Sanger as "the belief that the real, true 'whatness' of women is motherhood."[20] Nor do I wish to suggest that women experience mothering in predetermined ways simply because they are women, or that they are thus ideally suited to be bearers and raisers of children in ways that men are not. Furthermore, I recognize that women's experiences of mothering are as varied as women themselves and that women mother in a range of contexts, as single mothers, adoptive mothers, non-custodial mothers, as partners in a lesbian relationship or a common-law relationship, or within a marriage.[21] As well there are the new biotechnologically created mothers such as "surrogate mothers" or "donor" mothers, who are not included in the scope of this book. I do assert, however, that motherwork is a realm of experience that is very real for many women, but often overlooked in law and in feminist legal theory. Mothering needs to be acknowledged as part of a complete feminist understanding of women's choices in society and women's full equality.[22] How, then, is mothering affected by law and how are the effects different for differently situated mothers? One thing is clear: laws do not support mothers and mothers pay twice for the children they have chosen to mother. This is double jeopardy.

Chapter 2

REGULATING MOTHERS

THE LAW AND FEMINISM

> The problematic arises when, in the name of liberation, untying "woman" from "mother" results in or leads to a delineation of liberation that precludes mothering.
>
> — Mielle Chandler, "Emancipated Subjectivities and the Subjugation of Mothering Practices," *Redefining Motherhood*

IT IS IMPORTANT to outline some of the basic legal concepts that underlie the arguments I make in this book.[1] How does law function in western democratic societies, and in Canadian society in particular? How do feminist theories approach the issue of mothering? How has feminist thought contributed to the development of feminist legal theory? In many instances, feminist legal theory has shaped arguments on behalf of mothers facing the courts. Yet, in their attempts to attain equality through law, feminists face challenges from the legal institutions and from political and social forces like the "pro-family" organizations. It is also important, in light of these feminist, legal and anti-feminist theories, that I identify and assess my own position. This assessement will give you a sense of the basis on which I advocate the changes to law and policy to better benefit mothers.

WHAT IS LAW?

Law is commonly described by its function within society, that is, as a system of rules that exists to guide or govern human conduct. Where humans live in groups, there is a need for a system for resolving conflicts that may arise among individuals or between individuals and the state. Part of the law's self-definition is that the law manifests the common values of society and resolves the conflicts that arise in an impartial, neutral and objective manner. The law, then, is not simply a set of rules but also a system or process that shapes the society within which it functions.

Law is commonly depicted as the figure of Justice, the blindfolded woman with the scales and the sword. This vision of the law is translated in western legal systems as the Rule of Law, which states that everyone is subject to the law, and no-one is exempt. It also requires that the law treats everyone in the same manner. Considered to be the foundation of an ordered and civilized society, the Rule of Law presents legal decision making as a function of rational processes, not arbitrary ones, and is intended to exclude the biases or discretion of judges in their decision making.

At a more concrete level, the law is also the set of rules that govern a particular society. In the Canadian context, those rules are found in judicial decisions and in statutes and regulations, which are the laws passed by Parliament and provincial legislatures within their own areas of legal competence. A written constitution is also a source of legal rules. The *Charter of Rights and Freedoms*[2] is the example most relevant to the discussion in this book. With the exception of Quebec, Canada's legal system is derived from the English common-law system. The federal and provincial judicial systems operate on this basis. Quebec, however, operates on a civil-law system that has its origins in the French legal system. In the common-law provinces, and at the federal level, the decisions of judges constitute part of the law and their decisions are known collectively as the common law.

There is a hierarchy among the judicial decisions — decisions made in the higher-level courts are binding on decisions in similar cases made in the lower-level courts. This is known as the principle of *stare decisis* (a Latin phrase meaning "to stand by decided matters").

When a court declares what the law is to be in a certain case, that ruling becomes an authority or precedent that must be considered and followed by other judges when they are determining what law should apply in other similar cases. Judges are bound to decide a new case on the basis of a previous decision, where that previous decision is substantially the same as the problem the judge is resolving. The more similar the precedent, the more the principle of *stare decisis* requires the judge to follow the precedent case. To determine the similarities in the cases, a judge uses two methods of common-law analysis — "analogy" and "distinction." In cases where a common-law rule may be applied, the judge must consider the extent to which precedent cases are similar, or "analogous," to or different, or "distinct," from the case to be decided. The system of *stare decisis* establishes a level of stability within the law. This stability also implies, however, that the law may be slow in responding to change.

The Canadian judicial system is known as an adversarial system where vigorous advocacy on the part of parties on each side of an issue help the judge to discover the truth. The judge's task, then, becomes to find the facts based upon the evidence provided by the parties. In this role the judge is known as the "trier of fact." A jury may also fulfil the role of trier of fact. After making findings of fact, the judge must then interpret and apply the relevant statutes or precedent cases to come to a correct decision. A party who is not satisfied that the decision was the correct one may appeal the finding of the trial judge to the provincial Court of Appeal. In some circumstances, there may be a further appeal to the Supreme Court of Canada, although the Court will not automatically hear all appeals but will grant leave to hear those of national significance. The Supreme Court is also not bound by *stare decisis* as are the lower courts but may overrule its own previous decisions, if it is persuaded that a proper interpretation of the law requires it.

This description may give the impression that all or most disputes are resolved only after recourse to the courts. In fact, the opposite is a more accurate description. People in conflict will often resolve their issues in light of their own understanding of the type of resolution that might be dictated by law. Those who cannot resolve their issues informally may consult lawyers who will give their advice

on the basis of their professional judgement of the facts of the dispute and the law as it is likely to be applied. With the increasing availability of alternative dispute resolution mechanisms such as mediation, few matters make it to court (and even some of these are settled on the steps of the courthouse) and even fewer progress through the higher courts in the path I've just described.

In spite of this reality, many of the cases that I discuss here are decisions made by provincial appeal courts and the Supreme Court of Canada. The reason for this focus is that the pronouncements of the Supreme Court are generally on broad issues of national significance. They are also binding on lower courts and so can be considered to be indicative of the direction of developments in law. I use these higher-level court decisions to indicate the way the law characterizes mothers and their motherwork.

The law is also considered not to be political but rather to be separate from the political sphere. The functions of the state in Canada are divided into three branches: the legislative, which makes the laws; the executive, which is obliged to carry out the laws; and the judicial, which is responsible for interpreting the laws and adjudicating disputes under the laws. One branch is not permitted to encroach upon the domain of the others. According to this understanding, judges are not responsible for "making" or "reforming" the law but simply for applying it. Feminist thinkers have challenged this vision of the law.

KEY FEMINIST THEORIES

Feminism is both theory and practice about working for social change to improve the position of women in the world and to eliminate systemic gender inequality. While feminists may share these general goals, their understandings of how to achieve them, or even of what precisely they may mean in particular contexts, are shaped by their varied experiences and philosophical backgrounds. While attempts to categorize feminist approaches risk being rigid and thus misleading, there are several commonly recognized branches of feminist theory that I briefly discuss here.

LIBERAL FEMINISM

Some feminist theories are derived from existing political theories. Liberal feminism, for instance, is rooted in theoretical liberal notions of rationality and objectivity, and of the individual as a separate and autonomous entity. Liberal theory tends to look at situations and individuals in the abstract, not in a particular social context. Liberal feminists apply these notions to the situation of gender inequality. According to liberal feminist theorists, the inequality experienced by women in society is the result of socialization and gender roles rather than the result of particular biological differences between men and women. Therefore, women will achieve equality when true equality of opportunity exists and changes in gender roles are necessary to attain this. Liberal feminism is based on the rational, objective approach of traditional liberalism and maintains that what is required to change women's position within society is simply for women to clearly communicate their rights and visions for change. In response, the state will make modifications to what is essentially a fair society. The basis for this argument is that gender inequality is simply a question of a misunderstanding, and that rational argument can persuade those in positions of power to implement changes that will put women on a level playing field with men.

Liberal feminism's vision of equality is captured in the phrase "equality of opportunity." Commonly known as "formal equality," this vision is based on Aristotle's dictum that those who are alike should be treated alike, to the extent of their likeness, and those who are different should be treated differently, to the extent of their difference. In the context of gender equality, women may be treated like men to the extent that they are "similarly situated" to men. Where they are not, they may be treated differently. The male standard is the norm, and women are entitled to equality to the extent that they become more like men. A liberal notion of equality also relies upon gender neutrality as a means of achieving equality. This vision of equality has not been unproblematic in resolving equality issues related to maternity, since a pregnant woman is in many ways not similarly situated to a man.

SOCIALIST FEMINISM

Like liberal feminism, socialist feminism is based upon pre-existing political theory. Marxism provides the basis upon which socialist feminism is constructed. Under Marxism, the primary form of oppression is identified as capitalism, which is seen as creating a division between productive work that takes place in the marketplace and reproductive work that takes place within the home. Capitalism, then, is at the root of the public/private divide. Socialist feminists recognize the intersection between women's labour in the workforce and their home-based labour of caregiving. They also recognize that women's oppression is based not only on gender but also on issues of class. The socialist-feminist framework looks critically at the fact that women's reproductive and mothering work are simply means of producing more labourers for the capitalist world. Criticisms of the public/private divide are prevalent in feminist thought, and probably originated with socialist feminists.

The boundaries that exist between the public and the private spheres are fluid and shift over time; even the definition of what is public or private varies, depending upon the context of the debate. The public/private divide may variously describe the demarcation between the state and the market, the state and the family, or the market and the family. Key to any feminist discussion of the dichotomy is the recognition that these divisions are divisions of power and that the power is distributed along lines of gender, race, class, sexual identity, ability and disability. Consequently, an analysis that takes into account "separate spheres" theorizing is complicated by the recognition that boundaries shift between the spheres and that inequalities of power exist among groups. Many feminist thinkers who have used the public/private divide as a basis of their theorizing are now becoming critical of the extent to which, in this era of fiscal cutbacks, states are increasingly moving previously "public" responsibilities into the "private" sphere. The socialist feminist perspective is critical of this increasing privatization of social responsibility.

RADICAL FEMINISM

The radical feminist perspective developed at least partially in

response to the limitations of liberal feminism. The radical feminist movement was started by women working in sexual assault crisis centres and who were concerned about violence against women and reproductive choice. These activists focused on and analyzed the relationship between power and sexuality. Within this context, women's situation is seen not merely as one of inequality with respect to men but rather as one of oppression. Radical feminists maintain that inequality in society is systemic in nature, and propose a radical vision of substantive equality that is concerned with equality of outcome, unlike formal equality that is concerned only with equality of opportunity. This vision of equality does not advocate merely treating likes alike, but aims to alleviate the disadvantages under which unequal groups suffer so that they may partake equally in the riches of society. Radical feminism proposes that patriarchy has structured society in a way that is most advantageous for men. As a result, a real change in women's position can come about only with a radical transformation of society that moves away from the "malestream" model to a more inclusive one.

CULTURAL FEMINISM

Considered by some to be a branch of radical feminism, but also derived from European theorizing, cultural or relational feminism maintains that men and women have inherently different natures. From this point of view, women's inequality results more from society undervaluing the functions and qualities commonly attributed to women than from inequality of opportunity. Cultural feminists are thus interested in reclaiming and according social value to the feminine. Cultural feminist work has examined such areas as mothering and other relationship aspects of women's lives as well as female moral reasoning, noting that women reason in ways that emphasize responsibility and relationships. In this respect, work of feminists in this area has been important in resisting the assimilationist influence of liberal feminism.

Each of these feminist theories has come under criticism throughout the past decade for their failure to take adequate account of the standpoint of racialized groups. None of these feminist frameworks has been immune to the accusation that they represent

primarily the interests of white and often middle-class women. Concerns relevant to women who experience oppression not simply because of their gender but also because of their racialized identity, their disability, their class or their sexual orientation have not been adequately included. These critiques urge upon feminist theorists the need to incorporate diversity and to consider the way in which differences are defined. The ability to define difference and to set the purpose for that definition means that inequalities and oppression are in fact social practices that allow the exercise of power among women and not just by men.

POSTMODERNISM

Another recent and significant influence on feminist theories has been postmodernism, which rejects the notion that a single, knowable authoritative truth exists. Instead, postmodernism envisions a world in which many truths compete. Knowledge, according to postmodern theory, emanates from power, and power can be found everywhere. Postmodernism uses deconstruction and the interrogation of discourses as its methodology. For example, in this book I engage in a deconstruction of judicial decisions and various laws as they pertain to mothers. That is to say, I look at how the law has characterized mothers and how this characterization has affected mothers' options within society, as well as who has the power to shape or create these options and who has the power to avail herself of them.

FEMINIST APPROACHES TO MOTHERING

Historically, "mothering" has been considered to be either natural or private, and thus has not been a subject that has been discussed or analyzed in public or scholarly forums. In contrast, much has been written about "motherhood." With the second wave of feminism in the 1960s and '70s, motherhood became the subject of much feminist writing, although a lot of that writing dealt more with abstract and symbolic notions of motherhood than with the concrete realities of women who were mothering. Many feminist thinkers have not been interested in the subject, given that a strong focus of feminist

thought has been on increasing women's autonomy and power.[3] Feminism's usual response to issues about mothering has been to condemn the universally prescribed nature of the mother role and the ideology of motherhood as being primarily responsible for the oppression of women. The liberal feminist theory of "equality of opportunity" has dominated feminist discussions of mothering, encouraging women to seek equality in the public sphere. This viewpoint envisions women as being entitled, just as men are, to be both paid workers and parents of children, without any recognition of what is entailed in being a mother.

There are other, more extreme feminist approaches to motherhood. For some, women's liberation from male dominance is inextricably linked to the liberation of both men and women from compulsory parenthood. According to this theory, the proper response of feminists to motherhood is outright rejection. At the opposite end of the spectrum are the feminist theorists who attempt to revalue the feminine and reclaim mothering. These thinkers identify feminist ambivalence about the feminine as being responsible for the devaluation of mothering. As we can see, the feminist literature on mothering is varied and challenging.

Mothering is now taking a more prominent position on the agendas of feminist writers and activists, and a more central place in Women's Studies programs. Feminists are engaging in the challenges that mothering and motherhood present to feminist theory and are tackling the question of how the maternal dimension of women's lives can be taken into account. A tension in these theoretical writings revolves around the reconciliation of the autonomous and encumbered positions of subjectivity that accurately describe the reality of mothering. This book is intended to be a contribution to these ongoing dialogues.

FEMINIST LEGAL THEORY

Feminist legal thinkers, representing the full spectrum of feminist theory, have responded to the version of law outlined at the opening of this chapter. Their views challenge the vision of law as impartial, neutral and objective, and they argue that the law functions in the service of a patriarchal system. Further, because the law deals with

abstract legal persons rather than people within their particular context, it tends to be unresponsive to the needs of people who don't fit the liberal model of the individual. Some feminist legal theory, drawing upon postmodern theory, also questions the ability of law to lay claim to a single truth.

The functioning of the legal system has also been challenged or criticized by many feminist writers. Professor Mary Jane Mossman has put forward perhaps the clearest explanation of how the functioning of the legal system fails women.[4] She has identified three elements of traditional legal method that have allowed it to evade the feminist challenge. The first is the power of law to declare its own boundaries, to define certain matters as moral or political and thus outside the realm of law, which has allowed women's concerns to be excluded. This definition of boundaries allows legal actors to claim full expertise and neutrality within these boundaries and to refuse to step outside them, which enhances the legitimacy of law. The second is the definition of relevance in the traditional legal analysis, which often means that the particularity of women's experience can be "legitimately" excluded because it is deemed to be irrelevant. The third element is the use of precedent in judicial decision making. From the range of previous cases that may bear on an issue, a judge is free to follow one (or several) as good law and to distinguish and disregard other decisions. This latitude leaves ample opportunity to exclude feminist concerns.

Through these legal methods, legal discourse is divorced from women's day-to-day lives. Feminist legal theorists continue to critique the functioning of the Canadian legal system and strive in new and creative ways to combat the partiality (that is, both the incompleteness and the bias) of the system's current manifestation. Their aim is to transform it into a more inclusive and complete body of law. According to Carol Smart, it is imperative that feminist legal theorists "seek to construct feminist discourses on laws" and reject "abstract theorization which can be validated without reference to the material world."[5]

THE "PRO-FAMILY" MOVEMENT

One area of theorizing and advocacy particularly relevant to the subject of this book is the "pro-family" movement in Canada. This movement is a conservative one and can fairly be labelled as anti-feminist. Its primary concern is to preserve or re-establish traditional gender relations within society and within the family. Women's and men's positions in society are believed to be natural and based in innate biological differences rather than learned behaviour. Therefore, the division of labour between the sexes is considered to be appropriate and functional for society as a whole. One of the central tenets of the "pro-family" movement is that the heterosexual family is the fundamental building block of society. As a result, advocates argue that Canada's social policy should be structured in a way that promotes and protects that type of family, especially the ideal model that has a single-breadwinner father and a stay-at-home mother.

Related policies promoted by the "pro-family" movement include making divorce more difficult to obtain and reserving marriage for heterosexual couples. Many "pro-family" organizations actively oppose access to abortion, affirmative action, a national childcare program, equal pay for work of equal value and other more "radical" reforms aimed at achieving substantive gender equality. While it may be the case that some of the policy changes advocated by the "pro-family" movement, particularly those with respect to the income-tax system, are similar to those advocated here, the policy proposals contained in this book are aimed at a broader, more inclusive gender equality that includes women in all their circumstances, with or without children, as workers and full citizens.

THE POLITICAL IS PERSONAL

An author must set out the philosophical or theoretical position from which she advocates to allow a reader to accurately assess and weigh the arguments that are presented. Leaving my own ideological perspective unstated risks conferring on my work the legitimacy of apparent neutrality, making it much more difficult for a reader to confront the political commitments or engagements within which my work is rooted. No work can be value free, as authors naturally

bring their own perspectives to bear on their work, but setting these out allows the reader to evaluate the rest of the work in light of these stated perspectives.

The risk with the position I take, which validates what may be characterized as a traditional role for women, is that I will reinforce the "pro-family"/anti-feminist premise that I am seeking to oppose. I consider the risk necessary, however, in order to signal that feminists do uphold women's freedom to choose a role that is considered traditional, and value the work that is done within this role. However, I am actively seeking to have motherwork recognized as valuable without compromising the gains that women have made or the choices that other women are making and without suggesting any of the regressive changes that others in this debate have advanced. Perhaps for these reasons, I find it difficult to apply exclusively any of the feminist theories discussed to describe the position from which I am writing.

I am a mother. I write from experience. I do motherwork. Daily. I believe the experience of dailiness is crucial to sound critical analysis and to theory and policy formulation. Without grounding in concrete facts or information, authors tend to draw tidy doctrinal or normative conclusions unhindered by "messy details." In the context of maternity, Marie Ashe has argued that such grounding is vital because "no escape from the incoherence of public discussion of pregnancy and childbirth will be available without reference to the discourse of women who have in our own bodies, experienced maternity." Although she talks of being grounded in the context of women who have given birth to their children, the logic can be extended to the specific work of women mothering in a variety of contexts. Ashe goes on to propose that "such first person narrative, without claiming to be 'the voice of nature,' can contribute to the resolution of the contradiction inherent in present legal theories of maternity." She maintains that "such female discourse may represent a departure from the limitations of both an 'essentialism' that purports to define 'the nature of women' and an 'egalitarianism' that ignores the significance, for many women, of uniquely and exclusively female experiences."[6] While resulting policy positions and proposals may be more complex and less conclusive, they will also be strengthened by incorporating such insights.

I am a feminist. I share the views held by radical feminists in that I see the inequality of women as being systemic in nature. I also see women's inequality as being related to their position as mothers and as motherworkers. In this sense I also share some of the views held by cultural or relational feminists. I also lean towards socialist feminism, recognizing that the greatest challenges of mothering are magnified for women with the fewest economic resources. I might even lay claim to the postmodernist label, as I maintain that mothers have a knowledge and power that derives directly from their hands-on experience of daily mothering and that this knowledge and power must be included in feminist thinking. Yet I am reluctant to apply a single label and prefer to consider examples of women's inequality free of any prior commitments to a particular feminist stance.

I am an activist. I want to make the law and society more responsive to women's lived experience of mothering. In order to accomplish this, it is important to look at the role of the law in creating the situation within which women mother, as well as the effectiveness of using legal means to improve the situation for mothers. Such a reformist approach highlights a tension that exists in a lot of legal writing, a tension between pure theory and the imperative to *do something.* For legal academics whose concern with law is more than merely academic but rather is purposive and reform-oriented, it seems to be clear that we must somehow look beyond our ivy-covered walls and beyond our own individual experiences, to try to gain some notion of "the world out there" and the place and functioning of law in it.[7] My own involvement with the law and my interest in being a law teacher and a legal academic are about my concern with change and my desire to "make law serve society better." I am unable to accept the point of view that I have no responsibility to direct my efforts towards positive social ends. And while I share the skepticism of those who doubt the instrumental nature of law and who question our ability to consider anything even approaching "reality," I am unprepared to let that deter me in my efforts.

I agree with Madam Justice Wilson, a retired judge of the Supreme Court of Canada, who said on the occasion of her swearing in for the Ontario Court of Appeal in January 1976, that "people and

the law are inextricably intertwined, and the role of the profession is essentially to serve the needs of the people."[8] I see my role as examining the ways that the law can serve the needs of the particular people who are mothers and children. I want all of our children, should they choose to become mothers or to do motherwork, to have real choices about the maternal dimensions of their lives.

Chapter 3

SEEING MOTHERS

INVISIBILITY AND POVERTY

> I have come to believe over and over again that what is most important to me must be spoken, made verbal and shared, even at the risk of having it bruised or misunderstood.
>
> — Audre Lorde, *Sister Outsider*

THE EXPERIENCE OF MOTHERING is not one that is really known either in popular culture or in law, and it remains at the margins of scholarly inquiry, even in such disciplines as Women's Studies. There are many myths or stereotypes of what it is to be a mother or that dictate how a mother should be. There are heated debates, amplified by the media, whether "working mothers" or "stay-at-home mothers" are better for the children. But there is little clear *public* discussion by mothers of what mothering means to them, or of how their work as mothers could be supported and recognized in a meaningful way in contemporary North American society. By contrast, mothers are having these discussions among themselves on the playgrounds, in office cafeterias, on the Internet and in other places where mothers have a chance to meet and share. Within this context, policy is formulated and cases are decided that have a direct effect upon women who are mothering, often with the result that these policies and cases do not reflect the lived experience of the mothers who are touched by them.

The law does not recognize and is not responsive to mothers'