FROM DIFFERENCE TO SAMENESS — LAW AND WOMEN'S WORK*

BY PROFESSOR MARCIA NEAVE*

[*Despite increases in women's participation in paid work, their responsibility for child-rearing remains a major cause of economic disadvantage. This article examines the ways in which the law's approach to women's domestic role has contributed to sexual inequality. Feminists have sometimes argued that women should be treated 'the same' as men and sometimes supported strategies which take account of the differences in men's and women's lives. This article explores how these competing visions of sexual equality have influenced the development of family law and social security law.*]

A *INTRODUCTION*

The history of the women's movement reveals a continuing tension between the view that the position of women will be improved by treating them 'the same' as men and the view that sexual equality can only be achieved by policies which take account of the ways in which men and women differ.[1] The fundamental difference between the lives of men and women is that responsibility for child-rearing and domestic labour is socially assigned to women. Hence it is not surprising that much of the sameness/difference debate has concerned strategies for overcoming the disadvantages which women suffer because of their role in household production. This article explores the extent to which the development of family law and social security law (both areas of law which affect the economic position of women) have been influenced by these competing approaches to sexual equality.

Despite large increases in the work-force participation of married women the sexual division of labour remains a major cause of women's economic disadvantage. Child-rearing and domestic work are still seen as the primary responsibility of women whether or not they are also in the paid work-force.[2] Because of their need to balance paid employment with child-rearing, women often take poorly paid part-time or casual jobs with few promotional prospects. The paid work-force remains highly segregated, reflecting women's continuing identification with the domestic sphere. Women remain concentrated in lower-paid jobs such as clerical or sales work or in 'caring' professions such as nursing where their tasks often mirror traditional gender expectations.[3]

* LL.B. (Hons) (Melb.), F.A.S.S.A., Barrister and Solicitor of the Supreme Court of Victoria. Professor of Law, Monash University. Many thanks go to Susanne Liden, my researcher, who did a superb job in disentangling the complexities of the social security system.

1 For a detailed examination of this historical debate, see Bacchi, C. L., *Same Difference* (1990).

2 Bittman, M., *Juggling Time: How Australian Families Use Time*, Office of the Status of Women, Department of the Prime Minister and Cabinet (1991).

3 Sharp, R. and Broomhill, R., *Short-changed: Women and Economic Policies* (1988) 37.

The sexual division of labour provides men with the emotional support, leisure time and practical services necessary for them to participate in paid work. Yet the costs of this division of labour are largely borne by women. In Australia the life-time earnings of women who have borne children are significantly lower than the earnings of women without children and econometric modelling has enabled estimates to be made of the opportunity costs associated with child-rearing.[4]

The impact of domestic responsibility on the earning capacity of women is one of the central causes of the 'feminisation of poverty'. According to Professor Bettina Cass:

> Gender-based explanations of poverty emphasise the 'disabling' outcomes of the inequalities resulting from women's dependency as household workers and childcarers. Non-market caring work is accorded no monetary value, but is used to legitimate women's industrial marginality, discontinuous labour force participation and relatively low pay in sex-segmented occupations and industries ... These inequalities have their effect through the female life-cycle for single women, mothers who do not live with a male partner and for older women.[5]

The purpose of this article is to examine the ways in which the law has contributed to women's inequality by its approach to their responsibility for work in the home. The article suggests that the development of the legal system has been moulded by the perceptions and experiences of men. Although caring for children, the aged and other vulnerable members of the community is a central part of most women's lives, the legal system is largely concerned with the paid work of men. The essay argues that because the work of women is largely 'invisible' to the legal system, the law has responded to the experience of women as workers in the home in two main ways.

Traditionally, the law treated women as different from and subordinate to men. Because women were seen primarily as wives and mothers they were disqualified from participation in higher education, the professions and most aspects of public life. Law, economics and social policy disregarded the fact that many women were paid workers who supported children and treated all women as dependents on male breadwinners. Even after the removal of the formal legal barriers to women's participation in paid employment the law characterized women as dependants, rather than as contributors to the resources of society. Torts law, workers' compensation and social security legislation provided some protection for women 'homemakers' who were deprived of financial support by the death or desertion of their spouses, but this 'protection' was gained at the cost of entrenching women's dependency. In Australia women's domestic role served as the justification for payment of a 'family wage' to all men, and a lower wage to

4 See *e.g.* Beggs, J. J. and Chapman, B. J., *The Foregone Earnings From Child-Rearing in Australia*, Centre for Economic Policy and Research, A.N.U., Discussion Paper No. 190 (1988) ii (commissioned by the Australian Institute of Family Studies); see also Funder, K., 'Australia: A Proposal for Reform' in Weitzman, L. J. and Maclean, M. A., *Economic Consequences of Divorce: The International Perspective* (1992) 143, 152-4.

5 Cass, B., 'The Feminisation of Poverty' in Caine, B., Grosz, E. A., and de Lepervanche, M. (eds), *Crossing Boundaries: Feminisms and the Critique of Knowledge* (1988) 110, 114. See also Cass, B., 'The Changing Face of Poverty in Australia: 1972-1982' (1985) 1 *Australian Feminist Studies* 67.

all women, regardless of whether or not such women actually had the support of a male breadwinner.[6]

In more recent times most of the legal rules which treated women as inferior to men have been repealed, and some provisions which conferred advantages on women because of their dependent status have now been extended to include men. These changes reflect the view that sexual equality requires men and women to be treated 'the same', despite the existence of a division of labour under which women take primary responsibility for childrearing.

Feminist theorists have now begun to question the view that the attainment of sexual equality requires women to choose between accepting an 'assimilationalist' model under which they must behave the same as men in order to achieve their advantages, or arguing for 'special treatment' in order to compensate for the disadvantages caused by child-bearing and their responsibility for child-rearing. American feminist theorist, Catherine MacKinnon has argued that sexual inequality should not be analysed in terms of sameness and difference, but rather in terms of power. According to MacKinnon both the legal system and the State institutionalize and uphold men's domination and women's subordination. In her words:

> If you see gender as a hierarchy — in which some people have power and some people are powerless, relatively speaking — you realise that the options of either being the same as men or being different from men are just two ways of having men as your standard. Men are set up as a standard for women by saying either: 'You can be the same as men, and then you will be equal,' or, 'You can be different from men, and then you will be women.'[7]

Consistently with MacKinnon's argument, this article argues that neither the traditional approach of treating women primarily as the dependents of men, nor the current trend towards treating women as abstract ungendered individuals with choices identical to those of men, redresses the inequality caused by the sexual division of labour. This article suggests that the law's approach to 'women's work' has played a significant role in constructing and maintaining a sexual division of labour which has advantaged men and disadvantaged women.

Law and social policy reinforce the subordination of women by refusing to recognize the value of women's work to the men who benefit by it, or to society as a whole. Historically, the division of labour and resources within the family has been treated as a matter of private choice, which is consequently outside the sphere of legal intervention. The effect of this non-intervention is that the costs associated with child-rearing are largely borne by women. The article argues that sexual inequality is perpetuated by the reluctance of the State to intervene in the private sphere of the family to

6 See Cass, B., 'Rewards for Women's Work' in Goodnow, J., and Pateman, C. (eds), *Women, Social Science and Public Policy* (1985) 65, 67 *ff*., especially 68-75; Bryson, L., 'The Proletarianization of Women: Gender Justice in Australia' (1989) 16 *Social Justice* 87, 92-5. The 'family wage' principle was not abandoned until 1975.

7 Du Bois, E. C., Dunlop, M. C., Gilligan, C. J., MacKinnon, C. A. and Menkel-Meadow, C. J., 'Feminist Discourse, Moral Values and the Law — A Conversation' (1985-86) 34 *Buffalo Law Review* 11, 20-1. See also MacKinnon, C. A., *Feminism Unmodified* (1987) ch. 2.

require the sharing of resources between family members, to provide support to women who are involved in child-rearing, or to adopt social policies which enable women in heterosexual families to avoid becoming dependent on their spouses. During the period when the law treated married women differently from men, their unpaid work was largely, though not entirely, invisible to the legal system. It is argued that it remains invisible under a legal system which treats men and women the same. Changes to the law based on the ideal of formal legal equality between men and women fail to take account of ideological and structural factors which constrain women's choices. Such changes will not produce equality of outcome and may even worsen women's economic position because they continue to ignore the significance of the way in which responsibility for child care and unpaid domestic work is divided.

Three main areas of the law affect the economic situation of women.[8] Employment law determines the conditions under which women reconcile paid work with their child-rearing responsibilities. Family law controls the financial consequences of marriage breakdown. Social security law determines eligibility for income support for women who cannot support themselves through paid work and are not supported by a 'breadwinner'. Since this article is concerned with women's work in the home it focuses on family law and social security law.

The first section of this article examines the legal rules governing the financial consequences of marriage and heterosexual co-habitation. Although women were historically seen as dependents on men, they had no enforceable right to share in their husband's resources. The law maintained women's dependency by ignoring the value of their domestic labour, or by treating it as a gift to their partners.

The second section examines the effect of changes to laws regulating the economic consequences of marriage breakdown. Whether property is divided equally between the parties, or on a discretionary basis which takes into account the needs of spouses who cannot support themselves, it is argued that the costs of the sexual division of labour are still borne mainly by women. Although the Family Law Act 1975 (Cth) requires the 'homemaker and parent' contribution to be taken into account for the purposes of matrimonial property division, the division of financial resources on divorce does not adequately compensate women for loss of earning capacity due to interruptions in their paid work-force participation.

The third section of the paper examines the approach of the State to the role of women as child-rearers, as reflected in social security law. Historically the social security system reinforced the sexual division of labour by assuming that women were normally supported by male breadwinners. Recent changes to social security law reflect the view that men and women should be treated 'the same'. It is argued that the position of women has

8 *Cf.* Graycar, R., 'Family Law and Social Security in Australia: The Child Support Connection' (1989) 3 *Australian Journal of Family Law* 70, 71.

been worsened by changes to social security rules which ignore the effects of the sexual division of labour on women's capacity to support themselves and their families. The State has perpetuated women's inequality by failing to address the structural factors which make it difficult for women to combine paid work and child-rearing.

Although law's approach to 'women's work' has played a role in maintaining the sexual division of labour, the legal system is not the coherent, logical, internally consistent and rational body of doctrine it professes to be.[9] There are conflicting trends both within particular areas of the law and between different areas. Some legal developments have improved the position of women, while others have 'kept us in our place'.[10] By examining the extent to which the competing themes of dependence and formal equality have influenced the development of family law and social security law this article seeks to uncover contradictions and ambiguities in the law's approach to the role of women. Both family law and social security law raise questions about the value attributed to women's unpaid work, about the impact of the formal equality principle, and about the role of the State in maintaining women's traditional role within the patriarchal family.

B *FAMILY LAW — THE HISTORICAL CONTEXT*

Because family law regulates the relationship between heterosexual couples, between parents and their children and between families and the State, it both reflects and plays a part in constructing the respective roles of men and women and the ideology of the heterosexual family.[11]

Until the late nineteenth century the law treated married women as different from, and subordinate to, their husbands.[12] Under the doctrine of matrimonial unity the law regarded man and wife as one flesh, that one being the husband.[13] Title to a wife's real property and chattels and the right to manage and dispose of property, vested in her husband on marriage,[14] although the wife had certain rights to property if her husband predeceased her.[15] Women could not make wills or contracts disposing of their property during marriage. Under the marriage contract wives were entitled to be supported by their husbands for life, in return for the

9 Naffine, N., *Law and the Sexes* (1990) 12.

10 *Ibid.* See also Smart, C., *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984).

11 Gray, K. J., *Reallocation of Property on Divorce* (1977) 1. See also Smart, *op. cit.* n. 10, 101-2.

12 For an overview of women's status within marriage see Finlay, H.A., 'Baron and Feme — Women in Family Law' (1990) 4 *Australian Journal of Family Law* 96.

13 See *Murray v. Barlee* (1834) 3 My & K 209, 220; 40 E.R. 80, 84 *per* Lord Brougham.

14 In the case of interest in realty, the wife's lands passed, on her death, to her heirs, rather than to the husband, but a husband who survived his wife had a life interest based on his right of curtesy. The wife's chattels passed to the husband on marriage. See Hardingham, I. J. and Neave, M. A., *Australian Family Property Law* (1984) 4-10.

15 The wife had a right to her 'dower' in one-third of her husband's realty if he predeceased her. See Hardingham and Neave, *op. cit.* n. 14, 15.

provision of their domestic and sexual services, but the husband's support obligation was unenforceable in practice.[16]

During the nineteenth century, divorce law reforms and the enactment of married women's property legislation represented the first faltering steps towards formal equality. The enactment of married women's property legislation repealed the doctrine of matrimonial unity, extending to poorer women the right to own property and retain earnings that had been available to wealthy families through use of marriage settlements.[17] Although these reforms treated men and women 'the same,'[18] the law which dealt with the financial consequences of marriage continued to disadvantage women in two main ways.

First, family law regulated the economic relationships of men and women only after divorce. Unlike the situation of workers in the paid work-force, the terms on which women provided domestic labour within marriage were uncontrolled by law.[19] Even after maintenance legislation was enacted wives could not compel their husbands to share their earnings during marriage, but could only recover maintenance[20] if they were deserted or wrongfully left without means of support.[21] Family law rules upheld men's power over women by depriving women of their right to maintenance if they committed a breach of the matrimonial contract. Maintenance legislation also entrenched women's dependency, by giving the 'innocent' wife a right to recover maintenance even if she was capable of supporting herself.[22] Under the Family Law Act 1975 (Cth) it is now possible for a spouse to apply for maintenance while the couple are living together,[23] but family law is still primarily concerned with regulating the financial consequences of divorce, rather than of marriage.

Secondly, married women and women in *de facto* relationships were disadvantaged because their contributions of domestic labour were legally irrelevant in ascertaining title to property. Adoption of a principle of 'separation of property' for married persons was a reaction against the earlier doctrine of matrimonial unity. But applying the same rules to married men and women did not result in equality of outcome, because

16 See Finer, M. and McGregor, 'The History of the Obligation to Maintain' in *Report of Committee on One Parent Families (1974)* Cmnd 5629, vol. 2, appendix 5, 98 *ff.* The only effectual means of enforcing the maintenance obligation was the right of a married woman to pledge her husband's credit. See Hardingham, I. J., 'A Married Woman's Capacity to Pledge Her Husband's Credit for Necessaries' (1980) 54 *Australian Law Journal* 661.

17 For an account of the adoption of the legislation in Australia see Hardingham and Neave, *op. cit.* n. 14, ch. 2.

18 See Smart, *op. cit.* n. 10, 4.

19 Married women (and *a fortiori* women in *de facto* relationships) had no legal right to a share in their partners' resources during marriage and were consequently dependent on their goodwill for support.

20 The first major Australian legislation was passed in New South Wales in 1840. See An Act to Provide for the Maintenance of Deserted Wives and Children 1840 (N.S.W.).

21 See *e.g.* Maintenance Act 1958 (Vic.) s. 4. For a more detailed discussion of the history of the husband's maintenance obligation see Hardingham and Neave, *op. cit.* n. 14, 491-6.

22 The wife's means could affect the quantum of the order.

23 *In the Marriage of Eliades* (1980) 6 Fam. L.R. 916.

women were much less likely than men to earn income or acquire assets.[24] Rather than recognizing the value of domestic labour, the law treated women's work as leisure or pleasure.

In property disputes between married or *de facto* partners title was determined by the 'solid tug of money'.[25] Generally speaking, only those with legal title to property, or those who had directly contributed to its purchase price (for example by paying the deposit on land), could claim an interest in it. For the purposes of division of property on the breakdown of heterosexual relationships the law disregarded indirect financial contributions (such as payment of household expenses) and non-financial contributions (such as domestic contributions).

In the 1960s and 1970s English[26] (and at a later stage Australian) courts began to extend equitable principles to take into account indirect financial contributions to the acquisition or improvement of property for the purposes of determining title to assets owned by spouses and *de facto* partners.[27] Equity intervened by imposing a constructive trust in favour of a contributor where the parties had a common intention that he or she should obtain an interest in the property, which he or she had acted upon to his or her detriment. In certain cases the existence of such an intention could be inferred from the conduct of the parties. But the fact that a couple had divided their labour along traditional lines was not regarded as evidence justifying the inference of an intention that the wife should have an interest in her husband's property. As Fox L. J. in *Burns v. Burns* commented:

> the mere fact that parties live together and do normal domestic tasks [note the assumption that such tasks are normally shared equally] is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them.[28]

Although the marriage contract assumed that women would share their husbands' resources in return for their domestic labour, courts did not take this assumption into account in deciding whether a couple had a 'common intention' that a wife should have a share in her husband's property.

24 As Sir Jocelyn Simon commented: 'The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it': 'With All My Worldly Goods', Holdsworth Lecture, Birmingham, 1974 cited in *Pettitt v. Pettitt* [1970] A.C. 777, 811 *per* Lord Hudson.

25 *Hofman v. Hofman* [1965] 1 N.Z.L.R. 795, 800 *per* Woodhouse J.

26 Initially the Court of Appeal argued that s. 17 of the English Married Women's Property Act 1882 conferred a broad discretion on the court to reallocate property rights in order to do justice between the parties. This view was overruled by the House of Lords in *Pettitt v. Pettitt* [1970] A.C. 777. Thereafter the Court (more particularly Lord Denning) developed the constructive trust as a device for achieving a fair distribution of property. See *e.g. Hazell v. Hazell* [1972] 1 All E.R. 923 (where the couple were married) and *Cooke v. Head* [1972] 1 All E.R. 41 (where the couple were *de facto* spouses). The 'deserted wives' equity' was also invoked to protect deserted wives in their occupation of the matrimonial home until the Court of Appeal was overruled by the House of Lords in *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175.

27 For a detailed discussion of the cases see Hardingham and Neave, *op. cit.* n. 14, 104-27; Neave, M. A., 'Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability' in Youdan, T. (ed.), *Equity, Fiduciaries and Trusts* (1989) 247, 255; Neave, M. A., 'Living Together — The Legal Effects of the Sexual Division of Labour in Four Common Law Countries' (1991) 17 *Monash University Law Review* 14.

28 [1985] 1 Ch.D. 317, 331 *per* Fox L. J. See also *Grant v. Edwards* (1986) Ch.D. 638, 657.

Feminist theorists have attributed the failure to attach legal significance to domestic labour to the fact that it is performed within the 'private realm' of the home. Professor Carole Pateman has commented that:

> The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.[29]

Because child-rearing and domestic labour occurs within the private sphere of the home it is identified with the values of altruism and self-sacrifice. Women's work is seen as a gift to their husbands and children, which is made without any expectation of reward. The notion that women's services are 'beyond price' is reflected in the case of *Hohol v. Hohol* where O'Bryan J rejected a *quantum meruit* claim for compensation for domestic services provided over a 25 year period.

> [The woman] performed her household and other services extremely well, but she did so, not in any expectation of financial reward, but out of love and affection which she had for her children and her [*de facto* husband].[30]

Mrs Hohol was not entitled to compensation for her domestic labour because women's work was characterized as 'a labour of love'. This view may be compared with the approach taken by the Supreme Court of South Australia in *Jackson v. Crosby No. 2,* where a man claimed an interest in the land owned by his former *de facto* wife, because he had built a house on it. Responding to the argument that the man should not be entitled to an interest because he had built the house 'for love', Bright J. commented:

> [I]t is not unnatural to think of the plaintiff as being in love with the defendant and building a house for her because he was in love with her, yet nevertheless expecting to receive a reward.[31]

Given the traditional invisibility of domestic labour, it is not surprising that courts have had less difficulty in manipulating legal doctrines to recognize the value of labour which can be equated with the work done by men in the paid work-force. In *Eves v. Eves*[32] the Court of Appeal held that a *de facto* wife, who had wielded a sledge-hammer to break up concrete, and loaded the broken concrete into a skip, was entitled to an interest in her *de facto* husband's property. Brightman L.J. commented that he 'found it difficult to suppose' that she would have performed such tasks except on the basis of an understanding that she would obtain an interest in the house.[33] In *Eves v. Eves* the female plaintiff was rewarded for doing 'a man's job', whereas if she had simply served her husband meals and washed his clothes while he reconstructed the garden, she would probably not have

29 Pateman, C., *The Disorder of Women* (1989) 118. See also O'Donovan, K., *Sexual Divisions in Law* (1985) x-xi.

30 [1981] V.R. 221. Mrs Hohol was successful in establishing an interest arising under a constructive trust in one of the lots to which Mr Hohol had legal title, because Mr Hohol had told her that the property was for both of them when he acquired it, and she acted upon that statement of intention to her detriment.

31 *Jackson v. Crosby* (1977) 21 S.A.S.R. 280, 287.

32 [1975] 3 All E.R. 768. (In *Eves* one reason given for the decision was that the man had told the woman that he would have given her an interest in the property, but for the fact that she was under 21.) *Cf. Miller v. Sutherland* (1991) D.F.C. 95-102.

33 [1975] 3 All E.R. 768.

succeeded in establishing her claim. The comment of Brightman L.J. suggests that women who conform to normal gender expectations by providing domestic labour do not expect to obtain any interest in their husband's property. By contrast, men who provide domestic labour may be rewarded because they have done more than is normally expected of them.[34]

In recent times courts have begun to extend the constructive trust beyond the situation where the parties had a common intention that the contributor should obtain an interest in the property. In its 1987 decision in *Baumgartner v. Baumgartner*[35] the High Court held that a woman who had pooled her earnings with those of her male partner, had acquired an equitable interest in the family home despite the absence of any common intention to that effect. Although the quantum of the woman's share took into account her direct financial contributions, the court also credited her with the additional amount which she would have earned, if she had not taken three months off work to care for the couple's baby son. (In other words, the value of her domestic labour was assessed on an opportunity cost basis.) However the value of her domestic contributions *during the period she was in paid employment* was not taken into account for the purposes of ascertaining her share.

This is the first case in which a woman's domestic labour has been regarded as relevant in determining the extent of her interest in property in the name of her partner, in the absence of a common intention that her contribution should give rise to an interest.[36] But it is not yet clear whether the courts will be prepared to extend *Baumgartner* to cover a case where the woman's contributions are purely domestic. The basis for the decision in *Baumgartner* was that it was unconscionable for the man to retain the benefit of the woman's earnings which had not been contributed as a gift, but as part of a joint endeavour which had subsequently failed. The question which has not yet been resolved is whether courts will regard it as unconscionable for men to appropriate women's domestic contributions without giving them any share in property accumulated as a result of the work of both spouses. Because men have traditionally enjoyed the benefits of domestic labour without providing their wives or *de facto* partners any share in their assets, judges (who are usually men) may not 'see' such conduct as unconscionable.

Historically then, the value of women's domestic labour has been disregarded in the family law context.[37] Despite some legislative reform, domes-

34 Liden, S., 'Difference and Exceptionality' (1990) 15 *Legal Service Bulletin* 118, 119. As Liden comments 'these exceptional men expect and receive, a disproportionate amount of social credit just for bearing a fair share'. See n. 78, 32.

35 (1987) 164 C.L.R. 137. See also *Muschinski v. Dodds* (1986) 106 C.L.R. 583 which was the starting point for development of this doctrine.

36 In *Hohol v. Hohol* [1981] V.R. 221, the woman's contributions were mainly domestic, but the man had expressed an intention to give her an interest.

37 This may be compared with the approach of torts law under which a husband was able to recover for loss of the domestic services of a wife negligently injured by the defendant, in an action for loss of consortium.

tic labour continues to be invisible for most legal purposes. As will be seen below, the Family Law Act 1975 (Cth) requires the 'home-maker and parent' contribution to be taken into account for the purposes of property division between spouses. But this provision does not apply to property disputes between a party to a marriage and a third party, for example a wife and the husband's creditors, or between a wife and a beneficiary under the husband's will. Similarly, in most jurisdictions, property disputes between *de facto* partners continue to be resolved by equitable principles which may fail to take account of the value of domestic labour. Only New South Wales, Victoria and the Northern Territory have legislated to require the court to take account of the 'home-maker and parent' contribution in determining title to property on the breakdown of a *de facto* relationship and the Victorian legislation is limited to disputes concerning title to real property.[38] Except in New South Wales and Tasmania, women in *de facto* relationships cannot claim maintenance from their partners, even where their earning capacity has been affected by caring for the children of the relationship. Currently family law treats men and women 'the same' by ignoring the value of women's work in the home, except for the purposes of dividing property after matrimonial breakdown. In this context formal equality enhances men's power and women's economic disadvantage.

C *FAMILY LAW REFORMS — FORMAL AND SUBSTANTIVE EQUALITY*

In the past 20 years most Western countries have adopted no-fault divorce. In most jurisdictions the primary purpose of divorce law reform was to change the grounds for divorce, rather than to redress the economic disadvantages experienced by women on marriage breakdown, although the abandonment of fault prompted consequential changes to rules governing property division and maintenance.[39] It was not until the divorce rate began to rise, and the economic effects of marriage breakdown on women became more apparent, that feminists became involved in the debate. The dilemma for feminists has been how to overcome the economic disadvantages women experience because of the sexual division of labour, without entrenching breadwinner-dependent spouse relationships.[40]

38 De Facto Relationships Act 1984 (N.S.W.); Property Law (Amendment) Act 1987 (Vic.) inserting Part IX into Property Law Act 1958 (Vic.); De Facto Relationships Act 1991 (N.T.). Western Australia is considering the introduction of similar reforms. For a detailed discussion of the case law on such legislation see Chisholm, R., Jessep, O., and O'Ryan, S., 'De Facto Property Decisions in N.S.W.: Emerging Patterns and Policies' (1991) 5 *Australian Journal of Family Law* 241. See also Bailey-Harris, R., 'Property Disputes Between De Facto Couples: is Statute the Best Solution' (1991) 5 *Australian Journal of Family Law* 221.

39 Rhode, D. L. and Minow, M., 'Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law' in Sugarman, S. D. and Kay, H. H. (eds), *Divorce Reform at the Cross-Roads* (1990) 195; for a detailed history of the change see also ch. 1. For a description of the debate in Australia see Graycar, R., 'Feminism and Law Reform: Matrimonial Property Law and Models of Equality' in Watson, S. (ed.), *Playing the State* (1990) ch. 11.

40 Trebilcock, M. J. and Keshvani, R., 'The Role of Private Ordering in Family Law' (1991) 44 *University of Toronto Law Journal* 533, 554. See also Minow, M., 'Learning to Live with the Dilemma of Difference' (1985) 48 *Law and Contemporary Problems* 159; Minow, M., *Making All the Difference* (1990).

To some extent debate about matrimonial property reforms reflects the competing approaches to gender equality identified at the beginning of this essay. American and Australian feminists[41] influenced by the 'sameness' model of equality, supported equal division of matrimonial property (or at least a starting point of equality).[42] In their view, equal division recognized the economic value of women's domestic contributions and was more likely to produce favourable outcomes for women than discretionary regimes in which (usually male) judges were required to assess the value of domestic contributions.[43] Other commentators argued that equal division of matrimonial property disregarded the effects of the sexual division of labour on women's earning capacity. They supported property and maintenance laws which would recognize domestic contributions and take account of the future needs of women who had taken primary responsibility for child-rearing.[44] In principle both groups agreed that women should be encouraged to become financially independent after marriage breakdown, rather than looking to their husbands for life-long maintenance. But there was disagreement[45] about the extent to which it was practicable to limit the availability of maintenance in the short term, given the large number of women whose earning capacity had been affected because they had withdrawn from the work-force to care for children.[46]

These competing models of equality were reflected in the drafting of the Family Law Act 1975 (Cth) and in subsequent debate about its provisions. In some respects, the provisions of the Act reflect a commitment to the notion of equality as sameness. On a symbolic level formal equality is reflected in the gender-neutral terms of the legislation. On a practical level, the 'clean break' principle contained in s. 81[47] of the Act indicates that

41 For an account of the Australian debate on property division see Graycar, R., 'Feminism and Law Reform: Matrimonial Property Law and Models of Equality' in Watson (ed.), *op. cit.* n. 39, ch. 11; Scutt, J.A., 'Equal Marital Property Rights' (1983) 18 *Australian Journal of Social Issues* 128; O'Keefe, E., 'Property Rights on Marriage and Property Distribution on Divorce: Room for Manoeuvre' (1983) 18 *Australian Journal of Social Issues* 136; Cox, E., 'Beyond Community of Property: A Plea for Equity' (1983) 18 *Australian Journal of Social Issues* 142.

42 The Australian Law Reform Commission has pointed out that there are a variety of different 'equal sharing' models. In particular, there are differences about the property which is included in the 'deferred community' regime and about the extent of the discretion to depart from equal division. See Australian Law Reform Commission, *Matrimonial Property Report*, Report No. 39 (1987) 109 (hereafter cited as '*Matrimonial Property Report*').

43 See *e.g.* Scutt, J. A. and Graham, D., *For Richer, For Poorer: Money, Marriage and Property Rights* (1984).

44 See *e.g.* Fineman, M. L., 'Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequence of Divorce' (1983) *Wisconsin Law Review* 789.

45 For two different views on the maintenance issue see O'Donovan, K., 'Should All Maintenance of Spouses be Abolished' (1982) 45 *Modern Law Review* 424; Deech, R. L., 'The Principles of Maintenance' (1977) 7 *Family Law* 229. See also Graycar, R., 'Towards A Feminist Position on Maintenance' [1987] 3 *Refractory Girl* 7.

46 Conservative critics often suggest that feminists worsened the situation of women by supporting no-fault divorce and campaigning for property and maintenance rules based on the principle of formal equality. Carol Bacchi has exposed the historical inaccuracy of this indictment and shows that most feminists accepted that women whose earning capacity had been affected by child rearing would continue to require maintenance after marriage breakdown. Bacchi, *op. cit.* n. 1, ch. 8. See also Rhode and Minow, *op. cit.* n. 39, 195-7.

47 Family Law Act 1975 (Cth) s. 81 provides that in making rules for property division and mainentance after the breakdown of the marriage 'the court shall, so far as practicable, make such orders as will finally determine the financial relationships between the parties.'

marriage is no longer to be regarded as providing a life-long right of support to women, and that after marriage breakdown both men and women should normally become economically self-sufficient.

However, other provisions in the legislation recognize the effect of the sexual division of labour on women's capacity to support themselves. Rather than providing for equal division of property, s. 79 of the Family Law Act 1975 (Cth) creates a discretionary regime for property division which takes into account both past contributions and future needs.[48] Contributions include both financial and non-financial contributions, including contributions made to the welfare of the family in the capacity of homemaker and parent.[49] Orders under s. 79 may contain a maintenance component which takes into account disparities in the financial situation of the parties or which provides for the future needs of a spouse. Unlike the situation prior to the abolition of fault when the 'innocent' spouse was entitled to life-long support, eligibility for maintenance is based on need and the other spouse's ability to pay. In determining a spouse's eligibility for periodic or lump sum maintenance, and the quantum of any order, the court must consider the age and health of the parties, their physical and mental capacity for paid work, their respective incomes, resources and other financial commitments (including those arising from other relationships), the duration of the marriage and the extent to which it has affected earning capacity and the extent of responsibility to care for children.[50] As originally enacted, s. 75(2)(l) specifically recognized women's traditional role as child-rearers by requiring the court to take account of the need to protect a maintenance applicant's wish to continue in her role as 'wife and mother'[51] (though it was not clear how a divorced woman could continue in the former role). The sub-section is now cast in gender-neutral terms, requiring the court to take account of 'the need to protect a party who wishes to continue that party's role as parent'. The effect of marriage on the earning capacity of wives is specifically recognized by the provision for payment of 'rehabilitative maintenance' which enables a spouse to undertake a course of education or establish herself in business, so that she can become self-supporting.[52]

Research in the United States[53] has shown that the 'sameness' approach to gender equality has not produced equality of outcome. Lenore Weitzman's famous research on the effects of 1970 Californian reforms which provided only limited rights to maintenance and applied a strict equal sharing rule to property acquired during marriage showed that a year after

48 Family Law Act 1975 (Cth) sub-ss 79(4)(d) and (e). Subs. (e) requires the court to consider the 'needs' factors listed in sub-s. 75(2).

49 Family Law Act 1975 (Cth) sub-s. 79(4)(c).

50 Family Law Act 1975 (Cth) sub-s. 75(2).

51 This provision was introduced as the result of a motion by Malcolm Fraser in the House of Representatives.

52 Family Law Act 1975 (Cth) sub-s. 75(2)(h). (The provision is drafted in gender-neutral language, but seems to be mainly directed to the situation of women.)

53 See Weitzmann, L. J., 'The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards' (1981) 28 *University of California Law Review* 1181; Weitzman, L. J., *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985).

divorce the living standards of men had risen by 42%, while those of women had fallen by 73%.[54] As Martha Fineman has commented:

> Simplistic, rule-equality changes in divorce laws premised on an unrealised egalitarian marriage ideal . . . tend to further impoverish women and their children. Under such laws, divorced women are to assume sole economic responsibility for themselves and joint economic responsibility for their children . . . Equal treatment in divorce, however, can only be fair if spouses have access to equal resources and have equivalent needs. Realistically, many women do not have access to such economic advantages. In addition, they continue to care for children.[55]

The Family Law Act 1975 (Cth) has greater potential for recognizing the effects of the sexual division of labour on the earning capacity of women. But despite provision for the recognition of 'needs' as well as contributions as the basis for financial provision after divorce, Australian research indicates that the cost of marriage breakdown is still disproportionately borne by women. The Australian Institute of Family Studies examined the position of 825 divorced men and women for the purposes of the Australian Law Reform Commission reference on matrimonial property.[56] The survey showed that 'men living alone, as a sole parent, or with a new partner with no children had considerably improved their living standards' after divorce, while 'women living alone or as sole parents had sustained a drastic fall in living standards'.[57] At the time of interview 41% of women living alone and 35% of sole parent women were below the poverty line. In the interview group two-thirds of the women who were single at the time of the study and had been dependent on their husbands, or had only low earnings prior to the divorce were more than 20% below the poverty line, and three-quarters were reliant on social security. For many women the only practical means of escaping from poverty after divorce is to find another man who is prepared to support them and their children. As Herma Hill Kay puts it: 'Marriage . . . is both a long-term cause and a short-term cure of female poverty.'[58]

Historically women caring for children alone were disadvantaged by the failure of courts to make maintenance orders against fathers which realistically reflected the costs of supporting children, and by the difficulty of enforcing maintenance orders against fathers who were determined to avoid payment. The introduction by the Commonwealth of the child support

54 In order to measure 'living standards', Weitzman relied on an index of economic well-being developed by the U.S. government. For details see Weitzman, L.J., *The Divorce Revolution, supra* n. 53, 337-8.

55 Fineman, M. A., *The Illusion of Equality* (1991) 52. See also Minow, M., 'Consider the Consequences' (1986) 84 *Michigan Law Review* 900.

56 See *Matrimonial Property Report, op. cit.* n. 42, 66 for a more detailed discussion of the sample. See also McDonald, P. (ed.), *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) (hereafter cited as 'McDonald').

57 *Matrimonial Property Report, op. cit.* n. 42, 73. Men and women who had established a new household with a partner and children had returned, roughly, to their pre-separation income level. It should be noted that women living alone or as sole parents were rarely 'asset-rich' and income-poor. Despite the bias in favour of better off couples in the sample, 92% of women received property below the level entitling a person to a full social security benefit.

58 Kay, H. H., 'Beyond No-Fault: New Directions in Divorce Reform' in Sugarman and Kay, *op. cit.* n. 39, 30.

scheme,[59] stage two of which determines child maintenance obligations by statutory formula and provides a more efficient mechanism for the collection of child maintenance, will improve the financial situation of sole parents to some extent. But the greater availability of child support will not produce greater equality of outcome in the financial position of husbands and wives after divorce.

Both American and Australian research shows that women's economic disadvantage on divorce is a direct consequence of the sexual division of labour. As Funder, Harrison and Weston explain:

> Inequalities in the standards of living experienced by men and women after separation derive from five major sources: the lower earnings of women generally, the effects on future earnings of the division of labour within marriage which depreciates women's earning capacity (the opportunity costs of children); the continuing indirect costs of children caused by restrictions on resident parent's time and efforts in the labour market; the almost universal lack of any transfer of resources from the marriage to redress the differential which flows from the marriage partnership and the dependence on public support of sole parents.[60]

The research of the Australian Institute of Family Studies examined the matters which influenced the amount of property which husbands and wives received after matrimonial breakdown. Factors which had a differential impact on women included the value attributed to domestic contributions, particularly in determining allocation of property other than 'family assets' such as the matrimonial home; the insufficient weight given to child rearing and its effect on women's earning capacity; and the effect of the 'clean-break' principle.

Section 79(4)(c) of the Family Law Act explicitly recognizes non-financial contributions made by a party to the welfare of the family, including contributions made in the capacity of home-maker and parent. Despite this symbolic recognition of the value of domestic labour it appears that home-maker and parent contributions are still under-valued in comparison to financial contributions. The Family Law Act provides no guidance as to how domestic contributions should be valued or what weight they should be given in comparison with financial contributions. Courts have simply repeated the platitude that the home-maker and parent contribution should be recognized in a 'substantial and not a token way '.[61]

The Australian Institute of Family Studies has found that 'men and women have genuine and pervasive differences in their perceptions of each other's contributions.'[63] Ultimately the valuation of domestic contributions, and their comparison with financial contributions is a 'subjective value judgement'. Dr Hilary Charlesworth has analysed the effect of a number of cases in which the home-maker and parent contribution was considered,

59 Child Support (Registration and Collection) Act 1988 (Cth); Child Support (Assessment) Act 1989 (Cth).

60 Funder, K., Harrison, M. and Weston, R., *Settling Down: Pathway of Parents After Divorce*, Australian Institute of Family Studies (forthcoming).

61 See *e.g. In the Marriage of Rolfe* (1979) 25 A.L.R. 217; *Mallett v. Mallett* (1984) 156 C.L.R. 605.

62 *Matrimonial Property Report, op. cit.* n. 42, 85.

63 *Ibid.* 141.

and has concluded that domestic work is systematically undervalued. In her words:

> Legislative reform has not touched the economic inequality between the sexes on marriage breakdown . . . The recognition of the homemaking and parental role in property distribution in the Family Law Act appears to have little impact on Family Court decisions because it is phrased too generally. It is given content by a judiciary who implicitly accept that work given economic value in the marketplace contributes more to family property than work with no public economic recognition.[64]

The High Court's disapproval of the use of presumptions to restrict the exercise of the courts' discretion under s. 79, requires the contributions of parties to be assessed on a case by case basis.[65] Charlesworth and Ingleby have argued that this process of individualized assessment prevents recognition of the systemic effects of the sexual division of labour, thus obscuring the fact that women are disproportionately disadvantaged. In their words:

> The exercise of judicial discretion on the basis of particular circumstances allows the values on which the decision is made to be submerged because each decision is apparently totally explicable on its own facts.[66]

Decided cases offer little guidance on the extent to which a woman who has been a 'home-maker' should be regarded as contributing to the accumulation of business assets by her husband.[67]

Domestic contributions may also be overlooked or discounted where the woman has made substantial financial contributions to the marriage, or has worked in the family business. In *Anast and Anastopolous*,[68] the marriage lasted for 12 years. The wife worked full-time in the husband's business without wages for the first six years, until the birth of the oldest child. Thereafter she assisted to a lesser extent in the business, took responsibility for looking after the three children and, for a short period, had another paid job. But she received only slightly more than a quarter of the property. In *Racine and Hemmett*[69] Nygh J. used the presumption of equality as a starting point for matrimonial property division (an approach since overruled by the High Court)[70] but held that there was to be no additional loading for the home-maker and parent contribution where the wife had

64 Charlesworth, H., 'Domestic Contributions to Matrimonial Property' (1989) 3 *Australian Journal of Family Law* 147, 155. Some support for this view is provided by the finding of the Australian Institute of Family Studies that '[r]elative contributions to the normal household tasks . . . have almost no impact on the property division for either men or women': McDonald, *op. cit.* n. 56, 187.

65 *Mallett v. Mallett* 156 C.L.R 605. See also *Norbis v. Norbis* (1986) 161 C.L.R. 513, and *In the Marriage of Giunti* (1986) 11 Fam. L.R. 160.

66 Charlesworth, H. and Ingleby, R., 'The Sexual Division of Labour and Family Property Law' (1988) 6 *Law in Context* 29, 34.

67 It appears that the Family Court now recognizes that a woman who has been a 'home-maker' makes some contribution to her husband's business assets, by freeing him to pursue his career, but it is unclear how this contribution will be valued. For further discussion see Kovacs, D., *Family Property Proceedings in Australia* (1992) 217 and *In the Marriage of Albany* (1980) 6 Fam. L.R. 461, *Mallett v. Mallett* (1984) 156 C.L.R. 605, and *Napthali and Napthali* (1988) 96 F.L.R. 187. The A.I.F.S. study showed that men tended to receive a larger share of non-basic assets such as businesses and farms. *Infra* 784 (text accompanying n. 75).

68 (1982) F.L.C. 91-201. *In the Marriage of Marinko* (1983) 8 Fam. L.R. 849, where the woman's efforts were slightly less but she received a half share.

69 (1982) F.L.C. 91-277.

70 *Supra* n. 65 and accompanying text.

been in full-time work throughout the marriage and contributed her earnings to family resources. Professor John Wade has commented that '[i]t is not clear ... in what circumstances the share of the battling super-mother will climb to, or above, 50%.'[71]

(1) *Factors Disadvantaging Women on Divorce*

Several studies have shown[72] that the increased involvement of women in the paid work-force has had little effect on division of responsibility for household labour. Ignoring domestic contributions in cases where the wife has also made substantial financial contributions, disadvantages the increasing number of married women who are in paid employment and carry the double load of domestic work as well. Such women may also receive a smaller share of property because their need for financial support is likely to be less than that of women who have not worked outside the home. Comparing the situation of traditional 'home-makers' with that of women who are in full-time or part-time paid work epitomises the sameness/difference dilemma. Currently women in the paid work-force may be treated the 'same' as men at the cost of ignoring their domestic contribution, whilst women who work full-time in the home may be treated differently from men, at the cost of reinforcing the breadwinner/homemaker dichotomy.

In its *Matrimonial Property Report* the Australian Law Reform Commission recognized the difficulty of comparing domestic contributions and financial contributions. The Commission recommended that the starting point for division of matrimonial property should be equal sharing, with provision for variation of shares to take account of the economic history of the marriage and the spouses' post-separation circumstances. Relevant factors under the first head would include the fact that one party had made a substantially greater contribution than the other, or the fact that one party had the benefit of financial resources built up during the marriage. Under the second head the Court could adjust shares to take account of disparity of living standards caused by one spouse's responsibility for future care of children, or because one party's income earning capacity had been affected by the marriage. These recommendations have not been implemented.[73]

A second factor which disadvantages women on divorce is that their earning capacity is affected by interruptions to their paid work participation during the marriage, and by their continuing responsibility for child-care after marriage breakdown. Section 79 of the Family Law Act 1975 (Cth) requires needs as well as contributions to be taken into account in dividing property but financial provision on divorce appears to place insufficient weight on reductions of earning capacity related to child-rearing.[74]

71 Wade, J. H., *Property Division upon Marriage Breakdown* (1984) 171.
72 See *e.g.* Bittman, *op. cit.* n. 2.
73 *Matrimonial Property Report*, *op. cit.* n. 42, xxx-i.
74 For a more detailed discussion of this issue see McDonald, *op. cit.* n. 56, ch. 16, 313 *ff*; Funder, K., 'The Value of Work in Marriage' in Ironmonger, D. (ed.), *Household's Work* (1989) 173; Funder, K., *op. cit.* n. 4, 143.

The research of the Australian Institute of Family Studies showed that men tended to receive a larger share of non-basic assets such as businesses and farms, while women tended to receive a larger share of basic assets including the family home, furniture and car.[75] This finding is difficult to interpret. On the one hand women may receive a greater share of the basic assets because of their income needs. Alternatively, the finding may mean that 'needs are given little importance and wives receive shares almost exclusively in terms of their contributions to the basic assets.'[76] The study also showed that custodial parents received a larger share of matrimonial property than spouses who were not caring for children[77] but that the additional share received by a wife if she was the custodial parent was much less than the share she lost if her husband had custody.[78] This finding reflects the existence of the sexual division of labour under which men who take care of children are seen as 'losing' more in economic terms, than women who do so.

Apart from the issue of custody, there was little evidence that property division outcomes were affected by women's need for future income.[79] The Australian Law Reform Commission commented:

> Whether the wife ever received the supporting parent's benefit and whether the wife had an income of her own before separation were not important factors. To this extent, the analysis suggested that the custodial mother's need for income did not have an important impact on property division.[80]

The third factor which disadvantages women after divorce is the application of the 'clean break' principle. The 'clean break' principle assumes that men and women have the same capacity to support themselves, regardless of the effect of child-rearing on women's earning capacity. The Australian Law Reform Commission found that the 'clean break' principle encouraged courts to make orders terminating the parties' financial relationship 'even in cases where they would not be the most appropriate means of achieving justice for the spouses and their children'.[81] Apparently the 'clean break' principle made courts reluctant to make orders for periodic maintenance even where the parties property was insufficient to provide for the future needs of a spouse with reduced earning capacity. In the group of divorced men and women interviewed by the Australian Institute of Family Studies only 7% of younger women and 8% of older women were receiving spousal maintenance at the time of interview.[82] (It has already been seen that even where there is sufficient property to allow for future needs, property division does not always allow sufficiently for these needs). Women who are incap-

75 McDonald, *op. cit.* n. 56, 184-5, table 9.11.
76 *Ibid.* 186.
77 *Ibid.* 189.
78 *Matrimonial Property Report*, *op. cit.* n. 42, 85. See also n. 34.
79 McDonald, *op. cit.* n. 56, 190.
80 *Matrimonial Property Report*, *op. cit.* n. 42, 86.
81 *Ibid.* 147.
82 McDonald, *op. cit.* n. 42, 261. This figure relates to those *receiving* maintenance. However, it was pointed out that only small proportions of older women had any maintenance arrangements, including court orders.

able of supporting themselves after marriage breakdown must seek income support from social security. Thus, the effect of the 'clean break' principle is to transfer the cost of supporting women from their former husbands to the State. In 1987 the 'clean break' principle was amended, to some extent, by amendments to the Family Law Act and the Social Security Act 1991 (Cth) which were intended to ensure that the costs of supporting women after marriage breakdown are borne by their husbands.[83] Despite these changes, courts continue to be reluctant to make periodic maintenance orders in favour of wives. The Australian Law Reform Commission has recommended repeal of the 'clean break' principle,[84] but so far this recommendation has not been implemented.

(2) *Proposals for Reform*

Feminist family lawyers have proposed a variety of reforms to overcome the economic disadvantages which women experience after marriage breakdown. Lenore Weitzman opposes discretionary regimes for the distribution of property, which take into account both needs and contributions, but has suggested that the inclusion of wealth such as pension rights in the property available for division, would help to meet the needs of spouses whose earning capacity had been affected by child-rearing, without entrenching their dependent role. Weitzman points out that[85] much of the wealth of divorcing couples takes the form of 'career assets' including future earning capacity and employment-related benefits such as superannuation entitlements.

The inclusion of such property in the pool available for distribution would improve the situation of women. In the past 10 years, most States in the United States have begun to treat future eligibility for a pension as marital property. There is also a trend towards treating professional degrees and licences acquired during the marriage as matrimonial property which can be divided on divorce, although issues of valuation are still far from being resolved.[86]

In Australia it has also been recognized that women are disadvantaged by the exclusion of certain forms of wealth from the definition of property which can be divided between the parties. The Australian Law Reform Commission identified prospective superannuation entitlements as an area for particular concern. Although a future entitlement to superannuation is a valuable asset which may have been built up over the period of the marriage, the Family Court has held that a prospective superannuation entitlement (as opposed to a vested interest in a superannuation fund) is not property.[87] Hence the court cannot make a direct order in relation to a

83 See nn. 180-91, 194-206.

84 *Matrimonial Property Report*, *op. cit.* n. 42, xxxii.

85 Weitzman, L. J., 'Marital Property: Its Transformation and Division in the United States' in Weitzman and MacLean, *op. cit.* n. 74, 85, 86-91.

86 *Ibid.* For further discussion see Kay, H. H., 'Beyond No-Fault' in Sugarman and Kay, *op. cit.* n. 39, 13-5.

87 *In the Marriage of Crapp (No. 2)* (1979) 35 F.L.R. 153.

superannuation benefit which has not matured,[88] although it may take eligibility for superannuation into account as a 'financial resource', when considering how other property should be divided.[89] This approach is of little assistance where the value of other assets is insufficient to off-set the value of the superannuation. The Australian Institute of Family Studies found that 'in the majority of cases superannuation played no part in the property division (average of 68 per cent of younger group and 54 per cent of older group)'.[90] Approximately 51% of younger men but only about 7% of younger women were reported by male respondents to be members of superannuation funds. In the older group of respondents 47% of men but only 15% of women were reported to have superannuation.[91] Thus, the failure to take superannuation into account in dividing marital assets significantly disadvantaged women.

Increasing Commonwealth emphasis on superannuation, as part of its retirement incomes policy, makes it particularly important that women should have access to their spouses' prospective superannuation entitlements. A number of proposals have been made for reform in this area.[92] Most recently the Commonwealth Attorney-General's Department has proposed that rather than including superannuation entitlements in the pool of property available for division between the spouses, the non-member spouse should be deemed to have become a member of the scheme entitled to a share in the other spouse's entitlement, as from marital breakdown.[93] The share of the non-member spouse would be calculated under a statutory formula. The non-member spouse would be subject to the normal conditions of the scheme relating to realisation of benefits so that no payment would be available before that spouse reached a specified age. This is consistent with the Federal Government's policy of encouraging superannuation fund membership. But it is unlikely to address the more immediate financial difficulties which many women experience after marriage breakdown.

More radically, some commentators have proposed that matrimonial property division should compensate women on an opportunity cost basis

88 The Family Court has power to adjourn proceedings or to defer the operation of an order for property division, until a spouse receives a pay-out from the superannuation scheme. This procedure is generally useful only where the spouse will retire within a short period after the marital breakdown. Family Law Act 1975 (Cth) sub-ss 79(5), (7).

89 Family Law Act 1975 (Cth) subss 75(2)(b), (f). For a discussion of how such prospective entitlements have been valued see Kovacs, D., *Family Property Proceedings in Australia* (1992) ch. 5.

90 McDonald, *op. cit.* n. 56, 199. This was particularly likely to be the case for younger respondents, where only 20% of women and 38% of men reported it had been taken into account.

91 *Ibid.* 178, table 9.5. Women reported a slightly higher proportion of women having superannuation.

92 See *e.g.* Australian Law Reform Commission, *Company and Securities Advisory Committee, Collective Investment Schemes: Superannuation*, Discussion Paper No. 50 (January 1992). See also *Matrimonial Property Report*, *op. cit.* n. 42, ch. 11.

93 Federal Attorney-General's Department, *The Treatment of Superannuation in Family Law*, Discussion Paper (March 1992). Note that the Discussion Paper seeks submissions on the approach to be taken in the case of 'defined benefits' schemes.

for loss of earning capacity caused by interruptions to paid work participation associated with child-rearing.[94] The Australian Institute of Family Studies[95] has suggested that such opportunity costs should be treated as a debt owed to the wife by the marriage partnership.

The life-time earnings of women with children can be compared with the earnings of women with similar educational and career backgrounds whose work histories have not been interrupted by child-rearing. Such data could be used as the basis for assessment of the opportunity costs borne by women who withdraw from the work-force to care for children, and used as a guide to couples negotiating settlements. Reductions in earning capacity caused by interruptions to paid work could be treated as a debt to be borne by the matrimonial partnership, deducted from the joint assets of the parties and paid to the person suffering the loss. Payments would not be based on the 'need' of the partner in the weaker economic position (although they would alleviate such need) but would recognize that one spouse has been economically benefitted and the other disadvantaged because of the way in which productive work (both paid and unpaid) has been divided between the spouses.

Although there is room for debate about the details of this scheme, the opportunity cost approach has the merit of recognizing the costs which women bear because of the sexual division of labour. It avoids the difficulty of comparing the value of financial and domestic contributions, in a context in which the latter have always been under-valued. In many cases it would give women a larger share (perhaps the majority) of family property. But it also has some disadvantages. Women who withdraw from the work-force for an extended period may have significant opportunity costs and the assets of the parties may be insufficient to satisfy the claim. Where there is little property to distribute, the woman's claim would have to be satisfied by resort to her partner's future earnings. If her husband re-married and his liability to his ex- wife continued, liability to a former wife would need to be balanced against his liability to support a new partner and children. The Australian Institute of Family Studies proposal takes only losses related to child-rearing into account and gives no recognition to the value of other domestic work. It could result in the payment of higher amounts to women who were full-time home-makers before separation (and thus had experienced a greater diminution in earning capacity) than to women with similar qualifications who had carried a double load, working full-time for wages and working in the home as well.

The proposal of the Australian Institute of Family Studies raises a more fundamental question. At present, family law symbolically acknowledges the

94 See *e.g.* Duclos, N., 'Breaking the Dependency Cycle: The Family Law Act Reconstituted' (1986) 44 *University of Toronto Law Review* 1; Carbone, J. and Brinig, M., 'Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform' (1991) 65 *Tulane Law Review* 953; Trebilcock, M. J. and Keshvani, R., 'The Role of Private Ordering in Family Law' (1991) 44 *University of Toronto Law Review* 533; Kay, H. H., 'Beyond No-Fault' in Sugarman and Kay, *op. cit.* n. 39, 32-5.

95 McDonald, *op. cit.* n. 56, ch. 16; Funder, *op. cit.* n. 4, 147.

existence of the sexual division of labour by recognizing the 'home-maker and parent' contribution and (at least in theory) by enabling a wife whose earning capacity has been affected by child-rearing to claim maintenance from her husband, provided he has the capacity to pay it. This approach assumes that the costs which the sexual division of labour imposes on women should normally be regarded as the responsibility of individual men, rather than as the responsibility of the State. Recent changes to the Family Law Act, which have attempted to shift the responsibility for maintaining women and children away from the social security system and back to ex-husbands and fathers, are explicitly based on the view that the support of women caring for children is primarily a private responsibility.[96] Along somewhat similar lines, the Australian Institute of Family Studies proposal suggests that husbands should be responsible for marriage-related losses of earning capacity, but that losses caused by structural factors in the work-force should not be taken into account for the purposes of matrimonial property division.[97] The current popularity of economic rationalism may provide further support for social policies attempting to ensure that the costs of the sexual division of labour are 'privatized' to the family. This trend takes us back to the distinction between the public world and the private sphere which was criticized earlier in this article.

Traditionally child-rearing has been seen as the responsibility of the family, rather than of the State (except during war time, when state-funded child care has been provided to encourage women to enter the paid work-force). Similarly, the division of responsibility for child-rearing between men and women, and the costs borne by women as a result of this division, have been seen as a matter of individual choice. While the economic problems of women caring for children alone have become more visible, much of the reform debate has focussed on changing family law rules, rather than on examining the broader interconnections between family law, and the policies relating to paid work and social welfare. This approach fails to recognize that the arrangements which men and women make to divide their labour do not occur in a vacuum but are influenced (and sometimes determined) by such factors as State support for child care and the structure of the paid work-force.[98] The conflict between sameness and difference models of equality will not be resolved by family law reforms alone.

As Carol Bacchi puts it:

> The dilemma feminists face ... in trying to devise proposals which will assist women to assume an active role in the marketplace without disadvantaging women in traditional relationships is not a dilemma of their creation. It is a result of that continuing problem of either/or choices which the system imposes upon women.[99]

Family law treats the cost of supporting 'wives and mothers' as the responsibility of individual men, thus disregarding the contributions which

96 *Infra* 804-5.
97 Funder, *op. cit.* n. 4, 151
98 For further discussion of this issue see Rhode and Minow, *op. cit.* n. 39, 191-210.
99 Bacchi, *op. cit.* n. 1, 193.

women make to the resources of society through the bearing and rearing of children. Family law solutions also maintain the relative positions of men and women while they are married, intervening only to ensure redistribution of resources after matrimonial breakdown. A further limitation on the effectiveness of family law solutions is that family law is directed towards achieving fairness in particular cases rather than towards altering the relative positions of all men and all women. Bacchi suggests that State welfare provisions may be able to address the effects of the sexual division of labour on a more systemic basis, thus improving the position of women as a group, relative to the position of men.[100]

The remainder of this article examines the response of the State to the sexual division of labour as reflected in the social security system.

D *THE RESPONSE OF THE SOCIAL SECURITY SYSTEM TO THE ROLE OF WOMEN*

The same tension between sameness and difference reflected in family law approaches to the sexual division of labour is also apparent in the social security system. Changes to social security law which have occurred over the past two decades have been increasingly influenced by the philosophy of formal equality. Paradoxically, however, social security legislation continues to be underpinned by the assumption that women are normally supported by the men with whom they live.

1. *The Construction of Women as Dependants*

Historically, the categories contained in Commonwealth social security legislation recognized women's financial dependence.[101] Commonwealth pensions for civilian widows were introduced in 1942, replacing the pensions that had previously been provided for widows in New South Wales and Victoria.[102] The provisions of the Commonwealth Widow's Pension Act 1942 were based on the recommendations in the report of the Joint Select Committee on Social Security.[103] Both the reasoning in that Report, and John Curtin's contribution to the second reading debate on the Bill[104] reflect the view that women should be treated differently from men, because of their responsibility for child-rearing and their consequent economic dependence.

100 *Ibid.* 194-5.

101 State provision for old age and invalid pensions was made prior to the enactment of widows' pension legislation. See Old Age Pensions Act 1900 (N.S.W.). An invalid pensions scheme operated in N.S.W. from 1908 under the Invalidity and Accident Pensions Act 1907. See Kewley, T. H., *Social Security in Australia* 1900-1972 (2nd ed. 1973) Part 1.

102 For a detailed history of widows pensions see Kewley, *op. cit.* n. 101, chs 11, 21. Victoria provided limited support for widows with children under the Children's Welfare Act 1928. New South Wales provided support to a strictly defined group of widows under the Widows' Pension Act 1925.

103 See the second reading speech of Mr Holloway, Minister for Social Services, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1942, 1236-7.

The Committee argued that it was undesirable for mothers bringing up children without the support of a breadwinner to have to engage in paid employment, and supported the payment of a pension to widows caring for children on the basis that they were providing a 'national service' for which they should receive some assistance from the community. The Report recommended that widows under 50 without children should receive temporary assistance after the death of their spouse and that a widows' pension should be paid to widows of 50 or more without dependent children, in recognition of the hardship they would suffer if they were forced to support themselves after spending many years out of the paid work-force.[105]

Consistently with these recommendations, the Act provided pensions for three groups of widows. (In subsequent legislation these were designated as Class A, B and C Pensions.[106]) A Class A pension was payable to a widow who was maintaining at least one child under 16, and a Class B pension was payable to a widow without children who was 50 or over.[107] A Class C pension (described as a widows' allowance in the original legislation) was payable to a widow 'in necessitous circumstances' for up to 26 weeks after the death of her husband.[108] 'Widows' were defined to include *de facto* wives who had been dependent upon their partners for at least three years before death, *de jure* but not *de facto* wives who had been deserted by their husbands for not less than six months, divorced women and women whose husbands were in mental hospitals.[109] In 1956 the Class B widows' pension was extended to cover widows who became ineligible for a Class A pension after reaching 45 years, because their youngest child had reached 16.[110]

Like the maintenance obligation imposed on husbands under family law,[111] widows' pension legislation controlled the behaviour of women as well as recognizing their financial dependence. The provision in s. 14 of the Widows' Pension Act that a pension was not payable to a widow 'unless she [was] of good character and deserving of a pension', remained in operation until 1974.[112] Single mothers, wives of prisoners, women who had deserted

104 See Joint Select Committee on Social Security, *First Interim Report* (1941) 13; see also *Parliamentary Debates*, *op. cit.* n. 103, 1307.

105 Joint Select Committee on Social Security, *op. cit.* n. 104, 12-3.

106 Social Services Consolidation Act 1947 (Cth) ss 59, 60.

107 Widows' Pension Act 1942 (Cth) s. 13.

108 Widows' Pension Act 1942 (Cth) s. 26. Section 18 of the Social Services Consolidation Act 1952 (Cth) extended the period for which Class C Widows pension was payable beyond 26 weeks where the widow was pregnant by the deceased. Such a widow would be paid a Widows C pension until the birth of the child when she then became eligible for a Widows A pension.

109 Widows Pension Act 1942 (Cth) s. 4. The Widows' C pension was payable only to women whose husbands or *de facto* husbands had died and not to women who were deserted or divorced.

110 Social Services Act 1956 (Cth) s. 7.

111 *Supra* nn. 21-2 and accompanying text.

112 The assumption that eligible widows were in need of assistance through no fault of their own was implicit in the Joint Select Committee Report, the second reading speech and debate, and in the actual qualifications for the widows' pension. In response to second reading debate on the Bill the definition of 'widow' was extended to include women who were innocent parties but who, for religious reasons, would not themselves petition for divorce. The requirements in s. 14 of the 1942 Act, preserved by sub-s. 62(1)(a) and (b) of the Social Services Consolidation Act 1947 (Cth), were finally repealed over 30 years later by the Social Services Act (No. 3) 1974 (Cth) s. 13. During his second reading speech the then Minister for Social Security, Mr Hayden, characterized the requirements as remnants of the 'poor law mentality': Commonwealth, *Parliamentary Debates*, House of Representatives, 16 October 1974, vol. 91, 2427.

their husbands and women who had deserted or been deserted by their *de facto* partners were ineligible for income support. Carney and Hanks have observed that these provisions

> reinforced the dependent child-rearing role of women, by carefully avoiding any 'reward' to women who did not conform to basic moral standards; it thus reinforced, so far as was possible, intra-familial relations and obligations.[114]

In later years the distinction between widows (as defined in the legislation) and other women caring for children was gradually eroded. In 1968 the States Grants (Deserted Wives) Act authorized the Commonwealth to contribute up to half the cost of assistance provided by the States to women with dependent children who were ineligible or not immediately eligible for a widows' pension, including unmarried mothers, *de facto* wives of prisoners, separated women and deserted wives during the first six months of separation.[115]

In 1973 the Commonwealth introduced a supporting mothers' benefit[116] for women caring for children who did not qualify for a Class A Widows' Pension. Such a benefit was not payable until after a 6 month period during which welfare assistance was provided by the State. The six months qualifying period was abolished in 1980, but the maintenance of separate categories of 'widows' and 'supporting mothers' gave the legislation a continuing role in reinforcing social and moral judgments.[117] Supporting mothers, who included women who had left their husbands and women who had never been married, were regarded by many as less deserving of public support than widows.[118] The supporting mothers' benefit was extended to include fathers in 1977 but the distinction between widows and other supporting parents did not disappear until 1 March 1989, when the Class A widows' pension and the sole parents' benefit were merged to become a sole parents' pension.[119]

Social security provision for widows was originally based on loss of 'the breadwinner', but the extension of the benefit to sole fathers represented

113 The Social Services Consolidation Act 1947 (Cth) subs. 60(1)(d) provided for payment of a Widows D pension to women whose husbands were in gaol for at least 6 months provided they were over 50 or caring for children. *De facto* wives of prisoners remained ineligible until the introduction of the supporting mothers' benefit in 1973. See n. 116.

114 Carney, T. and Hanks, P., *Australian Social Security Law, Policy and Administration* (1986) 123.

115 States Grants (Deserted Wives) Act 1968 (Cth) subs. 4(1).

116 Social Services Act No. 3 1973 (Cth) s. 9.

117 Social Services Amendment Act 1980 (Cth) s. 14. It is commonly assumed that women receiving the widows' pension enjoyed greater levels of assistance than women receiving the supporting mothers' benefit. However, when the supporting mothers' benefit was introduced, the government was at pains to point out that it was ending previous discrimination by providing supporting mothers with the same rates, allowances and fringe benefits as were enjoyed by widows. See the second reading speech of the then Minister for Social Security, Mr Hayden, *Parliamentary Debates*, House of Representatives, 22 May 1973, 2382-4. There were limited differences in relation to fringe benefits, such as the ability to participate in retraining schemes. See Sackville, R., 'Social Security and Family Law in Australia' (1978) 27 *International and Comparative Law Quarterly* 127, 155.

118 See Lewis, M., 'Values in Australian Income Security Policies' Commission of Inquiry Into Poverty, *Research Report* (1975) 13, and Sackville, R., 'Social Security and Family Law in Australia' (1978) 27 *International and Comparative Law Quarterly* 127, 152.

119 Social Security Legislation Amendment Act 1988 (Cth) s. 11.

an important change in philosophy. Nevertheless other parts of the legislation still reflect the assumption that the 'normal' heterosexual family consists of a 'breadwinner' who shares his resources with the dependent spouse.[120] These include

(a) provision for a wife pension and for additional payment for a partner and/or children;

(b) aggregation of couples' income and assets for means testing purposes;

(c) provision for payment of a married rate to couples which is less than the amount payable to two single individuals; and

(d) the cohabitation rule.

Each of these measures is briefly examined below.

(a) *Payments to Wives*

The wife pension, which is payable to the wives of age or disability support pensioners,[121] reflects the view that women are normally dependants on breadwinners. Generally the pension is payable regardless of the age or employability of the wife, or of whether she is caring for children. The wife pension[122] is almost the last vestige of positive discrimination in favour of women[123] in the social security legislation, but this policy may be under reconsideration. From 1 October 1991 wives of disability support pensioners ceased to be eligible for a pension, where the couple have no children and either the pensioner or his wife are under 21.[124]

Recipients of job search or newstart allowance (the allowances which now take the place of unemployment benefit) also receive an additional amount for a dependent spouse, where both the recipient and the spouse are over 21, regardless of whether they have children. Unlike the wife pension, the additional payment for a partner is paid to the beneficiary rather than to his or her spouse.[125] Hence it does not guarantee women any share in their partner's resources.[126]

120 *Cf.* Graycar, R. and Morgan, J., *The Hidden Gender of Law* (1990) 150.

121 An allowance for non-pensioner wives of invalid and permanently incapacitated or blind old age pensioners was introduced by the Commonwealth in 1943. In 1965 it was extended to wives of invalid or old age pensioners with a child or children under 16: Kewley, *op. cit.* n. 101, 402. Somewhat surprisingly, provision for payment of a pension to wives of all old age and invalid pensioners was not made until 1972.

122 Social Security Act 1991 (Cth) s. 147.

123 Husbands and other persons who are caring for aged or disability support pensioners may be entitled to a carer's pension. But the eligibility requirements are more rigorous than those applicable to the wife pension. A person claiming a carer's pension must personally provide constant care for a severely handicapped person in, or adjacent to, the home of the handicapped person: Social Security Act 1991 (Cth) s. 198.

124 Social Security Act 1991 (Cth) s. 147(1A). The Opposition's 'Fightback!' package proposes limiting the wife pension to wives of disability support pensioners who are over 50 and are not eligible for a carer's pension. 'Fightback!' (1992) para. 16.27.9.

125 Social Security Act 1991 (Cth) sub-ss 1068-C1, C2.

126 Note that in relation to each pension/benefit there is provision for the Secretary to direct payment of the whole or any part of the instalments to someone else on behalf of the claimant. See *e.g.* Social Security Act 1991 (Cth) sub-s. 566(2) in relation to payment of job search allowance. The extent to which this provision and its equivalents are utilized by the administration in practice is not known. Note also that family allowance and family allowance supplement are each normally paid to the *female* member of a couple with an eligible dependent child. See

Although these provisions are now drafted in gender-neutral terms, historically they recognized the breadwinner/dependant spouse relationship by requiring only one member of the couple (usually the husband) to demonstrate willingness to undertake paid work.[127] Recently however, there has been some erosion of this principle. From 20 September 1990, recipients of job search allowance and new start allowance do not receive an additional payment for a partner where the couple do not have children and either the recipient or his or her spouse is under 21.[128] The Minister for Social Security, Mr Howe described this provision as designed 'to give proper recognition to spouses as potential labour market participants in their own right, rather than as dependents of breadwinners, a dated concept now largely inapplicable in modern society'.[129]

The effect of these changes is to treat young childless couples as single individuals, rather than as members of a family unit. Both members of a couple under 21 must now satisfy the eligibility requirements for job search and newstart allowance, including the 'activity' test (formerly known as the work test), although for the purposes of applying the income and assets tests they are still treated as 'members of a couple'.[130] It is harsh to impose more rigorous eligibility requirements during a period of recession when little work is available. It also seems inconsistent to treat couples as individuals for activity test purposes, but as couples when applying the income and assets tests. But applying the same rules to young men and young women discourages the creation of relationships of dependence. Since unemployment rates for young women and for young men are comparable,[131] gender-neutrality in this area seems unlikely to have a differential impact.

Social Security Act 1991 (Cth) sub-ss 831(2), 895(1). The Social Security (Family Payment) Amendment Bill 1992 (Cth), introduced into Parliament on 7 May 1992, provides for the integration, from 1 January 1993, of family allowance, family allowance supplement and additional payment of pension/benefit for children into a single payment to be called the family payment. The family payment will be made to the person primarily responsible for the care of the children, usually the mother. See the second reading speech of the Minister for Family Support, Mr Simmons, Commonwealth, House of Representatives, *Parliamentary Debates*, 7 May 1992, 2659-60.

127 The original provision for unemployment and sickness benefits disqualified married women from eligibility unless it was not reasonably possible for their husbands to maintain them, Unemployment and Sickness Benefits Act 1944 (Cth) s. 18. This restriction was limited to sickness benefit by the Social Services Consolidation Act 1947 (Cth) s. 110, and was finally repealed by the Social Services Amendment Act 1977 (Cth) s. 11.

128 The change was effected by the Social Security and Veterans' Affairs Legislation Amendment Act 1990 (Cth) sub-ss 10(1)(a), (c) and 10(3). The current provision is Social Security Act 1991 (Cth) s. 1068-C2.

129 A further reason for this particular provision was to improve equity between job search/newstart allowance recipients, and to discourage young people from entering into marriage or *de facto* relationships in order to receive the slightly higher rate then applying to couples under 21 as compared to two single individuals aged under 21: see the second reading speech of Mr B. Howe, Social Security and Veteran's Affairs Legislation Amendment Bill 1990, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1990, 171.

130 Unlike the situation for recipients of job search or newstart allowance who are over 21, however, the amount paid to each married person under 21 is now the same as the amount paid to a single individual under 21.

131 The unemployment rate for those aged between 15 and 19 is 25.6% for males and 25.3% for females. For those aged between 20 and 24 the unemployment rate is 18.1% for males and 14.7% for females: Australian Bureau of Statistics, *The Labour Force, Australia*, March 1992, Table 24, 25.

(b) *Aggregation of Income and Assets*

Payment of a wife pension or additional amount for a partner advantages women in heterosexual relationships by exempting them from activity test requirements. But the assumption of dependency also disadvantages them by treating them as if they have access to their partner's income and assets. Under the Social Security Act, the income and assets of married couples and couples in 'marriage-like relationships' are aggregated for the purposes of applying the income and assets tests which determine the eligibility of one or both of the parties for a pension or allowance.[132] Aggregation of income is based on the assumption that couples normally share their resources. In the case of married couples there is some (limited) justification for this assumption, since spouses have a reciprocal duty to maintain each other under the Family Law Act, although neither spouse has a legal interest in the other spouse's earnings or assets.[133] It is more difficult to justify the assumption that a *de facto* wife is being supported by her husband, since in most Australian States *de facto* wives have no legally enforceable right to maintenance. Edwards' survey of financial arrangements in Australian families shows that the assumption that husbands and wives pool their incomes is not well-founded. While both class and employment status affected intra-familial income distribution, '[w]omen who did not earn had least control over the spending pattern of their family.'[134]

Although the provisions requiring aggregation of income and assets are gender-neutral they are more likely to affect women than men because women often work part-time and generally earn less than their husbands. Women in the paid work-force who become unemployed are usually ineligible for job search, or newstart allowances because of the level of their partner's income, regardless of whether or not the couple share their incomes in practice.

(c) *The Married Rate*

The assumption of dependency is also reflected in the lower rate of pension which is paid to heterosexual couples. At present such couples receive approximately 91% of the amount of pension payable to two single individuals who are living together. The 'married' rate is said to reflect the economies that can be achieved by two people who are living together. But this principle does not operate to reduce the entitlement of homosexual or lesbian couples, siblings or parents and adult children who are sharing accommodation and pooling income. Contrary to the evidence about income-sharing between couples, the distinction between the 'married' and 'single'

132 Social Security Act 1991 (Cth) sub-ss 1064-A2 (pensions); ss 530 and 1068-G2 (benefits).

133 Spouses may apply for maintenance while they are living together. However, the amount of the order is not based on a right to a share of the other spouse's earnings, but on the applicant's need and the respondent's capacity to pay.

134 Edwards, M., 'Individual Equity and Social Policy' in Goodnow and Pateman, *op. cit* n. 6, 99. For a detailed discussion of this issue see Edwards, M., *The Income Unit in Australia: Tax and Social Security* (1983) chs 6, 7.

rate assumes that women within heterosexual relationships are always supported by their partners.

(d) *The Cohabitation Rule*

The assumption of dependency is also reflected in the cohabitation rule which treats couples who are living together in a marriage-like relationship as if they are married, for the purposes of assessing eligibility for income support and determining the amount of payment. Even more significantly for women, the cohabitation rule disqualifies a woman who is caring for children from receiving a sole parents' pension if she enters into a marriage-like relationship. The cohabitation rule now applies to both male and female sole parents, but it was historically based on the assumption that women living with men were normally supported by them. From early in the history of the widows' pension, the Department of Social Security denied pensions to widows who had subsequently entered into *de facto* relationships.[135] When the supporting mothers' benefit was introduced, a similar principle was applied to disqualify claimants living in *de facto* relationships from eligibility.[136] From the outset it appears to have been the existence of a *de facto* relationship, rather than evidence that the man was actually supporting the woman, which led to denial of the pension or benefit.[137] In *Lambe* the Federal Court determined that financial need, and whether or not the man was financially supporting the woman, was not decisive, and held that all aspects of the relationship between the two persons were to be taken into account in deciding whether a woman was 'living with a man as his wife on a bona fide domestic basis'.[138]

The provisions of the Social Security Act 1991 currently provide that sole parents who are living with a partner of the opposite sex in a marriage-like relationship are ineligible for a pension.[139] It was not until 1989 that the criteria for 'a marriage-like relationship' were set out in the legislation.[140] Factors which must be taken into account in determining whether the couple are cohabiting include, *inter alia*, financial aspects of the relationship,

135 Carney and Hanks, *op. cit* n. 114, 145-6. In 1975 the Poverty Commission pointed out that there was no legislative basis for this practice in the case of widows. Subsequently the legislation was amended to bring it into line with departmental practice. See Social Services Act No. 3 1975 (Cth) s. 7 and Australian Government Commission of Inquiry into Poverty, Law and Poverty Series, *Essays on Law and Poverty: Bail and Social Security* (1977) 81, 92.

136 Subs. 83 AAA(1)(b), introduced by the Social Services Act (No. 3) 1973 (Cth) s. 9, excluded women who were living in a *de facto* relationship from eligibility for the supporting mothers' benefit.

137 See Cossins, A., 'Women's Dependence on the State' (1990) 15 *Legal Service Bulletin* 105.

138 *Lambe v. Director-General of Social Services* (1981) 4 A.L.D. 362, 368–9. Prior to this decision the AAT in *R. v. Waterford* (1980) 3 A.L.D. 63, 71 had stated that the question of whether financial support was being provided by the man with whom the woman was alleged to be living was 'of very great significance.'

139 Social Security Act 1991 (Cth) sub-s. 249(1)(a)(i).

140 Originally the criteria were set out in the Social Security Act 1947 (Cth) s. 3A which was inserted into the legislation by the Social Security and Veterans' Affairs Legislation Amendment Act (No 3) 1989 (Cth) s. 25. The criteria are now set out in Social Security Act 1991 (Cth) s. 4(3).

such as joint ownership of property and pooling of financial resources or day to day household expenses; the nature of the household; living arrangements and 'the basis on which responsibility for housework is distributed'; social aspects of the relationship including whether the couple hold themselves out as married and the basis on which they participate in social activities; any sexual relationship between the couple; and the nature of their commitment to each other.[141]

The most draconian aspect of the legislation is the reverse onus provision which raises a *prima facie* presumption that couples are living in a 'marriage-like relationship' where they have been cohabiting for at least eight weeks and certain other requirements are satisfied. Under this provision a sole parent is ineligible for a pension unless s/he affirmatively establishes that no such relationship exists.[142]

The cohabitation rule assumes that couples living together in marriage-like relationships share their resources. Women sole parents are much more likely than men to be reliant on the sole parents' pension. The effect of the rule is to force a woman to choose between becoming financially dependent on a man who may have no emotional relationship with her children, or ending the relationship in order to preserve her social security eligibility. Family law does not intervene in the 'private realm' of the family to require spouses to share their income and assets, but enforcement of the cohabitation rule for social security purposes requires intrusive inquiries into the private lives of men and women who live together. Ironically, both the assumption of dependence made for the purposes of social security law, and the failure of family law to 'intervene' in the financial relationship of spouses during marriage disempower and financially disadvantage women.[143]

The cohabitation rule is sometimes justified as a means of ensuring that those living together outside marriage are not treated more favourably than married couples. This argument begs the question whether married women should be treated as individuals, rather than as dependants.

Some commentators have proposed that eligibility for social security payments should be assessed and paid on an individual rather than a family basis.[144] A reform of this kind would require women to satisfy requirements

141 See Social Security Act 1991 (Cth) s. 4(3).

142 The current provision is Social Security Act 1991 (Cth) sub-s. 4(4). Originally this provision appeared as s. 43A Social Security Act 1947 (Cth) as a result of Social Security and Veterans' Affairs Legislation Amendment Act (No. 3) 1989 (Cth) s. 28. Commentators such as Hanks, P., 'Defining Cohabitation (and Isolating Sole Parents)' (1989) 51 S.S.R. 680, and Graycar and Morgan, *op. cit.* n. 120, 151-152, have noted that, aside from this provision, the 1989 amendments represented a codification of existing case law. The significance of the 'reverse onus' provision in sub-s. 4(4) was recognized by the A.A.T. in *Secretary to the Department of Social Security and Villani* (1990) 20 A.L.D. 49, 58, in which it was held that, as a result of the provision, if the Tribunal is uncertain after considering all the evidence, and unable to decide either way on the balance of probabilities, the sub-section requires a decision that the person *is* living in a marriage-like relationship, resulting in either a decision to cancel the pension or a decision not to grant one. This view was approved in *Secretary to the Department of Social Security v. Aquilina* (1991) 60 S.S.R. 824.

143 See also Cossins, *op. cit.* n. 137, 105 and Graycar and Morgan, *op. cit.* n. 120, 150-7.

144 Edwards, M., 'Individual Equity and Social Policy' in Goodnow and Pateman, *op. cit.* n. 6, 101-3. See also Edwards, M., *The Income Unit in Australia: Tax and Social Security Systems* (1983).

such as the activity test for job search or newstart allowance independently of their husbands, but would permit separate assessment of the parties' income and assets (as is the case for tax purposes) and payment of a single rather than a married pension rate to couples. This approach would be consistent with the philosophy of formal equality which has motivated changes to the social security system which are discussed in more detail below. As is the case with those changes, the danger is that such a reform could fail to take sufficient account of the broader social and economic factors which affect women's lives. If income support was provided on an individual basis, it would need to allow for the fact that women, rather than men, usually take primary responsibility for the care of children. Moving to an individual, rather than a family basis for social security payments would be consistent with research suggesting that many men do not share their income with their wives.[145] But it could direct resources towards families which were relatively well-off, while reducing the resources available for welfare provision for poorer families and women sole parents. Arguably, this approach would give women in heterosexual relationships greater independence from their partners, without addressing factors such as race and class which interact with gender to produce inequality of outcome. Attempts to improve women's situation by treating them as autonomous individuals, rather than as spouses or partners, expose ambiguities and complexities in the meaning of equality[146] which have been discussed earlier in this article.

2. *The Movement Towards Formal Equality*

So far, the provisions discussed reflect the view that women, particularly women caring for children, are normally dependent on male breadwinners. In light of provisions in the legislation which construct and maintain such dependency it is ironic that recent changes to social security legislation have been justified, at least in part, by the philosophy of formal equality, which requires the application of the same rules to men and women, regardless of differences in their circumstances.

The purpose of the original widows' pension legislation was to relieve women who had been deprived of the support of their breadwinners from the responsibility of supporting themselves and their children. By providing income support to 'widows' and later 'supporting mothers', the legislation acknowledged the practical difficulties of combining child-rearing with paid work and symbolically recognized the social value of the work done by women. The 1977 extension of the supporting mothers' benefit to fathers[147] reflects a more flexible view of gender roles and a change in emphasis from meeting the needs arising from past relationships of dependence, to meeting needs arising because of parental responsibilities. But this change has not

145 But see n. 126.

146 For more discussion see Eekelaar, J. A., 'What is Critical Family Law?' (1989) 105 *Law Quarterly Review* 244, 259-60. See also Minow, M., 'Consider the Consequences' (1986) 84 *Michigan Law Review* 900.

147 Social Services Amendment Act 1977 (Cth) s. 3.

improved the situation of women whose earning capacity has been affected by past child-rearing responsibilities, who are still the vast majority of sole parents.

The movement towards treating men and women 'the same' was also reflected in changes to sole parents' benefits and widows' pensions announced in the May 1987 Budget Statement.[148] Prior to 1987 a sole parent could remain on a pension or benefit after his or her youngest child reached 16 if the child was a dependent full-time student under the age of 25. From 1987, only children under 16 qualified, thus requiring women who had been on widows' pensions or supporting parents' benefits for many years to satisfy the eligibility requirements for unemployment benefit.[149] The same legislation provided for the phasing out of the Widows' B pension.[150] The Widows' B pension was previously payable to widows (as defined) aged 50, or to recipients of Class A widows' pensions whose youngest child had reached the age of 16 after the mother had reached the age of 45. It was not payable to men or women who were on the supporting parents' benefit whose youngest child turned 16.[151] The Class B pension recognized the difficulties which older women are likely to have in supporting themselves by paid employment, particularly if their earning capacity has been affected by their responsibility for child-caring. Abolition of the Widows' B pension removed the distinction between men and women over 50, and between class A widows and sole parent beneficiaries,[152] forcing women to re-enter the workforce after they had fulfilled their social function as mothers. Such women

148 Stephenson, A., 'The May Economic Statement: Winding Back Welfare' (1987) 12 *Legal Service Bulletin* 172.

149 The Widows' Pension Act (Cth) 1942 ss 4, 13(a) required a widow seeking a Class A pension to have a dependent child under the age of 16. This requirement remained under the equivalent provisions in the Social Services Consolidation Act 1947 (Cth) ss 59, 60(1)(a). The Social Services Act 1963 (Cth) s. 9 broadened the definition of child by deeming a child aged 16 but under 18 who was in full time education to be a child under 16. The definition was broadened again in 1965 when a child aged 16 but under 21 who was in full time education was deemed to be a child under 16: Social Security Act 1965 (Cth) s. 12. The Social Services Act 1973 (Cth) s. 7 extended the definition of child to any person who would, if under 16, be a child of the widow, provided that person was receiving full time education. This definition of child was used in the eligibility requirements for the supporting mothers' benefit when it was introduced later that same year; Social Services Act (No. 3) 1973 (Cth) s. 9, and for the supporting parent's benefit when it was introduced in 1977; Social Services Amendment Act 1977 (Cth) s. 3. The Social Security and Repatriation Legislation Amendment Act (No. 2) 1984 (Cth) restricted the previously unlimited age for a child to those under 25 who were in full time education for the purposes of both the Class A widows' pension (s. 13) and the supporting parents' benefit (s. 15) (Cth). In 1987 the Social Security and Veterans' Entitlements Amendment Act (Cth) restricted the age of a relevant dependent child to under 16 for the purposes of both the Class A widows' pension (s. 12) and the supporting parents' benefit (s. 13). This age limit was preserved when these payments were merged to become the sole parents' pension in 1989 (Social Security Legislation Amendment Act 1988 s. 11). Note that the Opposition's 'Fightback!' package proposes to terminate the sole parents pension when the youngest child turns 12: 'Fightback!' (1992) 16.27.7.

150 Social Security and Veterans' Entitlements Amendment Act 1987 (Cth) ss 11, 12.

151 The legislation which phased out the Widows' B pension extended eligibility to a specific group of women on the supporting parents' benefit, namely those who had reached the age of 45 years by 1 July 1987 and who were in receipt of the benefit on that day or who commenced to receive it after that day: Social Security and Veterans' Entitlements Amendment Act 1987 (Cth) sub-s. 12(a). See also n. 168.

152 The Widows' B pension was criticized as discriminatory on this ground. See *e.g.*, Social Security Review, *Bringing Up Children Alone: Policies for Sole Parents*, Issues Paper No. 3 (1987) 108.

are now required to satisfy the eligibility requirements for job search allowance (and after 12 months, newstart allowance) from the date their youngest child turns 16 until they reach the age of 60 and become eligible for the age pension.[153] Transferring them to job search allowance involves a drop in income (since they no longer receive payments for children), loss of eligibility for certain fringe benefits, a lower rate of rent assistance and harsher income and assets tests.[154] The phasing out of the Widows' B pension reflects the view that women who have ceased to care for children should be treated the same as men and women whose earning capacity has not been affected by past patterns of dependence. The stated policy objective of this change was to encourage all sole parents to obtain employment and thereby combat long term dependence on social security.[155]

The abolition of the Widows' C Pension and the substitution of a widowed persons' allowance, payable to either a widow or widower for 12 weeks after the death of his or her spouse[156] was explicitly based on the principle of gender neutrality. In his Second Reading Speech on the Bill, the Minister for Social Security Mr Brian Howe commented:

> The Bill will end the sexist distinction currently embodied in the Class C of widows' pension. [The allowance] ... will remove anomalies in the coverage of income support to people without dependent children who have been recently widowed, including inconsistencies in the treatment of widowed males and females.[157]

Unlike the old Widows C Pension, the widowed persons' allowance was initially payable for 12[158] rather than 26 weeks.[159] The Minister's speech did not give any reason for this reduction, but presumably it was intended to ensure that the new widowed persons' allowance would not require greater government expenditure than the old Widows' C pension. Again, the trend towards treating men and women 'the same' disadvantaged women. Men and women who are widowed are not similarly situated, because women are more likely than men to have been financially dependent on their spouses. Expansion of eligibility to a small number of men who have been supported by their wives has been achieved at the cost of reducing the adjustment period during which a much larger number of women must find paid work or qualify for job search allowance. Like the phasing out of the Widows' B

153 Women without dependent children who fall within one of the following three categories are eligible for the Widows' B pension under the phase out provisions:
i) those in receipt of the Widows' B pension before 1 July 1987
ii) those who had reached 45 years of age on 1 July 1987 and who were then receiving, or later commenced to receive, the supporting parents benefits or Class A widows' pension
iii) those who had reached 50 years of age on 1 July 1987.
Social Security and Veterans' Entitlements Amendment Act 1987 (Cth) subs. 12(a).

154 Cabassi, J., 'Caught in the Poverty Trap' (1990) 15 *Legal Service Bulletin* 72, 73.

155 See the Second Reading Speech of Dr Blewett, for the Minister for Social Security, Mr Howe, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1987, 3270.

156 The changes were effected by the Social Security Legislation Amendment Act 1988 (Cth) s. 11. See now Social Security Act 1991 (Cth) s. 315.

157 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1988, 1919.

158 S. 74 Social Security Legislation Amendment Act (No. 3) 1991 (Cth) extended the period to 14 weeks from 26 March 1992.

159 It is payable until the birth of the child when the widow is pregnant at the time of the husband's death. The same provision applied to the Widows' C Pension from 1952: Social Services Consolidation Act 1952 (Cth) s. 18.

Pension the gender-neutral widowed persons' allowance ignores the social and economic factors which make it difficult for older women to re-enter the paid work-force after significant periods of absence.

The provisions discussed above suggest that sex-based categories are in the process of vanishing from the social security system. Gender-neutrality has been achieved either by phasing out or abolishing eligibility categories originally designed for women (for example the Widows' B pension) or by expanding such eligibility categories to include men (for example the sole parents' pension and the widowed persons' allowance). Although the distinctions previously made between men and women are gradually disappearing from the social security system, such changes have not produced greater equality of outcome.

Between 1974 and 1986 the number of sole parent families in Australia is estimated to have increased by 75%.[160] The vast majority of sole parents are women[161] and women-headed families have been consistently reported as among the poorest of Australian families.[162] The continuing existence of a sexual division of labour in which women take primary responsibility for child-rearing is neatly mirrored in social security statistics. Although the number of male sole parent pensioners has steadily increased since men became eligible in 1977, women still receive 95% of sole parents' pensions, but only 26% of unemployment allowances and 29% of sickness benefits.[163] Eighty-one percent of sole parent pensioners were previously married or living in a *de facto* relationship.[164] Increases in the number of sole parent families reflect rises in the divorce rate, the economic costs of which are largely borne by women and children.

Increasing numbers of sole parent pensioners and changing attitudes to the role of women have prompted attempts to reduce social security expenditure by increasing the work-force participation of those caring for children. More generous income and asset tests which came into operation in 1961, 1969 and 1976 were intended to give widows and supporting mothers some incentive to supplement their income with part-time earnings.[165]

Given the barriers to paid work-force participation faced by sole parents it is not surprising that this approach was relatively unsuccessful in encouraging women sole parents to re-enter the paid work-force even on a part-time basis. The proportion of sole parents in the labour force actually declined during the 1970s and 1980s while at the same time the labour force participation rate of married women continued to rise.[166] These trends

160 Department of Prime Minister and Cabinet, Office of the Status of Women, *Women's Budget Statement 1987-88* (1987) 252.

161 Social Security Review *op. cit.* n. 152, 33. In 1985 just over 88.2% of sole parents were women.

162 *Women's Budget Statement* 1987-88 (1987), *op. cit.* n. 160, 243, 249.

163 Department of Social Security, *Annual Report 1990-91*, 305-6, 317.

164 *Ibid.* 317.

165 Social Security Review, *Lone Parent and Wage-Earner? Employment Prospects of Sole Parent Pensioners*, Background Discussion Paper No. 31 (1989) 3.

166 Social Security Review, *Labour Force Status and Other Characteristics of Sole Parents: 1974-1985*, Background Discussion Paper No. 8 (1986) 1.

prompted some commentators to argue that sole parent pensions were actually generating social security dependence and poverty, although as Jordan points out,[167] the realities were far more complex. Government policy has been increasingly directed to getting sole parents back into the paid work-force. A combination of 'carrot' and 'stick' has been used to achieve this goal. The 1987 changes to social security rules, reducing the age of the qualifying child for the purposes of the sole parents' pension and phasing out the Widows' B pension,[168] represent the 'stick'. The 'carrot' was the Jobs, Education and Training (JET) Scheme announced by the government in the 1988-1989 Budget. The JET scheme is a voluntary programme which is designed to improve sole parents' job skills so that they can move into paid employment. The target groups for the scheme are teenage sole parents, sole parents whose youngest child has reached school age, and sole parents whose youngest child is 14 or more, who will lose eligibility for the pension when the child attains 16.[169]

Both the 'stick' and the 'carrot' approach reflect the view that women, as well as men, should support themselves through paid work, rather than relying on income support provided by the State. But such policies have a harsh impact on women whose earning capacity has been reduced because they have spent many years out of the work-force caring for children. Older women with few recognized work skills and little paid work-force experience are particularly likely to be disadvantaged by policies which treat them the same as men. Shortly after the May 1987 Budget Statement, the Australian Council of Social Services conducted a survey of the availability of work in traditional areas of female employment:

> Of the more than 800 jobs surveyed, including secretary, typist, clerk, receptionist and sales assistant, only 20 (.02%) were potentially open to women over 46 with no recent employment experience.[170]

A survey conducted by the Brotherhood of St Lawrence showed that older women confronted with the cancellation of their pensions faced 'a crisis in terms of feelings of disaster, loss of self-esteem and psychological distress'.[171] These women brought up their children when fewer married women were in the paid work-force and the social expectation was that they would stay at home to care for their children. Treating this group of women 'the same' as men simply further entrenches their economic disadvantage.

Younger women are also likely to have difficulty combining work with child-care, particularly in periods of recession when jobs are scarce. Carrying the double load of paid work and parenthood is difficult enough for married women. It is even more difficult for sole mothers who are bringing

167 Social Security Review, *op. cit.* n. 165, 4-5.

168 *Supra* nn. 149-55 and accompanying text. The current provisions restricting eligibility for the sole parent pension to persons with a child under 16 are ss 249(1)(b) and 250(1)(b) Social Security Act 1991 (Cth).

169 Department of Social Security, Department of Employment, Education and Training, Department of Community Services and Health, *JET Interim Evaluation Report* (1990) 4-5.

170 Australian Council of Social Services, *Policies Affecting Sole Parents: Income Security Effects of May Statement Measures*, ACOSS Position Paper 1987/3 (3 November 1987).

171 Morris, H. and Tretheway, J., *Sole Parents and the 1987 Amendments to the Social Security Act*, Brotherhood of St. Lawrence (1988) 13.

up children without the support of a husband or partner. Many women are still socialized to think of themselves primarily as mothers, and have limited education or paid work-force experience.[172] Women who have been out of the work-force for significant periods may lack self-confidence[173] about their abilities. Even if they can find paid work they usually earn much less than men. The costs associated with working, such as child care and travel, together with loss of pensioner concessions, and reduction of pension income on a 50 cents in the dollar basis for income above the 'free area', may mean that women who attempt to find part time work are little better off or even worse off than when they were on the full pension. Some attempts have been made to alleviate 'poverty traps' in recent years, but the interaction between income tests applied for pension and fringe benefits purposes and the taxation system[174] may mean that the break-even point for a woman pensioner who is considering re-entering the work-force may be a much higher amount than she can realistically expect to earn, particularly if she can only find part-time work.

Schemes such as the JET scheme are intended to overcome the institutional and attitudinal barriers which sole parents face in re-entering the work-force, but so far it appears that the labour market outcomes of the JET programme have been modest, to say the least. According to a survey of sole parents who had participated in JET,[175] three months after they ceased programme participation 34% of JET sole parents were in employment, compared to 38% of sole parents who had not participated in the

172 For a discussion of this socialization process see Montague, M. and Stephens, J., *Paying the Price for Sugar and Spice: A Study of Women's Pathways into Social Security Recipiency* (1985). An analysis of the characteristics of participants in the JET scheme showed they were 'severely disadvantaged in terms of educational qualifications and work force experience': *JET Interim Evaluation Report*, *op. cit.* n. 169, executive summary.

173 For a discussion of the barriers to mothers' work force participation see *Bringing Up Children Alone*, *op. cit.* n. 152, 86-91.

174 See Cabassi, *op. cit.* n. 154, 73; Council of Single Mothers and Their Children, *Supporting Children in Sole Parent Families*, Pre-Budget Submission to the Minister of Social Security (March 1989) 18; Lang, J., Leonard, H. and Cox, E., *'Tax Reform and Poverty Traps for Women: Women's Tax Convention* (4 March 1989); Gillespie, R., *Poverty Traps and the Price of Injustice: Women's Tax Convention* (4 March 1989); Gourlay, M. and Meggitt, M. (eds), "Paid Work' Is it a Luxury Sole Parents Can't Afford?' *VCOSS Papers No. 5* (1991).

Attempts made to reduce poverty traps include increases of the 'free area' (the amount of income which can be earned before the pension is reduced), the 'earnings credit' provision which makes it easier for pensioners to earn money from casual work without experiencing a pension reduction, provisions for indexation of family and child payments and an increase in the sole parents' tax rebate. Nevertheless poverty traps continue to affect sole parents work-force participation. This may be partly a problem of perception. Not surprisingly, sole parents find it difficult to assess accurately the effects of part-time earnings on their pension entitlements. See Social Policy Research Centre Reports and Proceedings, *Sole Parents and Public Policy* No. 89 (February 1991) 40-4.

The Social Security (Family Payment) Amendment Bill 1992 proposes additional measures to reduce poverty traps, including: automatic provision of information and claim forms to improve the take-up rate of 'additional family payment' (the payment which will replace family allowance supplement), payment of guardians' allowance to all working sole parents who are eligible for additional family payment, and the testing of maintenance income to determine only the rate of additional family payment (rather than the rate of pension/benefit *and* family allowance as is presently the case). These changes are to operate from 1 January 1993. See the second reading speech of The Minister for Family Support, Mr Simmons, *Parliamentary Debates*, House of Representatives, 7 May 1992, 2659-61.

175 *JET Interim Evaluation Report*, *op. cit.* n. 169, 30. See also p. 43 which shows that of 6,165 sole parents registering with C.E.S. after JET Adviser referrals, 24% had found work between March 1989 and April 1990.

scheme, although the proportion of former JET clients who had gone on to further education or training was higher (23% of JET participants compared to 15% of non-JET sole parents).[176] Thirty-one percent of JET clients were unemployed and looking for work. JET clients who had been successful in finding work had generally moved into traditional female occupations offering low wages, low status and insecure or casual employment. Of the 223 people who responded to the survey and were employed 3 months after completing the JET programme 49% were in office jobs, 20% in jobs associated with the hospitality industry and 8% in retail positions.[177]

Sole mothers will not be able to achieve financial independence unless retraining schemes are combined with strategies to tackle the structural barriers to employment faced by all women, including discriminatory hiring and promotion practices, labour force segregation, low earnings and lack of suitable child care. If combined with structural changes the JET scheme could be an important initiative. But, as Chesterman comments:

> if these moves are not made, additional pressures may be placed on women unable to find reasonable jobs, and these potentially progressive programs may be used to punish the victims.[178]

The Opposition Fightback package proposes to restrict the supporting parents pension to women with children under 12, thus forcing more women sole parents to compete for paid employment.[179]

The goal of reducing social security expenditure has also motivated recent attempts to 'privatize' the costs of supporting women and children. Social security legislation has always contained provisions to ensure that the costs of supporting women whose earning capacity has been affected by their domestic role are met privately, rather than borne by public resources. The Social Security Act 1947 permitted denial of a widows' pension to a divorced or deserted wife who had not taken reasonable steps to obtain maintenance from her husband[180] and a similar provision was later enacted to provide for supporting mothers.[181] However, such provisions have not always been consistently enforced.[182] In December 1975 the Director-General of Social Services directed that the maintenance requirement should not be applied to widow pensioners and supporting mothers from the commencement of the Family Law Act (in January 1976).[183] Subsequently the requirement has been revived, abandoned and revived again.

As the Director-General's directive recognized, the maintenance requirement was inconsistent with the 'clean break' principle of the Family Law Act, which encouraged the termination of couples' financial relationships after marriage breakdown. In its original form, s. 75(2)(f) of the Family Law

176 It is possible that the JET participants suffered greater employment disadvantages prior to entry.
177 *JET Interim Evaluation Report*, *op. cit.*, n. 169.
178 Chesterman, C., 'Sole Parents and the Labour Market' (1989) 31-2 *Refractory Girl* 31.
179 *Fightback!* (1992) para. 16.27.7. See also footnote 156.
180 Social Security Act 1947 (Cth) sub-s. 62(3).
181 Social Security Act 1947 (Cth) sub-s. 83AAD.
182 Sackville, R., 'Social Security and Family Law' (1978) 127 *International and Comparative Law Quarterly* 127, 159-63.
183 Carney and Hanks, *op. cit.* n. 114, 152.

Act permitted the court, when assessing the needs of the claimant spouse, and the capacity of his or her partner to pay maintenance, to take into account the claimant's eligibility to a social security pension or benefit and the rate of that pension or benefit. Despite some doubts about the meaning of the provision[184] courts tended to make orders for lump sums, rather than for periodic maintenance, so that the wife's income did not preclude her from claiming social security. Alternatively courts often ordered the payment of small amounts of periodic maintenance to 'top-up' social security.

In 1987 both the Family Law Act and the Social Security Act were amended to ensure that maintenance and property orders provided the primary source of support for women and children. Consistently with the 'clean break' philosophy, applications for maintenance are normally required to be made within 12 months of divorce. This restriction no longer applies to an applicant who was incapable of supporting herself without recourse to social security at the end of the 12 month period.[185] The Family Court must now disregard social security in assessing entitlement to an order,[186] and must specify the proportion of any order for the payment of a lump sum or for the transfer of property which is intended to provide maintenance for a spouse.[187] A similar provision applies to court-sanctioned agreements on financial matters reached by the parties.[188] The purpose of these provisions is to enable the social security authorities to take such payments into account in determining the amount of social security payments to be made to those who have previously been married.

These provisions, together with child support legislation and other amendments to the Family Law Act designed to prevent the burden of supporting divorced women from falling upon the State, have been matched by changes to the Social Security Act which cast the primary burden of supporting women and children on ex-husbands and fathers. Under s. 252 of the Social Security Act 1991 (Cth) a sole parent is ineligible for a pension if she is entitled to claim maintenance for herself, or a child, and has not claimed such maintenance in circumstances where the welfare authorities consider it reasonable.

From 17 June 1988, the maintenance income test applies.[189] This test applies to both child and spousal maintenance[190] and covers a variety of forms of maintenance including cash maintenance (such as periodic payments), 'in kind' non-cash maintenance (such as provision of food) and capitalized maintenance income (such as payment of a lump sum or the

184 Hardingham and Neave, *op. cit.* n. 14, 550-6.
185 Family Law Act 1975 (Cth) sub-s. 44(4)(b).
186 Family Law Act 1975 (Cth) sub-s. 75(3).
187 Family Law Act 1975 (Cth) s. 77A. See also s. 66L in relation to child maintenance.
188 Family Law Act 1975 (Cth) s. 87A.
189 Social Security and Veteran's Entitlements (Maintenance Income Test) Amendment Act 1988 (Cth), see new Social Security Act 1991 (Cth) ss 10, 1066 F1-F11.
190 Social Security Act 1991 (Cth) sub-s. 10(1) (definition of maintenance income); O'Connor, P., 'The Interaction of Social Security Law and Family Law' *Leo Cussen Institute Seminar on Social Security Law* (June 1992).

maintenance component in a property transfer).[191] A formula is provided to enable lump sum maintenance to be treated as a periodic payment for the purposes of income testing.[192] The 'free area' for maintenance income is lower than the 'free area' for earned income, although each source of income is separately tested.[193] The higher free area for earnings and the fact that the two free areas can be combined to produce a larger total income which can be derived before the pension is reduced, are intended to provide women with an incentive to supplement their pension by finding part-time work.

The changes to the maintenance income test were part of the child support reform package which was intended to ensure that fathers made adequate contributions to the costs of supporting their children,[194] but the 'maintenance income test' applies to spousal as well as child maintenance. The distinction drawn between maintenance and earned income is consistent with the policy of encouraging women to become involved in or maintain their connection with the paid work-force. However, forcing women to pursue their husbands for spousal as well as child maintenance may reduce their bargaining power in negotiating about property division, access and custody and it remains to be seen whether such provisions actually make them any better off financially.[195]

In the past widows' pensions and supporting parents' benefits gave some nominal recognition to the 'national service'[196] provided by women bringing up children. The value of domestic labour, which has always been disregarded by law, is ignored under provisions which privatize support obligations and further entrench women's dependence on men. In Regina Graycar's words, the Act reflects the notion of the 'eternal biological family',[197] perpetuating the dependence of women on men after marriage or cohabitation has ended. This perpetuation of dependency exists side by side with legislative changes based on the principle that men and women should be treated 'the same' for social security purposes.

Domestic labour remains invisible to law under both these approaches. Neither treating women the same as men, or treating them as dependent on men disrupts the existing division of labour between men and women. Social security provisions which are intended to encourage women to support themselves, rather than relying on breadwinners, do not operate until relations of dependence have already been created. State policy does not

191 Social Security Act 1991 (Cth) sub-s. 10(1) and (3). Note that s. 10(1) provides that certain benefits excluded from the ordinary maintenance income test are to be treated concessionally as 'special maintenance income'. The most important relates to benefits received in relation to the pensioner's residence.

192 Social Security Act 1991 (Cth) s. 1116.

193 Social Security Act 1991 (Cth) ss 1068-F8 Table F (maintenance income free area); 1066-E, Table E (ordinary income test).

194 Child Support (Registration and Collection) Act 1988 (Cth), Child Support (Assessment) Act 1989 (Cth).

195 Harrison, M., Snider, G., Merlo, R. and Lucchesi, V., *Paying for the Children* (1991) xv. Apparently the scheme has resulted in savings in pension outlays, see pp. 19-20.

196 See p. 790 above.

197 Graycar, *op. cit.* n. 8, 81.

seek to discourage married women from becoming dependent on their partners and, as in the case of the cohabitation rule, it sometimes encourages such dependence. The best protection against poverty after marital breakdown is for women to continue employment during marriage, but there are few policies designed to encourage women to continue employment after marriage or to upgrade their skills. It is not until women threaten to become a charge on the State that they feel the brunt of policies designed to encourage them to enter the work-force.

E *CONCLUSION*

This essay has examined the ways in which ideas about women's sameness to and difference from men have influenced the development of social security and family law.

Following the enactment of married women's property legislation it has been seen that women were treated 'the same' as men by ignoring their domestic contributions for the purposes of property division. Although the Family Law Act now attempts to equate financial and 'home-maker and parent' contributions for the purposes of property division on marriage breakdown, financial provision on divorce still fails to compensate women adequately for the economic costs of their withdrawal from the work-force to care for children.

Social security legislation traditionally recognized women's 'difference' from men, by providing pensions to older women and women caring for children who had been deprived of the support of their male breadwinners. The sole parents' pension reflects a change in emphasis from the protection of women who have been in relationships of dependence, to the provision of support for both men and women who are caring for children. Examination of both family law and social security law suggests that men and women are increasingly being treated 'the same'. Paradoxically this trend has been accompanied by privatization of support obligations, which perpetuates relationships of dependence between women and their former partners and entrenches the way in which responsibility for wage-earning and child care is divided between men and women.

The notion of 'sameness' treats men and women as having equal power and autonomy in making choices about paid work-force participation and in negotiating with their partners about sharing financial resources and dividing responsibility for child-rearing. In practice women's autonomy is reduced by a variety of social and institutional factors. These include the lower amounts which can be earned by women because of the sexual segmentation of the paid work-force and the social expectation that women (rather than men) will stay at home to care for young children or, at least, will carry a double burden as paid workers and 'working mothers'.

Despite the symbolic importance of treating men and women equally, in a society in which access to power and resources is still determined by sex (as well as by race and class) provisions requiring formal equality of

treatment simply entrench the *status quo*. Equal treatment disadvantages women by ignoring the structural barriers which limit job opportunities and underestimates the practical difficulties and cultural expectations which deter women from combining employment and domestic responsibility.

At present the State is ostensibly neutral to the sexual division of labour, seeing it largely as a matter of individual choice. It is not until women become dependent on the social security system that they are exhorted, or coerced, to become financially self-sufficient. In practice, however, the policies of the State force women into (at least partial) financial dependence on men. The breadwinner/dependent spouse relationship is a natural consequence of the lower wages available to women, the structure and organization of the paid work-force and the limited availability of support for those who wish to combine child-rearing with wage-earning. But, because the decision to remain at home to care for children continues to be treated as a 'private' decision, there has been a reluctance to adopt policies which would avoid women from becoming dependent in the first place.

The position of women will not be improved by 'protecting' them as dependents of male breadwinners or by ignoring their responsibility for child care and treating them as if they have the same employment opportunities and choices as men. What is needed are creative social policies which make it easier for men and women to share domestic work and child-rearing and enable those involved in the essential work of raising children to do so without sacrificing their opportunity to participate in paid work as well. As a society we need to take account of the *human* need to rear the next generation. In Carol Bacchi's words:

> A social model which *includes* women in the human standard could achieve this goal. In this model it will be possible to speak about women as women, in their own right, and not as 'not men'... Including women in the standard changes our way of thinking about the nature of people and what they require to flourish ... It helps to ensure that our living and working conditions reflect the full range of humanity in all its diversity — a humanity which comprises two sexes, not one.[198]

Such a model requires a rejection of the false choice between sameness and difference and fundamental changes to the ways in which the legal system 'sees' and responds to the lives and experiences of women.

198 Bacchi, *op. cit.* n. 1, 265-6.