

What Is Left of *Pelech*?

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I. INTRODUCTION

In core areas of private law, lawyers and judges routinely cite cases centuries old. The great English judges of the 18th and 19th centuries still speak through their judgments on property, contracts and torts, while the most eminent Quebec judges of the 19th century retain relevance for the civil law of property and obligations. By contrast, in family law it is rare to cite a case 40 or even 30 years old. A Denning family judgment from 1950 appears almost ancient. Legislatures have rightly relegated to the history books rules and doctrines repugnant to present observers, such as the doctrine of coverture and the hierarchy of illegitimate filiations. The sense seems to be that the repeal of the rules they elaborated has rendered those old judgments, and commentary on them, irrelevant. One need not mourn the demise of these ghastly instances of family regulation to wonder if the forward-looking briskness of scholars has perhaps deprived family law of the historically minded reflection — so evident in other areas — on how the meaning and significance of judicial and scholarly texts change over time. Instead of rereading old judgments and doctrine in light of subsequent decisions, research and events, family law scholars often enough just ignore them.

If the enterprise of this volume consists in rereading Justice Bertha Wilson from a temporal distance, three judgments of hers, known collectively as the *Pelech* trilogy,¹ are especially well-suited to serve as

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¹ *Pelech v. Pelech*, [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.) [hereinafter "*Pelech*"]; *Richardson v. Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857 (S.C.C.) [hereinafter "*Richardson*"]; *Caron v. Caron*, [1987] S.C.J. No. 32, [1987] 1 S.C.R. 892 (S.C.C.).

point of departure for inquiry into the life of family law judgments and scholarship over time. These judgments are suitable in part because they turned on the extent to which texts — in those cases separation agreements concluded by estranged spouses — retain force to govern the future or succumb to the hazards of later events. This paper's concern is not the durability of an agreement between particular former spouses, but that of Justice Wilson's reasons and the sophisticated critical reaction they provoked, much of it avowedly feminist. It adopts a socio-legal focus on texts in evolutionary motion, rejecting a dogmatic focus on law as an object frozen "dans l'instant de la positivité".² Put otherwise, the hermeneutic inquiry is not what Justice Wilson intended to say in 1987, but what the judgments and their scholarly reception say now.

The *Pelech* trilogy called the Supreme Court of Canada to pronounce on important matters in family law at a time of significant change. Though the judicial developments under the *Canadian Charter of Rights and Freedoms*³ of the 1990s and the present decade often monopolize scholars' attention, the late 1980s marked the end of a wave of legislative reform to family law.⁴ In 1968 the Parliament of Canada's first exercise of its exclusive jurisdiction to legislate in respect of divorce resulted in the *Divorce Act*.⁵ Remote as it seems today, the 1968 Act had replaced a patchwork of regimes that included received colonial law and the declaration in the *Civil Code of Lower Canada* of 1866 that marriage was dissolved only by death. Less than two decades later, Parliament superseded that statute with fresh divorce legislation.⁶ In the 1970s, legislatures, galvanized by the public outcry occasioned by the Supreme Court's judgment in *Murdoch v. Murdoch*,⁷ set about reforming matrimonial property regimes. In the last years of that decade and into the 1980s, provincial legislatures overhauled the law connecting children to their parents by abolishing distinctions between legitimate and

² Jean Carbonnier, *Sociologie juridique*, 2d ed. (Paris: Quadrige, 2004), at 350.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁴ Robert Leckey, "Family Law as Fundamental Private Law" (2007) 86 Can. Bar Rev. 69, at 86-87.

⁵ R.S.C. 1970, c. D-8 [hereinafter "1968 Act"].

⁶ R.S.C. 1985 (2nd Supp.), c. 3 [hereinafter "1986 Act"].

⁷ [1973] S.C.J. No. 150, [1975] 1 S.C.R. 423 (S.C.C.) [hereinafter "*Murdoch*"]. In that judgment, the majority of the Supreme Court — all but Laskin J. — rejected a wife's claim for a share in assets to which her husband held title and towards which the two had worked through decades of marriage.

illegitimate children. Meanwhile, the Supreme Court had, on several occasions, interpreted the general law of obligations and property in favour of a woman disadvantaged by her male partner's holding exclusive title to assets acquired and improved during their conjugal relationship.⁸ The discourse animating these reforms, and pervasive in social and legal discourse, was one of formal equality: "sameness of treatment was all that was required to meet the principle of equality".⁹ The disputes in the *Pelech* trilogy made their way to the Supreme Court at this moment in which a commitment to formal equality prevailed.

The *Pelech* trilogy concerned three sets of divorced spouses. Each former wife sought an order for spousal support under the 1968 Act.¹⁰ The difficulty was that those applications were inconsistent with the parties' prior agreements limiting such support.¹¹ The disputes put in issue not only the extent to which spousal support duties survived a marriage's dissolution by divorce, but also the measure in which a court would recognize a support obligation exceeding that delimited by the parties in a prior consensual agreement.¹² The principle that a maintenance agreement can never totally extinguish the jurisdiction of the court to impose its own terms on the parties — concretized in the statute — provided the basis for the women's claims. This principle and the subject-matter distinguished the cases from ordinary contract scenarios where the parties have mutually rescinded their contract or otherwise extinguished their obligations.

⁸ See, e.g., *Rathwell v. Rathwell*, [1978] S.C.J. No. 14, [1978] 2 S.C.R. 436 (S.C.C.); *Beaudoin-Daigneault v. Richard*, [1984] S.C.J. No. 2, [1984] 1 S.C.R. 2 (S.C.C.).

⁹ Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 749, at 760 [hereinafter "'The Changing Family'"].

¹⁰ *Supra*, note 5.

¹¹ All three applicants — Shirley Mae Pelech, Donna Gail Richardson and Betty Anne Caron — were receiving social assistance. Mrs. Pelech had applied for further spousal support 13 years after the divorce; the maintenance agreement concluded with the husband had provided spousal support for 13 months. The Richardsons had concluded a separation agreement providing Mrs. Richardson with spousal support for one year; that entitlement had expired by the time of the divorce proceedings, and it was in the divorce action itself that she sought further support. The Carons' situation was different: their separation agreement provided for spousal support payable to the wife until she remarried or cohabited in a conjugal relationship for more than three months. Mrs. Caron had cohabited with someone longer than the stated period and Mr. Caron consequently discontinued payments, though the new partner failed to support Mrs. Caron.

¹² Mere mention of a "consensual agreement" here likely disturbs some readers: it is fair to wonder how thoroughly informed were the women, or whether they expected that a later court would regard the agreement as so conclusive, or whether their factual assumptions about their ability to achieve economic self-sufficiency were reasonable.

While sitting on the Court of Appeal for Ontario, Justice Wilson had proven herself a pioneer for women's entitlements in her development of the common law of trusts in connection with a proprietary claim advanced by a woman after a long-term unmarried cohabitation.¹³ At first blush, the *Pelech* trilogy, which few hailed as an advance for women, appears to depart from Justice Wilson's earlier path. The disjuncture appears lesser if one contrasts her expansive approach to the law of property in the earlier judgment, where a long-term relationship fell outside any regime of protective default rules, from the circumstances in *Pelech* where parties, having the benefit of the scheme of the 1968 Act,¹⁴ had agreed on quantum and duration for the rights it envisaged.

In all three cases of the *Pelech* trilogy, the majority of the Court denied the applications for spousal maintenance. Justice Wilson held that a court should order spousal maintenance contrary to the parties' settlement of their affairs only where a "radical change in circumstances flow[ed] from an economic pattern of dependency engendered by the marriage".¹⁵ All three applicants failed to satisfy the threshold for variation of a prior agreement. If they required help to survive, former spouses who had signed away their right to spousal support should look to the state's income support regime, not to their former husbands. Individuals should be held responsible for their decisions, held Justice Wilson, and decisions in winding down the marital enterprise formed no exception.

The judges of the Court had no pretence that their decisions in the trilogy were syllogistic applications of established major premises, in the form of posited rules, to minor premises, in the form of facts. Rather, the judgments, especially *Pelech*, show an explicit working through of different plausible approaches for adjudicating such claims. Justice Wilson was aware of a tension between "competing values of fairness and freedom".¹⁶ She contrasted the need to compensate for systemic gender-based inequality — hardly an orthodox consideration in the delineation of private law rights and duties — with the interest in the finality of arrangements on divorce.

¹³ *Becker v. Petkus*, [1978] O.J. No. 3398, 20 O.R. (2d) 105 (Ont. C.A.), affd [1980] S.C.J. No. 103, [1980] 2 S.C.R. 834 (S.C.C.). Justice Wilson relied on the dissent by Laskin J. in *Murdoch*, *supra*, note 7.

¹⁴ *Supra*, note 5.

¹⁵ *Pelech*, *supra*, note 1, at 851.

¹⁶ *Id.*, at 849.

The trilogy bequeathed difficult practical questions to judges and scholars concerning its scope and application. Judicial developments have largely resolved or superseded these difficulties. Indeed, the Supreme Court of Canada has overruled the trilogy's test, while reserving the policy concerns driving the trilogy as "not ... wholly irrelevant".¹⁷ This paper does not defend the trilogy's outcomes in the three appeals, nor does it aim to blunt the criticism that the judgments underestimated the impediments for former wives on the path to self-sufficiency. Instead, it attends to the theoretical criticisms of the judgments' alignment of families, the state and the market.

The title of this paper suggests a two-fold inquiry. First, what remains of the trilogy, now that it has been overruled? Might Justice Wilson's judgments and their reception by scholars nonetheless contribute to present debates? Second, do the attacks levied against those judgments from the left still hold? Which commitments in family law stand to the left of *Pelech*? Exploration of these questions unfolds in three parts. Part II attempts to dislocate *Pelech* from its usual place in the current narrative of spousal support, indicating (modest) ways in which it might have laid the groundwork for the watershed judgment of Justice L'Heureux-Dubé in *Moge v. Moge*.¹⁸ Part III canvasses the criticisms produced shortly after the judgment that *Pelech* privatized the family. Those criticisms obscure the trilogy's important public dimensions. The transformation of the welfare state of the 1980s and 1990s changes the significance that the trilogy and the scholarly criticisms have today. Part IV tests criticisms of Justice Wilson's individualism in family matters in light of more recent debates and disputes in family law. If her emphasis on the enforcement of private agreements resulted in material disadvantage for women who had followed traditional marital patterns, that emphasis seems to hold some promise for those seeking to inhabit less traditional configurations of family.

II. REFIGURING THE RIGHT TO MAINTENANCE

Today the literature on the modern law of maintenance in Canada reveals a standard story. As related by Carol Rogerson, the leading Canadian scholar on spousal support, it is built around "a series of three

¹⁷ *Miglin v. Miglin*, [2003] S.C.J. No. 21, [2003] 1 S.C.R. 303, at para. 40 (S.C.C.).

¹⁸ [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.) [hereinafter "*Moge*"].

important decisions”.¹⁹ First came *Pelech*, which enjoined judges to enforce almost all final agreements. On what became an influential reading, it also set out a general theory of spousal support promoting the “clean break”,²⁰ an approach applicable whether or not the parties had concluded an agreement limiting support. Many scholars regarded the judgment as bad, abstract, atomistic and inattentive to structural gender disadvantage: a defeat for women. Next came *Moge*. Informed by social science on the prevalence of women’s poverty after divorce, and influenced by the value of substantive equality radiating from the Charter, it developed spousal support’s compensatory mission. It emphasized the imperative of an equitable sharing of the consequences of a marriage or of its breakdown. In other words, spousal support served, not only prospectively to tide a wife over until she achieved self-sufficiency, but also, retrospectively, to compensate her for the losses flowing from the marriage. *Moge* was contextual and alert to women’s material disadvantage on divorce: a victory for women.²¹ *Bracklow v. Bracklow*,²² the next in the story, is confusing enough to resist characterization. Whatever else it decided, though, it announced the possibility of spousal support that is non-compensatory. That is, *Bracklow* contemplated support even where the claimant could not demonstrate loss connected to the marriage. The support creditors for whom this development is good news — ill or disabled, with a former spouse able to pay — are often women.

In this story, *Pelech* inaugurates the judicial elaboration of modern spousal support. It becomes the foil of *Moge*, its “background”.²³ The virtues of the victory in *Moge* become discernible by contrast with the evils of the defeat in *Pelech*. The tendency to characterize family law judgments as victories or defeats for women reflects the feminist understanding of family law as a site of gender struggle. Such a theoretical lens undoubtedly illuminates crucial features of family law. It can, however, conceal factors that complicate positive and negative

¹⁹ Carol Rogerson, “The Canadian Law of Spousal Support” (2004) 38 Fam. L.Q. 69, at 73.

²⁰ The source generally acknowledged for this view is James G. McLeod, “Case Comment on *Pelech v. Pelech*” (1987) 7 R.F.L. (3d) 225.

²¹ One reading qualifies the victories of *Moge* as “uncomfortable”, though victories nonetheless: Colleen Sheppard, “Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*” (1995) 12 Can. J. Fam. L. 283.

²² [1999] S.C.J. No. 14, [1999] 1 S.C.R. 420 (S.C.C.) [hereinafter “*Bracklow*”].

²³ Nicholas Bala, “Spousal Support Transformed — Fairer Treatment for Women” (1994) 11 C.F.L.Q. 13, at 15.

characterizations of judgments.²⁴ This standard account of the development of spousal support under federal divorce legislation can impede full appreciation of *Pelech* in two respects. One, to which Part III will turn, concerns the judgment's foregrounding of the state's support obligations in a way consistent with some progressive and feminist commitments. The other concerns the extent to which *Pelech* may be fruitfully read as replying to its antecedents. Released from its conscription as background to *Moge*, *Pelech* reveals important judicial efforts to recognize spousal support as an economic right.

While *Moge* interpreted the support provisions in the 1986 Act,²⁵ *Pelech* applied its 1968 predecessor. If statutory interpretation always requires of judges a role that is "inescapably creative,"²⁶ the earlier legislation on maintenance was especially open-textured. The court might order maintenance if it thought it "fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them".²⁷ The provision in the 1968 Act indicated neither the aims in awarding an alimentary pension nor the pertinent criteria. Readers of *Pelech* suggest that Justice Wilson viewed spousal support with suspicion, or downright negativity. In one of the stronger formulations, *Pelech* is said to regard maintenance as "a necessary evil, to be frowned upon and terminated as quickly as possible".²⁸ Scholars risk, though, overstating Justice Wilson's antipathy towards support and, consequently, underestimating her discussion's progressive thrust. The trilogy's treatment of spousal support may be viewed, not as a cramped, inadequate precursor of the more generous compensatory understanding that flowered in *Moge*, but as an attempt to bury the past.

Not so long before the litigation — certainly throughout most of John and Shirley Pelech's marriage — maintenance had played a role different than anything now contemplated. Prior to the 1968 Act, spousal maintenance was a pension payable to "a faultless wife to maintain her

²⁴ See exploration of this idea in Robert Leckey, "Contracting Claims and Family Law Feuds" (2007) 57 U.T.L.J. 1. Interrogation of the standard account here is inspired by scrutiny of the standard periodization of "Western feminist storytelling". Clare Hemmings, "Telling Feminist Stories" (2005) 6 Feminist Theory 115, at 117.

²⁵ *Supra*, note 6.

²⁶ T.R.S. Allan, "Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority" (2004) 63 Cambridge L.J. 686, at 708.

²⁷ 1968 Act, *supra*, note 5, s. 11(1).

²⁸ Steve Wexler, "Case Comment on *Ritchie v. Ritchie*" (1989) 18 R.F.L. (3d) 443, at 445.

in the standard to which her errant husband had accustomed her”.²⁹ Conversely, a wife who committed adultery lost any claim to maintenance, showing the regime’s disciplinary character regarding women’s sexuality.³⁰ The former understanding of maintenance was consistent with historical representations of women as “thought, represented, defined from the point of view of the Man”, defined in the “economy of masculine desire”.³¹

Justice Wilson’s judgment aimed to shift maintenance from the moral to the economic realm. She announced herself to be carrying out a “change in emphasis” regarding alimony, one having occurred since the enactment of the 1968 Act. This move, which she characterized as “salutary”, was one away from “moral blameworthiness or ‘fault’”.³² When speaking of the economic dependency appropriately addressed by spousal support inconsistent with a final agreement, she spoke of need arising, not from the conduct of either spouse, but from the marriage. Spousal maintenance was henceforth “the right of the spouse and a spouse can therefore contract as to the amount of maintenance he or she is to receive”.³³ As titular of a right in a context of consensual divorce, a divorcing woman is to be regarded otherwise than as a passive victim of adultery. Alimony could henceforth be bargained away with the advice of counsel — say, in exchange for concessions regarding the division of matrimonial property — as opposed to ceded by sexual misconduct judged by the publicly fixed terms of the marriage (or sexual) contract.³⁴ While critiques of liberal rights discourse abound, there is something to be said for Justice Wilson’s understanding of maintenance as a right that might be ceded at the negotiating table, not in the bedroom. A heading in Justice Wilson’s exposition of possible approaches to the key question further reveals her model. She glossed a line of judgments by the Ontario Court of Appeal, with which she sympathized, as exemplifying a “‘private choice’ approach”.³⁵ “Private choice” might

²⁹ Christine Davies, “Judicial Interpretation of the Support Provisions of the *Divorce Act, 1985*” (1992) 8 C.F.L.Q. 265, at 265.

³⁰ William Pinder Eversley, *The Law of the Domestic Relations*, 3d ed. (London: Stevens and Haynes, 1906), at 167.

³¹ Adriana Cavarero, *Relating Narratives: Storytelling and Selfhood*, Paul A. Kottman, trans. (London: Routledge, 2000), at 50.

³² *Pelech*, *supra*, note 1, at 829 [sic], 828.

³³ *Richardson*, *supra*, note 1, at 870.

³⁴ Carol Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), chapter 6.

³⁵ *Pelech*, *supra*, note 1, at 833.

fairly be understood as contrasting with public constraint, such as that of a moral economy in which women's infidelity ensured their privation.³⁶

Scholars were right that Justice Wilson underestimated the constraints on women's contractual disposition of their right to spousal support. Readers of the trilogy are also justifiably critical of its impoverished working out of causation, including the failure to appreciate the effects of a specialization in domestic labour during a marriage on an effort, after divorce, to integrate into the labour market. The judgments' difficulties seem to be ones more at the level of applying principles to facts than of devising the principles themselves. The statement, in *Pelech*, that courts were required "to analyze the pattern of financial interdependence generated by each particular relationship and devise a support order that minimizes as far as possible the economic consequences of the relationship's breakdown"³⁷ is not itself especially objectionable. The factual assessment of the causal relation — that is, absence of one — between the relationship breakdown and the claimant's financial straits is especially problematic in *Richardson*.³⁸ One can also wonder if Justice Wilson reflected adequately on the message that lawyers and judges would infer from a trilogy of judgments in which, in each case, the claimant failed to satisfy the threshold for judicial alteration of the support duties. Family law scholars sometimes criticize the Court for what they regard as inconsistent applications of principles to similar facts.³⁹ Here, by contrast, the ostensible "clarity"

³⁶ The French translation of "the 'private choice' approach" as "la thèse de 'l'autonomie de la volonté'" (*id.*, at 833) lacks this flavour, instead evoking — in a way foreign to Wilson J.'s original text — the classical will theory of contracts. Jean-Louis Baudouin, *Les obligations*, 6th ed. by Pierre-Gabriel Jobin with Nathalie Vézina (Cowansville, Qc.: Yvon Blais, 2005), at paras. 72-91.

³⁷ *Pelech*, *supra*, note 1, at 829.

³⁸ It is solely in *Richardson* that La Forest J., who wrote separate reasons in all three judgments of the trilogy, dissented. Several features of the case ground the intuition that the most unfair of the three outcomes was the denial of support to Mrs. Richardson. First, Mrs. Richardson advanced the claim for spousal support with her petition for divorce. By contrast, Mrs. Pelech made her claim for spousal support 13 years after the divorce, a point by which Mr. Pelech might, a good deal more reasonably than Mr. Richardson, have supposed himself free of any contingent liability from the dissolved marriage. Second, the final, typewritten version of the Minutes of Settlement accepted as the basis for denying Mrs. Richardson's claim for support differed, crucially, from the earlier, handwritten version: unlike the typewritten version, the earlier version contained no clause declaring the settlement to be final and conclusive. Third, Mrs. Richardson's difficulty in integrating into the labour market really does seem to have been caused by her having been a homemaker during the marriage (*Richardson*, *supra*, note 1, at 864, 863).

³⁹ *Young v. Young*, [1993] S.C.J. No. 112, [1993] 4 S.C.R. 3 (S.C.C.), and *P. (D.) v. S. (C.)*, [1993] S.C.J. No. 111, [1993] 4 S.C.R. 141 (S.C.C.), are two judgments which, if distinguishable, are perhaps an example of the phenomenon.

when the Court resolved three disputes the same way imposed its own costs: it made a “test” look like a rule.

In any event, the understanding, expounded in *Moge*,⁴⁰ of the equitable compensation due to some former spouses on dissolution of a marriage depended on an economic lexicon largely absent from spousal support jurisprudence not long before the trilogy. Admittedly, the text of the 1986 Act gestures towards a compensatory vocation for spousal support.⁴¹ Yet more than is generally recognized, *Pelech* laid the groundwork for the current understandings of that obligation. While *Pelech* did not go far enough in recognizing women’s economic contributions to marriage and their opportunity costs, it opened conceptual space for such recognition. In this respect, *Pelech* may be viewed as background to *Moge* more positively. Today’s standard readings of the judgment, which look back critically from *Moge* to *Pelech*, seem to impede appreciation of *Pelech*’s moving forward from the past.

III. PRIVATIZATION AND THE STATE

A recurring charge is that the *Pelech* trilogy privatized the family. In one of the best-known phrases, Justice Wilson held:

Where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not, in my view, be undermined by courts concluding with the benefit of hindsight that they should have done it differently.⁴²

One of the most-cited critiques declares the *Pelech* judgments consistent with the “global trend toward privatization, our traditional protection of the private sphere of the family from state intervention [and] the current push for settlement of family law cases”.⁴³ The judgments sent a strong message against public regulation of the content of domestic contracts.⁴⁴ The *Pelech* trilogy’s high threshold for variation

⁴⁰ *Supra*, note 18.

⁴¹ R.S.C. 1985 (2nd Supp.), c. 3, s. 15.2(5)(a).

⁴² *Pelech*, [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801, at 853 (S.C.C.).

⁴³ Martha J. Bailey, “*Pelech, Caron, Richardson*” (1989-90) 3 C.J.W.L. 615, at 616 [hereinafter “*Pelech, Caron, Richardson*”].

⁴⁴ David G. Duff, “The Supreme Court and the New Family Law: Working through the *Pelech* Trilogy” (1988) 46 U.T. Fac. L. Rev. 542, at 567.

of separation agreements has been thought to reflect a conviction that the family is part of the private sphere, beyond the state's legitimate reach.⁴⁵ The implication is unmistakable: if private settlement is "mature and responsible", is not resort to litigation immature and irresponsible?⁴⁶ Admittedly, a privatization gesture, such as this one, does not entail a net reduction in the amount of law, or at least not in the amount of governance.⁴⁷ Incentives for private settlement are rightly understood as themselves technologies of disciplinary governance. Still, the courts' withdrawal is detectable in their apparent disinterest in the contours of the post-divorce maintenance obligations.

If the majority reasons are accurately read as endorsing the settlement of family disputes, underscoring the trilogy's privatizing effect risks obscuring a key public dimension. Admittedly, the opening paragraph in *Pelech* implies that a maintenance dispute is a private, family affair. Justice Wilson framed the question in comparatively narrow terms, focusing on the former spouses and their agreement: "Should the parties be held to the terms of their contract or should the court intervene to remedy the inequities now alleged by one of the parties to be flowing from the bargain previously entered into freely and on full knowledge and with the advice of counsel?"⁴⁸ As the judgment proceeds, however, it inscribes the couple and the dispute over support in a wider political economy. That is, Justice Wilson demonstrated awareness of a picture bigger than just the "private" dispute between spouses, and she presumed the state to have obligations to support former spouses.

Justice Wilson announced a high threshold for a court's intervention to order support contrary to a prior agreement. Where that threshold is not met, "the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state".⁴⁹ The

⁴⁵ Barbara C. Bedont, "Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts" (1994-95) 12 C.F.L.Q. 21, at 26-27. Such criticisms are consonant with those raised by Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

⁴⁶ The lexicon of responsibility presaged later developments elsewhere. On responsibility in the post-liberal regulation of divorce in the United Kingdom, see Helen Reece, *Divorcing Responsibly* (Oxford: Hart Publishing, 2003).

⁴⁷ See, e.g., Kevin Walby, "Contributions to a Post-Sovereignist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism" (2007) 16 Soc. & Legal Stud. 551.

⁴⁸ *Pelech*, *supra*, note 42, at 806.

⁴⁹ *Id.*, at 852. See similarly *Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857, at 868 (S.C.C.).

linking of citizens with the state's communal responsibility echoes T.H. Marshall's sense of citizenship-as-rights.⁵⁰ Emphasis on the state's duty to support dependent former spouses appears stronger still when — bracketing the idea that *Pelech* begins the spousal support story — one connects it to an earlier judgment.

Four years before *Pelech*, in *Messier v. Delage*,⁵¹ the majority of the Court had held that the former husband's duty to support his wife should persist. Three judges, however, had dissented, Justice Wilson among them. Their opening situated the dispute in the grim economy of the early 1980s. The appeal raised an important question

in view of the current economic situation, the difficulty in finding work and the resulting high rate of unemployment. Should a divorced spouse who is working always bear the consequences of all this and provide for the needs of his unemployed former spouse, or is it for the government, if it cannot remedy, at least to alleviate the effects, and to what extent?⁵²

The dissent's answer was that an unemployed divorced spouse reflected a social problem, one incurring “the responsibility of the government rather than the former husband”.⁵³ Scholars are aware of the connections between the *Messier* dissent and *Pelech*.⁵⁴ But emphasis on the sequence from *Pelech* to *Moge* and on the privatizing effect of *Pelech* overshadows the extent to which it and the dissent in *Messier* endorsed a *publicization* of the support obligation for former spouses. With hindsight, an observation made one year before *Pelech* is nearly comical: feminist scholars attuned to the interpenetration of family law and social welfare policy approved the *Messier* dissent for proposing the identical treatment of unemployed former spouses and other individuals. They observed, with disappointment, that the proposition appeared largely ignored, perhaps because it would entail greater eligibility by women to claim income assistance.⁵⁵

⁵⁰ T.H. Marshall, “Citizenship and Social Class” in his *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950), at 1.

⁵¹ [1983] S.C.J. No. 80, [1983] 2 S.C.R. 401 (S.C.C.) [hereinafter “*Messier*”].

⁵² *Id.*, at 417, Lamer J., dissenting.

⁵³ *Id.*

⁵⁴ See, e.g., Nicholas Bala, “Domestic Contracts in Ontario and the Supreme Court Trilogy: ‘A Deal Is a Deal’” (1988) 13 Queen's L.J. 1, at 31, note 66.

⁵⁵ Mary Jane Mossman & Morag MacLean, “Family Law and Social Welfare: Toward a New Equality” (1986) 5 Can. J. Fam. L. 79, at 103 [footnote omitted].

Admittedly, the emphasis in *Pelech* on the possible extinguishment of private maintenance obligations irrespective of the ensuing need for state support is problematic. While the support sought in that judgment would have flowed from the *Divorce Act*,⁵⁶ reduction of the public charge figured among the concerns of provincial legislation regulating the duty of support during marriages. For example, Ontario's regime listed reliance on public support as a factor favouring the setting aside of a domestic agreement limiting alimony.⁵⁷ Moreover, *Pelech* arguably failed to address the problem of shifting a gendered pattern of dependence outwards from the family, making those who had been dependent within the family become, in turn, dependent in "the other realms of market and state".⁵⁸ Yet desirable or not, Justice Wilson's stance regarding community obligations undermines characterizations of *Pelech* as primarily about privatization. If *Pelech* privatized the family, it simultaneously committed the state to step into the breach. Yet once the notion that *Pelech* chiefly concerned privatization took root, it became difficult to see its public aspects.

Further evidence of the tendency to occlude the trilogy's public dimensions lies in critical characterizations of Justice Wilson's vision of contract, individuals and the family as libertarian.⁵⁹ Her stance differs sharply from libertarianism. The understanding in the trilogy of the *Divorce Act*⁶⁰ and of the private obligations it authorizes is embedded in the state welfare system. Reliance on a social safety net ready to catch those disadvantaged by their contracts is incompatible with libertarian views of the taxation system as one of "forced labor"⁶¹ and of the right to welfare as "a right to involuntary servitude from other persons".⁶² Readings of Justice Wilson as libertarian underscore the elision of the trilogy's public elements. While scholarly glosses may help in under-

⁵⁶ R.S.C. 1970, c. D-8.

⁵⁷ *Richardson*, *supra*, note 49, at 885, La Forest J., dissenting. The point matters in part because courts, especially in the common law provinces, often apply the principles developed respecting support under the *Divorce Act* to cases arising under provincial family statutes. Courts arguably do so with insufficient regard for the constitutional distinction between the Parliament of Canada's power over divorce and that of the provinces over property and civil rights.

⁵⁸ Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28 *Osgoode Hall L.J.* 303, at 330.

⁵⁹ "*Pelech*, *Caron*, *Richardson*", *supra*, note 43, at 616; Beverley McLachlin, "Spousal Support: Is it Fair to Apply New-Style Rules to Old-Style Marriages?" (1990) 9 *Can. J. Fam. L.* 131, at 137.

⁶⁰ *Supra*, note 56.

⁶¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), at 169.

⁶² Tibor R. Machan, *Libertarianism Defended* (Aldershot: Ashgate, 2006), at 297.

standing judgments, dominant understandings may hinder appreciation of their complexity.

Fresh difficulties with the critical literature on privatization emerge from scholarly readings of the next judgment in the story. On many views, *Moge* took steps to right the Canadian law of spousal support. It telegraphed that previous spousal support awards had been “unfairly parsimonious”.⁶³ Justice L’Heureux-Dubé clarified that the trilogy was not properly read as endorsing a general clean-break theory of support absent private agreements. Promoting economic self-sufficiency was not the Act’s pre-eminent objective. *Moge*, in lengthy reasons grounded in scholarly acknowledgment of the financial privation confronting many women after divorce, elaborated a compensatory theory of spousal support. From the perspective that *Pelech*⁶⁴ had privatized the family by signalling indifference to the distribution of resources as between the former partners, *Moge* is the antithesis of any privatizing gesture. It repudiates any sense of the family as a private sphere shielded from public scrutiny: a state court concerned itself with the obligations owed by one former spouse to another. Determining what will amount to an equitable sharing of the economic consequences of a marriage’s end requires the judge to enter the supposedly private sphere of the family to ensure that justice is done, measured by publicly established, substantive norms. If, as a consequence of her unfortunate contract, Mrs. Richardson would never receive just compensation for the losses entailed by her marriage, Mrs. Moge would get hers.

Paradoxically, if the low spousal support resulting from the trilogy represented a defeat for women that showed the state privatizing the family, some commentators feared the same phenomenon in the ostensible victory of the substantially thicker, private support obligations in *Moge*. Susan Boyd conjectured that *Moge* might let society “off the hook” in tackling the entrenchment of women’s roles, responsibilities and economic dependence.⁶⁵ Similarly, Colleen Sheppard noted that the judgment’s emphasis on privatized economic responsibility for family members might minimize a collective commitment to the economic well-being of all individuals, irrespective of the presence and economic

⁶³ Carol Rogerson, “Spousal Support after *Moge*” (1996) 14 C.F.L.Q. 281, at 283; *Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.).

⁶⁴ *Supra*, note 42.

⁶⁵ Susan B. Boyd, “(Re)Placing the State: Family, Law and Oppression” (1994) 9:1 C.J.L.S. 39, at 67.

status of a husband or father.⁶⁶ While *Moge* appropriately reaffirmed the importance of family solidarity — the classical justification for the civil law’s enforcement of family support obligations — it remained crucial not to lose sight of the collective responsibility triggered by the social consequences of divorce.⁶⁷ Mary Jane Mossman has expressed a similar concern that intense focus on enforcement of support obligations owed by “deadbeat dads” reinforces the private responsibility for children, “masking the state’s abdication of responsibility for children”.⁶⁸

The common thread in these writings is that private is bad and public is good (or the lesser evil). It would have been better, the critics argue, for the process in *Pelech*⁶⁹ to have been more public and the husband’s private support duty, consequently, to have been larger. Furthermore, it is feared that enlarged support duties, such as those found attaching to Mr. Moge, might justify the state’s withdrawal from its public responsibilities to provide economic support. Admittedly, the measures criticized as instruments of privatization are distinguishable; both may connect, differently, to women’s inequality. The privatization in *Pelech* concerns the *process* of dispute resolution and the extent to which a private agreement precludes later judicial orders. The privatization detected in *Moge*⁷⁰ concerns the *substance* of economic responsibility and whether it lies on the state or on individual family members. The difficulty for critical intervention is that, possible as it is to distinguish privatization by process and by substance, the anti-privatization remedy that scholars would have liked to see in *Pelech* — a public process leading to enlargement of the husband’s private support duty — is precisely that which causes alarm as the catalyst of privatization in *Moge*.

In any event, it would be unwise to exaggerate the influence of Justice L’Heureux-Dubé’s reasons in *Moge* on the retrenching welfare

⁶⁶ Colleen Sheppard, “Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*” (1995) 12 Can. J. Fam. L. 283, at 323. A distinct concern is that the compensatory approach in *Moge*, *supra*, note 63, confuses *interpersonal* and *social* obligations by allowing systemic social inequality to affect the content of private support duties. See Lucinda Ferguson, “Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation” (2008) 22 Int’l J.L. Pol’y & Fam. 61, at 82.

⁶⁷ Dominique Goubau, “Une nouvelle ère pour la pension alimentaire entre ex-conjoints au Canada” (1993) 72 Can. Bar Rev. 279, at 304.

⁶⁸ Mary Jane Mossman, “Child Support or Support for Children? Re-thinking ‘Public’ and ‘Private’ in Family Law” (1997) 46 U.N.B.L.J. 63, at 65.

⁶⁹ *Supra*, note 42.

⁷⁰ *Supra*, note 63.

state. The “restructuring”⁷¹ of the welfare state did not draw its chief energy from the Supreme Court Reports. Beginning in the 1970s and escalating through the 1990s, various incarnations of neo-liberalism provided the impetus for a transformation of the welfare state from one relatively universalist and rights-based to one residualist and needs-based. In a “tectonic shift” criticized by feminist scholars, the costs of social reproduction were transferred from state to family.⁷²

These material and discursive shifts found reflection in family decisions by the Supreme Court of Canada. A trio of judgments — *Bracklow*,⁷³ *Chartier v. Chartier*,⁷⁴ and *M. v. H.*⁷⁵ — reflected “an expanding notion of familial responsibility, sweeping more and more individuals within the reach of legal support obligations”.⁷⁶ In *Bracklow*, the Court enlarged the possible bases for an award of spousal support to include one that was non-compensatory. As that case turned on entitlement to support absent a private agreement, *Pelech* was not directly on point. Still, as the relative priority of spousal and state support obligations proved crucial on the facts in *Bracklow*, it was surprising that the reasons made no mention of Justice Wilson’s endorsement in *Pelech*, a dozen years prior, of the state’s duty to support its citizens. Instead, Justice McLachlin spoke indignantly of the “potential injustice of foisting a helpless former partner onto the public assistance rolls”.⁷⁷ Similarly, in *M. v. H.*, Justice Iacobucci held that the challenged legislation had the “deleterious effect” of potentially driving a needy member of a same-sex couple to the welfare system, thereby imposing additional costs on the “general taxpaying public”.⁷⁸ If the

⁷¹ Maureen Baker, *Restructuring Family Policies: Convergences and Divergences* (Toronto: University of Toronto Press, 2006), at 16-17.

⁷² Judy Fudge & Brenda Cossman, “Introduction: Privatization, Law, and the Challenge to Feminism” in Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 3, at 3. The point cannot be explored here, but the criticisms of privatization emerging from the 1990s risk exaggerating the extent to which the Canadian state was ever more than residual and fragmentary. See the critical rereading of Shelley A.M. Gavigan & Dorothy E. Chunn, “From Mothers’ Allowance to Mothers Need Not Apply: Canadian Welfare Law as Liberal and Neo-Liberal Reforms” (2007) 45 Osgoode Hall L.J. 733, at 762.

⁷³ [1999] S.C.J. No. 14, [1999] 1 S.C.R. 420 (S.C.C.).

⁷⁴ [1998] S.C.J. No. 79, [1999] 1 S.C.R. 242 (S.C.C.).

⁷⁵ [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.).

⁷⁶ Brenda Cossman, “Developments in Family Law: The 1998-99 Term” (2000) 11 S.C.L.R. (2d) 433, at 434 [hereinafter ““Developments in Family Law””].

⁷⁷ *Supra*, note 73, at para. 31.

⁷⁸ *Supra*, note 75, at para. 115.

Court was not a “driving force” in the movement, by the late 1990s it had absorbed the intensified emphasis on fiscal conservatism and private familial responsibility.⁷⁹

In light of these developments, Justice Wilson’s insistence that the state care for all individuals, irrespective of their ability to connect present need to the means of a former spouse, may appear more attractive today. Her judgment implied “hostility to the notion that the state might not be fully responsible for its citizens, and to the notion that the state should be able to pin its costs for the basic sustenance of a citizen on a legal stranger (the former spouse)”.⁸⁰ Justice Wilson rejected in advance the later determination by legislatures, the social assistance bureaucracy and the judiciary that it was “too expensive” for society to absorb “the cost of public policies assuring spousal equality and accessible divorce”.⁸¹ Empirically, adequate public support is not forthcoming. Yet is the progressive position on spousal support to fortify women’s private law claims against men on the basis of formalized conjugal relationships? Spousal support is payable only in relatively few cases, and those with relatively prosperous men.⁸² Writing in the mid-1990s, Professor Mossman — a stern critic of *Pelech*⁸³ — called for “(re)conceptualizing family law reform as a matter of public policy rather than the enforcement of private familial obligations”.⁸⁴ Do not Justice Wilson’s statements in *Pelech* regarding the collective responsibility to support dependent former spouses, as any other individual, plausibly advance such a rethinking? The ambivalence of progressive positions on spousal support — pinioned between the imperative of adequately compensating women for their unpaid labours and the desire not to construct women as subjects supplicating their former male partners for money — underscores this paper’s title: What is *left of Pelech*? If both negative and positive views towards spousal

⁷⁹ “Developments in Family Law”, *supra*, note 76, at 478, 435.

⁸⁰ Harvison Young, “The Changing Family” (2001) 80 Can. Bar Rev. 749, at 762.

⁸¹ Mary Jane Mossman & Morag MacLean, “Family Law and Social Assistance Programs: Rethinking Equality” in Patricia M. Evans & Gerda R. Wekerle, eds., *Women and the Canadian Welfare State: Challenges and Change* (Toronto: University of Toronto Press, 1997) 117, at 133 [reference omitted].

⁸² Harry D. Krause, “Comparative Family Law: Past Traditions Battle Future Trends — And Vice Versa” in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1099, at 1113.

⁸³ [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.).

⁸⁴ Mary Jane Mossman, “‘Running Hard to Stand Still’: The Paradox of Family Law Reform” (1994) 17 Dal. L.J. 5, at 31.

support function as instruments of privatization by the state, what would make the family appropriately more public? The views may reflect, respectively, long-term and short-term feminist legal strategies. Nevertheless, the senses of what is a gesture of privatization and what is a progressive stance appear contingent, destabilizing the formulation of progressive strategies.

Normative debates regarding the appropriate place of the state in relation to the costs of social reproduction and the resolution of family disputes persist. For present purposes, it suffices to observe that the privatization of which critics accused Justice Wilson for *Pelech*⁸⁵ is a different phenomenon — arguably a more anodyne one — than that of which critics would accuse her colleagues just over a decade later. Viewed across the ensuing two decades, Justice Wilson’s firm acceptance of the public charge, as opposed to maximizing the redistribution of family resources, is remarkable. It is not that it was mistaken for critics at the time to underscore the trilogy’s privatizing effect. Rather, the subsequent downloading of the costs of social reproduction has altered the background conditions for rereading *Pelech*. The changing contours of criticisms, expressed in terms of privatization, levied against spousal support judgments illustrate that the instability of political, economic and discursive structures ensures the fragility of scholarly interventions. External events may conspire so as to make scholarly contentions that appear progressive or progressively feminist at one juncture seem less so subsequently. Yet while it is common to characterize *Pelech* as “a product of its era”,⁸⁶ it is less so to see the scholarship discussing it as similarly situated historically. Alterations in the present significance of the criticisms of the trilogy relating to privatization testify to the contingency of scholarly discourse, as do changes relating to a concern about the view of the family that also emerged from *Pelech*.

IV. FAMILY TIES AND THE PLACE OF INTENTION

In *Pelech* Justice Wilson accepted that divorce ends the marriage and the spouses are, once more, individuals: “the courts must recognize the right of the individual to end a relationship as well as to begin one.”

⁸⁵ *Supra*, note 83.

⁸⁶ Carol J. Rogerson, “Developments in Family Law: The 2002-2003 Term” (2003) 22 S.C.L.R. (2d) 273, at 303.

She also wrote, perhaps insensitive to the relation of explicit and implicit expressions of intention, that “parties who have declared their relationship at an end should be taken at their word.”⁸⁷ In the years following the trilogy, some scholars contended that Justice Wilson demonstrated an inappropriately individualist notion of family, one connected to her reliance on contractual ordering. For Professor Mossman, Justice Wilson’s “idea of family is irrelevant because the focus is the individual family members; indeed, even their relationships are less significant than their autonomy and independence”.⁸⁸ The judge’s emphasis on contract — the paradigmatically liberal means for the creation and extinguishment of relationships and obligations — is viewed especially dimly.⁸⁹ It has been said that the trilogy’s “atomistic view” of the family reproduces dominant liberal discourse, which misrepresents the “oppressive relationship between husband and wife as a freely chosen contract between rational, unencumbered, autonomous individuals”.⁹⁰

Discussion of the trilogy in this register evokes a rich feminist political philosophical literature critical of liberal conceptions of the subject as a “self-possessing individual linked to others only by agreement”.⁹¹ Theorists who take a “relational approach”⁹² contrast the liberal idea of obligation, which is voluntarily undertaken, with their notion of relational responsibility, which may be involuntary. They perceive interdependent relationships as generating, over time, obligations in excess of those devised by contractual undertakings. Relational theorists tend to object to a privileging of contract in the family setting on the basis that the normative content of deep

⁸⁷ *Pelech, supra*, note 83, at 851, 852-53.

⁸⁸ Mary Jane Mossman, “The ‘Family’ in the Work of Madame Justice Wilson” (1992) 15 Dal. L.J. 115, at 163.

⁸⁹ For doubts on the fairness of contract on marriage breakdown, see, e.g., Carol J. Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)” (1991) 7 C.F.L.Q. 155, at 248-49.

⁹⁰ “*Pelech, Caron, Richardson*” (1989-90) 3 C.J.W.L. 615, at 616 [footnote omitted].

⁹¹ Martha Minow & Mary Lyndon Shanley, “Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law” (1996) 11:1 *Hypatia* 4, at 12. [hereinafter “‘Relational Rights’”].

⁹² See, e.g., Jennifer Nedelsky, “Property in Potential Life? A Relational Approach to Choosing Legal Categories” (1993) 6 Can. J.L. & Juris. 343; Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008), at 12-22.

relationships is unpredictable *ex ante*.⁹³ Individualism is for many critics “the evil demon of modern Western social and political life”.⁹⁴

Family law scholarship after *Pelech*⁹⁵ complicates the charge that Justice Wilson focused — at the expense of a view of families — on individuals’ autonomy and independence. The 1990s witnessed scholarship critical of the extent to which legal regimes treated the family unit as surviving divorce. Specifically, for some critics, the operation of child custody and support law has overemphasized the family unit at the expense of women’s autonomy. In *Thibaudeau v. Canada*,⁹⁶ the Supreme Court of Canada rejected a Charter challenge to the rule by which child support was taxed in the hands of recipient custodial parents (mothers) and deductible by the non-custodial parent payors (fathers). Justices Cory and Iacobucci held that the legislation conferred a benefit on the “post-divorce ‘family unit’”; for them it was “clear” that divorced parents provided financial and emotional support to their children “as a unit”.⁹⁷ For some observers, the Court here evoked the familial ideology, historically oppressive to women’s autonomy, which assumes that women’s and children’s economic well-being is best “secured privately”, through the resources of a husband or father.⁹⁸ Application of legislation in connection with custody and access is thought to have perpetuated and even created situations “whereby women/mothers and their children remain bound to their former male partners”.⁹⁹ Discourses of the “restructured nuclear family” or the “post-divorce family unit” arguably reinscribe familial ideology and a heterosexual norm. Emphasis on access, and indeed on maximum contact, by non-custodial parents translates to contact with fathers and imposes a corresponding onus on mothers, whose duty it is to facilitate

⁹³ “Relational Rights”, *supra*, note 91, at 12.

⁹⁴ Marilyn Friedman, *Autonomy, Gender, Politics* (New York: Oxford University Press, 2003), at 16.

⁹⁵ *Supra*, note 83.

⁹⁶ [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.).

⁹⁷ *Id.*, at 702.

⁹⁸ Lisa Philipps, “Tax Law: Equality Rights: *Thibaudeau v. Canada*” (1995) 74 Can. Bar Rev. 668, at 679. In criminal law, a too-robust sense of the relationship enduring between estranged spouses, as well as of the significance of relational history and spousal privacy, arguably underlies the appreciation of the provocation defence in *R. v. Thibert*, [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37, at paras. 25-27 (S.C.C.).

⁹⁹ Dawn M. Bourque, “‘Reconstructing’ the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada” (1995) 10:1 C.J.L.S. 1, at 3.

exercise of that access.¹⁰⁰ Subsequent to *Pelech*,¹⁰¹ in light of these manifestations of the post-divorce family's potentially oppressive effects on women, Justice Wilson's recognition of the right of individuals to unfasten family ties appears less inimical.

Further issues arise when moving from opposite-sex families to the challenges confronting "dissident mothers":¹⁰² women aiming to raise children within a non-traditional family form. Controversy often ensues when a woman deploys legal means to assert a "monoparentalité choisie".¹⁰³ In *Trociuk*, the Supreme Court of Canada had to determine whether vital statistics legislation that permitted a birth mother to preclude registration of the biological father (to "unacknowledge" him) violated the Charter.¹⁰⁴ The Court concluded, unanimously, that the impugned provisions discriminated against fathers on the basis of sex. Scholars have criticized the Court for ignoring the perspective of women wishing "to extract themselves from a relationship with a man".¹⁰⁵ Another scenario concerned once more the logistics of intentional solo motherhood. A woman, who was cohabiting with a man, became pregnant via artificial insemination with anonymous donor sperm. Neither of them intended for the woman's partner to become or to act as a father. They sought to preclude, by private agreement, the man's subsequent recognition as a *de facto* parent. The courts, however, refused to regard themselves as bound by the formal expression of the woman's and the man's mutual intention. They reserved the power to characterize in the future the factual relationship that would unfold between the man and the child.¹⁰⁶ The judgment strikes some observers as regrettably impinging on the autonomy of a woman to form the family

¹⁰⁰ Susan B. Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003), at 131.

¹⁰¹ *Supra*, note 83.

¹⁰² Julie A. Wallbank, *Challenging Motherhood(s)* (Harlow: Pearson Education, 2001), chapter 2.

¹⁰³ Pierre Noreau, "Construction et déconstruction du lien social en droit privé: le cas de la monoparentalité" in Nicholas Kasirer, ed., *La solitude en droit privé* (Montreal: Thémis, 2002) 133, at 147.

¹⁰⁴ *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835 (S.C.C.).

¹⁰⁵ Susan B. Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25 Windsor Y.B. Access Just. 63, at 81 [hereinafter "'Gendering Legal Parenthood'"]. See, on the ideological structure in which the litigation unfolded, Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16 C.J.W.L. 165.

¹⁰⁶ *Doe v. Alberta*, [2007] A.J. No. 138, 404 A.R. 153 (Alta. C.A.), leave to appeal refused [2007] S.C.C.A. No. 211, [2007] 2 S.C.R. vi (S.C.C.).

unit of her choosing. Scholars critical of one or both of these judgments — committed to “female autonomy” and women’s interest in making “autonomous decisions about their family units” even where a known father asserts a claim¹⁰⁷ — might find a helpful resource in the place accorded by Justice Wilson to explicit intention in the formation and termination of family relationships.

When one casts an eye on family law, the openness to the intentional management of family bonds by contract acquires special salience. For those for whom “traditional” family models are unsatisfactory and confining — subjects historically excluded from the “heterosexualized familial domain”¹⁰⁸ — the development of alternatives may depend on robust recognition of private ordering. In many jurisdictions, same-sex couples remain excluded from legislated family regimes. They may conclude that contract is the best alternative means of establishing mutual rights and responsibilities. Carl Stychin argues that contract “may provide an alternative language that is productive and enabling” for those who may be “stifled” by the dominance of a status approach rooted in marriage.¹⁰⁹ Turning from adult conjugal relationships to parental bonds, surrogate motherhood contracts come to mind, as do agreements delineating the relationships between a prospective mother, her lesbian partner and a sperm donor. Contract may liberate parties from the constraints of a default regime structured around the biological parenthood of “natural” mothers and fathers.

In such cases, a place for contract presumes the legitimacy of explicit formal ordering on acutely emotional turf. The possibility for lesbians to raise children autonomously from the biological fathers depends on the openness to weighting interests of autonomy and independence more heavily than the persistence of “the eternal biological family”.¹¹⁰ The desire for measures to “enhance the autonomy of women who wish to take control over the conditions under which they

¹⁰⁷ “Gendering Legal Parenthood”, *supra*, note 105, at 86.

¹⁰⁸ Richard Collier, “Heterosexual(izing) Family Law” in Carl Stychin & Didi Herman, eds., *Law and Sexuality: The Global Arena* (Minneapolis: University of Minnesota Press, 2001) 164, at 176.

¹⁰⁹ Carl F. Stychin, “De-meaning of Contract” in Vanessa E. Munro & Carl F. Stychin, eds., *Sexuality and the Law: Feminist Engagements* (Abingdon: Routledge-Cavendish, 2007), at 88.

¹¹⁰ Jenni Millbank, “The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family” (2008) 22 *Int’l J.L. Pol’y & Fam.* 149.

parent”¹¹¹ posits individualism in the selection, development and sustainment of family relationships.

A final example links Part III’s elucidation of the shifting configurations of private versus public with this part’s exploration of intention and choice in family formation. It concerns the scholarly reception of recent reforms in Quebec. In 2002, as part of a package of reforms introducing a civil union for same-sex couples, the Quebec legislature installed a regime that innovated by permitting a woman alone or a same-sex couple to become parents of a child by assisted procreation.¹¹² Filiation, the institution connecting parents and children, is regarded within the civil law of the family as a matter of public order. It is with this characterization in mind that scholars in Quebec have criticized the potential roles for contract and volition regarding the filiation of children born of assisted procreation.¹¹³ More specifically, according to some critics, the new rules *privatize* filiation. The parentage of the child, no longer the non-negotiable consequence of publicly established rules applied syllogistically, becomes a consequence of the intention of the persons involved. As a consequence of the intention of one or more adults, a child might end up with bonds of filiation connecting him to the birth mother alone, to the birth mother and to her partner of either sex, or to the birth mother and to the genetic donor.¹¹⁴ One reading of these criticisms would view the conservative scholars as co-opting a feminist discourse to denounce progressive changes to filiation as a privatization. The better reading, though, would take the denunciations as indicating the multiple rhetorical and substantive positions that the idea of privatization can occupy. Where law resolutely codes the traditional family — its members’ civil status and their core

¹¹¹ “Gendering Legal Parenthood”, *supra*, note 105, at 93. See also Susan B. Boyd, “Is Equality Enough? Fathers’ Rights and Women’s Rights Advocacy” in Rosemary Hunter, ed., *Rethinking Equality Projects in Law: Feminist Challenges* (Oxford: Hart Publishing, 2008) 59, at 79.

¹¹² Arts. 538ff C.C.Q.; Robert Leckey, ““Where the Parents Are of the Same Sex’: Quebec’s Reforms to Filiation” 23:1 *Int’l J.L. Pol’y & Fam.* (forthcoming in 2009).

¹¹³ See, e.g., Suzanne Philips-Nootens, “De l’enfant conçu à l’enfant programmé: quand la liberté s’égare” in Françoise-Romaine Ouellette, Renée Joyal & Roch Hurtubise, eds., *Familles en mouvance: quels enjeux éthiques?* (Saint-Nicolas: Presses de l’Université Laval, 2005) 177.

¹¹⁴ See, e.g., Benoît Moore, “Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)” in Barreau du Québec, Service de la formation permanente, ed., *Développements récents en droit familial* (Cowansville: Yvon Blais, 2002) 75, at 86.

reciprocal obligations — as public, the flourishing of newer family forms may require enlarging the private.¹¹⁵

In at least some situations, Justice Wilson's individualism, and her attention to the autonomy and independence of individual members of a broken family, look better than recognized on *Pelech's* publication.¹¹⁶ It is fair to ask whether the use of contracts to limit a support duty on the end of a family relationship, as in *Pelech*, is comparable to the use of contract to create a new family structure. It is possible to distinguish agreements terminating support on a marriage's end from ones regarding the parentage of children. Scrutiny shows, however, that the two scenarios are not diametrically opposed. Admittedly, the extent of sunk costs and reliance or restitution interests are likely lesser in the case of conferring fresh legal status on family relationships than terminating existing ties. Yet an agreement that, from one perspective, creates a new family arrangement — for instance, two lesbians who, in order to parent their child autonomously, secure a sperm donor's waiver of parental status — simultaneously, from another, terminates a different family relationship (that between genetic father and child), including its potential support duties. Moreover, while the intentionality emphasized in some accounts of autonomous lesbian parenting is grounded in relations of caregiving,¹¹⁷ intention is nonetheless understood as facilitating, *ex ante*, caregiving by some individuals, such as the social mother, and forestalling caregiving and the development of social relations by others, such as the sperm donor. Thus while there may be contextual differences, demarcating contracts that end family relationships from those establishing them may be problematic.

In any case, criticisms of *Pelech*¹¹⁸ spoke in general terms when questioning Justice Wilson's view of the family. It has been acknowledged that the public/private divide is "indeterminate and shifting", an "ideological marker" that moves *vis-à-vis* the role of the state at "particular historical moments, in particular contexts, and in relation to particular issues".¹¹⁹ The larger point, though, is not just that

¹¹⁵ On the paradoxical imperative of privacy for lesbian mothers, see Jenni Millbank, "Lesbians, Child Custody, and the Long Lingering Gaze of the Law" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 280 [hereinafter "*Challenging the Public/Private Divide*"].

¹¹⁶ *Supra*, note 83.

¹¹⁷ "Gendering Legal Parenthood", *supra*, note 105.

¹¹⁸ *Supra*, note 83.

¹¹⁹ Susan B. Boyd, "Challenging the Public/Private Divide: An Overview" in *Challenging the Public/Private Divide*, *supra*, note 115, 3, at 4.

the boundary shifts, but that the side of it regarded as good varies. It is wrong to assume that emphasizing the public is always progressive and that the private is always the sphere of oppression. The public/private line has varying, contingent effects for those espousing radical, homosexual or constructivist views of family, ones in which choice and autonomy predominate.¹²⁰ Admittedly, the extent to which the concept of “choice” has the “potential to empower or to disempower women” remains fiercely contentious.¹²¹ But its prevalence in family discourse that presents itself as progressive is nonetheless unmistakable. If scholars sometimes overlook private law as a promising source for family law developments,¹²² they may also, with inopportune bluntness, reject privacy while aspiring to an egalitarian and progressive family justice. Endorsement of public norms and a rejection of consensual deviation from them may aid those whose families most reflect dominant forms and ideology. They do less, however, for others whose family configurations, or the religious norms they abide by, are more marginal.¹²³ One need not be the standard bearer for private ordering in the family setting to admit that, more than sometimes acknowledged, its potential and perils are complex.

¹²⁰ See, e.g., Jeffrey Weeks, Brian Heaphy & Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (London: Routledge, 2001).

¹²¹ Rosemary Hunter & Sharon Cowan, “Introduction” in Rosemary Hunter & Sharon Cowan, eds., *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Abingdon: Routledge-Cavendish, 2007) 1, at 1.

¹²² On the distinction between private law and the private sphere, the latter so aptly explored by feminist legal theory, see Robert Leckey, “Family Law as Fundamental Private Law” (2007) 86 *Can. Bar Rev.* 69, at 93-94.

¹²³ Two examples, both involving religion, challenge the scope of application of the assumption derivable from the criticisms of *Pelech* that privatization is the enemy of progressive or left commitments in family law. One is religiously influenced arbitration. As scholars have thoughtfully argued, mainstream feminist discourse’s impulse to save Muslim women from the darkness of private dispute resolution by forcing them into the light of public court processes may have unwittingly served a repressive anti-Muslim agenda. See Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008), at 148; Natasha Bakht, “Religious Arbitration in Canada: Protecting Women by Protecting them from Religion” (2007) 19 *C.J.W.L.* 119. The other is *Braker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607 (S.C.C.), in which an Orthodox Jewish woman successfully sued her husband for damages flowing from his tardy performance of his contractual undertaking to arrange for her religious divorce. Did the Supreme Court of Canada’s enforcement of the contract further privatize the family by enlarging the place of contract and the dominion of patriarchal religious law, or, by enlarging the state’s warrant to award damages for breach of civil contracts — here the husband’s undertaking to the wife — did it reduce the family’s privacy? See Ayelet Shachar, “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law” (2008) 9 *Theor. Inq. L.* 573.

V. CONCLUSION

Scholars are unlikely to open the dusty volumes of the Supreme Court Reports to embrace the *Pelech* trilogy penned by Justice Bertha Wilson. Still, those judgments arguably warrant reactions less harsh — or at least more ambivalent — than is common. The orthodox view of *Pelech*¹²⁴ hides other features of the judgment, such as its effort to solidify the view of maintenance as a right, not a form of moral governance, and its emphasis on the state's role in supporting former spouses. What is most arresting about *Pelech* today is not its place for private ordering, but its emphasis on robust communal duties. And its emphasis on private ordering, denounced by many as an instrument of injustice, may today appear fruitful for those seeking to fashion unconventional family arrangements of their own. More than evident at first blush, determining what is left of *Pelech* is a complicated exercise. By telling the story of the uneven life of a single trilogy of judgments, this paper hints, on a larger level, at the uncertainties of legal judgment, the variability of the conditions in which texts are read and interpreted, and the complexity and unpredictability of the life of ideas.

It would be an exaggeration to say that the scholarship critical of the trilogy has aged badly. The terrain has, however, shifted enough that it is necessary to revise assumptions about what advances privatization and the objectionableness of independence and autonomy in defining family ties. While it is widely accepted in other areas of private law that legal scholarship reflects its time and is a worthy object of study as such, the temporal existence of Canadian family law scholarship, and the contingency of its assumptions about the family, the state and the market, is rather less acknowledged.¹²⁵ Academics recognize the historical specificity of the trilogy itself more than they do that of the scholarship around it. While legal scholarship on the family does not constitute a source of law, it nevertheless exercises a *de facto* suasion. It is thus worth trying to understand better how family law scholarship operates, including its shelf life. Such an understanding may well signal the need for humility on the part of scholars regarding the durability of their work.

¹²⁴ [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.).

¹²⁵ A rare example is Susan B. Boyd & Claire F.L. Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2004) 42 Osgoode Hall L.J. 545.

The scholarly reception of *Pelech*¹²⁶ and *Moge*¹²⁷ and subsequent feminist family law scholarship risk appearing contradictory. The validation of contracts confirming stingy spousal support is denounced as privatization, while, later, more generous support is questioned in the same terms. In one instance, contractual termination of family ties is criticized as atomistic; elsewhere, it is desired in the service of autonomy. Certainly the set of family law scholars working in the field — even from an explicitly feminist perspective — is large enough that diversity, inconsistency and disagreement are to be expected. Yet it is possible to read the tensions and potential contradictions in the scholarship another way. The dissatisfaction with family law judgments such as *Pelech* and *Moge* may indicate not only the fragility of scholarly interventions in time, but also the limits of private law adjudication. The anticipated dark consequences of narrow and broad understandings of spousal support might gesture less towards contradiction than towards the structural constraints on individual family law judgments to palliate power imbalances and remedy entrenched inequities. Family law scholars are, of course, alert to law's "contradictions, limits, and possibilities", including the limits of law reform.¹²⁸ It is less common, though, to see evidence of these constraints, as this paper does, in scholarly contradictions. Perhaps the *Pelech* trilogy, and the rich subset of scholarship it inspired, are best understood as a reminder of the limits on the powers of judges and lawyers to remake the world, limits of which Justice Bertha Wilson, in her pragmatic wisdom, was soberly aware.

¹²⁶ *Supra*, note 124.

¹²⁷ [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.).

¹²⁸ Susan B. Boyd, "Legal Regulation of Families in Changing Societies" in Austin Sarat, *The Blackwell Companion to Law and Society* (Oxford: Blackwell Publishing, 2004) 255, at 266.

