

REVIEW

**In the Shadow of the Law:
Divorce in Canada 1900–1939**

James G. Snell
University of Toronto Press, 1991
xii, 322 pp.

*Alison Diduck**

IN 1991 I PARTICIPATED in convening a gathering of scholars from across Canada who worked in the field of prairie women's legal history.¹ The geographical dimension aside, we discovered some surprise among social historians, anthropologists, and political scholars with our suggestion that they might be doing *legal* history. We hoped at the time to encourage a blurring of divisions between law and what are more traditionally known as social science disciplines, and were committed to the views of historians like E.P. Thompson who suggested that in his study of history "law did not keep politely to a 'level' but was at *every* bloody level,"² and lawyers like R.W. Gordon who wrote:

the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.³

In stating these views in the introduction to his text, *In the Shadow of the Law: Divorce in Canada 1900–1939*, one of a series on the social history of Canada published by the University of Toronto Press, James Snell appears to share our commitment.

* Lecturer in Law, Department of Law, Brunel University.

¹ "Conversations Across Disciplines: Women, Law and Prairie History," 22 November, 1991. Sponsored by the Canadian Legal History Project, Faculty of Law, University of Manitoba and the Legal Research Institute, University of Manitoba.

² E.P. Thompson, *The Poverty of Theory and Other Essays* (New York, 1978), cited in J.G. Snell, *In the Shadow of the Law: Divorce in Canada 1900–1939* (Toronto: University of Toronto Press, 1991) at 7.

³ R.W. Gordon, "Critical Legal Histories," (1984) 36 *Stanford L. Rev.* 109, cited in Snell, *ibid.* at 7.

Professor Snell is an historian at the University of Guelph and has ably put together analyses of law, parliamentary proceedings and social history to produce an accessible and complete study of not only divorce in Canada, as the title suggests, but also of the family and its powerful ideology in the first four decades of the twentieth century. From the beginning of his book Snell's view of law is clear. He sees it as not only a site of struggle, but also as a vital player in the process of social formation.⁴ His work is an example of social history, legal history, gender studies and politics. It reveals how the ideology of the conjugal family structure was both reinforced and reflected by the many institutions of the state. The issue of divorce is, in many ways, only the lens through which he observes the Canadian family at this time.

Snell is not a lawyer. He attempts to make his work user-friendly for other non-lawyers by including a glossary of legal terms. In many ways this is but a gesture, however, and is less helpful than the idea would seem at first. The glossary is not extensive, and includes terms like "condonation" and "judicial divorce," which are certainly terms of art for lawyers, but which I felt were adequately explained in the text. The glossary gives the illusion of accommodating non-lawyers to the legal nature of the text. Due not least to the curious selection of which terms to include, it does not really achieve its purpose. For example, although "collusion" has both a colloquial and a legal meaning and is therefore included in the glossary, so does "adultery," which is not included. It struck me that the glossary was a gesture designed to pierce the intimidating veil of mystique and self importance with which law surrounds itself, but one which really serves no useful purpose in this text other than to alert the reader to the truism that law speaks in its own language.

Snell's primary research sources were trial records, law reports, legislative debates, and government documents, including the annual Statutes of Canada publications in which he found the only surviving information on parliamentary divorces. However, his view of history is not entirely "from above." Snell makes more than occasional reference to other sources: letters from aggrieved individuals (found in the private papers of politicians and government officials); the popular press; and reports of various non-governmental agencies. In an instructive appendix which includes a "Note on Sources," he describes his reasoning behind choosing the jurisdictions and records relied upon. An interesting observation to arise from many of Snell's

⁴ *Ibid.*

sources is the dramatic negative influence of “a peculiarly British Canadian construction” of the United States on potential divorce reform in Canada.⁵ Liberal divorce laws in many of the states were seen as the cause of moral decay within that nation, and opponents to reform referred to them again and again in the Canadian debate.

In Part 1 of the text, Snell describes what he terms the “divorce environment” in Canada of the period in question and discusses the public and private culture of the family and the role of the state in creating and maintaining it. He examines how institutions of the state including law, the church,⁶ the King’s Proctor, the media and non-governmental agencies repeatedly confirmed an ideology extolling the class and gender-based conjugal family. In Part 2, Snell looks more particularly at how people actually behaved within that environment and includes a chapter containing statistics of purely demographic information about who was marrying and divorcing whom.

All told, this book does not provide a theoretical analysis of why things happened the way they did, but it does provide some clear pictures of what was happening and the consequences of those actions for Canadians. It also provides insights into the power of a dominant ideology to (paraphrasing Gordon) persuade people that the conjugal family ideal described in its images and categories was the only way of living to which a sane person would aspire. Further, Snell demonstrates how that conjugal family ideal lay at the very heart of the social, and, as others would argue, economic system of early twentieth century Canada.⁷

Neither surprisingly nor radically for many readers, Snell identifies class and gender as the two fundamental components of the ideal conjugal family and the law which supported it. In embracing this feminist and class analysis, Snell’s work is different from other histories of divorce such as Lawrence Stone’s lively English study, *Road to Divorce: England 1530–1987*.⁸ Starting from the position that property is at the heart of marriage and divorce laws, Snell reveals the importance of class in defining those laws and shows how legal

⁵ I am grateful to Professor Wes Pue for suggesting this phrase to me.

⁶ Snell only discusses various denominations of the Protestant Christian church and the Roman Catholic church. One is left to wonder about the public views on divorce of other religious denominations. Missing, for example, are the views of members of non-European religions, Jews, and Orthodox Christians.

⁷ See for example J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: The Women’s Press, 1992).

⁸ L. Stone, *Road to Divorce: England 1530–1987* (Oxford: Oxford University Press, 1990).

reform in both areas, by necessity, reflected middle class concerns. According to Snell, "[i]nheritance and the transmission of property were central to most divorces."⁹ Although less powerful classes participated in reshaping divorce and family law over the years, "they were nonetheless required to conform to the basic values and ideas inherent in the legal environment."¹⁰ Further, Snell records differences in the divorce behaviour among different classes.

While the concept of social class is fundamental to Snell's study, he is aware of the difficulties involved in using class as an interpretive tool. He discusses these difficulties in the second part of the appendix, which he calls "Social Class and Occupation." In it Snell demonstrates that he is sensitive to debate within the social sciences and among Marxist theorists as to assignation of class membership based on indicators such as one's relation to the means of production, the size of one's share of the social wealth, or — the means used by Snell himself — occupation. Snell's recognition of these methodological difficulties did not, for me, detract significantly from the strength of his arguments. In addition to class, gender roles and the power distribution between the sexes are integral to the notion of the family, and Snell then points out that "[r]elated to the question of property and inheritance was a second issue: the man's traditional need to be certain that he was the father of his wife's children."¹¹ From this perspective, the view that marriage and divorce laws were concerned with maintaining patriarchal power in the family becomes evident. One can more easily understand the law's traditional and long-standing reliance on adultery as the only offence serious enough to warrant a divorce, its insistence that a married woman had no domicile of her own and the general limitation of legal rights for married women. Further understanding of these laws is assisted by a good chapter on how the judiciary decided issues of importance for women such as legal domicile and recognition of foreign divorce.

While he examines the rigidity of gender roles for both men and women, Snell states quite succinctly that "[a] study of divorce reveals both women's systematic inequality in marriage and their continuing struggles to alter that situation."¹² Any attack on the status quo was seen as an attack on the power distribution within the family and, I

⁹ Snell, *supra* note 2 at 8.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.* at 9.

would further argue, on the place of the family within a society committed to reproducing a patriarchal and class system.

Snell gives many examples of how gender roles played an important part in defining the ideal family and thereby influenced both the course of law reform and the interpretation of law on a case-by-case basis. Through the importance of its part in maintaining strictly prescribed gender roles in the family as well as in the broader society, divorce law reflected a politically loaded ideology.¹³ Further, Snell also notes the law's power to feed back into the ideology of the ideal family and thereby assist in *constructing* realities for society. Only private, procreative, nurturing and supportive roles were supported and created for women by the culture of the conjugal family, and the family in this way played a role in "defining and giving expression to modern womanhood."¹⁴ A "true woman" was a "true wife." Mother, comforter and nurturer — she played a distinct and complementary role to her husband's public one in society. Both men's and women's roles in the so-called public and private spheres were expressed through divorce law, labour law, criminal law, immigration law, the Christian Church and the popular press.¹⁵ Furthermore, although contrary to the lived realities of many working class people, the ideal of the male-dominated, middle class family eventually successfully infiltrated into their lives and those of Canadians generally, such that this notion of the family indeed became the social foundation of Canadian society.

Snell writes as an observer and describer of this "environment," and Canadians' divorce behaviour within it. He analyzes the course of divorce and family law reform in this context. Snell describes the intricacies of parliamentary divorce, the complicated legislative history of provincial and federal divorce law and the role of the judiciary in applying the law's normative principles. His observations are insightful and clearly written. He does not, however, attempt to theorize the environment itself; readers interested in this sort of analysis must refer to other works in this area — two interesting recent examples of which are Jane Ursel's *Private Lives, Public Policy*:

¹³ Indeed, in addition to the frequency with which the gender issue arises in all sections of the book, Snell devotes a whole chapter to it in Part 2 of the book; see Chapter 7 — The Role of Gender.

¹⁴ *Ibid.* at 23.

¹⁵ *Ibid.* at 23–27.

*100 Years of State Intervention in the Family*¹⁶ and Dorothy Chunn's *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario 1880-1940*.¹⁷

Generally, this book highlights a number of issues. First, Snell reveals the gradual expansion of the law and the state into the lives of Canadians. One example of this is the discrediting of "supernatural" law in the form of religion and the concurrent legitimation of the "rational" in the form of positive law. The Canadian state was concerned to preserve a certain morality for society. Snell's work suggests that the relative importance of the roles of religion and law in assisting with this project shifted dramatically. Moral rules within the Christian religions over time became embedded in the discourse of law. By way of example, Snell discusses the Christian churches' influence in creating and maintaining the ideology of the family and the divorce environment, and suggests that it participated in "enforcing official standards of morality, family structure and sexual conduct."¹⁸ He then goes on to suggest law's coup over religion as the guardian of morality by referring to several speeches made in Parliament about the role of law. Legislators, who most frequently voted according to their religious beliefs, felt that through restrictive divorce laws, the state could control the immorality of actual marriage breakdown.¹⁹

Snell does not ignore the use of "scientification" as a legitimator of discourses in his brief, but telling, examples of how eugenic considerations formed part of the family and divorce ideal.²⁰ The ideal Canadian family was of a certain image; not only was it to be reproduced socially, the law attempted to be in control genetically as well. The stated objective of early domestic relations courts, or "social clinics," was to defend the ideology of the family by "mediating" (coercing?) proper behaviour within the working class family. In the era of moral reform, that court was concerned with "rehabilitation" and "social adjustment" of deviant working class families, rather than

¹⁶ *Supra* note 7 at 4.

¹⁷ D. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario 1880-1940* (Toronto: University of Toronto Press, 1992).

¹⁸ Snell, *supra* note 2 at 17.

¹⁹ *Ibid.* at 52.

²⁰ On eugenics and its history in Canada, see A. McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: McLelland and Stewart, 1990).

in distributing punishment.²¹ Snell pointedly mentions that punishment meant incarceration, which would result in “breeding criminals by the wholesale.”²² Indeed, Snell shows us that dejudicialization of family matters goes much further back than the modern 1980’s and 1990’s versions of it, and he provides an interesting historical perspective of its class-based origins.

Finally, Snell reveals that the expansion of the state was not surprisingly accompanied by its increased legitimacy in the minds of Canadians. He includes a chapter on extra-legal divorce behaviour, underlining the importance of community and custom in marriage and divorce, but notes as well that, throughout the period of his study, increased recourse was made to the state to legitimize people’s living arrangements.

Increasingly, informal (or non-state) divorce processes were abandoned, and spouses turned to the state as the most authoritative and powerful body in contemporary society. While family and community opinion still exerted considerable influence, for many couples their authority was an inadequate sanction for the dissolution of their marriage.²³

The desire for state approval reached to all classes and cultures, and Snell reproduces letters written to state officials by people requesting that approval, whether it be in the form of a “remarriage permit,”²⁴ or simply a “paper to prove I am free of him.”²⁵ In the only reference he makes to aboriginal culture, Snell illustrates the power of the ideology, and the strength of the desire for “official” approval, by telling the story of an aboriginal man who worked as a locomotive engineer. The man was forced to “appeal to the dominant attitudes of the local society and the legal system” and to “denigrate his own racial background”²⁶ when he applied to the Court for custody of his

²¹ D. Chunn, “Maternal Feminism, Legal Professionalism and Political Pragmatism: The Rise and Fall of Magistrate Margaret Patterson, 1924–1934” in Pue and Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History*, (Ottawa: Carleton University Press, 1988) at 101. See also Chunn, *supra* note 7 at 8; and S.B. Boyd, “Peculiar Paradoxes: Legal Regulation of Families and Women’s Lives,” (1993) 8 *Can. J. Law & Soc.* 171.

²² Snell, *supra* note 2 at 120.

²³ *Ibid.* at 256.

²⁴ *Ibid.* at 246.

²⁵ *Ibid.* at 247.

²⁶ *Ibid.* at 176.

children. His request to the Court was based on the fact that his wife, since going off to live with another man, "has been residing on an Indian reserve in a home where [the children] would not be in good moral surroundings."²⁷

Secondly, Snell effectively demonstrates that the power of the ideology of the family was not simply a barrier to reform of divorce law, but was used to facilitate legal reform as well. Those in favour of divorce reform were not in any way suggesting reform of the family structure or family ideology; they "accepted the essential elements of the dominant familial ideal; state instruments, including the courts and the law, ought to be used in the most effective manner to support that ideal."²⁸ Sometimes, then, one needed a second chance to achieve the model Canadian family.

Snell's history does more than merely outline the complicated legislative history and application of Canadian divorce law. It is a study of the growth of state and legal intervention in one's everyday life and the leading role that law takes in "organizing and expressing beliefs and social relationships."²⁹ Importantly, it is also a study of how people, particularly women, struggled, resisted and adapted that law to make their lives more livable.

One of the most striking aspects of Canadian divorce in the early twentieth century is the way in which Canadian women asserted their own rights and sought to meet their own needs in marriage and family. Women were not just token participants in the formal and informal divorce process; they were not simply 'allowed' by their husbands to act as the 'innocent' party in a divorce action. Women made many of their own choices, and sought both formal and informal solutions to their marital problems.³⁰

This is one of Snell's main themes. In positing law as a site of resistance, rather than as solely an instrument of ideological oppression, he ascribes some power to the many Canadians who "pioneered" the way toward modern Canadian divorce and who manipulated the existing process by "taking advantage of existing loopholes in some instances and creating others where necessary... and in doing so resisted the immediate authority of the divorce environment even as they sought the sanction of that authority".³¹

²⁷ *Ibid.*

²⁸ *Ibid.* at 74.

²⁹ *Ibid.* at 262.

³⁰ *Ibid.* at 264.

³¹ *Ibid.* at 17.

As is the function of history, Snell's work sheds light on contemporary law and society. It allows for explanation as to why women then (and now) tended to make up the majority of petitioners³² even though they stood to lose the most after divorce, and why family law is still marginalized as a women's concern. Moreover, if the ideal of the family is a way of conceptualizing self and social relationships, and the state of family law is a reflection of women's degree of emancipation in any society, it is clearer why attacks on the conjugal or "support service"³³ family today are still seen as striking at the heart of social stability and organization. These views are not historical anachronisms; the plethora of political calls for a return to "traditional family values" are indices of the continued strength of the ideal conjugal family over the five decades since the period of Snell's study. This book urges us to recognize that "our current law is not neutral with regard to family form, structure, or roles."³⁴ By understanding the dynamics of history in this regard, we can better understand the dynamics of law and dominant ideology today.

Finally, Snell demonstrates that legal history is alive and well in Canadian scholarship. Further, simply by integrating an understanding of women's concerns into his history of divorce, he shows that *women's* legal history has come some way from its previous marginalization as a speciality of a few feminist scholars. Although the co-convenors of that first Manitoba workshop³⁵ are now dispersed among various parts of the globe, this one, at least, welcomes Snell's contribution to that body of literature.

³² Except for the period immediately following the First World War.

³³ See Ursel, *supra* note 7 at 4.

³⁴ Snell, *supra* note 2 at 261.

³⁵ Professor Wes Pue holds the Nemetz Chair in Legal History at the Faculty of Law, University of British Columbia; Professor Alvin Esau is Director of the Legal Research Institute at the Faculty of Law, University of Manitoba; and Alison Diduck is Lecturer in Law at Brunel University, Middlesex, England. I am grateful to both Professors Pue and Esau for the insights and encouragement they have provided to me in the study of legal history, and to Professor Pue for his always valuable comments and suggestions on this review.