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Toward the Feminization of Collective Bargaining Law

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Canadian collective bargaining law is flawed because it fails to address the concerns of a substantial segment of the work force and overlooks women as a rich source of insight into the dynamics of the bargaining environment. The author begins by exploring the problems inherent in the classical contractualist model, arguing that current collective bargaining law reflects these weaknesses and echoes a morality and ideology which are stereotypically masculine. By analyzing the legal and practical structures of collective bargaining, the author illustrates the ways in which the "morality of the workplace" is manifested differently between men and women. The author then examines the ideological difference between public and private work, discussing how this distinction situates women as subordinate to men and its effects on the unionized workplace. Moving to an analysis of dispute resolution, certification, unfair labour practices and bargaining unit determination, the final part of the article is devoted to suggestions for structural change in collective bargaining law. The author proposes ways in which feminist insight can be used to replace the current oppositional structure of collective bargaining with more cooperative mechanisms for resolving disputes.

Le droit relatif à la négociation de conventions collectives est déficient en ce qu'il ignore une portion considérable de travailleurs et n'apprécie pas l'importance des perspectives féminines dans la dynamique des négociations. L'auteur dévelope cette thèse en examinant d'abord les faiblesses propres au modèle contractuel classique qu'elle dit se refléter dans le droit du travail actuel, et qui reproduisent une idéologie et une moralité typiquemment masculine. En analysant les structures légales et pratiques de la négociation de conventions collectives, l'auteur illustre comment la « moralité du contexte de travail » se manifeste différemment chez les hommes et les femmes. L'auteure examine ensuite les différences idéologiques entre le travail public et privé, distinction qui subordonnent les femmes aux hommes, et ses conséquences dans le contexte du travail syndiqué. Elle passe ensuite à une analyse de la résolution de griefs, de l'accréditation, de la détermination de l'unité de négociation et des pratiques interdites afin de suggérer des changements d'ordre structurel au droit de la négociation de conventions collectives. L'auteur propose des mécanismes qui permettraient l'adoption de perspectives féminines afin de remplacer le modèle contradictoire de la négociation, tel qu'il existe présentemment, par une structure coopérative de résolution des conflits.

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Synopsis

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Introduction

Collective bargaining law, though laudable in its aspiration of fostering autonomy among workers in relation to their employers and the state, is flawed. It is flawed in part because it fails adequately to address the concerns of a substantial segment of the Canadian workforce.[1] It is also flawed because it overlooks a rich source of insight into the dynamics of organization and relationship in the bargaining environment. This source is women.

In this article, I suggest that because collective bargaining is formulated within a classical contractualist understanding of human interaction, its premises are incompatible with an alternative worldview emerging in the writings of feminist scholars. I begin by proposing that two elements of classical contrac-

[1]The Canadian workforce is 43% female. Seasonally adjusted figure as of December 1989: Statistics Canada, *The Labour Force* (Ottawa: Minister of Supply and Services Canada, January 1990) B-3.

tualism, its morality[2] and its ideology,[3] are fundamentally at odds with this alternative vision. Contractualism presumes a form of social relationship which is intrinsically oppositional, and which draws sharp distinctions between public and private life. Critics of collective bargaining have argued that the system betrays its contractualist foundations, or more specifically, that it replicates the very errors of contractualism that it was designed to defeat. I take this argument further, and propose that to the extent that collective bargaining does echo the failures of contractualism, it also echoes a morality and ideology which are stereotypically masculine.

In order to illustrate my thesis, I examine the legal and practical structures of collective bargaining. I investigate, for example, what I will call "workplace morality," focusing on the ways in which that morality is manifested differently between men and women. In addition, I draw upon the types of work women perform and the nature of their participation in unions to illustrate how the ideological distinction between public and private, which situates women as subordinate to men, is reflected in the structure of the unionized workplace. In the final part of this article, I explore four aspects of collective bargaining — dispute resolution, certification, unfair labour practices, and bargaining unit determination. I suggest ways in which feminist insights can inform changes to replace the current approach with a less oppositional conception of collective bargaining.

I. Theory of Contract

The common law of employment is based on classical notions of contract: the employee bargains freely with the employer to determine the terms of an exchange of labour for remuneration. This private relationship is insensitive to inequalities between the parties and, for this reason, the common law has often produced inequitable outcomes between frequently wealthy employers and less powerful employees. Collective bargaining law developed as a response to this and other inadequacies in the common law of employment. Nevertheless, for most Canadians, the common law is still the primary institution governing the employment relationship, supplemented by statutorily imposed standards such as minimum wage requirements, restrictions on the duration of the work week, and maternity provisions. Even where collective bargaining law applies, the

[2]When I use the word "morality" in this article, I am not using it in the sense of human virtue or ethics. Rather, I use it to describe one's perception of self in relation to other persons and things.

[3]I use the word "ideology" to describe the ideas which characterize a social or political system. I argue in this article that collective bargaining is an example of a social/political system shaped by a particular ideology. Morality and ideology, as I refer to them, are closely related concepts. The morality of individuals gives rise to their social ideology. In a hierarchical society, the prevailing ideology is likely to reflect the morality of the dominant class of persons.

essential relationship between the parties is still one of contract, albeit in modified form.

The contractualist model infusing the common law of employment hails market ordering as the path to individual and social freedom. Freedom in economic arrangements is seen not only as an efficient means of structuring a capitalist society, but also, and more importantly, as an ideology unto itself. Milton Friedman describes it as such: economic freedom constitutes freedom of action *per se*, and also is an indispensible instrument in achieving political freedom, that is, freedom of the market from state intervention.[4] The contract envisaged by proponents of private market exchange is between equally powerful, consenting parties who have adequate information to make a reasoned choice.[5] Critics of contractualism, most notably in the legal realist tradition, have argued that classical notions of contract flowed from a modern myth that freedom was embodied in capitalist ideology.[6] The myth, however, led to a perversion of the original ideal of freedom, and has come to permit legal coercion through contract law under the pretense of maximizing freedom.[7] This is so, it is argued, because the state exercises the prerogative to enforce or not to enforce a contract, based on paternalistic notions of what constitutes "freedom." Therefore the contract itself, supposedly the centrepiece of the private law regime and thus free from public constraint, becomes tantamount to a regulatory system. The determination of "freedom" ultimately is reduced to a judicial assessment of the appropriate exercise and distribution of power in the market.[8]

A. Morality

Contractualism is based on the presumption that all persons share a common understanding of the moral individual. I believe this understanding of morality is stereotypically masculine.[9] A "masculine" conception of self infuses traditional notions of contract with a corresponding bias. Freedom of contract presumes a shared understanding that the liberty to pursue individual interests is an essential aspect of freedom.[10] This morality runs deep in contemporary

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[4]M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 8.

[5]J.M. Feinman, "The Significance of Contract Theory" (1990) 58 U. Cin. L. Rev. 1283 at 1286.

[6]For a comprehensive review of the contributions of the legal realists to the criticism of classical theory of contract, see J.W. Singer, "Legal Realism Now" (1988) 76 Cal. L. Rev. 465 at 482-95.

[7]*Ibid.* at 495. See also, P. Gabel & J. Feinman, "Contract Law as Ideology" in D. Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982) 172 at 176.

[8]Singer, *ibid.* at 486.

[9]When I use the term "masculine," I do not mean that all men necessarily have only masculine qualities or that women cannot be masculine. I refer to the common social understanding, or the archetype, of what is appropriately masculine, *i.e.*, the manner in which boys and men are taught to think and behave.

[10]R.A. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981) at 90. The modern liberal conception of freedom of contract is generally thought to find its genesis in

contractualist discourse. Even those who distance themselves from an unapologetic defence of self-interest reveal this bias. For example, Charles Fried's reaction to the individual liberty argument put forth by Friedman is to eschew self-interest as the moral basis of one's obligation to keep a promise. Rather, he argues, the obligation stems from respect for trust and the autonomy of others. Ultimately, though, Fried's response is anchored to the presumption that this regime is a necessary harness for men and women in what otherwise would be a "jungle of unrestrained self-interest."[11] Anthony Kronman seeks to modify the Hobbesian state of nature (the unregulated state, which is a "war of every man against every man") by incorporating into it the necessary ingredients of cooperation and mutualism in relations of exchange.[12] Nevertheless, the state of nature remains an inherently risky place where all contracting parties must provide for their own protection and maximize their own ends.[13] For both Fried and Kronman, whose work I have set out as examples of broader, more flexible approaches to contractarian thinking, the independent, atomistic individual is still the primary unit in social relations.

Contractarian thinking, as I discussed earlier, has met with spirited criticism. Among the critics are communitarians, who challenge the doctrine for its failure to recognize community as relational, contextual, and conducive to coercive, interdependent exchanges.[14] Communitarians raise important arguments which question the legitimacy of the free market model. Indeed, feminist and communitarian sympathies are often closely aligned in their shared challenge to the liberal presumption that individualism is the path to self-fulfillment. However, while feminists may glean considerable insight from communitarian scholarship, there nevertheless are significant distinctions to be made between the two families of discourse.

The work of several feminists is helpful in examining the difference between communitarian and feminist conceptions of the self. It has been argued,

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the treatises of Thomas Hobbes and John Locke. See T. Hobbes, *Leviathan* (1651) ed. by M. Oakeshot (Oxford: Basil Blackwell, 1960) and J. Locke, *Two Treatises of Government* (1690), ed. by P. Laslett (Cambridge: Cambridge University Press, 1967).

[11]C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981) at 14.

[12]A.T. Kronman, "Contract Law and the State of Nature" (1985) 1 J. L. Econ. & Org. 5.

[13]*Ibid.* I should note that one of the ways in which Kronman suggests individuals can reduce their risks is through union with another, *i.e.*, by "taking steps to increase the likelihood that each will see his own self-interest as being internally connected to the welfare of the other" (*supra* at 20). However, in the end, he affirms that the state of nature is inescapable: even union "is likely to result in the internal replication of those same conflicts it was intended to overcome" (*supra* at 30).

[14]R.W. Gordon, "Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law" [1985] Wisconsin L. Rev. 565.

for example, that communitarianism is dangerous because it threatens to deny the legitimacy of difference.[15] Iris Marion Young suggests that "the desire for mutual understanding and reciprocity underlying the ideal of community is similar to the desire for identification that underlies racial and ethnic chauvinism."[16] Donna Greschner rejects the determinism she sees as inherent in communitarianism.[17] She contends that

> [f]or the vast majority of women, remaining true to the traditions of their birth communities (or even voluntary communities such as universities, let alone professions such as law) would mean they would never be feminists. To paraphrase Simone de Beauvoir, one is not born but rather becomes a feminist. If the communitarian conception of self is that we are completely constituted by our communities, that we cannot escape the traditions into which we are born, that all we can do is continue the narratives and practices, then that conception is anti-feminist.[18]

Greschner, however, does not deny that community and connection are fundamental constituents of the self. Rather, she describes the negotiation of one's identity as a process involving the constant rejection of old connections and forging of new ones.[19] This position, it seems, occupies a space somewhere between liberalism and communitarianism. Yet it would be simplistic to characterize such a position as merely hybrid and without any distinguishing insight. Jennifer Nedelsky ventures to formulate her feminist vision of the self as simultaneously autonomous and inseparable from the dense weave of social context.[20] She uses the term, "finding one's own law," to describe the process of achieving personal autonomy. Her notion of autonomy is distinct from liberal autonomy. She suggests that "[t]he idea of 'finding' one's own law is true to the belief that even what is truly one's own law is shaped by the society in which one lives and the relationships that are part of one's life."[21]

Robin West is bolder than most feminists in that she freely attributes divergent conceptions of self to nature.[22] West distinguishes between the cultural

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[15]See, *e.g.*, I.M. Young, "The Ideal of Community and the Politics of Difference" in L.J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990) 300 and S. Williams, "Feminism's Search for the Feminine: Essentialism, Utopianism, and Community" (1990) 75 Cornell L. Rev. 700 at 708.

[16]Young, *ibid.* at 311.

[17]D. Greschner, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero" in A. Hutchinson & L. Green, eds, *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) 119.

[18]*Ibid.* at 135.

[19]*Ibid.* at 138.

[20]J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale J. L. & Fem. 7.

[21]*Ibid.* at 10.

[22]R. West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1.

feminist,[23] and communitarian notions of connection between self and community. She contends that while communitarians *aspire* to connectedness, cultural feminists believe women already possess it. In West's view, connection for communitarians is a device for achieving self-fulfillment, while for cultural feminists, it is an expression of their true selves.[24] West interprets the communitarian quest for love and intimacy in societal relations as a reaction against men's fundamental, existential state of being: individuation, or the feeling of separation between self and other.

West is criticized by some feminists for her reliance on biology. Her position is threatening to them because she makes the essentialist claim that women are inherently and materially different from men. She sees women as "essentially connected" to the rest of humanity through the processes of pregnancy, childbirth and lactation; this material connection replicates itself "existentially, through moral and practical life."[25] Most North American feminist legal theorists are wary of essentialist claims, fearing that an emphasis on difference serves only to encourage law's tendency to objectify, and thus to perpetuate the domination, disadvantage and disempowerment of women.[26] In addition, essentialism has been criticized on the grounds that highlighting gender as the basis for women's oppression results in the de-emphasis of differences in experience

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[23]*Ibid.* West's "cultural" feminism is mainstream feminism, and it is this I often mean when I use the generic term, "feminist." Carol Gilligan, discussed below, is cited as typical of cultural feminists (*supra* at 14). In contrast, West refers to Andrea Dworkin and Catharine MacKinnon as "radical" feminists who prize "individuation" and view intimacy as a form of collaboration with patriarchy (*supra* at 43). Individuation, however, is not to be confused with liberal autonomy: individuation "is the right *to be* the sort of person who might have and then pursue one's own ends," while liberal autonomy is simply "one's right to pursue one's own ends." Radical feminism's individuation precedes autonomy (*supra* at 42).

[24]Quaere, however, whether the following assertion by Michael Sandel represents a communitarian vision that surpasses mere aspirational thinking:

> And insofar as our constitutive self-understandings comprehend a wider subject than the individual alone, whether a family or a tribe or a city or class or nation or people, to this extent they define a community in a constitutive sense. And what marks such a community is not merely a spirit of benevolence, or the prevalence of communitarian values, or even certain 'shared final ends' alone, but a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of persons is reduced if never finally dissolved (M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 172-73).

Perhaps West would (I think somewhat tenuously) characterize his acknowledgement of shared final ends, or more likely, his concession that the opacity of persons may never finally be dissolved, as evidence that his experience of connectedness will never be more than aspirational.

[25]West, *supra*, note 23 at 3. This view is shared by many French feminists; for a collection of French feminist thought in this area, see C. Duchen, ed., *French Connections: Voices From the Women's Movement in France* (Amherst: University of Massachussetts Press, 1987), in particular, Annie LeClerc's essay, "Woman's Word," *supra*, 58.

[26]See, for example, A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373 at 1376.

among women,[27] and misstates the constraints of gender as a problem which is uniquely women's, rather than one shared by both men and women.[28]

While it may be dangerous to rely on determinism rather than socialization in theorizing about morality, it would appear to me to be more dangerous still to construct a rigid dichotomy between the two. If the self is recognized as the product of an interaction between social organization, biology and the physical environment, gender difference must be seen as something more complex than merely a manifestation of determinism or socialization alone.[29] I do think that the essentialist/anti-essentialist debate is collateral, in many respects, to the central project of social change shared by all feminists.

Nevertheless, I tread cautiously when using the terms "masculine" and "feminine" to characterize differing moralities and ideologies. In using these terms, I speak of socially recognized archetypes. It would be inimical to my thesis to convey that I believe these archetypes preclude social change. I do, however, as I explain further below, accept as a premise that traditional social institutions privilege archetypically masculine over feminine rituals and conventions.

I suggest that archetypically masculine assumptions regarding what constitutes the individual, and what constitutes rationality, inform traditional notions of contract and as such make the regime of contract one which typically fails for women. The model contracting person is impartial and can remove himself from his context in order to assess his situation. Many feminist philosophers urge us to recognize that the universality of efficiency, consistency and self-interest is a fictional notion.[30] This fiction ignores traits such as affectivity, passion and desire, often associated with the private world of women, in the creation of social policy and justice.

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[27]See, for example, A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581; M. Minow, "The Supreme Court, 1986 Term — Forward: Justice Engendered" (1987) 101 Harvard L. Rev. 10 at 34-37; and Z. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988) at 38.

[28]K.T. Bartlett, "Feminist Legal Methods" (1990) 103 Harvard L. Rev. 829 at 876; J. Flax, "Post-Modernism and Gender Relations in Feminist Theory" (1987) 12 Signs 621 at 629.

[29]For a rich discussion on this subject, see A. Jaggar, *Feminist Politics and Human Nature* (Brighton: Harvester, 1983).

[30]See, for example, J. Grimshaw, *Philosophy and Feminist Thinking* (Minneapolis: University of Minnesota Press, 1986) at 195-204; M. Minow & E. Spelman, "Passion for Justice" (1988) 10 Cardozo L. Rev. 37; R. Poole, "Morality, Masculinity and the Market" (1985) 39 Rad. Phil. 1 at 22; and I.M. Young, "Impartiality and the Civic Public," in S. Benhabib & D. Cornell eds, *Feminism as Critique: Essays on the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 56 at 58.

Some feminists maintain that women take a different approach than men to solving problems and resolving disputes.[31] Mary Joe Frug examined this hypothesis in the contract context.[32] In a particularly illustrative example, she describes a standard form contract case in which a court enforced the obligation of a woman who signed a bill of lading without reading the fine print.[33] The footnotes to the judgment reveal that the woman testified she signed the contract hastily because the men who delivered her goods were cold and tired and in a hurry to leave. Her actions were thus shaped by what could be called a typically female personality trait — a concern and sympathy for the discomfort of the workers. Frug analyzes the case in terms of relations of power:

> it reveals that traditional contract doctrine, by treating the parties as if they had an adversarial relationship, implicitly rejects the more cooperative way in which many women have traditionally experienced power and knowledge. The major form of power available to most women, given the kind of work they have done, has been the power to nurture and share. ... [T]he court's rhetoric of freedom of choice in *Allied* is simply another way of exercising power.[34]

Katharine Bartlett avoids posing feminine "contextualized" reasoning as the polar opposite of abstract male thinking.[35] Instead, she uses the term "feminist practical reasoning" to describe a mental process in which the problem solver considers factors beyond the minimum required to reach an answer, yet also sees rationality and abstraction as legitimate and essential tools in solving the problem. Thus the feminist practical reasoner will recognize the diversity in human experience, state her moral assumptions and political partiality, and seek to integrate her emotive and intellectual faculties. I think this approach is particularly well-suited to the present enterprise. It supports the idea that, while it may be dangerous to overstate the role of nature in distinguishing men and women, "feminine methods" can foster a brand of justice which is more integrated, responsive to diversity, and ideally, accessible to men as well as women.[36]

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[31]By now, a reference to the work of Carol Gilligan has become almost rhetorical in feminist writing. Gilligan presented a moral dilemma to children and asked them to solve it. On the basis of their differing responses, she concluded that girls and women tend to solve moral dilemmas by exploring their connection to others and relations of care within the community, while boys and men tend to rely on abstract notions of individual justice. C. Gilligan, *In A Different Voice* (Cambridge: Harvard University Press, 1982).

[32]M.J. Frug, "Re-Reading Contracts: A Feminist Analysis of A Contracts Casebook" (1985) 34 Am. U. L. Rev. 1065. For another feminist treatment of contract doctrine, see C. Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L.J. 997.

[33]*Allied Van Lines Inc.* v. *Bratton*, 351 So.2d 344 (Fla., 1977), discussed in Frug, *ibid.* at 1125-34.

[34]Frug, *ibid.* at 1133-34.

[35]Bartlett, *supra*, note 28 at 854-58.

[36]In this vein, see also Drucilla Cornell's treatment of difference in an article where she states that "[w]ithout in any way denying how deeply imprinted our gender identity is, it is still possible to change, and, more specifically, for men to change by allowing themselves to 'accept' the fem-

B. Ideology

The ideology of the classical liberal paradigm is as masculine as its morality. Freedom of contract depends on voluntary choice by parties entering into relations of exchange. Choice is a difficult, multi-faceted concept which incorporates wealth, endowment, power, and opportunity. Critics of classical liberalism have analyzed the complexity of choice, and suggested that many factors operate to constrain the choices of an individual or a social class. For example, the legal realist holds that by refusing to intervene in private contractual relations, the state in fact makes a normative decision.[37] Specifically, the state decides that there is justice in the pre-existing distribution of wealth, be it in the form of property or natural attributes. Marxists have argued that the separation of capital and labour is fundamentally coercive, and as such, represents a regime of constrained or illusory choices.[38]

If constrained choices operate to undermine freedom of contract, then for women, that freedom is tenuous indeed. In many ways, society traditionally has restricted the choices available to women because they are women. The concept of choice or consent is complicated because the true voluntariness of a decision depends on the extent to which social factors influence one's subjective experience. Jody Freeman's discussion of consent in the context of prostitution captures its complexity:

> Consent is structural and changeable. Interpreting what consent means in a given situation is partly objective, and partly subjective. ... So when one consents, one is both responding to and creating the meaning of the term at a particular time in a particular context. A woman's past experience, her socialized self-image, her fears and expectations about sexuality — all of these things are in play when she says yes, no or remains silent.[39]

Thus a woman's conception of herself, immersed in a dynamic milieu of relationship and responsibility, may be manifested in an ambiguous and shifting set of prerogatives. More concretely, a woman's "choice" of a particular occupation or the decisions she makes once a member of the labour force may be influenced by her belief that other options are not available or appropriate.

What has come to be known as the public/private distinction further contributes to the constraints on women's choices. Contractualist ideology emphasizes and seeks to preserve a distinction between the public (government regu-

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inine in themselves" (D. Cornell, "The Doubly-Prized World: Myth, Allegory and the Feminine" (1990) 75 Cornell L. Rev 644 at 673).

[37]Singer, *supra*, note 6 at 482.

[38]See, for example, C.B. MacPherson, "Elegant Tombstones: A Note on Friedman's Freedom" in C.B. MacPherson, *Democratic Theory* (Oxford: Clarendon Press, 1973) 143.

[39]J. Freeman, "The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists and the (Im)possibility of Consent" (1989-90) 5 Berkeley Women's L.J. 75 at 97-98.

lation) and the private (market freedom).[40] Both realist and Marxist critics identify this division as central to the flaw in contractualist thinking.[41] Similarly, most feminists adopt a modified (and in the case of essentialists, sometimes misused) version of the public/private critique to explain the subordination of women. However, an important distinction must be made between feminist and other notions of the the public/private split. While others see the distinction as being between governmental or political regulation and the private market, feminists see it as being between the private family regime and the public market.[42]

Since well before the industrial revolution, women have been tied primarily to familial tasks, tasks related to reproduction and to the maintenance of an environment conducive to sustaining men's lives. Simone de Beauvoir, in her classic text, *The Second Sex*, spoke of the effect of woman's situation in the home on her self-esteem, and its role in shaping a subordinate, even parasitic status for women.[43] The *ideology* of dependency has led, in Carole Pateman's words, to the regime of the "sexual contract."[44] Pateman views social contract theory as incomplete because our society adopts a patriarchal conception of sexual difference in which women are subordinate to men. In this conception of society, only men own property in their person (and they also own women). However, ownership of one's own person is the primary precondition to being a subject of the original contract. Therefore, women are not "individuals" for the purposes of the social contract (but are instead the object of the contract).[45] The work a woman performs in the home is "labour power appropriated by her husband,"[46] thus, in Pateman's view, her function becomes tantamount to slavery.

This "domestic economy" persists despite our contemporary recognition of its oppressive effects upon women, because it serves the indispensible role of

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[40]However, the locus and determinants of the dividing line between public and private are subject to some debate. See R. Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U. T. Fac. L. Rev. 248 at 252-54.

[41]See Singer, *supra*, note 6, for his discussion of both realists and Marxists; D. Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 U. Penn. L. Rev. 1349; K.E. Klare, "The Public/Private Distinction in Labor Law" (1982) 130 U. Penn. L. Rev. 1358.

[42]See, for example, K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985); and F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harvard L. Rev. 1497. It has been argued that the manipulability of the distinction has been used to create barriers to feminism. See Dalton, *supra*, note 32; and J. Fudge, "The Public/Private Distinction: The Possibilities of and Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 487-88.

[43]S. de Beauvior, *The Second Sex* (New York: Knopf, 1952) at 511.

[44]"The (sexual) contract is the vehicle through which men transform their natural right over women into the security of civil patriarchal right" (C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) at 6).

[45]*Ibid.*

[46]*Ibid.*, at 133, citing C. Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (Amherst: University of Massachusetts Press, 1984).

supporting the public sphere as we know it.[47] The domain of women, that of undervalued labour in the private sphere, is the natural corollary to the public, wage-earning sphere of men. The nature of familial organization, in which women are perceived as vulnerable, and are held responsible for secondary or supplementary tasks, has gained ideological status. Thus it is reinforced and duplicated in other settings. Later in this paper, I will argue that this has currency in the labour setting.

II. Collective Bargaining

A. The Goals of Collective Bargaining

Collective bargaining law seeks to correct for injustices within the common law of employment. It enables workers to form a collective for the purposes of bargaining with the employer. Where a majority agrees to it, the workers will select a union to act as an agent in representing their interests. The system assumes that employees as a group will have greater power than they would individually in dealing with the wealthier, more powerful employer. Equally important, it seeks to preserve for workers a sense of autonomy or self-governance in determining the conditions of their working lives. The state regulates collective bargaining through federal and provincial legislation. In Canada, the *Canada Labour Code* and analogous provincial statutes serve this role. Broadly speaking, these pieces of legislation contain protections against the coercion and restraint by employers of workers seeking to organize a union, and ensure that the parties deal with one another in good faith. The economic "levers," or manifestations of power in collective bargaining, are the strike and the lockout. Where the employees cannot bear the terms of an agreement, they may, within legislatively controlled limits, refuse to work, or "strike." Likewise, the employer may stage a "lockout," or refuse to employ the union members (and hire replacement workers) under legislatively controlled circumstances. Empirical evidence suggests that collective bargaining has been successful in improving the economic condition of workers. Freeman and Medoff's[48] examination of the influence of unions on the economics of the labour market led them to conclude that unionism is a powerful force in reducing wage inequalities.[49] They based their conclusion on three phenomena associated with unionization. First, union activities reduce inequalities within firms by operating on a philosophy of distributive justice, by replacing managerial discretion with equitable rules, and by promoting worker solidarity and organizational unity. For example, the

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[47]N. Redclift, "The Contested Domain: Gender, Accumulation and the Labour Process" in N. Redclift & E. Mingione, eds, *Beyond Employment: Household, Gender and Subsistence* (Oxford: Basil Blackwell, 1985) 92.

[48]R. Freeman & J. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

[49]*Ibid.*, c. 5 at 78-93.

wage in a unionized setting is more likely to attach to a given job than to a particular individual. Second, unions exert sufficient pressure on the market to standardize wages across industries. Individual differences between workers, such as education, have less of an impact on earning in a unionized environment.[50] Third, unionism reduces the wage disparity between white collar and blue collar workers.

The principal challenge to their findings is that by increasing wages in the organized sector, the number of jobs in that sector correspondingly decreases. The displaced workers go to the non-organized sector, resulting in a decrease in wages for all non-unionized workers. Freeman and Medoff meet this argument by comparing the gains to be had in the organized sector with the losses in the non-organized sector. They conclude that the net effect is a reduction in wage inequality. Thus from a utilitarian perspective, collective bargaining is economically beneficial.

Collective bargaining, however, is more than merely a means to redress inequality of bargaining power. It is also a vehicle for individual self-fulfillment because the workplace is the locus of what for most people is their primary social contribution. Flanders[51] warns against viewing the collective agreement as merely an employment contract serving multiple parties. He argues that collective bargaining differs from bargaining for employment contracts in the marketplace in three ways. First, collective bargaining gives rise to a body of procedural rules which regulate the continuing functioning of the labour market. Second, it is highly political in character, thus justifying its description as "a diplomatic use of power."[52] More specifically, it imposes the "rule of law" on employment relationships, such that workers are no longer at the mercy of the market. Both parties have an interest in more than just the exchange of labour for capital. They also mutually desire to establish and maintain continuity in relations, a desire for self-government which manifests itself in the institution of collective bargaining. Third, negotiation in collective bargaining goes beyond the resolution of economic conflict. Rather, it is fundamentally about power: the power to shape the conditions and the values informing managerial decision-making. Central to this is a clash between the values of efficiency and worker security.[53]

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[50]Freeman and Medoff acknowledge that equality may favour unionism rather than unionism producing equality. That is, workers who are similar to one another may feel more community with one another and therefore be more likely to organize.

[51]A. Flanders, "The Nature of Collective Bargaining" in A. Flanders, ed., *Collective Bargaining: Selected Readings* (Middlesex: Penguin, 1969) 11.

[52]*Ibid.* at 17.

[53]*Ibid.* at 30-31. Note the contrast between this thinking and the argument of Freeman and Medoff that these two values are not mutually exclusive.

Power is a theme common to all theoretical accounts of collective bargaining. Dubin characterizes the manifestations of power in a somewhat less benign light than does Flanders. Dubin argues that power is exercised primarily through the conscious and deliberate use of force. He describes the union's use of the strike, slowdown and jamming of the grievance procedure, and the management's use of the lockout, arbitrary re-interpretation of the collective agreement, and harsh grievance decisions, as the arsenal of weapons available to parties engaging in industrial combat. Conflict and disorder are the lifeblood of industrial justice. Collective bargaining law, by institutionalizing this use of force, tempers it. It provokes management to respect industry-wide standards and has a stabilizing influence on the human relations in the industrial sector. Although Dubin assures us that "each conflict-created disorder is inevitably succeeded by a reestablished [*sic*] order,"[54] and that "collective bargaining tends to produce self-limiting boundaries that distinguish permissible from subversive industrial disorder," the use or threat to use force, albeit tempered, is still the animating essence of the institution.

B. Critiques of Collective Bargaining

The promise of "industrial democracy" accompanying the introduction of collective bargaining to North America nearly a half-century ago has long since lost its lustre.[55] The dissolution of these hopes inspired one commentator to lament that contemporary American labour law is "an elegant tombstone for a dying institution."[56] The presumptive model of self-interest remains a pervasive force in the collective bargaining environment.[57] Even so, the system has failed to secure autonomy for individual workers, both in its inability to foster their full participation in making decisions that affect their working lives, and in terms of the quality of participation that has been attained.

Critics of collective bargaining have focused the problem in a number of ways. Although different diagnoses of collective bargaining's failure to correct for the flaws of the free market derive different suggestions for reformulating the system, they do not, by and large, include calls to abandon collective bargaining. In the pages to follow, I will discuss ideas of selected critics, followed

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[54]R. Dubin, "Constructive Aspects of Industrial Conflict" in A. Kornhauser, R. Dubin & A. Ross, eds, *Industrial Conflict* (New York: McGraw-Hill, 1954) 37 at 45.

[55]It should be noted that for many, the form in which collective bargaining law was introduced failed to meet their aspirations for radical change. Nevertheless, it can be fairly stated that most perceived the new laws as a positive move in the direction of industrial democracy. See K.E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62 Minnesota L. Rev. 265 at 290.

[56]P. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA" (1983) 96 Harvard L. Rev. 1769 at 1769.

[57]See B. Langille & P. Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988) 13 Queen's L.J. 62 at 74-75.

by an exploration of concerns unique to women in the current bargaining regime. Later I will seek to incorporate feminist arguments into existing criticisms of collective bargaining.

Paul Weiler asserts that the primary flaw in American collective bargaining lies, not in the prevailance of free contract values, but rather, in the degree of contractual freedom permitted at various stages of the bargaining process.[58] On one hand, the parties are given too much freedom at the initial contract stage. In the U.S., the hands-off approach of the National Labor Relations Board during the events leading to the signing of a first agreement has a traumatizing effect on fledgling unions struggling to secure some collective voice for workers. At this threshold stage, a union is particularly vulnerable to damaged morale and attrition. Allowing the employer to engage freely in resistance tactics is contrary to the intention of collective bargaining legislation.[59]

On the other hand, Weiler argues, the workers are given too little freedom in their permissible use of economic weapons during the term of an agreement. More specifically, free bargaining with the strike as a weapon, as opposed to interest arbitration by a labour tribunal, is an essential ingredient of the negotiation process. It is the primary weapon available to the workers in exercising control in shaping an agreement responsive to the particular requirements of their situation. The strike is seen as the "litmus test for distinguishing the regime of collective bargaining from that of individual employment relations."[60] Even though strikes are allowed, the terms regulating their use are unduly restrictive. For example, it is inequitable that employers can hire replacement workers during a strike but employees cannot enlist support from unionized workers in companies carrying on business with the struck employer.[61] In sum, Weiler sees contractual freedom within collective bargaining as a good thing, one which promotes the autonomy of the worker *vis à vis* the employer. His criticism focuses largely on the *balance* of that freedom in the current American bargaining regime. Reform, for Weiler, will come from shifting rather than increasing the existing constraints imposed by collective bargaining law on contractual freedom.

While advocating greater contractual freedom in collective bargaining, Weiler also identifies an emerging trend among workers to eschew the formality and legalism of "business unionism."[62] He argues that the large bureaucratic union has come to resemble the employer with which it does battle; the worker

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[58]P. Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation" (1984) 98 Harvard L. Rev. 351.

[59]*Ibid.* at 357-63. It should be noted that in Canada, this problem is not as significant: see J. Rose & G. Chaison, "New Measures of Union Organizing Effectiveness" (1990) 29 Ind. Rel. 457.

[60]Weiler, *ibid.* at 365.

[61]*Ibid.* at 387-94.

[62]P. Weiler, *Governing the Workplace* (Cambridge: Harvard University Press, 1990) ch. 5.

feels silenced and alienated by the very institution created to give him a voice. Weiler calls for a move to "enterprise unionism," a less centralized, more co-operative scheme in which workers have a higher degree of responsibility for decisions affecting the operation of the workplace.[63] The dilemma, for Weiler, is how to reconcile the continued need for big-union muscle to back organizing and mount strikes with this new vision of enterprise unionism.[64]

"Critical" labour law scholarship has also scrutinized collective bargaining. Karl Klare's scheme for labour law reform is rooted in the ambition that the institutions of industrial governance can act as the catalyst for broad-based participatory democracy.[65] Self-realization, individual autonomy, and interpersonal connection are, in his view, the hallmarks of this approach. Klare concentrates his criticisms of the existing American collective bargaining regime on its misguided notion of a dichotomy between market freedom and regulation. Traditional notions of market freedom wrongly juxtapose state regulation and efficiency as if they were mutually exclusive. Assessing the merits of the free market is reduced to a trade-off between efficiency and the intervention necessary to secure basic guarantees of social justice. Klare reconstitutes and relies on the contributions of the legal realists, who exposed the fallacy of the "unregulated" free market. The realists reformulated the question in the debate from *whether* to regulate, to *what form* the regulation, inevitable in any market regime, should take.[66] Klare wishes to restrain contractualism more than does Weiler. In Klare's opinion, the judicial use of formal contractual analysis is a primary culprit of the systematic "deradicalization" of the progressive intentions of the American collective bargaining statute, the *Wagner Act*.[67] While the U.S. Supreme Court facilitated free choice and private ordering between the parties by rearranging their relative bargaining power, it failed to address the substantive content of the bargains struck.[68] Klare seeks to mobilize a "reconstruction of the market" at all levels of the employment relationship. He thinks comprehensive substantive and procedural restrictions on freedom of contract are a necessary means to enhancing employment democracy. He shares with Weiler a desire to facilitate the opportunity for workers and fledgling unions to organize and establish a first contract by legislative means. He also advocates measures to abolish managerial prerogative and the doctrine of reserve rights, through disclosure and a redefinition of "the basic social understanding of prop-

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[63]*Ibid.* at 189.

[64]*Ibid.* at 223.

[65]K.E. Klare, "Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform" (1989) 38 Catholic U. L. Rev. 1.

[66]*Ibid.* at 13-18. See also the earlier discussion in this paper of the legal realists *supra*, notes 6-8 & 37 and accompanying text.

[67]*Supra*, note 55 at 292-93. The *Wagner Act* is another name for the *National Labour Relations Act*, 29 U.S.C. §§151-169 (1988) [hereinafter NLRA].

[68]*Ibid.* at 309.

erty."[69] Other goals are employee participation in management, retaining elements of adversarialism while fostering greater co-operation,[70] and a broad-based statutory imposition of minimum standards in the conditions of employment.

A third critic of collective bargaining, David Beatty, takes a somewhat different tack.[71] For Beatty, the collective bargaining regime is ineffective, first because it replicates and institutionalizes the inequities of the common law, and second, because it generates injustices of its own. Pivotal in Beatty's argument is the notion that the "democratic" tenet of majoritarianism, fundamental to collective bargaining, is actually a principal barrier to workplace justice. He counters the utilitarian defence of collective bargaining by pointing to the vast number of workers denied the benefits of the system. The reasons for their exclusion, be they statutory, locational (*i.e.*, both in terms of industry and geography), or as a result of the "displacement" Freeman and Medoff spoke of (whereby every gain for the unionized produces a corresponding loss for the non-unionized), are devoid of morality. Rather, they are the same social constructs, stemming at the basest level from inherited endowments, that generate distributional inequities in a regime of free contractualism. The losers in this scheme are those who are already disadvantaged: at a broad level, those in sectors without the strength of organization to unionize, and at a more local level, those in a workplace who have the least seniority (the young, the ethnic, and the female). He explains:

> It is a system in which the well-to-do prosper at the expense of the weak; the haves take from the have-nots; better paid workers gain at the expense of the more poorly paid, the organized at the expense of the unorganized, the employed at the expense of the unemployed. Whatever the final definition of industrial justice, a scheme of employment regulation which settles its wins and losses in such a manner cannot be considered distributively just. It is plainly not fair. It is not the way we commonly teach sisters to treat each other and their brothers.[72]

To the extent, Beatty continues, that utilitarian justifications are advanced, they fail because the "losers" in this scheme cannot fairly be said to have consented to their position in the heirarchy of entitlements.

Beatty also attacks claims that value inheres in the process of collective bargaining itself. Advocates analogize the process to democracy because of its

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[69]*Supra*, note 65 at 52.

[70]K.E. Klare, "The Labor-Management Co-operation Debate: A Workplace Democracy Perspective" (1988) 23 Harvard C.R.-C.L. L. Rev. 39 at 77.

[71]See, *e.g.*, D. Beatty, "Shop Talk: Conversations About the Constitutionality of our Labour Law" (1989) 27 Osgoode Hall L.J. 381; *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen's University Press, 1987); and "Ideology, Politics and Unionism" in K. Swinton & K. Swan, eds, *Studies in Labour Law* (Toronto: Butterworths, 1983) 298.

[72]"Ideology, Politics and Unionism," *ibid.* at 315.

electoral mechanisms.[73] Furthermore, the process of allowing each individual to participate in the determination of matters affecting the conditions of her life is said to enhance individual justice. Beatty replies by asserting that where participation is not universal, there can be no true democracy. He re-iterates his position that there is no justice in the arbitrary allocation of personal endowments, and adds that the tyranny of the majority determines individual justice. His vision of a just regime of industrial democracy places the system on a political, as well as market plane.[74] Specifically, Beatty envisages the "constitutionalization" of collective bargaining, whether via a Bill of Rights for employed people, or the *Canadian Charter of Rights and Freedoms*,[75] as the natural route to the democratization of and achievement of justice in labour markets.

C. *Women and Collective Bargaining*

The critiques of collective bargaining I outlined above analyze collective bargaining from a variety of perspectives. Although each offers insight into why collective bargaining has failed to correct the inadequacies of the market, none addresses those failures as they pertain uniquely to women. As I discussed earlier, the free market is blind to the moral and ideological gender divisions in our society. Ironically, collective bargaining, despite its mandate to correct for the failings of the market, fails in the same ways as the free market in achieving social justice for women. A fuller discussion of the barriers women face will be useful in assessing whether existing suggestions for reform of collective bargaining can incorporate the concerns of women.

1. Morality Revisited

The moral framework of collective bargaining is based on masculine social stereotypes. It is premised on the notion that the employer and the employees are engaged in combat. The system provides the rules for combat, and the parties have access to the "weapons" that will assist them: the strike and the lockout. Even the language of bargaining, the influence of which is not to be underestimated, invokes images of the passion and struggle of a clash of powers.[76]

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[73]This claim can be found in the arguments presented by both Flanders, *supra*, note 51, and Dubin, *supra*, note 54.

[74]This echoes the observation of Flanders in describing the difficulties in defining collective bargaining as a path to social justice based solely on a market model: "[w]hen, however, one goes out from the alternative premise that what is known as collective bargaining is primarily a *political* institution because of the two features already mentioned — that it is a rule-making process and involves a power relationship between organizations — no logical difficulties obstruct definition" (*supra*, note 51 at 19).

[75]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[76]This is particularly unsettling if one accepts (as I do) the arguments of Lakoff and Johnson that metaphors in all aspects of life and discourse shape our experience of the world. See G. Lakoff

Terms such as "hard bargaining" and "bull sessions" create in the mind's eye the spectacle of angry embattled adversaries. According to some feminists, this combative conception of conflict resolution is incompatible with the moral worldview of women. Womens' conceptions of power, as discussed earlier, evolved within the private sphere, where the rituals and conventions of social interaction differ from those of the public sphere. This, cultural feminists have theorized, has led women to take a different approach to solving problems and resolving disputes. From this point of view, it is not surprising that women are less willing than men to resort to strike action in resolving industrial disputes.[77] I hope to illustrate, by way of the following examples, how I perceive women's approach to shop floor conduct to be different than traditional approaches.

Charlene Gannage spent two years studying the operation of a union and the interaction among workers in a small Toronto garment factory.[78] Part of her study involved a comparison of the manner in which the primarily male "operators" and primarily female "finishers" distributed work among themselves.[79] The men developed a system of rules for determining work assignments. They set out guidelines and elected a shop chairman and committee to implement the guidelines. The women, on the other hand, developed an informal, *ad hoc* arrangement based on the honour system. For example, if a worker had taken on light assignments one day, she was expected to volunteer for heavier assignments the next day. Where individual antagonisms arose, the shop floor workers themselves bore the responsibility of mediating the conflict, rather than calling in the male shop chairman to resolve it. Only if the dispute could not be resolved internally would the shop chairman be called.

The behaviour of the women was consistent with an alternative conception of how to divide the burdens and benefits of the shop floor, and how best to minimize personal tensions among themselves.[80] First, the women chose an honour- over rule-based system, and in doing so, opted for a more internalized, less rigid form of organization, based on principles of trust. Second, the women

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& M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980). On the power of language in particular in shaping our construction of reality, see K. Busby, "The Maleness of Legal Language" (1988) Man. L.J. 191; and R. West, "Communities, Texts and Law: Reflections on the Law and Literature Movement" (1988/89) 1 Yale J.L. & Hum. 129.

[77]N. Charles, "Women in Trade Unions" in Feminist Review, ed., *Waged Work: A Reader* (London: Virago, 1986) 160 at 174-75.

[78]C. Gannage, *Double Day, Double Bind: Women Garment Workers* (Toronto: The Women's Press, 1986).

[79]*Ibid.* at 151-58.

[80]I should note here that this was not Gannage's interpretation — she attributed the "disorganization" and "dependence" on the shop steward to the ideology of the gender division of labour (*ibid.* at 173), which I discuss below.

chose horizontal rather than hierarchical forms of governance and dispute resolution. These choices require a greater degree of involvement in one another's lives, as well as sensitivity to, and personal responsibility for, each other's stresses and conflicts.

A second notable feature among the women was their sensitivity to the double workday of women co-workers. Hanne Petersen made some astute observations about the "morality of the workplace" in her recent study of unionized women in the Swedish public sector.[81] She found that both management and union colleagues felt a sense of responsibility for employees struggling to balance wage with non-wage (domestic) labour. Petersen observed the development of an "informal law of the workplace," in which employees took into account the competing demands in each others' lives. It was characterized by an ethos of "non-intervention" of work into private life, manifested in a vigilant effort among workers to protect one another from the possibility of employment responsibilities infringing on private/family time. It was characterized by a "norm of consideration, [which] presupposes certain conditions among employees, namely, 'responsibility,' trust and abstention from abuse; a certain 'cautiousness,' and 'watchfulness' when making use of the liberty of action provided by it."[82] For example, this norm would contemplate a woman's taking an extra workload where her colleague required relief due to a domestic obligations such as a sick child.[83]

A third revealing set of observations about this alternative "morality of the workplace" is illustrated by the organizing drives of the all-women Harvard Union of Clerical and Technical Workers and Women Workers (HUCTW) in 1988,[84] and Local 34 (also clerical and technical workers) of the Federation of University Employees at Yale University in 1981.[85] The unions used a variety of alternative techniques, and set for themselves non-traditional goals. These campaigns, unlike most, placed secondary emphasis on pay and benefits, focusing instead on worker empowerment, participation and self-representation. One HUCTW organizer described the message to the employees as being, "you are as smart and capable of handling these problems certainly as anyone in manage-

[81]H. Petersen, "Perspectives of Women on Work and Law" (1989) 17 Int. J. Soc. L. 327.

[82]*Ibid.* at 340.

[83]This sensitivity to each others' dual lives has been cited elsewhere as serving a greater role than merely mutual protection and support. Rather than being seen as "trivial" domestic concerns, the shared ethos among women of the centrality of the family translate into heightened solidarity and the facilitation of organization through kin. See M. di Leonardo, "Women's Work, Work Culture, and Consciousness" (1985) 11 Fem. Stud. 491 at 494.

[84]See M.D. Kandel, "Finding a Voice Through the Union: The Harvard Union of Clerical and Technical Workers and Women Workers" (1989) 12 Harvard Women's L.J. 260.

[85]See M. Ladd-Taylor, "Women Workers and the Yale Strike" (1985) 11 Fem. Stud. 465.

ment currently, and you ought to be involved in those processes."[86] The unions attracted members through personal contacts ("we organized one employee at a time"[87]) rather than through leaflets, so that each employee could express her concerns to the union representatives.[88] Leadership roles were played down, in order to foster confidence and participation among "rank and file" workers. In addition, the themes and slogans of the campaign focused on attitudes or fears women tend to share regarding trade unions. For example, a major theme was the notion of "a community of co-workers" rather than opportunities for individual gain.[89]

Both campaigns also addressed another hurdle. Because many traditionally female jobs (for example, secretarial and clerical jobs) involve close personal interaction with management, an identification with and loyalty towards management often develops.[90] Both drives contemplated the possibility of fear among workers that the union would jeopardize personal relationships and positive identification with management. Interestingly, the two drives used different tactics in this regard. The HUCTW assured workers that unionization was not incompatible with good employer/employee relations and discouraged anti-employer sentiment (as one slogan put it, "It's not anti-Harvard to be pro-union").[91] The Yale union, on the other hand, sought to debunk management's paternalistic claim to be interested in protecting the workers from union harassment.[92] Both campaigns, however, shared the overarching strategy of promoting personal empowerment and women's "gaining control of their lives."[93]

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[86]*Supra*, note 84 at 272. One Canadian study, however, suggests that women may seek traditional rather than non-traditional goals through the union: P. Andiappan, R. CaHaneo & D. Stasiulis, "Attitudes of Female Union Members Towards Their Union: Result of a Survey of Nurses and Clerks in a Canadian City" (1984) University of Windsor Faculty of Business Administration Working Paper No. 84-001. Two things must be noted, though. In the study, the term "non-traditional" referred to benefits and working conditions specifically desirable to women, such as child care, maternity benefits and flexible hours. In the HUCTW campaign, benefits and flexibility fit within the "traditional" category. Furthermore, the authors of this study emphasized that the data were gathered during the 1982 recession, when workers in general were concerned with high inflation and unemployment.

[87]Kandel, *ibid.* at 265.

[88]Yale's Local 34 used a "bottom-up" structure, such that small groups of workers all across campus discussed any decision before it was made. This allowed women who previously had never found themselves in leadership positions to run meetings, speak before large groups, and present grievances to their supervisors. See *supra*, note 85 at 470.

[89]The upshot of this was that some women who otherwise might not have had a particular interest in the union developed an interest out of a sense of obligation to their co-workers. For example, one worker was quoted as saying, "If younger workers are going to be concerned about my issues, it would be unfair if I wasn't concerned about theirs" (*supra*, note 84 at 274).

[90]*Ibid.* at 269-70, esp. 269 n. 56; *supra*, note 85 at 467. See also V. Schultz, "Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument" (1990) 103 Harvard L. Rev. 1749 at 1828-29.

[91]Kandel, *ibid.* at 269.

[92]*Supra*, note 85 at 470.

[93]*Ibid.* at 471.

2. Ideology Revisited

Earlier in the paper I touched upon the ideological force of the public/private distinction. More specifically, I focused on the ideology of the family, and the resulting social construction of male and female participation in society.[94] This social construction of gender is replicated in the labour setting, in two primary ways: there is a devaluation of women's labour power in the wage-earning sector, and the political organization of industrial society is structured in a way which inhibits women's participation.

With respect to the devaluation of women's labour power, I will identify two theories of how this phenomenon emerges. The first emphasizes the construction of gender outside of, or prior to, women's entry into the labour market. Women's traditional work in the private, domestic sphere has come to be perceived as unstimulating, unchallenging, repetitive, isolated and low in prestige. The work is unpaid, and its relationship to the financial rewards of the family is indirect. It cannot be exchanged on the market, and as such, is considered to be of little value. The impact of the unfavourable social perception of home-centred work on women's self-valuation has been described by Armstrong and Armstrong:

> Although the labours of love may often appear superior to those performed merely for a wage, the labours of love may in our society be debilitating. Care and love often mean submission to others, submission that is not often reciprocated. For women in the home, labours of love usually mean work without pay, work done for others and in response to others.[95]

The subjective or internalized devaluation of women's traditional work has put women into a vulnerable position upon entering the labour market. They may feel that their work is supplementary or secondary to the primary means of family support. Moreover, because work for any pay will always be financially worth more than housework, the thresholds of what women will accept in bargaining for compensation traditionally have been lower than those for men.

Vicki Schultz challenges the notion that women choose stereotypically female or female-dominated occupations, either because of socialization before they enter the labour market, or because of their heavier family obligations.[96]

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[94]Although this familial ideology is the starting point of many gender-based theories of social construction, some scholars have taken a "deconstructionist" approach, in which the division of labour in the family is one among several coexistent and equally influential elements of the social concept of gender. For a discussion of this, see V. Beechey, "Rethinking the Definition of Work: Gender and Work" in J. Jenson, E. Hagen & C. Reddy, eds, *Feminization of the Labor Force: Paradoxes and Promises* (New York: Oxford University Press, 1988) 44 at 57-58.

[95]P. Armstrong & H. Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work*, rev'd ed. (Toronto: McLelland & Stewart, 1984) at 188.

[96]Schultz, *supra*, note 90 at 1817-20.

Rather, Schultz contends that women's work aspirations and preferences are shaped by their experiences after they enter the labour market. This "new structuralist" tack posits that "employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs."[97]

In either scenario, the result is that women not only tend to perform lower-paying jobs, but they also are paid less than men to do the same or equivalent work.[98] While pay equity has been implemented in Ontario to remedy gender-based wage imbalances,[99] it attempts merely to equalize the discrepancies created within the system. It does not address how the discrepancies are socially created and systemically reinforced within collective bargaining.[100]

This bias manifests itself not only in the wage gap, but also in other aspects of working life. There has been much study of the influence of capitalist ideology on the labour process, postulating among other things the phenomenon of labour market segmentation. The theory of labour market segmentation posits that group status (sex, race, educational background) is a critical determinant of one's working conditions, promotional opportunities, wages, and industrial sector.[101] Men dominate the primary sector, which requires more stability and skill, and promises higher wages and job ladders. Women, minorities and youths dominate the secondary sector, characterized by less stable and less skilled work, low wages, high turnover, and few job ladders. Segmentation, it is suggested, was encouraged by early labour monopoly capitalists. By breaking jobs down into discrete, simplified, specialized tasks ("deskilling"), management was able to increase productivity, reduce costs, increase hierarchy and management control, and reduce worker independence.[102]

Feminist writers have criticized much of the literature on labour market segmentation because of its underlying gender neutrality. They argue that deskilling has a distinctly (and overlooked) gendered dimension to it, *i.e.*, forms

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[97]*Ibid.* at 1816.

[98]It would seem that this hypothesis is borne out in Canadian earnings statistics: the average female employment income (regardless of unionization) in the most recent figures was 66 percent of the male average (Statistics Canada, *Women and the Labour Force*, 1990 (1985 figures)). The gap is about 10 percent lower among unionized workers, but only 31 percent of women (as opposed to 39 percent of men) are unionized. See P. Kumar & D. Cowan, "Gender Differences in Union Membership Status: The Role of Labour Market Segmentation," *Queen's Papers in Industrial Relations* (Kingston: School of Industrial Relations, Queen's University, 1989).

[99]*Pay Equity Act*, S.O. 1987, c. 34.

[100]See C. Cuneo, *Pay Equity: The Labour-Feminist Challenge* (Toronto: Oxford University Press, 1990) at 149-50.

[101]M. Reich, D. Gordon & R. Edwards, "A Theory of Labor Market Segmentation" (1973) 63 Am. Econ. Rev. 359.

[102]*Ibid.* See also, H. Braverman, *Labour and Monopoly Capital: The Degradation of Work in the Twentieth Century* (New York: Monthly Review Press, 1974).

of control differ depending on whether the workers are male or female.[103] Furthermore, the analysis works more effectively in the male-dominated manufacturing sector than in the female-dominated service sector.[104] Many occupations typically filled with women, such as teaching and nursing, cannot accurately be described as fitting within the secondary workforce — yet the pay may be low and the work, though complex and high in responsibility, may not be defined as skilled.[105] Secondly, and related to the previous point, the definition of "skill" may be ideologically influenced. What counts as training, and what is considered skill may have as much to do with gender as it does objective qualifications and knowledge.[106] In these analyses, the ideology of patriarchy, rather than capitalism, is responsible for the dual labour market.

The empirical reality of women's participation in the workforce is consistent with the above hypothesis. Women are employed primarily in the service sector, particularly in "caring" jobs and paid domestic or domestic type labour.[107] Furthermore, women dominate the part-time labour force,[108] which tends to perform low skilled, low paying jobs with little job security, few benefits and minimal opportunities for advancement.[109] A recent study revealed that employers with special needs, such as a flexible workforce and longer operational periods, were more likely to create part-time positions if the workers were women than if they were men. For men in comparable situations, employers were more likely to create temporary contracts or short-time work, and use overtime.[110] The characteristics of female labour markets has prompted the observation that "women's work in the labour force does not promote the development of aggressive, independent, competitive, self-directing people."[111]

The ideology of collective bargaining also operates to exclude women by encouraging a particular political environment within the union. Political power

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[103]J. Wajcman, "Patriarchy, Technology and Conceptions of Skill" (1991) 18 Work & Occupations 29. See also Beechey, *supra*, note 94 at 48, citing a 1983 study by Game & Pringle, and N. Sokoloff, "What's Happening to Women's Employment: Issues for Women's Labor Struggles in the 1980s-1990s" in C. Bose, R. Feldberg & N. Sokoloff, eds, *Hidden Aspects of Women's Work* (New York: Praeger, 1987) 14 at 17.

[104]During 1989, an average of 57 percent of the service sector and 80 percent of clerical workers were female: Statistics Canada, *supra*, note 1 at C-24. More specifically, women dominate the secretarial, clerical, teller and cashier, food services, nursing, elementary teaching, janitorial, and textiles occupations.

[105]Beechey, *supra*, note 94 at 49.

[106]*Ibid.*, and Wajcman, *supra*, note 103.

[107]Beechey, *ibid.* Among unionized women, more than half are in the service sector.

[108]During 1989, an average of 72 percent of part-time workers in Canada were women: Statistics Canada *supra*, note 1 at C-27.

[109]Commission of Inquiry Into Part-Time Work, *Part-Time Work in Canada* (Ottawa: Labour Canada and Minister of Supply and Services Canada, 1983) (Joan Wallace, Commissioner) at 34.

[110]Beechey, *supra*, note 94 at 50.

[111]M. Barrett, *Women's Oppression Today* (London: Verso, 1980) c. 5. at 191.

within unions typically rests with men.[112] Indeed, men were the first to organize, and from their earliest days, trade unions operated in a way which excluded women.[113] There are several arguments why women have failed to participate and acquire leadership posts within unions, or even to become members of unions. First, women have more constraints on their time. Union meetings often take place in the evenings, outside of regular work hours. For women with family obligations, finding the time and physical resources to attend meetings and engage in organizational activities is difficult at best. This may be compounded by pressure from their husbands or partners to avoid union activities.[114] As one commentator succinctly puts it, "women 'negotiate' an ambiguous identity strung between two received 'worlds': the male world of wage labour, and the female world of home and family."[115] A recent study reveals, however, that women's priorizing of family commitments is not synonymous with lack of interest in the benefits of unionization.[116]

In addition, women's work in the shop is perceived as having a lower value than that of men. As I mentioned earlier, women tend to work in lower paying jobs, and on less "significant" aspects of production *vis à vis* the finished product. Consequently, women may feel less "identification with the finished product" because of their role in working on bits and pieces of garments after design and prior to assemblage. Gannage describes women who felt that the marginal-

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[112]A study within Canadian unions revealed a strong correlation between gender and union status. Women tended to fill the positions of secretary, secretary-treasurer or treasurer more often than men, while the reverse was true for the position of president. Furthermore, almost 75 percent of women in union posts reached them by acclamation, appointment, or elections where there was no male opposition. See G. Chaison & P. Andiappan, "Profiles of Local Union Officers: Females and Males" (1987) 26 Ind. Rel. 281.

[113]Barrett, *supra*, note 111. Barrett cites Karl Marx as endorsing a sexist vision of collective organization: he is reported to have encouraged male workers to organize in order to resist the dilution of the workforce with women and children. See also H. Hartmann, "Capitalism, Patriarchy and Job Segregation by Sex" in Z.R. Eisenstein, ed., *Capitalist Patriarchy and the Case for Socialist Feminism* (New York: Monthly Review Press, 1979) 206.

[114]A recent study found these family-related constraints to be more significant deterrents to achieving high union status than lack of personal confidence. See G. Chaison & P. Andiappan, "An Analysis of the Barriers to Women Becoming Local Union Officers" (1989) 10 J. Lab. Res. 148. See also the corroborating data of D. Cornfield, H. Cavalcanti Filho & B. Chun, "Household, Work, and Labor Activism" (1990) 17 Work & Occupations 131, which revealed an inverse correlation between household responsibilities in women and union activism. Regarding family constraints and participation in general, see Gannage, *supra*, note 78 at 179; A. Pollert, "Women, Gender Relations and Wage Labour" in E. Gamarnikow, D. Morgan & D. Taylorson, eds, *Gender, Class & Work* (Aldershot: Gower, 1985) 96; and D. Gallagher, "Getting Organized in the Canadian Labour Congress" in M. Fitzgerald, C. Guberman & M. Wolfe, eds, *Still Ain't Satisfied: Canadian Feminism Today* (Toronto: The Women's Press, 1982) 152 at 160.

[115]S. Cunnison, "Participation in Local Union Organisation: School Meals Staff: A Case Study" in Gamarnikow, Morgan & Taylorson, *ibid.* at 77.

[116]This was one conclusion of a study of American women and unionization: T. Moore, "Are Women Workers 'Hard to Organize'?" (1986) 13 Work & Occupations 97.

ity of their work and their lower pay resulted in the union's having little interest in fighting for their concerns. Furthermore, they felt that their contributions to union activities would be considered superfluous.[117]

A third problem is that sexist stereotypes function to discourage women from entering or remaining within the political fray. (I use the word "stereotypes" deliberately, because researchers in this area have been emphatic in stressing that women's "apolitical" stance has nothing to do with biology. That is, women are not inherently predisposed to be passive or apathetic). Men are encouraged more strongly than women to enter into the forum of union politics.[118] Those women who do enter often leave because of harassment or patronizing treatment by male co-workers and union officials. For example, women report pressures to vote with the men, rather than showing their "bias" by taking "pro-women" stances on particular issues.[119] Finally, the negative connotations associated with ambition in women may inhibit their desire to seek power within the union.[120]

Finally, I think that the male domination of union leadership produces a political climate which most women find inaccessible. The formality of bargaining may be alien and incomprehensible to women who have been in the workforce for a shorter time than men, and who have had little exposure to the mechanics of the system.[121] The *culture* of the trade union comprises a verbal

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[117]*Supra*, note 78 at 176. Collateral to this point, from a Canadian study comparing union leaders' perceptions of the concerns of women in unions with the women members' actual reported concerns, is the finding that male union leaders do not recognize this as a barrier to women's participation, while female union leaders do. See S. Hameed & J. Sen, "Perceived Barriers to Unionization of Women: A Survey of Canadian Union Leaders" in *Proceedings of the 23d Annual Meeting of the Canadian Industrial Relations Association* (Winnipeg: University of Manitoba, May 29-31, 1986) 125.

[118]S. Ledwith, F. Colgan, P. Joyce & M. Hayes, "The Making of Women Trade Union Leaders" (1990) 21 Ind. Rel. J. 112 at 113. See also J. White, *Women and Unions*, Prepared for the Canadian Advisory Council on the Status of Women (Ottawa: Minister of Supply and Services Canada, 1980) at 29-31; G. Lowe, "Problems and Issues in the Unionization of Female Workers: Some Reflections on the Case of Canadian Bank Employees" in N. Hersom & D. Smith, eds, *Proceedings and Papers From a Workshop Held at the University of British Columbia to Evaluate Strategic Research Needs in Women and the Canadian Labour Force* (Ottawa: Minister of Supply and Services Canada, 1982) 307 at 314; and J. Sen, "Towards a Theory of Unionization of Women" in H. Jain, ed., *Emerging Trends in Canadian Industrial Relations: Proceedings of the 24th Annual Meeting of the Canadian Industrial Relations Association* (Hamilton: McMaster University, 1987) at 637.

[119]T. Colling & L. Dickens, "Bargaining for Equality" (1990) 29 Equal Opportunity Rev. 22 at 23.

[120]This point brings to mind my own experience when I first joined a union at the age of 19. I consulted an older female co-worker, who had been a union member for many years, to learn how I might gain a better understanding of the workings of the union. She pulled me aside and informed me, in hushed tones, that only "militant lesbians" attended union meetings.

[121]Pollert, *supra*, note 114 at 96.

currency, a rhetoric — spoken and unspoken assumptions about protocol. All of these are part of a community from which women are tacitly excluded. This problem plays itself out in the attitudes of male union members to the female participants. In a study of the General and Municipal Workers' Union in England, male union members were interviewed about the women's contributions to internal union organization.[122] When women's issues were at stake, male union leaders often held special meetings, inviting only women to attend. They did so because they and other men in the union complained about the "unruliness" of women at meetings, and their lack of understanding of procedural formalities. Women who have tried to become active in union affairs report being ruled "out of order" or not being able to get their concerns put on the agenda at meetings,[123] or feeling that they had to work particularly hard in the union to prove themselves to be competent.[124] The result is that women feel silenced and lack confidence, which perpetuates "a vicious circle of non-involvement"[125] in the union.

Much of this discussion may beg the question, "Why don't women organize their own unions?" The answer is complicated for several reasons. First, not all of the reasons I discussed above related specifically to difficulties women confront due to sexist attitudes within mixed-gender unions. Women face the barrier of family commitments regardless of the demography of their union.[126] In addition, within a mixed-gender union, the factors inhibiting involvement would certainly also act to inhibit a movement to "break off" into a separate female union. Furthermore, non-unionized women have experienced tremendous difficulty in getting organized in largely female sectors of the workforce, the paradigmatic example being the banking sector. A study by Kumar and Cowan showed that this correlated with women's occupations and industries of employment, rather than gender *per se*.[127] For instance, in the banking industry, management has taken a very strong stance against unions and used a variety of tactics to preclude organizing activity.[128] However, as we have seen, gender

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[122]*Supra*, note 115.

[123]*Ibid.*

[124]*Supra*, note 77 at 186.

[125]Pollert, *supra*, note 114 at 106.

[126]And as noted at *supra*, note 114, Chaisson and Andiappan found this to be the most significant factor preventing women from gaining access to official posts in Canadian unions. See also Cornfield, Filho & Chun, *supra*, note 114.

[127]Kumar & Cowan, *supra*, note 98.

[128]For a full discussion of these tactics, which include interrogation and intimidation of employees, no solicitation rules, litigation based on legal loopholes in order to frustrate certification, disciplinary measures, pre-certification polling of employees to sway pro-union sentiment, and employee transfers, see E.J.S. Lennon, "Organizing the Unorganized: Unionization in the Chartered Banks of Canada" (1980) 18 Osgoode Hall L.J. 177; S. Muthuchidambaram, "Settlement of First Collective Agreement" (1980) 35 Rel. Ind. 387 at 390; and E. Beckett, "Unions and Bank Workers: Will the Twain Ever Meet?" Paper Prepared for the Women's Bureau, Labour Canada

and occupational segregation are intimately connected.[129] It is noteworthy that empirical evidence refutes any implication that women have less desire to organize than men.[130]

Let us return now to the academic criticisms of collective bargaining I presented earlier, and discuss how they might assist in addressing the ideological barriers that women face. Problems of gender exacerbate some of the tensions identified by these scholars. For example, both Klare and Weiler speak of the folly in denying the inevitability of conflict between labour and management. They recommend enhanced co-operation as a complement, rather than substitute for adversarial bargaining, the latter being the central lever of labour power.[131] The foregoing discussion illustrates that women, though not incapable of mastering conflict, tend to place particular value on exhausting co-operative methods of problem-solving before resorting to active confontation. Accepting the inevitability, indeed, necessity of some adversarialism in the labour-management relationship, the task of reform presents a dual challenge in responding to women workers. Reforms seeking to encourage the entry of women into the milieu of labour management relations should facilitate, not only the integration of more co-operative methods of participation, but also the modification of traditional bargaining structures to accomodate the constraints within women's lives.

Klare envisions a more politicized workforce.[132] But his enduring commitment to democratic forms in industrial governance makes sense only if one has faith in the justice of such arrangements. For the reasons I have outlined above, women feel alienated by, and remain excluded from, the democratic processes within union operations. Democracy, at least for women in mixed-gender unions, does not guarantee participation, though Klare is hopeful that the creation of more democratic employment structures will be informed by feminist consciousness.[133] He also speaks optimistically of the potential for minimum standards legislation to remedy the shortcomings of collective bargaining. In this regard, I believe that Klare's formulations for reconstruction may provide

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(Ottawa: Labour Canada and Minister of Supply and Services Canada, 1984) at 8. Furthermore, as I will discuss below, early labour board jurisprudence on bargaining unit determination in banks worked to the banks' favour.

[129]*Supra*, notes 101-109 and accompanying text.

[130]Studies by P. Marachak, cited in White, *supra*, note 118 at 30 (Canadian); and Moore, *supra*, note 116 at 106 (American) both found unorganized women to be *more* interested in becoming unionized than their male counterparts.

[131]K.E. Klare, *supra*, note 70 at 39; Weiler, *supra*, note 62 at 225-26.

[132]*Supra*, notes 61-65 & 70 and accompanying text.

[133]*Supra*, note 70 at 47.

answers to some of women's difficulties.[134] Nevertheless, the task before us is to devise ways to modify the structure of collective bargaining itself. In this way we can preserve the ideals of women workers' autonomy and self-governance (rather than turning solely to state intervention) while at the same time correcting for systemic gender bias.

Beatty does address the shortcomings of industrial democracy. I believe his assessment of women's situation would be that the subordination of women as we see it in the market is replicated in the union. The dominance of men is reinforced through majoritarian union politics, and women are the unwilling losers.[135] I find these arguments compelling and readily see their applicability to the reality of women's experiences in the collective bargaining setting. However, Beatty's solution to these inequities, a Bill of Rights for employed persons, or greater access to *Charter* remedies, should be approached with qualified optimism.

It is possible that the failures of the market, to the extent that they replicate themselves in collective bargaining, will again replicate themselves in the constitutional sphere. Chief Justice Dickson recognized this hazard in his majority judgment in *Slaight Communications Ltd.* v. *Davidson.*[136]

The constitutionalization of free market inequalities may occur on both substantive and procedural levels. Substantively, the *Charter* embraces liberal notions of individual rights. Judith Fudge cautions that rights discourse may abstract problems to a level removed from reality. Fudge argues that *Charter* jurisprudence, by and large, has been blind to the separation of public and private.[137] To the extent the public/private split is at the root of women's oppression, *Charter* jurisprudence has failed to correct for that oppression. Fudge analyzed *Charter* litigation in several areas of law, including labour, and found that the courts have tended to construe equality in a formal and narrow sense.[138] Formal equality does not take into account the full history and context of gender discrimination, a step necessary to ameliorating the subordination of women.

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[134]He specifically notes, in reference to women, that the elimination of the effects of labour market segmentation will require statutory intervention to reduce the work week, establish benefits for part-time workers, and improve childcare provisions. *Supra*, note 65 at 55.

[135]For a more detailed account of this position, see *supra*, notes 67-70 and accompanying text.

[136]The Chief Justice stated that "[t]he courts must be ... concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general" (*Slaight Communications Inc.* v. *Davidson* [1989] 1 S.C.R. 1038 at 1052, 59 D.L.R. (4th) 416). This decision is exceptional, however, among constitutional cases in the labour field. Patrick Macklem interprets this as being consistent with a recent ambivalence in the Supreme Court regarding the role of the contractualist ideal and its intrinsic individualism. See P. Macklem, "Developments In Employment Law: The 1988-89 Term" (1990) 1 Sup. Ct. L. Rev. (2d) 405.

[137]Fudge, *supra*, note 42 at 493.

[138]*Ibid.* at 489-509 & 530.

Thus legislation which formally treats men and women the same may have a disparate impact on women.

Fudge noted an exceptional case, *Action Travail des Femmes* v. *C.N.R.*[139] in which the Supreme Court of Canada affirmed the need to address systemic discrimination by implementing affirmative hiring programs in the workplace. Fudge warned, however, that we must be cautious not to read *Action Travail* as signalling a new judicial approach to equality.[140] The decision was merely a validation of the decision of an expert human rights tribunal (which the court quoted directly in the judgment), well versed in dealing with complex issues of equality. By contrast, Fudge argued, a challenge to s. 15 of the *Charter* would require the court independently to assess the scope of equality and strike down legislation if it saw fit.[141]

More recent judgments reviewing the decisions of human rights tribunals have followed the lead of *Action Travail* in promoting gender equality in the employment realm. The Supreme Court has ruled that both sexual harassment[142] and discrimination based on pregnancy[143] are forms of sex discrimination, which the employer has a responsibility to prevent.[144] Nevertheless, the Supreme Court has yet to address employment-related gender discrimination in the context of a challenge under s. 15 of the *Charter*.[145] However, even if rights adjudication

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[139]*Action Travail des Femmes* v. *C.N.R.*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193 [hereinafter *Action Travail* cited to S.C.R.].

[140]Fudge, *supra*, note 42 at 501.

[141]*Ibid.*

[142]"When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power" (*Janzen and Govereau* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284, 59 D.L.R. 4th 352, (Dickson C.J.)).

[143]"Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant" (*Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1242, 59 D.L.R. (4th) 321, (Dickson C.J.) (overruling *Bliss* v. *Attorney General of Canada*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 which held the opposite)).

[144]Though not in the context of sex discrimination, the Supreme Court has also held that an employer cannot justify discrimination on the basis of a "bona fide occupational qualification" (which has been a successful defence to discrimination on the basis of pregnancy: *Mack* v. *Marivtsan et al.*, [1989] 89 C.L.L.C. para. 17,004 (S.H.R.B.I.)) where there is indirect discrimination due to an adverse effect of a condition of employment. There is a duty on the employer, short of undue hardship, to accomodate the adversely affected employee or group: *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool et al.*, [1990] 2 S.C.R. 489, 6 W.W.R. 193. The Supreme Court also granted leave recently in a similar case from the British Columbia Court of Appeal in which the question is raised whether there is also a duty to accomodate on the union: *Renaud* v. *Board of School Trustees, District No. 23 (Central Okanagan) et. al.*, leave to appeal granted [1990] S.C.C. Bull. 1760.

[145]There is, however, an application in the Supreme Court of Canada for leave to appeal the decision of the Ontario Court of Appeal in *Re Tomen et al. and Federation of Women Teachers' Associations of Ontario et al.* (1989), 70 O.R. (2d) 48, 61 D.L.R. (4th) 565 in which a s. 15 argument was raised. The appellants are challenging a law which requires teachers to join certain unions based, in part, on their gender. The Ontario Court of Appeal dismissed the appeal without consid-

can further the interests of gender equality, it may not provide a complete solution. The assumption that legislators will respond to rights adjudication by implementing systemic reforms in employment law has been characterized as suffering strains of romanticism.[146]

Procedurally, using the *Charter* or *Canadian Bill of Rights*[147] may alter the relationship of the worker to the employer and to the state by making it legalistic, formal and ultimately, inaccessible. There may be reason to question the belief that the courts, complete with complex and formalistic procedures, adversarial norms, and costly, delayed proceedings, will be any more amenable to meaningful participation by women than the institution of collective bargaining itself.

In thinking about the merits of turning to rights as a solution to gender inequality, work in the area of race and legal reform might be helpful. Kimberlé Williams Crenshaw writes about the dilemma American Blacks face in evaluating the utility of liberal-based civil rights discourse in their struggle.[148] While the legitimation of a meritocratic free market has helped to co-opt Blacks through formal equality and reinforce the belief that they are socially inferior, rights discourse has also been the means by which Blacks have made their most important gains in American society. Crenshaw thinks the solution is the "pragmatic use of liberal ideology" in a way that preserves rights but transcends the oppositional dynamic in which Blacks are cast as subordinate.[149] Feminists, as well, may reap qualified benefits through human rights adjudication. While there is reason to remain wary of classical liberalism as an answer to feminist concerns, I agree with Crenshaw that "rights-talk" need not be wholly antithetical to progress towards equality and, in the labour milieu, more balanced participation.[150]

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ering the s. 15 argument on the ground that the impugned legislation was private and thus outside the scope of the *Charter*.

[146]Paul Weiler makes this point in cautioning against what he calls the romantic liberalism of David Beatty and others. See P. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labor and Employment Law" (1990) 40 U.T.L.J. 117 at 141.

[147]*Canadian Bill of Rights*, R.S.C. 1985, Appendix III.

[148]K.W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harvard L. Rev. 1331 at 1370.

[149]*Ibid.* at 1385-86.

[150]This echoes themes in the now-classic formulation by Duncan Kennedy of the "fundamental contradiction." Kennedy speaks of the inescapable tension, a pervasive theme in liberalism, between individual freedom and collective coercion:

> The very structures against which we rebel are necessarily within as well as outside of us. We are implicated in what we would transform, and it in us. This critical insight is not compatible with that sense of the purity of one's intention which seems often to have animated the enterprise of remaking the social world. None of this renders political practice impossible, or even problematic: we can overcome oppression without having overcome the fundamental contradiction, and do something against it. But it

III. Toward Structural Change: Selected Aspects of Collective Bargaining Law and Possibilities for Reform

I stated in the Introduction that although there are problems with current Canadian collective bargaining law, I endorse its aspiration, which is to enhance the participation of workers in determining the conditions that affect their lives. The question now is this: how can we preserve collective bargaining law while working to eliminate the processes which reinforce the social construction of gender? Statutory minimum standards, such as pay equity and anti-discrimination legislation, while salutory, operate "from the outside in." In other words, they attempt to remedy problems that arise, in part, from a defective process, but the process itself remains the same. In changing the process, we need to find ways to enhance opportunites for women to become involved in union activites, to voice their concerns, and to have those concerns met. In this Part of the paper, I will make several suggestions for reform within the framework of collective bargaining itself.

I mentioned earlier that collective bargaining legislation encourages a combative approach to dispute resolution. The strike and lockout (or threats of either) remain the prime arsenal in forcing agreement. Indeed, the right to strike is a primary, perhaps the primary, lever of worker power under collective bargaining law. At the same time, alternative methods of problem solving may better fit the sensibilities and encourage the participation of many workers, such as women, who fail to see strikes as the optimal path to dispute resolution.[151] This creates a paradox. Power, as traditionally conceptualized in the collective bargaining relationship, sits opposed to the full participation collective bargaining seeks to encourage. Despite this apparent dilemma, I think there is room for reconciliation of these competing concerns through the implementation of programs to facilitate greater co-operation between union and management. While not eliminating the strike and lockout as instruments of last resort, such programs might reduce the incentives of parties to make use of them.

Commentators have suggested an alternative model of collective bargaining which would seek to increase employee morale and productivity by replacing negative tactics with an atmosphere of accomodation, co-operation, trust, and respect.[152] Currently, collective bargaining statutes throughout Canada not only provide mechanisms for conciliation or mediation, but also usually require exhaustion of these procedures before the parties are legally permitted

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does mean proceeding on the basis of faith and hope in humanity, without the assurance of reason (D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205 at 212-13).

[151]See, *supra*, notes 58-61 and accompanying text.

[152]D. Yoder & P.D. Staudohar, "Rethinking the Role of Collective Bargaining" (1983) 34 Labor L.J. 311 at 314.

to strike or lockout.[153] However, these mechanisms constitute only one aspect of co-operative union-management relations. The sort of scheme I am referring to is far broader reaching. It would involve consultation between organized labour and mangagement in decisions affecting control of the enterprise.[154]

There is an extensive body of literature exploring this idea, to which my treatment here cannot do justice. However, for the purposes of illustration, I will sketch briefly how such a scheme might operate. An effective mechanism for enhancing co-operation at this level would be to create committees or teams, comprised of union and management representatives. These committees would meet on a scheduled basis to discuss issues arising in the maintenance of the collective agreement. As such, they would serve a troubleshooting function, as well as providing an educative role by broadening each party's awareness of the other's concerns. If successfully implemented, this type of network would cultivate a sense of common mission between management and labour, thereby reducing the mistrust that traditionally divides the two cultures.

Empirical and comparative research suggests that the success of such programs requires a significant commitment in principle and resources by both parties. The most effective joint labour-management teams are those having frequent (*e.g.*, weekly) meetings and which make decisions of some weight, rather than merely engaging in discussion or making recommendations.[155] Another effective technique is to give union members a "right of consultation" in decision-making at the plant and enterprise levels.[156] Evidence suggests that there is less resort to strike action where co-operative or horizontal rather than hierarchical union-management structures exist.[157] For one thing, union repre-

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[153]See, specifically, *Canada Labour Code*, R.S.C. 1985, c. L-2, ss 71 & 89; *Labour Relations Code*, S.A. 1988 c. L-1.2, ss 62 & 71-72; *Labour Code*, R.S.B.C. 1979, c. 212, as am., ss 137.3 & 81-82; *Labour Relations Act*, R.S.M. 1987, c. L-10, ss 67, 95 & 94; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss 36 & 91; *Labour Relations Act, 1977*, S.N. 1977, c. 64, ss 79 & 94; *Trade Union Act*, R.S.N.S. 1989, c. 475, ss 35 & 45; *Labour Relations Act*, R.S.O. 1980, c. 228, ss 16 & 72(2); *Labour Act*, R.S.P.E.I. 1988, c. L-1, ss 24 & 40(3); *Labour Code*, R.S.Q. c. C-27, ss 54 & 58, *Trade Union Act*, R.S.S. 1978, c. T-17, s. 22.

[154]For more comprehensive discussions of these principles, see D. Drache & H. Glasbeek, "The New Fordism in Canada: Capital's Offensive, Labour's Opportunity" (1989) 27 Osgoode Hall L.J. 517; K. Stone, "The Future of Collective Bargaining: A Review Essay" (1989) 58 U. Cin. L. Rev. 477; K. Stone, "Labor and Corporate Structure: Changing Conceptions and Emerging Possibilities" (1988) 55 U. Chi. L. Rev. 73; K.W. Wedderburn (Lord), "Trust, Corporation and the Worker" (1985) 23 Osgoode Hall L.J. 203; Weiler, *supra*, note 62, ch. 5.

[155]W. Cooke, "Factors Influencing the Effect of Joint Union-Management Programs on Employee-Supervisor Relations" (1990) 43 Ind. & Lab. Rel. Rev. 587.

[156]This type of system has met with considerable success in Sweden: for a description, see C. Summers, "Patterns of Dispute Resolution: Lessons From Four Countries" (1991) 12 Comp. Lab. L.J. 165 at 167-69.

[157]See *ibid.* at 168 and B. Levesque, "Cooperation et Syndicalisme: Le Cas des Relations du Travail dans les Caisses Populaires Desjardins" (1991) 46 Rel. Ind. 13.

sentatives can put the issue of greater decision-making power on the bargaining table. Better still, collective bargaining statutes could be amended to require or give unions the option of creating, by way of vote, horizontal management teams or rights of consultation. Though the strike may remain the ultimate challenge to employer control, with these more immediate levers of power in the hands of the union, the strike would become a less desirable alternative.

I am optimistic that the enhanced employee participation fostered by these methods would help transcend gender boundaries. The parties' working jointly and equally towards common goals such as harmonious relations and the success of the enterprise would instil a less oppositional atmosphere. The contextualized mode of problem-solving advocated by feminist scholars, examined earlier in this article, is fundamental to the present discussion. A collective bargaining scheme incorporating co-operative structures may well be conducive to a version of Bartlett's "feminist practical reasoning."[158] The parties would benefit by recognizing and confronting one another's divergences of interest, stating their assumptions and partialities, and seeking an empathetic understanding of each other's position. Such an atmosphere, according to the preceding analysis, would be less alienating to women and possibly other excluded groups of workers. Accordingly, employee participation would increase, and worker-management relations would take place under more harmonious conditions. The result would serve the interests of both parties and both genders.

To clarify further, I do not suggest simply that the parties should "be nice" to each other so that women will be more interested in participating. There is justified fear that such an approach could serve to cloak worker co-optation in a deceptive facade of co-operation. Although I maintain the belief that co-operative schemes will reduce the traditional combativeness of the bargaining relationship, this need not be synonymous with a reduction of union power. Rather, the notion of union-management co-operation envisages the replacement of one type of labour power by another. Power through the use of the strike and lockout weapons of economic force is at least partially replaced by power through the sharing of economic decision-making control.

Characterized in this light, co-operative schemes involve a radical shift in workplace proprieties. They require a modification of the prevailing understanding of management control as vested in ownership.[159] It may be that justice in employment requires a reconceptualization of the prerogatives of management and the social meaning of property. Patrick Macklem, for example, envisages a "relativist" conception of status and property in the employment milieu,

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[158]Bartlett, *supra*, note 28 and accompanying text.

[159]This understanding, popularly known as "reserve management rights," gives management, as owner (or agent thereof) of the enterprise, the right to make management decisions and use its property as it sees fit unless it has specifically bargained those rights away.

such that the rights attaching to managerial status and property are fluid and must be justified according to their context and purpose.[160]

In addition to facilitating positive change in the overall bargaining milieu, I would expect the structures put in place by these schemes also to be conducive to more direct measures for promoting workplace equality. In Canada, the only programs currently directed specifically at promoting equality are administered by umbrella groups hoping to increase general awareness. For example, the B.C. Federation of Labour set up a Women's Committee, which has recommended that employer monies be allocated to funding women's attendance at conferences devoted to enhancing women's participation, that women's committees be set up in unions throughout the province, that union meetings be scheduled during worktime or lunch hours, and that affirmative action be taken to place women in leadership positions in labour organizations across the country.[161] Some European countries, on the other hand, have attempted through legislation to implement such measures.[162] In Sweden, this has given rise to "equality committees," set up at the option of unions across the country, which lobby for and monitor the implementation of equality policies.[163] However, the formation of these committees, because it is optional, has met with some resistance.[164] A union may choose not to create such committees, and if it does, may pay lip service to their recommendations. Management, in turn, may reject any equality-enhancing proposals that the union does bring to the bargaining table. In light of early signs of success emanating from joint worker-management participation schemes generally, it may be fruitful to explore similar proposals for instituting equality-enhancing measures. Joint management-labour teams could be mandated, not only for the task of management, but also for the more specialized task of implementing equality measures.

The subject of equality within unions leads me to a second suggestion for legal reform, this one aimed at trade unions themselves. Collective bargaining statutes are relatively non-interventionist with respect to the constitution of trade unions. A minority of jurisdictions bar the certification of a union if it dis-

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[160]P. Macklem, "Property, Status and Workplace Organizing" (1990) 40 U.T.L.J. 74 at 96.

[161]See Women's Rights Committee, "Policy Statement on Eliminating Barriers to Women's Union Activities," *Summary of Proceedings of the B.C. Federation of Labour Annual Convention* (30 Nov. – 4 Dec. 1987) 142.

[162]See A. Cook, "Collective Bargaining as a Strategy for Achieving Equal Opportunity and Equal Pay: Sweden and West Germany" in R. Steinberg Ratner, ed., *Equal Employment Policy for Women: Strategies for Implementation in the United States, Canada and Western Europe* (Philadelphia: Temple University Press, 1980) 53.

[163]*Ibid.* at 69. The initiatives of these committees include on-the-job training of women in expert technical work, and men in typing, introduction of a shorter working week and flextime for both sexes, enhanced paternity leave provisions, and rotating chairmanships and group participation in policy planning and office committees.

[164]*Ibid.* at 70.

criminates on grounds of discrimination prohibited by human rights codes and the *Charter*.[165] Even these measures, however, would encounter enforcement obstacles. The worker who feels discriminated against but neverthless is eager to unionize faces a dilemma as to how to vote. The worker who wishes to defeat certification on the grounds of discrimination also faces a dilemma as to whether to make unrepresented submissions to the labour board, bear the costs of representation, or form a potentially uncomfortable alliance with the employer against the union. Finally, the employer wishing to defeat certification on this ground may not have access to evidence to support the claim. Perhaps it is no surprise that I can find no cases where certification was denied because of sex discrimination.

A more effective way to promote equality within unions would be to guarantee positive as well as negative rights. It could be required that affirmative equality guarantees be established as a precondition of certification. The most obvious strategy, already adopted voluntarily by some unions,[166] is to require that a certain number of seats be reserved for women in the union. There might be a requirement, for example, that there be proportional representation by gender in executive positions.

A third area where I see possibilities for equality-enhancing reform is "unfair labour practices." Collective bargaining statutes across Canada contain rules designed to prevent employers from interfering with union organizing activity. Accordingly, an employer cannot discriminate against, intimidate, threaten or otherwise discipline any person because of his or her participation in trade union activities.[167] However, these protections are tragically diluted by the limitations placed on how and when the employer's premises may be used for organizing activities. It lies wholly within the discretion of the employer to give a union access to its premises.[168] In addition, the employer is entitled to

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[165]B.C. *Labour Code*, s. 50; N.S. *Trade Union Act*, s. 24(15); Ont. *Labour Relations Act*, s. 13 and P.E.I. *Labour Act*, s. 14.

[166]See "Union Reserved Seats — Creating a Space for Women" (1990) 79 Labour Research 7; "Equality for Women in Trade Unions" (1990) 31 Equal Opportunities Rev. 18.

[167]*Canada Labour Code*, s. 94; Alberta *Labour Relations Code*, s. 146; B.C. *Labour Code*, s. 3; Manitoba *Labour Relations Act*, s. 6; N.B. *Industrial Relations Act*, s. 6; Newfoundland *Labour Relations Act*, s. 25; N.S. *Trade Union Act*, s. 51; Ont. *Labour Relations Act*, s. 66; P.E.I. *Labour Act*, s. 9; Quebec *Labour Code*, s. 14; Saskatchewan *Trade Union Act*, s. 11.

[168]As an example of the potential consequences of this rule, in *R.* v. *Labelle* (1965) 1 O.R. 321, 48 D.L.R. (2d) 37 (C.A.) union organizers were held liable in trespass for entering, for the purpose of lawful union organizing, property for which the employer held a land use permit. Exceptions, however, may be made where geographical constraints make it impossible or impracticable for the union to gain access to the employees without entering the employer's premises. See *Cadillac Fairview Corporation Ltd.* v. *Retail, Wholesale and Department Store Union et al.* (1989) 71 O.R. (2d) 206, 64 D.L.R. (4th) 267 (C.A.) [hereinafter *Cadillac Fairview*] (employer located in shopping mall); and *TNL Construction Ltd.* v. *Canadian Iron, Steel and Industrial Workers Union,*

prohibit union activites during working hours. Labour boards have upheld employer rules strictly limiting union activities to before or after the workday[169] and further, have withdrawn unfair labour practices protections where activities have occured during the working day.[170] Furthermore, despite the fact there is nothing in labour relations statutes to prohibit union activities during break and lunch periods at work, *Cominco*[171] has been taken as authority that the employer can also regulate the conduct of employees during this time and discipline those who overstep the bounds of permissible break-time organizing. These decisions reflect a policy of balancing the workers' rights to undertake trade union activities against the employer's right to run an efficient business.[172] Clearly implicit in this policy is deference to the concept of reserve management rights, discussed earlier.

However, in addition, by allowing employers to prohibit union activities during working hours and restrict them during non-working hours, the law puts those who are unable to attend meetings before and after work at a disadvantage. Because women tend to have the least flexibility outside working hours due to family obligations, these provisions have a disparate impact on women. As a first suggestion for reform in this area, collective bargaining laws could oblige the employer to provide the workers with some minimum monthly period of working time for organizing activities. Certainly, collective bargaining legislation is designed to maximize the freedom of the parties to strike the terms of their own agreement, but in the context in which it operates — a regime where

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Local 1 (1989) 90 C.L.L.C. para. 16,026 (B.C.I.R.C.) (employer operation at remote mining site accessible only by helicopter).

[169]See *Cadillac Fairview, ibid.*; *International Chinese Restaurant* [1977] O.L.R.B. Rep. 681; *Adams Mine, Cliffs of Canada Ltd.* [1982] O.L.R.B. Rep. 1767 [hereinafter *Adams Mine*]; *Ottawa-Carleton Regional Transit Commission* [1985]. But see *Re Michelin Tires (Canada) Ltd. and United Rubber, Cork, Linoleum and Plastic Workers of America, et al.* (1979), 35 N.S.R. (2d) 104, 107 D.L.R. (3d) 661 (C.A.), in which the Board arguably permitted an employer to prevent organizing activities outside the workday as well. The Board, although it issued a cease and desist order against the employer for extending a no-solicitation rule to periods outside working hours, held that it was not empowered under the Nova Scotia Act to order the employer to send a letter to employees explaining the effect of the cease and desist order.

[170]See *Union of Bank Employees, Local 2104 (C.L.C.)* v. *Canadian Imperial Bank of Commerce*, (1985) 85 C.L.L.C. para. 16,021; *Consolidated Fastfrate*, [1980] O.L.R.B. Rep. 418 at 421, and *Adams Mine, ibid.* However, it has been held on more than one occasion that employees' wearing union pins while working is not solicitation and thus ordering their removal constitutes an unfair labour practice by the employer: *Quan* v. *Canada (Treasury Board)*, [1990] 2 F.C. 191, 107 N.R. 147 (C.A.); *Union of Bank Emplyees (B.C. and Yukon), Local 2100* v. *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches*, (1979) 80 C.L.L.C. para. 16,001 (C.L.R.B.); *United Steelworkers of America* v. *Rosco Metal Products Ltd.*, (1964) 64 C.L.L.C. para. 16,303 (O.L.R.B.).

[171]*Cominco Ltd.* v. *Canadian Association of Industrial Mechanical and Allied Workers, Locals 23, 24, 25, 26 and 27 and United Steelworkers, Locals 480, 651, 8320, 9705 and 9672*, [1981] 3 Can. L.R.B.R. 499 (B.C.L.R.B.).

[172]*Consolidated Fastfrate Ltd., supra*, note 170.

both parties benefit from stable collective employee representation — it seems reasonable that management be required to bear some of the costs of securing fair and adequate representation. At a minimum, the legislation could compel one or both parties to provide child-care facilities or expenses for union meetings taking place outside working hours.

A fourth area meriting discussion is bargaining unit determination. Bargaining unit determination has been emphatically described as a determination of "the essential power relation in industrial relations" and "nearly everything of consequence."[173] Labour relations boards generally have unfettered discretion to determine the appropriate bargaining unit.[174] There is a multitude of competing considerations in determining bargaining unit size.[175] The larger the bargaining unit, the more powerful its bargaining position relative to the employer. However, the interests of marginalized groups within the unit are likely to be sacrificed in favour of a strong and unified collective voice. Where bargaining units are small and decentralized, on the other hand, they may be less powerful, but can more faithfully represent the unique interests of their constituents. Furthermore, they are easier to organize because of the ease of communication and harmony of interests possible within a small cohesive group. However, another disadvantage of small units is that the achievement of industrial stability may be more difficult. Where fragmented units represent workers in interdependent segments of one industrial sector, a strike by one bargaining unit may disrupt the entire industry.

I see this as particularly pertinent to women's situation, where personal contacts and a sense of support from the immediate community are more important than pressure from a large group in encouraging union membership.[176] However, the smaller unit suffers pitfalls beyond lack of bargaining power. For example, the high turnover of employees in female-dominated fields may make it difficult to maintain continuity and coherence within small units. It has also been suggested that, in smaller units, closer personal relations are likely to

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[173]J. Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws'" [1990] Wisconsin L. Rev. 1 at 121.

[174]See, respectively, *Canada Labour Code*, s. 27; Alberta *Labour Relations Code*, s. 32; B.C. *Labour Code*, s. 42; Manitoba *Labour Relations Act*, s. 45(1); N.B. *Industrial Relations Act*, s. 13(1); Newfoundland *Labour Relations Act*, s. 37(1); N.S. *Trade Union Act*, s. 24(4); Ont. *Labour Relations Act*, s. 6; P.E.I. *Labour Act*, s. 12; Saskatchewan *Trade Union Act*, s. 5(a). In Quebec, however, the Labour Commissioner is restricted to requests by the parties and the specifics of applications made (Quebec *Labour Code*, s. 28).

[175]The B.C. Labour Board reviewed them in *Insurance Corporation of British Columbia* v. *Canadian Union of Public Employees et al.*, [1974] 1 Can. L.R.B.R. 403 (B.C.L.R.B.). There is also a substantial body of literature on the subject. Two discussions I found useful are in B. Langille, "The Michelin Amendment in Context," (1981) 6 Dalhousie L.J. 523 and P. Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 151-78.

[176]Lowe, *supra*, note 118 at 331-32.

develop between employees and supervisors and serve as a deterrent to organization.[177] Regarding the latter point, however, it might equally be argued that the closely knit community composing a small bargaining unit could support resistance and liberation as easily as acquiescence and accomodation.[178]

The poignancy of the dilemma is illustrated in the history of unionization failures in female-dominated occupations, such as bank and clerical workers in Canada. In the mid-1970's the female office employees of the Canadian Imperial Bank of Commerce campaigned vigorously, led by the Service, Office and Retail Workers Union of Canada (S.O.R.W.U.C.), a feminist union, for branch-by-branch bargaining units.[179] They saw this strategy as a foil for their fiercely anti-union employer and the barriers to organizing the 2,000 branches dispersed across Canada. After a history of labour board resistance to branch-based units,[180] the bank workers rejoiced at the pathbreaking decision of the Canada Labour Board that individual branches were more appropriate units for representing their "communities of interest."[181] It was not long, however, before a whole new set of difficulties emerged with the decentralized units. Union leaders faced onerous organizational and financial burdens in having to negotiate for each branch individually. Furthermore, the banks were intransigent in their refusal to accomodate the union's request to negotiate a single master agreement. One year after the celebrated Labour Board ruling, S.O.R.W.U.C., unable to meet the demands on its resources, had its bank certifications cancelled. Similar difficulties defeated the attempt of Eaton's department store clerks, once certified in 14 bargaining units spread across 6 Ontario stores, to bargain effectively with the employer.[182] The pointed refusal of the employer to negotiate a master agreement or even to meet with more than one bargaining unit at a time resulted in frustration, expense, delays and, ultimately, the decertification of the union. These tactics were legal, and indeed, found to be consistent with a legitimate employer policy to engage in "hard bargaining."[183]

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[177]See Lennon, *supra*, note 128 at 226.

[178]See R. Austin, "Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress" (1988) 41 Stan. L. Rev. 1 at 29-35.

[179]My sources for this discussion, where the campaign was analyzed at greater length, are Lennon, *supra*, note 128; and Weiler, *supra*, note 175 at 15-20.

[180]*Kitimat, Terrace and District General Workers Union Local No. 1538 CLC* v. *Bank of Nova Scotia, Kitimat* (1959) 59 C.L.L.C. para. 18,152 (C.L.R.B.); *Syndicat National des Employés de la Banque Canadienne Nationale* v. *La Banque Canadienne National*, (1967) 67 C.L.L.C. para. 16,010 (C.L.R.B.).

[181]*Service, Office and Retail Workers Union of Canada* v. *Canadian Imperial Bank of Commerce* [1977] 2 Can. L.R.B.R. 99 (C.L.R.B.).

[182]See A. Forrest, "Organizing Eaton's: Do the Old Laws Still Work?" (1988) 8 Windsor Y.B. Access Just. 190.

[183]*Retail, Wholesale and Department Store Union* v. *T. Eaton Company Ltd. et al.*, (1984) 84 C.L.L.C. para. 16,026 (O.L.R.B.).

The Canada Labour Board later retreated from its endorsement of branch-specific bargaining units, adopting instead the concept of "clusters" of establishments on the basis of geographical area. The policy of labour boards across Canada appears generally to be to avoid fragmentation in favour of large centralized units able to bring enough economic pressure to bear on the employer to have some impact. The Ontario Board, on the other hand, has recently favoured regimes of smaller units in some sectors,[184] expressing concern about difficulties the union might otherwise have in reconciling competing interests,[185] and the broader impact this may have on the viability of the bargaining relationship.[186]

We return, then, to the original dilemma, which labour boards evidently have been unable to resolve in a consistent manner. One way to deal with the tension described above could be to occupy some middle ground between strictly independent local bargaining units and a single broad-based unit. For example, a labour board might certify small units to facilitate the fledgling stages of organization but then allow some form of enlargement later.[187] Although such practice might ultimately result in some compromise of the interests and autonomy of individual units, it is arguably a justifiable *quid pro quo* for the achievement of certification. A variety of techniques, such as amalgamation,[188] certification of trade union councils,[189] "sweeping in"[190] and decentralization of unions[191] have been explored elsewhere and, though not without their own difficulties, merit further investigation.

Conclusions

In this article I have argued from a feminist perspective that collective bargaining fails to create justice, equality, participation and autonomy, both among workers and between workers and employers. I advocate applying feminist methods in the context of workplace conduct and organization because I am optimistic of their transformative potential for both men and women in the

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[184]For example, among trust company workers *National Trust*, [1988] O.L.R.B. Rep. 168.

[185]*Kidd Creek Mines Ltd.*, [1984] O.L.R.B. Rep. 481 at 495.

[186]*Adams Furniture Co. Limited*, [1975] O.L.R.B. Rep. 491 at 493.

[187]The B.C. Board discussed the advantages of this approach in *Woodward Stores (Vancouver) Ltd.* v. *Graphic Arts International Union, Local 210 and Bakery and Confectionary Workers International Union of America, Local 468*, [1975] 1 Can. L.R.B.R. 114 (B.C.L.R.B.); see also *The Original Dutch Pannekeok House Ltd. and the Frying Dutchman Restaurants Ltd.* v. *Hotel, Restaurant & Culinary Employees Union and Bartenders Union, Local 40* (1978), [1979] 1 Can. L.R.B.R. 212 (B.C.L.R.B.).

[188]A. Forrest, "Bargaining Units and Bargaining Power" (1986) 41 Rel. Ind. 840 at 849.

[189]Weiler, *supra*, note 175 at 165-68.

[190]Langille, *supra*, note 175.

[191]Weiler, *supra*, note 62 at 222-23.

labour law setting.[192] I do not want, however, to be over-simplistic in my criticism of the combative nature of traditional collective bargaining. While a de-emphasis of opposition may serve to increase the participation and empowerment of women within the collective bargaining setting, it would be unrealistic to believe that it could be dispensed with entirely in the current regime or perhaps in any regime. Indeed, an absolute elimination of opposition between workers and employers would be regressive. It would be a bittersweet victory indeed if workers seeking to reduce conflict in their relations with the employer paid the price of presumed consent to their own domination.

Part of the goal of feminism is to find ways for women to challenge traditional power structures. This is, intrinsically, an exercise in opposition. But while conflict may be necessary to social change, I think there is also room for evolution of the methodologies employed. If opposition breeds opposition, then conversely, methods more conducive to mutual support, sense of community, and co-operative participation may assist in altering the tenor of the workplace as a whole.

I believe in the potential of collective bargaining among other forms of employment regulation to help build this new working environment and permit employees to play a meaningful role in shaping the conditions of their working lives. Many of the system's flaws are rooted much more deeply, in the foundational ideological premises of our society. The task of reformulating such ideology is immense. It would be naive to presume that modifications to collective bargaining law are the panacea for this greater ailment. Nevertheless, I have made some suggestions for reform within the current bargaining framework in the hope that they can serve as examples of initial steps towards transformation.

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[192]Nancy Ehrenreich similarly argues that legal measures against sexual harassment based on feminist principles will help "reveal to men the narrow confines of their own gender identities, thus enabling them to see that feminist reforms (ultimately) offer benefits to both sexes" (N.S. Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law" (1990) 99 Yale L.J. 1177 at 1230).