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Depriving Law Reform of Its Potential? *New Perspectives on the Public-Private Divide* Law Commission of Canada, Ed. (Vancouver: University of British Columbia Press, 2003)

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DEPRIVING LAW REFORM OF ITS POTENTIAL? *NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE*, LAW COMMISSION OF CANADA, ED. (VANCOUVER: UNIVERSITY OF BRITISH COLUMBIA PRESS, 2003)

New Perspectives on the Public-Private Divide is the second installment in a new series, Legal Dimensions, sponsored by the Canadian Association of Law Teachers, the Canadian Law and Society Association, the Canadian Council of Law Deans and the Law Commission of Canada.[1] The ambitions of this series are large: to "examine various issues of law reform from a multidisciplinary perspective [and] ... to advance our knowledge about law and society through the analysis of fundamental aspects of law."[2]

The focus on the public-private divide is an excellent choice for the Legal Dimensions Series for no matter how one conceptualizes the relationship, or what one thinks about it, it is incontrovertible that the distinction between public and private is a foundational aspect of contemporary understandings of the nature and function of law.[3] The multidisciplinary ambitions of the series are also fulfilled, not only because the authors come from disciplines such as Communications, Geography, Philosophy as well as Law, but also because the lawyers draw heavily on other disciplines such as feminist political economy, governance theory and industrial relations. As such, this volume does "advance our knowledge about law and society"[4] in significant and, in my view, quite exciting ways. However, the third side of the pyramid — issues of law reform — is more difficult to get a sense of in this collection. This last point will be the main focus of this brief review.

But first, a brief overview of the collection is necessary. The book opens with a lithe introduction by Nathalie Des Rosiers, President of the Law Commission of Canada, who outlines the complexity of even conceptualizing the public-private dichotomy, pitches a helpful analytic framework of personal, social, economic and governance relationships, and offers some lessons for law reform. Lisa Phillips, a lawyer, begins the substantive analyses with a concise but powerful indictment of conventional gendered structurings of the workforce in which women's private unpaid housework subsidizes men's public paid work. She then rapidly proceeds to delineate two potentially progressive counterprinciples — anti-free ride and integration. Phillips plays out the significance of these principles in three broad areas: labour markets and business enterprises, personal income tax law and family law. Geographers Damian Collins and Nicholas Blomley also highlight issues of inequality, but their focus is on the intersection between anti-panhandling laws, the meaning of money and the significance of public space — especially downtowns — and how law is used to try to purify that public space through the criminalization of begging. Philosopher Nathan Brett

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1 The first contribution was Law Commission of Canada, *Personal Relationships of Dependence and Interdependence in Law* (Vancouver: University of British Columbia Press, 2002). Forthcoming installments include volumes dealing with *What is a Crime?, Law and Risk, Law and Citizenship* and *Indigenous Legal Traditions*.

2 Law Commission of Canada, ed., *New Perspectives on the Public-Private Divide*, Legal Dimensions Series (Vancouver: University of British Columbia Press, 2003) at publication page.

3 Two other recent explorations are Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997); Brenda Cossman & Judy Fudge, eds., *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

4 *Supra* note 2.

draws on liberal political philosophy to protest the privatization of public goods via the patenting of genes to emphasize the inegalitarian consequences of such a move. Darrin Barney, a professor of Communications, draws on Aristotelian (Arendtian) and critical (Habermasian) theory to argue that digital networks are a threat to a vibrant and engaged political sphere because they priorize economic preferences and consumption and thereby reinforce patterns of individuation and passivity. Stepan Wood, a lawyer heavily influenced by Foucauldian governance theory, argues that the emergence of voluntary environmental standards with their emphasis on technological expertise results in a depoliticization and privatization of important environmental challenges. Finally, Christian Brunelle, another lawyer, returns us to the theme of inequality by arguing that unions, as hybrid public-private representative institutions, need to be more responsive to the diverse needs of their increasingly heterogeneous, identity-based membership.

Despite the disciplinary diversity of the authors and the variety of substantive areas under discussion there is a strong unifying theme in the collection: despondency. The basic message that pervades the various disciplinary discourses is that privatization is on the increase, that public participation and accountability are on the wane and that the long term prognosis is one of increasing social, economic and political inequality.

Analytically, there is much to support the authors' collective position. But the question remains: what is to be done? Or, more precisely in the context of the Legal Dimensions Series, what can law do? Is law reform possible? Such questions necessarily raise the question of what do we mean by law reform? Traditionally in Canada, this last question has generated two schools of thought: the legal law reformers and the social law reformers.[5] The former have argued that the basic function of law reform is to modernize legal rules to *reflect* the changing norms of society, be they economic, social or moral.[6] The latter have argued that what is required is a more ambitious project, social law reform, where the function of legal reform is *proactive*, to provide direction for economic, social or moral change, usually in the pursuit of some egalitarian ideals.

What is curious about *New Perspectives on the Public-Private Divide* is that the law reform question is so underanalyzed. Some of the contributors seem to ignore it completely (Brett, Barney, Brunelle) while others touch upon it only obliquely (Collins & Blomley). Wood makes some "tentative suggestions"[7] as to "how law can be used to resist the

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5 The pre-eminent article in this genre is Robert A. Samek, "A Case for Social Law Reform" (1977) 55 Can. Bar Rev. 409. See also, Noel Lyon, "Law Reform Needs Reform" (1974) 12 Osgoode Hall L.J. 422; Roderick A. MacDonald, "Access to Justice and Law Reform" (1990) 10 Windsor Y.B. Access Just. 287; Roderick A. MacDonald, "Access to Justice and Law Reform # 2" (2002) 19 Windsor Y.B. Access Just. 317; Richard F. Devlin, "Twisting the Tourniquet Around the Pulse of Conventional Legal Wisdom: Jurisprudence and Law Reform in the Work of Robert A. Samek" (1987) 11 Dal. L.J. 157; Mary Jane Mossman, "'Running Hard to Stand Still': The Paradox of Family Law Reform" (1994) 17 Dal. L.J. 5; Audrey Macklin, "Law Reform Error: Retry or Abort?" (1993) 16 Dal. L.J. 395.

6 For an example of the response to changing economic norms see Nova Scotia Law Reform Commission, *Privity of Contract Rules (third party rights): Final Report* (Halifax: Nova Scotia Law Reform Commission, 2004). For an example of a response to changing social norms, see Law Reform Commission of Canada, *Report on Sexual Offences* (Ottawa: Law Reform Commission, 1978). For an example of a response to changing moral norms see, Law Reform Commission of Canada, *Working Paper 58, Crimes Against the Foetus* (Ottawa: Law Reform Commission of Canada, 1989).

7 *Supra* note 2 at 148.

depoliticization of environmental management"[8] but confesses "[j]ust how this might be done is a question for further research."[9] It is only Lisa Phillips and Nathalie Des Rosiers who fully engage the issue. Phillips proposes a programmatic approach to law reform through her suggestions for the legal regulation of labour markets and business enterprises, personal income tax and family law. This puts her squarely within the social law reformer tradition.

Des Rosiers' introduction explicitly addresses the question of "Lessons for Law Reform." Her suggestions are potent, but excessively brief: a mere two pages. Des Rosiers advances three claims. "First, any law reform initiative must question the claim that the public-private distinction has universal appeal ... we must speak about the functions of the distinction, its purpose and its use, as opposed to assuming its undeniable existence."[10] "Second ... the public private divide is a concept that can be manipulated and it does influence the power dynamics between people."[11] Both these points are salutary reminders, but it is her third point that is most provocative:

> [L]aw reform must speak to more than governments, and it must engage the public ... [it] should allow a multiplicity of sites to debate the appropriate values that ought to support human conduct ... [it] must also speak to a multitude of actors and to a plurality of normative orders.... Ultimately, law reform must contribute to the creation of a questioning and self-reflecting legal culture — one that moves beyond the law as an icon and towards the law as a living and self-questioning entity.[12]

This third claim echoes the core themes of the "discursive turn" that has become apparent in much recent political and legal theory.[13] Law (and law reform) should facilitate progressive democracy by creating fora for engaged, inclusive, rational and reflective debate. But how far does such a dialogic vision take us? Is it materially grounded? For example, in this volume itself, most of the authors (except perhaps Phillips) — despite their disciplinary diversity — seem to toil in the long shadow of economic determinism: that technologically, ideologically, sociologically and politically the private economic interests of global capitalism are in the ascendancy. If these are accurate portrayals, is dialogic law reform sufficient? Does it have enough normative backbone to promote not just discursive equality but grounded substantive equality for an increasingly disempowered citizenry?

New Perspectives on the Public-Private Divide is an elegant, highly readable, thoroughly researched and decidedly enlightening collection of essays. The authors take us a long way in our understanding of the pervasive and interlocking impact of the public-private dynamic. And for the most part they paint a depressingly bleak picture. But, with respect, this is not enough. By way of conclusion, let me briefly suggest one alternative strategy for future scholarly consideration. Law reform scholarship might want to consider the diverse structures and institutions of law making, both public and private, to investigate whether they can be prised open to the democratic participatory and egalitarian impulses that each of the authors

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8 *Ibid.* at 149.
9 *Ibid.* at 150.
10 *Ibid.* at xv.
11 *Ibid.* at xvi.
12 *Ibid.* at xvi-xvii.
13 See most obviously, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).

seems to support. Traces of such an approach can be found in the contributions of both Phillips and Wood, but they need to be foregrounded in order to nourish and promote "structure-revising-structures"[14] rather than elite-enhancing-structures. Law reform proposals that focus on either the modification of substantive rules or the creation of discursive opportunities are undoubtedly helpful, but if democracy and equality are our normative lodestars then we need to foster institutional processes that can be conduits for reconstructive engagements.[15]

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[14] Roberto Mangabeira Unger, *False Necessity, Anti-Necessitarian Social Theory in the Service of Radical Democracy* Part I of Politics, A Work in Constructive Social Theory (Cambridge: Cambridge University Press, 1987) at 341-595.

[15] For further explorations of these ideas in the context of bureaucracies and the judiciary see Richard Devlin & Ronalda Murphy "Reconfiguration Through Consultation? A Modest (Judicial) Proposal" in Michael Murphy, ed., *Canada: The State of the Federation 2003. Reconfiguring Aboriginal-State Relations* (Kingston: Institute of Intergovernmental Relations, 2005) 267; and Justice Donna Hackett & Richard Devlin, "Constitutional Law Reform: Implementing Equality Rights and Social Context Education for Judges" (2005) [forthcoming].