, "Husbands also victims of spousal violence: Statscan" *The Globe and Mail* (26 July 2000) A3.

110 N. Bala *et al.*, *Spousal Violence in Custody and Access Disputes: Recommendations for Reform* (Ottawa: Status of Women Canada, 1998) at 2, online: Status of Women Canada <<http://www.swc-cfc.gc.ca/publish/research/svcad-e.html>> (last modified: 23 February 1998).

111 Fathers' Rights Action Group Submission to the Special Joint Committee on Child Custody and Access (27 April 1998), *Proceedings, supra* note 52.

112 Canada, National Association of Women and the Law, *Custody and Access: A NAWL (the National Association of Women and the Law) Brief to the Special Joint Committee on Child Custody and Access* (Ottawa: National Association of Women and the Law, 1998).

groups imply that children will be damaged more by lack of contact with fathers than they will by contact with abusive fathers. Others suggest that some mothers are abusing children by being cautious about their children seeing an ex-spouse who is suspected of abuse: "A severe form of child abuse is when one parent alienates a child from the other parent. Statistically, this is overwhelmingly mothers more than fathers."¹¹³ It has also been stated that:

If you have custody, then all of a sudden you have all the power, all the litigant power If you are going to abuse your child by refusing that child the right to maintain an ongoing relationship with both parents—so, since you're the custodial parent, you're saying, 'No, you can't see your daddy today'—that's harming the child. Then the court needs to address the fact that that is a form of child abuse.¹¹⁴

Punitive measures were often proposed by fathers' rights advocates. For example, Stacy Robb, for DADS Canada, suggested jail time should be considered in relation to false allegations of abuse.¹¹⁵ Carey Linde, for Vancouver Men, said "[t]here should be criminal sanctions against alienating parents."¹¹⁶ Through these devices, the focus of discussion has become the importance of paternal contact with children and how the system (and women) inhibit such contact.

Many of the points made by fathers' advocates have been disputed and discounted, including this notion that mothers often alienate children from fathers, and the notion that mothers are favoured by judges. As discussed earlier, the "children of divorce" research that emerged in the 1970s, as well as the joint custody "solution," have been deconstructed by social scientists and feminist scholars. Feminists, in particular, have offered an important critique of both the research itself and how it has been taken up, and sometimes reinterpreted, by fathers' rights groups and some legal and helping professionals.¹¹⁷ Scholars working on domestic abuse generally point out that abuse remains a gendered phenomenon and that the most serious forms of abuse are directed by men against women. What is important, for the purposes of this article, is to note that, despite these careful critiques, a form of social knowledge that highlights the apparent disadvantages of men in child custody law has achieved a good deal of currency in law reform debates and is influencing the direction of current child custody law reform in Canada.

113 Vancouver Men, Submission to the Special Joint Committee on Child Custody and Access (27 April 1998), *Proceedings, supra* note 52.

114 Fathers Are Capable Too (FACT) Submission to the Special Joint Committee on Child Custody and Access (11 March 1998), *Proceedings, supra* note 52.

115 DADs Canada Submission to the Special Joint Committee on Child Custody and Access, (30 March 1998), *Proceedings, supra* note 52.

116 Vancouver Men Submission to the Special Joint Committee on Child Custody and Access, (27 April 1998), *Proceedings, supra* note 52.

117 Abdemalik, *supra* note 61 at 56. See also M. Fineman & A. Opie, "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce" (1987) 1987:1 *Wis. L. Rev.* 107; J. Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1989) 3:1 *C.J.W.L.* 69.

V. CONCLUSION

This paper has attempted to show that legal norms typically reflect a struggle over the type of social knowledge that should be reflected in law. Legal knowledge itself is, then, usually the product of power struggles over the definition of social problems and solutions to these problems. Current child custody law reform debates are often characterized as battles, in particular battles between the sexes.¹¹⁸ It is thus clear that some sort of conflict of knowledge is represented in these debates. What is not always clear is that the playing field remains uneven and cannot be understood without an analysis of the ways that feminist knowledge remains contested in both law and society. In general, the “knowledge” that fathers’ rights advocates have offered in the custody law reform debates, even if discredited as extreme at times, has been taken up by the media and by law reformers who emphasize (typically in gender neutral language) the need of children to have relationships with two parents, often regardless of considerations of abuse or violence and typically regardless of the history of caregiving of the children in question. Although it remains clear that caregiving remains primarily a female responsibility and that abuse is directed more often and more severely against women by men than the other way around, these forms of social knowledge encounter difficulty in their reception at the official levels.

It is, therefore, still crucial to struggle for initiatives in legal education that assist future lawyers and law reformers in understanding the gendered power relations and other power relations that influence the processes of legal change. Courses in feminist legal studies at most law schools have only existed for less than two decades; courses on racism and the law are even fewer and are less entrenched. Thorough integration of these forms of legal knowledge into the curriculum as a whole, as I have attempted to do in my family law course, is far less developed. A strong commitment to work on this integration is essential to legal education in the twenty-first century. In the meantime, courses that focus specifically on the processes through which gender influences law and law reform are still necessary.

I will end with a teaching story that gives me hope for the future. During the 1999-2000 academic year, I offered a seminar on child custody law reform,¹¹⁹ in which I specifically sought to engender an understanding in students of the multiple factors that influence law reform and legal change. Our starting point was the role of “backlash” or conservative discourses in reinforcing various gender-based positions of power in the family and elsewhere, as well as the inequality of various groups (such as women) in these processes. We considered new ideas about masculinity that may or (more likely) may not be reflective of meaningful shifts in the sexual division of labour in the family or of the challenges that feminism has brought to constructions of masculinity and femininity. We also examined the role of ideologies of the (heterosexual, nuclear, middle class) family and of mother-

118 Mason, *supra* note 49; Bala, *supra* note 110.

119 This seminar was offered during spring term 1999-2000 under the title *Women, Law, and Family* (Law 365) at the Faculty of Law, University of British Columbia.

hood and fatherhood, and focused on feminist critiques of the ways these ideologies have played out in the legal terrain of child custody and access law. We then analyzed the relative influence that women's groups and fathers' rights groups have had on recent periods of law reform in Canada and in other jurisdictions such as Australia, England and Washington State. We explored the relationship between gender-based power struggles, the ways in which the key law reform issues are defined, the processes through which some voices and discourses have achieved a more dominant position than others and how "compromises" are reached in law reform and the definition of new legal norms. In particular, we observed the ways in which feminist voices have been discredited or sidelined in the reform debates despite an organized movement to insert such discourses into the public debate. We looked at how fathers' rights discourses have been taken up by the media and by some law reformers, despite the extreme nature of some of their arguments and the lack of support for their arguments in social science studies. At the end of the seminar, we used these tools to critically assess *For the Sake of the Child*, the Final Report of the Special Joint Committee on Custody and Access, discussed above, and the federal government's Response to the Report.

This child custody law reform seminar was over-subscribed and most students were enthusiastic about the materials, the issues and their research projects. They led class discussions in often very innovative ways, including dialogues, "talk shows" and small focus groups. Most of them wrote very strong research papers.¹²⁰ In contrast to reactions often received in my larger family law course, students seemed open to examining the wider influences on law and on law reform, probably reflecting the self-selection process of choosing a seminar. These students inspired me about the purpose of legal education and I am hopeful that they will find their own ways, in their own lives and careers, to challenge the way that legal knowledge is formed.

120 Six of these papers were published in S.B. Boyd, ed., *Child Custody Law Reform: Six Feminist Working Papers* (Vancouver: Centre for Feminist Legal Studies, U.B.C., 2000).