

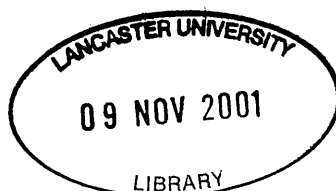
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**THE CONTROL AND DETERMINATION OF GENDER AND SEXUAL  
IDENTITY IN LAW**

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**ABSTRACT**

This thesis argues that the legal subject is unable to exercise control over their sexual and gender identity in law. In other words, I suggest that identity is controlled not by the individual, but by law. My focus is female gender and sexual identity with particular reference to lesbian sexual identity. I suggest that the legal 'meaning' given by law to the 'categories' of 'woman', 'mother' and 'lesbian' and so forth, are of central importance to law in its determination of 'identity'. I argue that this is a continuing process and takes place not only within the context of hetero-centric values, assumptions and norms, but also by the operational nature of 'distinct' epistemological fields within law. As a result, identity, is created by legal discourse, not the individual. I focus upon the ways in which female identity is represented within the contexts of 'the family and marriage'; child custody disputes; familial property disputes; visual rhetoric and biological determinism. I argue that lesbian identity within law continues to be rendered 'the other' and 'the invisible' due to the 'location' of lesbian identity in the network of heterosexual legal and social power relations.



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## **CHAPTER ONE**

### **Introduction and Methodology**

“Every person participates in a multitude of social relations, some of them consciously, some of them not. Once we begin to question our place in society, we are led to ask how, where, and in what ways we participate in it”. (Tong, 1989:125).

During the course of this thesis, I will explore the posit that identity is formulated by, and through, legal discourse, and not by the legal subject herself. I will argue that there is a complex and highly structured hierarchy of legal identities, resulting in a ‘spectrum’ of identities, ranging from those identities which are excluded, rendered ‘the other’, to those which are ‘favoured’ or ‘promoted’.

I argue that law ‘creates’ and ‘reproduces’ the identity of ‘family’ and as a consequence, the identities of the individuals within that family. Attempting to ‘map’ some of these ‘creative’ and ‘reproductive’ processes will, I argue, allow for the

discrepancies between law's 'promise' and its 'performance' to be exposed.

I cannot speak for all subjects of law and I would not be so presumptuous as to claim that I speak for the experience of all women, I can only tell a very small part of the story. However, I would argue that every legal subject's identity is affected in some measure by legal discourse. Although the vast majority of individuals do not encounter 'law' in quite the same way as the respondents and applicants who appear in reported cases, the 'effects' filter down law's 'capillaries' and permeate into a wider sphere of law and society.

I have sought therefore, to try and counter-act (if only in a small way), and argue against, socio-legal processes which construct certain identities as invisible, illegitimate and 'the other'. I have further sought to explore the possibility that not only do these 'socio-legal' processes exclude and discriminate against certain constructions of identity, but do so whilst purporting to be doing the opposite. In other words, law speaks of inclusion, but excludes, law talks of 'legitimacy', but practices 'illegitimacy'.

Whilst the concept of 'motherhood' is generally endorsed and approved of by law, this endorsement only occurs when expected

‘norms’ are conformed to. A lesbian identity is one which is immediately obvious as not conforming to heterocentric values and assumptions. The ‘juncture’ between lesbian identity and law provides the main focus of this thesis. Are lesbian mothers perceived of as ‘mothers’ or ‘lesbians’? Are these two concepts regarded as legal oxymorons? Why does a ‘lesbian’ identity receive a legal scrutiny that female heterosexual identity does not? Why is it that despite the popular concept of ‘glorious motherhood’, a lesbian identity is often perceived as being in direct opposition to the ideal of motherhood?

During the course of this first chapter, I want to explore some of the ways in which issues such as power, recognition, typification, conspiracy and cultural values continue to be preserved by law’s self-determined parameters, and its often ‘invisible’ practice of categorising legal ‘relevance’.

“I am an academic lawyer. Whilst researching and writing this book I often wished that I were also an historian and a sociologist”. (Doggett 1992:1).

In writing my own thesis, I have often expressed similar wishes. I do not think it is possible to ‘talk’ about ‘law’ without acknowledging that law is as much a ‘product’ of, and a

‘producer’, of these ‘other’ ‘disciplines’. Law is not created in a vacuum, nor is its function to maintain or produce a vacuum. While I too, am taking ‘law’ as my primary ‘object’ of study, I readily acknowledge that discourse from other ‘disciplines’ interacts with law in many different ways and on many different levels. In a similar way, ‘law’, its effects and its power, are experienced by its ‘subjects’ everyday. Despite the operation of power and its effects upon those ‘subjects’ of law, to what extent does individual experience impact upon, law?

As a ‘subject’ of law myself, it has become clear to me that families and sexuality are not the ‘set in stone’ fundamentals that I had always been led to believe. Instead, they appear to be free floating concepts, at the mercy of any interpretations, constructions and meanings associated with, or imposed upon them. This kind of formulation might imply that they carry no limits. However, these ‘free floating’ concepts are interpreted by law using the workings of discourse, knowledge and power. This led me to ask how ‘the culture of law’ was able to selectively admit, refuse to recognise, or render silent other voices, interpretations and constructions.

I also began to realise that the ‘laws’ governing how such concepts are encountered, interpreted and applied, were



themselves subjective, capricious and restrictive. They were not value free or neutral. The pursuit of, and the claim to, 'truth' within legal discourse is inherently ideological, hierarchical and selective. It appeared to me that in practice, 'law' seemed to have little in common with its inherent, implied 'promises' of justice, fairness, equality and so forth through which it seeks to legitimate itself. Again, not what I had previously been led to believe, not only by the law tutors during my undergraduate days, but also by the reading of hundreds of law reports in the 'traditional subject areas' (tort, contract, trusts etc.<sup>1</sup>). These cases were always 'legitimated' by reference to the underpinning of 'egalitarian' ideas - 'equal treatment' 'equal rights' 'impartiality', for example.

Butler cites this phenomenon as 'performative' power. She argues that the judge, in giving 'his' judgement, undertakes a performative act. It is the very 'act' of handing down a judgement and the 'power' conferred and implied within that 'act' which gives the judge power, not any previous citing of cases or statutes, nor reliance on precedent. In this respect, if the power of discourse is linked with performativity, then the performative domain is one which this form of power acts as

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<sup>1</sup> My undergraduate studies were overwhelmingly 'black letter, an approach to law which has been called a 'bastardisation of legal positivism' (McCoubrey

discourse (Butler 1993: 225). In other words, it is the performance of the citation of the past which grants the judge 'his' authority and not the citation per se. However, the judge's judgement, is not a singular act; instead the judgement repeats or mimes the discursive gestures of power:

"Hence, the judge who authorises and installs the situation he names invariably cites the law he applies, and it is the power of this citation that gives the performative its binding or conferring power. And although it may appear that the binding power of his words is derived from the force of his will or from a prior authority, the opposite is more true: it is through the citation of the law that the figure of the judge's "will" is produced and the "priority" of textual authority is established." (Butler 1993: 225).

Thus according to Butler, the position of 'authority' which the judge speaks from, is derived not from the judge, nor from the actual judgement given. Instead, the performative power is invoked through conventional citational legacy. It is through this 'legacy' that a judgement appears to be part of a 'continuous

chain' of judgements, giving both the judge and the judgement their 'legitimacy'. My subjectively lived experience as a law student, engaged in three years 'hard labour' reading many law reports, led to a conclusion that the underlying purpose was not necessarily to explore concepts of 'fairness', 'equality', 'justice' and so forth, but rather to learn 'how to cite the law'. In other words, my 'purpose' as a law student, was to 'imitate' the judges' citation.

It appears to me that on a rhetorical level, much of what law was supposed to 'do', was incompatible with my perception of myself as an (actual or possible) 'subject' of law. For example, my perception of myself as a 'woman' did not seem to match the image presented to me by law - and the image I had of myself as a lesbian most definitely did not match. On an experiential level, I realised that my 'self-perception' and my self-identity, causes a 'categorisation' problem for legal culture. However, it was also a recognition that law both requires, and necessarily operates through, categories of 'legal relevance'. The more 'law' I was exposed to, the more I began to realise that legally and socially speaking, 'families' and 'lesbians' were 'categories' not deemed to be 'compatible' (in the eyes of the law), either with each other, or the dominant legal culture. In other words, they are mutually exclusive polar opposites. I have sought to counter-act (even if

only in a small way), and argue against a process by which I had been constructed as invisible, illegitimate and ‘the other’ by a system which itself repeatedly purports to be doing the opposite. I wanted to explore the law’s selective refusal to recognise identity in some cases and the promotion of identity in others.

During this first chapter, I explore some of the methodological approaches I have taken advantage of in trying to explore these issues. I have drawn on some of Foucault’s work in order to explore some of the limits of the meaning associated with and constructed by the language that law uses. I do however, stop short of a complete adoption of Foucault’s ideas regarding the ‘non-existence’ of ‘the subject’, preferring instead to regard the subject as ‘something which exists’ within law, but whose experientially defined subjectivity is ignored or negated.

I start my substantial examination of these issues in my second chapter, by exploring the manner in which ‘family’ has been defined, categorised and imposed by dominant ideological discourse, a dominance which is often ‘hidden’ within ‘layers’ of ‘legitimacy’ and ‘truth’ from critical examination. Whilst there are, obviously, other familial arrangements which exist without the blood tie, (e.g. adoptive families), the ‘blood tie’ and biological determinism/constructionism continue to play a central

defining role in socio-legal familial construction. For example, adoptive families 'lack' the a blood tie, yet the law still seeks to construct a blood tie. In other words, the law forces the adoptive family to mimic the biological one. I seek to challenge some of the notions surrounding families as being 'natural' i.e. biologically constructed and determined. The appeal of 'the natural' to legal discourse, allows for the operation of power law to present the 'natural' as 'established truth, whilst simultaneously enabling this process to remain largely disguised.

For example, in the following extract, the judge makes the appeal to the 'natural' as if he were basing his judgement on facts; any 'difference' therefore, is presented as being based on fact, not cultural meanings and understandings:

"No matter how you may dispute and argue, you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and raise children:...He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. These diversities of function and temperament lead to differences of

outlook which cannot be ignored.” (Denning 1980:194).

Grosz, for example argues that this approach limits women’s social and psychological capacities according to biologically established limits. This approach therefore, ‘asserts that women are weaker in physical strength than men, that women are, in their biological natures, more emotional than men. (Grosz, 1995: 48).

This ‘desire’ to keep separate, make categories, set apart and so forth, is not only utilised to ensure for example, that ‘male’ identity is kept separate from ‘female’ identity, but also to exclude in other ways; ‘heterosexuality’ from ‘homosexuality’, or ‘mother’ from ‘lesbian’.

In chapter three, I examine some of the case law in ‘marital’ property dispute cases in an attempt to uncover a similar pattern of separation. Only this time it is not the divide between what is ‘natural’ and what is not, but a divide over ‘distinct’ areas of legal practice. With this in mind, in addition to problematising that relationship between law, identity and ownership, it is also my concern to problematise the ‘ownership’ of language by, and within, law. This latter analysis will explore the artificial and

thin divisions created by law in respect to its own internal workings. I hope to show that the continuation of the artificial divide between 'property' law and 'family' law, is not due to a necessity to prevent one 'discipline' overlapping another, (a common cry amongst some lawyers), but is part of a larger pattern of exclusion and ostracism (Bottomley 1993).

The 'injustice' that often results from this pattern of exclusion is arguably the most 'blatant' example of an open acknowledgement of law's divisive operational nature. Yet even here, there is a pervasive unwillingness to re-evaluate categories and concepts.

What happens then, when the acknowledgement that such divisive and exclusionary methods are missing?

In chapter four, I attempt to answer this question by suggesting that the exclusionary strategies used, become a little more 'subtle'. However, whilst the strategies may become more subtle, the effects on 'the subject' are not. In order to explore the operation and effect of these strategies, I concentrate upon the importance of the symbolic and iconic aspects of law's exclusionary operational nature and continued reinforcement of its own 'legitimacy'. I argue that law's dependence upon

legitimacy is achieved mainly through the re-enforcement of 'lines of succession' in the context of 'the family'. This is achieved through written discourse, but also through what I have termed 'visual' rhetoric; i.e., law's symbols and icons. The symbolic nature of law's visual symbols and icons has been the subject of critical examination in other contexts, for example, the symbolic nature of the court room.<sup>2</sup> However, the operation of power through more 'accessible' or 'common' visual symbols has not been addressed to a similar extent.

Constant bombardment of a particular visual representation of the family operates upon the subject to re-inforce the dominant ideology of an inherently heterosexual and gendered family. For example, the 'nuclear' family, is visually portrayed in a manner consistent with its a written image. Part of the 'problem' of trying to uncover dominant ideological constructions, has been the 'invisibility' of alternative discourses.

Even within the 'academy' itself, the problem of invisibility continues. At the level of undergraduate studies, whilst the students may be encouraged to think critically about law, the main 'tools' used for this are, of course, text books. These immediately present the student and lecturer with images of the

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<sup>2</sup> See for example, Jackson: 1985., Goodrich: 1991., Kelveson: 1989.



family which are prescriptive in nature and operation. The visual images I have chosen are found on the front covers of 'commonly used' family law text books to explore whether 'power' operates by the symbolic repetition of citation, and how that which is symbolic becomes invested with power.

Against this backdrop of the often uncritiqued, unacknowledged operation of 'power' and 'truth' within socio-legal discourse, how does the legal subject 'experience' 'law'; in what ways does this manifest itself? In chapter five, the legal subject under consideration is the lesbian mother. It is the wielding of power within law towards the excluded lesbian mother that I argue illustrates an incongruous operation of law's nature. The terms upon which a lesbian mother is 'allowed' to be recognised as a legal subject in her own right, are extremely restrictive.

I will argue that not only does this operate to the detriment of the particular lesbian mother concerned, but also to the detriment of law itself. The negative 'recognition' given to a lesbian mother is based on the repetitive sameness and homogeneity of heterosexuality. I argue that it is this 'sameness' and homogeneity which can lead to legal stagnation. In other words, diversity and difference are 'recognised' by law only in negative terms. 'Difference' is therefore constituted as deviance and

weakness. 'Conformity' to the 'ideal' as strength. In this respect, sameness and difference are placed in a hierarchy of privilege in relation to their opposites. For example, the legal category of 'woman' is placed on a hierarchical scale in relation to its binary oppositional category, that of 'male'. In other words, law concerns itself with the creation of categories, hierarchy and privilege - and 'power' is an integral part of that process. Thus, it is not necessarily the identification of difference(s) per se, that is of prime interest to me, but rather the operation and nature of those difference(s), and the meaning and importance law ascribes to them.

Would a Foucauldian analysis of the operation of power/knowledge allow us to theorise that the power/knowledge dichotomy was also inherently linked with the issue of control, ownership and possession of identity? Does law claim exclusive access to 'knowledge' and the 'truth' about identity; its construction and expression?

In chapter six, I attempt to answer these questions by exploring the operation of power/knowledge within the construction of sexual and gender identity and the resulting control over the possession and expression of that individual identity. 'Power' is

part and parcel of our everyday lives - we live it rather than have it:

“Foucault...constitutes a radical break with all previous conceptions of power...To begin with, power is not a possession, won by one class that strives to retain it against its acquisition by another. Power is not the prerogative of the ‘bourgeoisie’; the ‘working class’ has no historical mission in acquiring it. Power, as such, does not exist, but in challenging existing notions of how societies operate, one is forced, in the first instance, to employ the same word. Power is an effect of the operation of social relationships, between groups and between individuals. It is not unitary: it has no essence.” (Sheridan, 1980: 218).

Within this context, I will examine how power operates upon the legal subject’s ability to self-determine sexual and gender identity within the context of legal discourse. I will argue that the legal subject is disempowered from ‘having’ their own, self-defined identity, and instead is expected to adopt the identity constructed for them. In this respect, I concentrate upon the concepts of ‘ownership’ within ‘the family’ and explore the

extent to which sexuality and gender are viewed by law as 'property'. In other words, does law view 'identity' as the 'property of law'?

As with chapter five, I have chosen to concentrate primarily upon the operation of law on lesbian mothers. Through a random selection of some of the case law I will ask whether sexuality and its attendant expressions, is perceived by law as something to be controlled and categorised. Are there 'gaps' between the constructions, expressions and representations of a lesbian mother's self-identity, and those that are imposed upon her by law? If there are, it may be these 'gaps' allow us to 'map' the apparent continuing difficulty that women (especially lesbians), as legal subjects, have in authenticating their identity and exercising control over it.

My seventh and final chapter will draw together the substantive issues I have examined throughout the course of my thesis. At that juncture, the discussion will point towards possible modes of resistance to impositions of power and the possibility of moving towards a 'new' jurisprudentially/judicial approach to 'the family' and 'intimacy'. Within this context, I will try to examine why 'law' appears incapable of viewing the 'family' without the 'crutches' of gender, sexuality, femininity, masculinity and so

forth as they are presently defined. To use a politically fashionable phrase, ‘do we need to think the unthinkable?’ In my opinion, ‘thinking the unthinkable’, is not necessarily re-thinking familial structures themselves, but re-thinking the strategies and methodologies used to create and sanction those structures.

Having introduced some of the substantive issues to be explored within this thesis, I now turn to discuss the various methodological techniques and approaches I have utilised.

### **Qualitative/quantitative?**

I have decided that it would be inappropriate to use a quantitative methodological approach for a variety of reasons. A quantitative approach would necessitate identifying (and thereby defining), the object of the study. Even if it were possible or desirable to produce ‘categories’ that are suitable for quantitative research, defining in operational terms, the ‘object’ of the study, in my own case ‘law’, ‘family’, and ‘sexuality’ and so forth, would lead to that type of essentialist inclusion/exclusion approach, which I am anxious to avoid. In other words, external definitions have the propensity to suggest, and even stipulate, the ‘answers’ from the top-down. Classifying and categorising sexual and gender identity has largely proved to be a controversial issue for

quantitative approaches by forcing the field of experience onto/into pre-conceived operational categories and therefore allowing these to pass unchallenged. For example, in the 'research area' of lesbian sexuality, many such quantitative studies have been criticised for 'inaccurate labelling';

“This collection of invalidatory labels has the effect of severely reducing the number of ‘real’ lesbians in existence. By defining large numbers of women as outside the category of lesbianism, social scientists are then left with a relatively narrow, limited and homogeneous group of ‘real’ lesbians from whom accounts can be elicited.”  
(Kitzinger 1987: 68).

In other words, the question of what it means to be a 'lesbian' is defined not by the subject herself, but by the social scientist. To be a 'real' lesbian, she must conform to the parameters and definitions imposed by the researcher, at the expense of, and regardless to, how she herself defines her identity with respect to her life experiences.

Furthermore, once amassed, quantitative data can be mistakenly treated as 'knowledge' about the subject. Under these

circumstances, the 'knowledge' gained by the researcher as a result of such quantitative study, is limited to the experiences of lesbians who 'fit' the social scientists definition of 'lesbian' - women who have been defined as 'real' lesbians. Such studies do not allow for the act of 'self-definition'. In other words, there remains the possibility that such studies do not fully take into account the experiences of lesbians who have defined their identity for themselves:

“Arriving at a working definition of ‘lesbian’ is fraught with difficulty and contradiction, there is no consensus about what defines or even what characterises a lesbian. The word is variously understood and positioned within a multiplicity of paradigms: the moral, the mystical/religious, the juridical, the scientific, the medical, the political and the social. ... Among lesbians ourselves there is a profound dissensus about lesbian identity, with essentialist and constructionist theories of varying kinds and degrees giving rise to contradictory and often competing performances of ‘lesbian’, as well as political and theoretical positions.” (Wilton 1995: 29).

In this respect, I am not seeking to find the ‘truth’ about ‘lesbian’ identity (if there is such a thing), nor how it should be defined within the operation of law (which I would argue is impossible). That kind of ‘knowledge’ does not have the capacity to put under sufficient scrutiny, the operation of law and power upon the construction of identity. In this respect, I would argue that a quantitative approach relies heavily, either implicitly or expressly, upon essentialist connotations, treating the object of research as given, not as constructed, as something already produced, not as a process of on-going social construction mediated by ad hoc selective interpretations.

For example, in *The Lesbian Heresy*, Jeffreys makes a distinction between different kinds of lesbianism. ‘Lesbian feminism’ she argues, is the construction of lesbian identity through feminism; ‘Lesbians who are feminists experience their lesbianism and their feminism separately (Jeffreys 1994: xi). Whelehan notes that in this respect, “Jeffreys’ implicit aim to attribute a certain purity to a ‘proper’ lesbian perspective is becoming increasingly unpopular in academic and wider circles” (Whelehan 1995).

I would argue that essentialism is a methodological tool to be approached with caution. My caution stems from essentialists’ argument that every individual, every system, everything that is



‘known’, has one objectively given ‘essence’, i.e., that it is possessed by a common ‘nature’ or ‘property’ which is intrinsic to it. As a theory, essentialism provides definitions of a ‘thing’, revealing its ‘essence’; the perfect ideal form. In other words, it reifies a process that is presented as a factually given state of affairs. The legal subject is attributed with an ‘essence’. The subject who ‘complies’ with an essentialist definition is considered to be indisputable, true, exact, precise and incontrovertible. The subject who does not comply, is untrue, false, inadequate, imprecise and disputable:

“Essentialism entails that those characteristics defined as women’s essence are shared in common by all women at all times: it implies a limit on the variations and possibilities of change”. (Grosz, 1990: 334).

Essentialism is thus able to define ‘woman’, ‘man’, ‘sexuality’ and so forth, as being ‘natural’ and ‘real’, each possessing inherent qualities. However, ‘essentialism’ is not limited to one single system of thought. There appear to be three main types of thinking in relation to essentialism, each of them resting on different sorts of argument about how biological difference is transformed into subjective difference - ‘biological essentialism,

philosophical essentialism and historical reification' (Marshall 1994:104). In respect of the 'subject', it thus makes use of universal categories which are constructed as 'natural' and/or 'absolute', and are presented as rooted in biology. The work of Mary Daly, Adrienne Rich and Shulamith Firestone is usually associated with biological essentialism. In *The Dialectic of Sex*, Firestone maintained that women's ties to childbirth and childrearing caused a basic imbalance of power between men and women that predated all other power imbalances.

Probably one of the best known examples of philosophical essentialism came from the work done by Simone De Beauvoir. Beauvoir saw certain physiological differences between men and women, most notably in men's freedom from reproductive activity and the potential for men to first define themselves as subject. Thus for De Beauvoir, biology becomes elaborated into gender as woman becomes the 'other' to man within a hierarchical relationship. In a general sense, these writers wrote from a position whereby the sense of self is located in the specificities and peculiarities of the female body. Historical reification appears most clearly in socialist feminist theory, where consciousness and subjectivity tend to be located in human activity as it is organised under capitalism, not in a biological or philosophical essence (Marshall 1994: 107).

However, at the same time, resisting essentialism is not so much about merely deconstructing the category. Resisting essentialism is perhaps more to do with uncovering some of the processes through which identity is produced.

A qualitative approach necessitates a different focus. Rather than focusing upon the world as already categorised and the experience associated with that existence qua category, a qualitative approach by contrast, helps to understand how the meanings and constructions ascribed to those categories are constituted as such. In addition, such an approach can allow for attention to be paid to the 'tools' of construction; e.g. the ideologies which create and sustain the meanings, purpose and value of the categories 'woman', 'mother', 'lesbian'.

Although the 'empirically recorded' lived experience of lesbians and families is of great importance and provides one of the main focuses of this thesis, the purpose of including such a focus is not to engage in what would ultimately amount to a prescriptive and definitional exercise with regard to identity. Rather, the focus of my critical attention is the operation of power through law in the construction of identity. I feel that a quantitative approach to such 'data' would not advance the project by allowing for the adequate explorations of the issues under

consideration. Because in so doing, I have drawn upon aspects of feminist legal studies, and sociological perspectives in order to illustrate the exclusionary nature of law itself within families and the attendant sexualities. As much of the emphasis in this thesis is concentrated upon the constructed lesbian within family law, Feminist theory has much to offer as a methodological tool, and whilst I am a 'self-defined feminist' myself, I do have methodological reservations with certain aspects or critical focuses of certain feminist concerns.

The lack of attention paid by (especially early) feminist discourse to lesbian subjective experience<sup>3</sup>, (largely driven by the myth that one oppressed group cannot in turn oppress another), meant that early feminism centred its discourse on the patriarchal nature of male-female relationships, at the expense of critical examination of the heterosexual imperative. Because early feminism operated on the basis of essentialist meanings of male and female, the only 'path' of resistance was to reverse the present day assumptions, i.e., making women 'superior' to men. Feminism in the early 1970's paid scant attention to the assumptions and constructions upon which the compulsory nature of heterosexuality rests:

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<sup>3</sup> See Wilton 1995 where the author criticises the majority of feminist scholars for not acknowledging their heterosexual position in their writing.

“By this lack of attention, they risked accepting that being heterosexual was an essential part of their being, and in this way were demonstrably less willing to consider the possibility that sexual orientation is itself a social construct, rendered meaningless if social and ideological punishments and rewards associated with illicit and licit forms of sexual expression were removed.” (Whelehan 1995: 92).

In other words, the omission to critically address the construction of a compulsory form of heterosexuality, resulted in a failure to examine and expose the ideological and hierarchical construction of a sexuality constructed as normatively and exclusively, heterosexual. It is only recently, that ‘second wave’ feminism has left biological determinism behind<sup>4</sup> and turned instead to social constructionism, extending this to the sexual domain. Even so, there still appears to be a continuing lack of attention paid to the importance of the heterosexual imperative. For example, Tong only discusses lesbian feminism as a separate wing of radical feminist thought (Tong 1989). In contrast, Rich

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<sup>4</sup> I.e., the characterisation of female sexuality as radically distinct from a phallic organisation of sexuality.

has demonstrated the social construction and enforcement of compulsory heterosexuality (Rich 1980). Rich observes that the institution of heterosexuality holds sway over all women regardless of their sexual choices - which in fact, have little to do with 'choice' as such. Because of the assumption of a 'normality' deemed to be inherent in heterosexual existence, the social and political control over women and 'outgroups', continues to prevail (Rich 1980). In this respect her aim is to:

“encourage heterosexual feminists to examine heterosexuality as a political institution which disempowers women - and to change it.” (Rich 1980).

Notwithstanding certain methodological reservations regarding this lack of attention to the heterosexual imperative, on a more general level, feminist theory allows for examination of the workings of power and on gender (Butler, 1990). The importance of a feminist approach to gender discourse, lies in 'unravelling' the importance of gender considerations in law; what it means in law to be constructed as 'masculine'; 'feminine'; 'woman', or 'man'. Feminist discourse has thus made large inroads into exposing the hidden workings of power, and the revealing of the processes of construction and that which

is constructed. Examining the workings of power upon lesbian identity, allows not only for the exposing of gender as a construct, and of heterosexuality as a construct, but also as to how these two constructs are projected onto the body of the lesbian mother. The ensuing 'conflict' between that which is constructed and that which is lived and experienced is thus hopefully exposed to critical examination.

This experiential methodological approach will help to uncover discrepancies between law's claims and its operational practices. This kind of critical examination necessitates exploring how lesbian self-experience which, by its very existence challenges traditional notions of power and authority, is treated by the heterosexual imperative. In this respect, I am concerned with exposing often unchallenged familial structures, within the context of how 'important' (or otherwise), lived experiences are to law.

Although it is of interest to ask 'what does the operation of law tell us about intimacy?', this approach operates within a framework already established and controlled by law itself; it posits intimacy itself as the object of study over and above that which is the legal definition. Instead, I prefer to ask 'what does the operation of law tell us about law'? This question posits law

itself as the object of study and critique. It is by this process that I hope to uncover that which is being taken for granted, together with the consequent implications for the legal subject of these assumptions in lived experience. In other words, I hope to expose how the operation of law in concealing these discrepancies, certainties, doubts and ambiguities, reinforce and perpetuate the widely propagated image of law as objective, fair and universal.

I began to ask how these dominant ideologies of law managed to affect so dramatically, and integrate so successfully into lived experience. In exploring these issues, a Foucauldian approach allows for the workings of power and knowledge to be examined at the experiential level of the individual. Foucault argues that it is power that is primarily constitutive of individual identity, not governments, legal systems and institutions. In other words, power exists not only at institutional levels, but also within the individual's daily life.<sup>5</sup> One logical conclusion of this, is that if power is not located in the individual, they also do not have 'identity'.

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<sup>5</sup> An example of this is 'the personal is political', a phrase used in the early days of feminism.



Within this methodological context, I have adopted an approach based on a post-structuralist version of qualitative socio-legal research for varying reasons. A post-structuralist approach acknowledges the importance of the experiential subject as specifically distinct from the external third person approach found in the signs and signifiers of an exclusively quantitative approach. It allows a view of the operation of law and power upon the family by examining constructed meanings of knowledge, discourse and categories of legal relevance, which claim as their foundation, such things as essentialism, naturalism, absolutism, objectivity and truth. This latter approach, involving the construction and imposition of labels, categories and therefore identity, is a process of 'normalisation', an activity I endeavour to avoid. A post-structuralist (type) approach has been adopted, largely as the result of experiencing the law firstly, as a woman, and secondly as a lesbian. The apparent contradiction here is obvious; post-structuralism does not acknowledge the pre-constructed and coercively imposed labels. In short, post-structuralism<sup>6</sup> (of which Foucault, Lacan and Derrida are 'front runners'), maintain that there is no 'essential' core to the individual as such, any 'essential' core that might exist is constructed from language and discourse:

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<sup>6</sup> Sometimes otherwise known as post-humanist or post-essentialist.

“The self-contained, authentic subject conceived by humanism to be discoverable below a veneer of cultural and ideological overlay is in reality a construct of that very humanistic discourse. The subject is not a locus of authorial intentions or natural attributes or even a privileged, separate consciousness. Lacan uses psychoanalysis, Derrida uses grammar, and Foucault uses the history of discourses to attack and deconstruct our concept of the subject as having an essential identity and an authentic core that has been repressed by society. There is no essential core ‘natural’ to us, and so there is no repression in the humanist sense.” (Alcoff 1997: 337).

In other words, the individual’s essence is to have no essence. In this respect, a rigorous post-structuralist analysis leads to complete denial of not only the subject, but also of subjection, oppression and selectively lived experience. The subject is denied any ability to affect or challenge social discourse or indeed to any acknowledgement of the effects of dominant ideological discourse. There is therefore, no repression of the subject’s right to exercise self-determination over what and who they are. The result is that a non-existent subject cannot be repressed. There are additional problems of resisting the

impositions of power and dominant discourse upon subjective identity. If identity is formed through 'socialisation', then the subjective identity is formed largely through its oppression. In addition, the 'I' and the 'self' of lived experience are also denied. Following this line of thinking, any 'idea' or 'opinion' would be a 'negative' - 'deconstructing everything and refusing to construct anything' (Alcoff 1997: 338). Within this context then, how can I self-identify with, and adopt, the labels of 'female' and 'lesbian' and still claim that post-structuralist thinking has value to my thesis?

Whilst facilitating deconstruction, post-structuralism denies the subject the ability to affect or change social discourse. However, this is not to say that a post-structuralist approach denies possible sites of resistance. Butler for example argues that 'categories' of 'woman' do not become useless through deconstruction - they can be used as a site of resistance whilst simultaneously opening up discourse and challenging the exclusionary operations and power relations that construct and limit 'women' (Butler 1993: 29).

Although Foucault would also probably have gone out of his way to avoid being labelled as a post-structuralist, I would suggest that a Foucauldian approach incorporates post-structuralism. It

can allow us to conceive of, and analyse the operation of power and power relations. What was of interest to Foucault, was the relationship between modes of organisation of thought, and the relations of power and knowledge through which human beings are transformed into certain types of 'subjects'. In his early work, for example, *The Archaeology of Knowledge*, Foucault emphasised 'power' as being something which was stable and concentrated. However, he shifted away from this position in his later work which tended to emphasise the fractured and unstable nature of power which he maintained was both productive and accessible.

For example, in *Discipline and Punish* (1977), Foucault argued that power is not repressive or oppressive, rather, power was something both positive and productive. His concern was 'to create a history of the different modes by which, in our culture, human beings are made subjects' (Foucault 1982: 216-217). It was Foucault's main contention that the subject; the 'self' was an historical product created by, and through discourse:

“One has to dispense with the constituent subject, to get rid of the subject itself, that's to say to arrive at an analysis which can account for the constitution of the subject within a historical

framework. And this is what I would call genealogy, that is, a form of history which can account for the constitution of knowledges, discourses, domains of objects, etc., without having to make reference to a subject which is either transcendental in relation to the field of events or runs in its empty sameness throughout the course of history". (Foucault 1980: 117).

In this respect, using a Foucault and post-structuralist approach enables an analysis as to how and why women are constructed as subjects in both discourse and power relationships. In addition, it allows the 'gaps' or 'spaces' hidden by power and discourse to be exposed, freeing us from some of the 'inevitability' of regarding 'essentialist truths'.

In a variety of ways, women who are lesbians have been socially constructed as 'outsiders' to the law and society, they are constructed and defined in many different incarnations, but always it seems, as 'the other', and almost without exception, negatively (Kitzinger 1987). In other words, the subject is recognised only as that which is non-recognisable. Is this 'non-recognition' the result of law exercising power and control

through a process of oppression and suppression? Foucault poses the following questions:

“Do the workings of power, and in particular those mechanisms that are brought into play in societies such as ours, really belong primarily to the category of repression? Are prohibition, censorship, and denial truly the forms through which power is exercised in a general way, if not in every society, most certainly in our own?”  
(Foucault 1990: 10).

In other words, Foucault questions whether exclusion is the means through which power operates. Although it is important to identify that which is being censored and excluded, this ‘identification’ is not necessarily the prime focus of my concerns. The ‘identification’ of that which is censored will emerge as a result of focusing upon how that process of prohibition, censorship and denial operates; the mechanisms used and the instruments employed:

“to discover who does the speaking, the positions and viewpoints from which they speak, the institutions which prompt people to speak about it

and which store and distribute the things that are said.” (Foucault 1990:11).

### **Foucault’s theory of Power**

Within this context, what is Foucault’s understanding of ‘power’? In *History of Sexuality*, Foucault identifies power as a strategy, operating on, and upon, a multitude of ‘sites’. Power is not entered on specific institutional sites. It is not the ‘possession’ of governments, sovereigns or class, nor is it something that people have and wield over others, on the basis of their roles and positions in hierarchies. Power is not imposed from the apex of a social hierarchy, nor derived from a foundational binary opposition between a ruling class, rather it operates in a capillary fashion from below; it is all encompassing (Smart 1985). Even ‘resistance’ to power is no ‘resistance’ at all; it is merely yet another expression of power. ‘Power’, thus allows for the production and limitation of identity, and cuts off the possibility of an absolute and final essentialist ideal.

In Foucauldian terms, power is not what some people possess whilst others do not, but a tactical and resourceful narrative. It is thus relational, something that is exercised from a variety of points on the social body, rather than something that is ‘held’ or

'owned' by the subject. Power is established in and through its effects, and the effects, consequently felt, are the workings of power itself (Butler 1993: 251). In other words:

“There is no “power”, taken as a substantive, that has dissimulation as one of its attributes or modes. This dissimulation operates through the constitution and formation of an epistemic field and set of “knowers”; when this field and these subjects are taken for granted as prediscursive givens, the dissimulating effect of power has succeeded.” (Foucault 1990:).

On the subject of discursive power, he goes on to state that it is:

“[P]roduced from one moment to the next, at every point, or rather in every relation from one point to another. Power is everywhere; not because it embraces everything, but because it comes from everywhere. And “Power”, insofar as it is permanent, repetitious, inert, and self-reproducing, is simply the overall effect that emerges from all these mobilities, the concatenation that rests upon each of them and seeks in turn to arrest their movement.” (Foucault 1990: 93).



He goes on to point out that this, in turn, has ramifications for methods and modes of 'resistance' to power:

"Just as the network of power relations ends by forming a dense web that passes through apparatuses and institutions, without being exactly localised in them, so to the swarm of points of resistance's traverses social stratifications and individual entities." (Foucault 1990: 96).

For Foucault then, there is the possibility of resistance to the operation of power through discourse. However, resistance to the operation of power should concentrate critical attention on the varying complex processes through which the subject is constituted, not on the traditionally perceived 'institutions' of power, such as law. In this respect, any analysis of power should not:

"look for the headquarters that presides over its rationality; neither the caste which governs, nor the groups which control the state apparatus, nor those who make the most important economic decisions direct the entire network of power that

functions in a society (and makes it function).”

(Foucault 1990: 95).

Foucault’s theory of power allows us to expose the complex interactions of power within law to scrutinise what law does, why it does it and how it may be changed. It allows us to do away with more ‘conventional’ theories of power which relied almost exclusively upon a dichotomised world of domination and subordination. In this respect, it disrupts the notion that those who ‘dominate’ do not ‘possess’ power; indeed, there are no ‘dominators’ or ‘repressors’, no dominated and repressed.

As Foucault points out, the ‘truth’ about the human condition is constantly sought. With the continuing advances of science, it seemed possible to uncover an ‘essential truth’ of human nature. Although this possibility has now been recognised as over ambitious, it has managed to integrate itself into the legal psyche. One of these ‘essential truths’, is the classification and categorisation of ‘populations’. Through statistical forms of representation, the phenomenon of population was shown to have its own regularities, for example birth and death rates, characteristic ailments, age profiles, social groupings and so forth. Such representations established population as a higher order phenomenon of which the family constituted one aspect.

The family thus became a privileged instrument for the regulation or management of the population. Once governments began to conceptualise the people as being 'populations', they became a 'controllable' commodity; a public/state concern. As 'populations' cannot exist without 'sex', all things sexual became a 'public interest' issue:

“One of the great innovations in the techniques of power in the eighteenth century was the emergence of ‘population’ as an economic and political problem” (Foucault 1990: 25).

Many of the results of this occurrence, were that certain discourses on sex were silenced, while others were privileged. Foucault identifies that it was the sex of children and adolescents that was particularly subject to a process of silencing in the Eighteenth century. However, the same methodology can be applied to the constructions of lesbians. The establishment of a so called 'mainstream' discourse on sex and population, led to other discourses being marginalised, silenced or excluded.

However, at the same time, the silencing, also gave rise to discourses on sex which have been numerous, far reaching and wide ranging:

“What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as the secret.” (Foucault 1990: 35).

In conjunction with a ‘mainstream’ discourse on sex, this ‘*ad infinitum*’ speaking of it, led to its control - discourse produces power. Foucault suggests that the object of this, was to constitute a sexuality that is economically useful and politically conservative (Foucault 1990: 37). As he points out, just because there is a continuing, vociferous discourse on sex, does not mean that the discourse has value, says anything useful, or indeed, has any meaning.

Further, it was precisely the ‘repressive hypothesis’ which produced sexualities which were constructed as ‘unnatural’ ‘illegitimate’ and so forth. Rather than repressing such ‘sexualities’, they had the opposite effect - such ‘alternative sexualities’ multiplied. If this was true of the Eighteenth century, then it can also be true of this century. Whilst there does appear to have been a diversification of sex discourse<sup>7</sup>, the mainstream ideology continues to resist and marginalise other sex discourse.

For example, Queer culture, is struggling to maintain a discourse on 'gay marriage' which is free from heterocentric values. It does appear that the so called 'recent' discourses on sex, for example homosexuality, find themselves 'attached' to the dominant, mainstream discourse in which they struggle to disassociate themselves from re-defining heterosexual 'ideas' or 're-inventing the heterosexual wheel'.

However, as Foucault points out, despite the discourse on sex being multiplied instead of rarefied, the dominant discourse endeavoured to conceal sex:

“By speaking about it so much, by discovering it multiplied, partitioned off, and specified precisely where one had placed it, what one was speaking essentially was simply to conceal sex: a screen-discourse, a dispersion-avoidance.” (Foucault 1990: 53).

One ramification for 'minority' sexualities, was a 'spot light' type reaction. Because the new sciences were unable/unwilling to direct their gaze inwards and to conduct discourse upon themselves, attention turned to minority sexualities. The focus of that attention can tell us much about the dominant mainstream

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<sup>7</sup> For example, pornography, childhood sexuality, Queer culture and so forth.

sex discourse. The nature of what is defined as 'conventional' is set in relief and problematised via its anti-pode or 'other'. The emergence of science allowed for the creation of 'new' categories of human sexual behaviour, especially that of 'homosexual', a term 'invented' in 1869 and not used in England until the 1890's (Weeks 1977). As a result, homosexuality was classified as 'deviant'. At this stage it is possible to see that we have all the necessary ingredients for contemporary repression and control. We have a 'population' that needs controlling; we have the 'scientific ability' to classify human sexuality; and as a result, we have the sexual categories essential to the maintenance of hierarchy and privilege.

How does 'power', in this instance, relate to hierarchy and privilege? According to Foucault, power places sex in a binary system; licit and illicit; permitted and forbidden (Foucault 1990: 83). Given what I have outlined above, this must mean that only the minority part of the binary equation (the illicit and the forbidden), is thrust under the microscope as something to be explained. The majority part of the equation (licit and permitted), is presented as 'normal' and non-problematic. The underlying assumptions of 'normality' are re-entrenched as somehow 'obvious', 'self-evident', 'natural' and so forth.

## **Limitations of Foucault's Theory of Power?**

Although a Foucauldian methodology enables us to begin addressing the question of how power operates within law, its monolithic characterisation does not allow for the exposing of varying 'levels' or subtleties of power. Such a methodological approach does not fully explain how power can become concentrated in certain institutions and how this concentration is controlled in favour of some social groups, and to the disadvantage of others. The experience of 'family' (of one kind or another), is common to all individuals, as is the experience of 'sexuality'. However, the existence of so called 'deviant' sexuality with the family is not common to all individuals. Certainly, as Foucault argues, all individuals possess and experience power/knowledge, but he fails to acknowledge that at the experiential level of the subject, power operates at different levels.

Within Foucault's work there is a persuasive view (influenced largely by Nietzsche), of all forms of thought and knowledge being expressions of a 'will to power'; which designates both the productive and multiple possibilities of the law. This, effectively exposes the notion of 'the Law' in its singularity as a fictive and repressive notion (Butler 1990: 156). The ability to

wield power differs from individual to individual, and is experienced in a variety of ways; threat, opportunity, necessary evil, desire, and so forth. To be excluded from discourse; rendered as 'the other' and to have one's self-defined identity negated, is in my opinion, the result of a 'power-less' individual; not as Foucault would argue, a result of power not being exercised in the service of repression and domination. Up until this point, I find a Foucauldian analysis valuable.

However, I do have some reservations with a complete adoption of his methodological analysis. Firstly, according to Foucault, (especially in his earlier work), there is literally nothing to liberate, no 'essence' of natural sexuality to 'free'. In other words, there is no 'subject' to emancipate from power. In this respect, Foucault himself was reacting very much against the repressive theses of Marcuse, Norman Brown and Willeim Reich, who posited the idea of an 'inner essence' of sexuality, which society repressed allowing only a distorted expression and therefore requiring a 'liberation' from this repression by way of politics and theory. Some feminist theory accords with this standpoint (Smart 1990: 194), while other feminists argue that due to the distinct lack of attention to the constructed gendered subject, the visible, acceptable subject remains constructed as



male, and thus exempted from any radical criticism (McNay 1992).

However, this can produce a tension. If, according to Foucault, there is no 'subject' i.e. that the 'subject' can only exist within discourse and is a product of the technologies of power, then there can be no oppression and nothing to liberate. This total rejection of any value in essentialism as a method of possible resistance, has caused problems for those feminist thinkers who posit that feminist discourse is based on the notion of the female subject:

“The notions of women’s oppression and women’s liberation assume that there is an identifiable, bounded subject, woman, who is oppressed and who is fighting for liberation from this oppression.” (McNay 1992).

Denying the subject, necessarily means denying any discourse on oppression, liberty, freedom and so forth. I am not willing to argue that there is no oppression, or exclusion, largely because I experience it first hand. If Foucault is correct in his approach that power is created through discourse, and that consequently, all individuals experience power, he must rest this argument on

the assumption that all individuals are 'part and parcel' of the discourse.

However, if all individuals were indeed part of the discourse, there would not be some individuals pointing out that they are powerless. Does this mean that however large or wide ranging the discourse, there still remains that which is not covered by the discourse? i.e. that, which as a consequence of discourse, is rendered invisible?

My second reservation with a complete adoption of a Foucauldian analysis, is that to posit that a conceptual term (e.g. 'female' or 'lesbian' and so forth), has no 'essential' meaning, is not to say that those terms are rendered ineffective in exposing unfairness and capriciousness within legal discourse. Post-structuralism is useful in thinking about the material injuries suffered by women's bodies (Butler and Scott 1993). Indeed, a Foucauldian/post structuralist approach enables the 'process' of construction and normalisation to be exposed to scrutiny and critical examination, it does not negate the usefulness of the term:

“...the category of women does not become useless through deconstruction, but becomes one whose uses are no longer reified as “referents”,

and which stand a chance of being opened up, indeed, of coming to signify in ways that none of us can predict in advance. Surely, it must be possible both to use the term, to use it tactfully even as one is, as it were, used and positioned by it, and also to subject the term to a critique which interrogates the exclusionary operations and differential power-relations that construct and delimit feminist invocations of “women.” (Butler 1993: 29).

To undertake a critique of the processes of construction and normalisation is not the same thing as ‘getting rid of it’. Instead, the process of critique and deconstruction free the term from ‘its metaphysical lodgings’ (Butler 1993: 30). Although this may lead to a certain loss of ‘epistemological certainty’, this need not be the same thing as ‘political nihilism’. On the contrary:

“Such a loss may well indicate a significant and promising shift in political thinking. This unsettling of “matter” can be understood as initiating new possibilities, new ways for bodies to matter.” (Butler 1993: 30).

Indeed, once the 'label' has been imposed, it enables sites of resistance to appear. It enables individuals to make use of their subjectively lived experience, in resisting the imposition of essentialist meanings and labels. In this sense, in order to successfully resist such impositions, any marginalised group is obliged to establish at least a rudimentary sense of group identity (Whilton 1995). Foucault himself acknowledges that discourse 'can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy' (Foucault 1990: 101). Further, if as Foucault argues, it is the oppression which creates the subject, then for immanent critique to be successful, it is to a large extent, necessary to formulate resistance to oppression along the lines of the oppressed subject herself.

A further criticism I have of a Foucauldian analysis, is that as a Foucauldian analysis of power imbues all individual's with living power rather than having it, there is the implication that the 'illegitimate' subject is responsible to a greater or lesser extent, for her own oppression. This is, perhaps, one of the 'subtleties' of power which Foucault omits to pay attention to. Implying that the discursive subject is responsible for producing her own oppression diverts critical attention away from the operation of power by the dominant discourse, and absolves that dominant

discourse from any responsibility for its oppression. The idea of holding judges, lawyers and so forth 'accountable' for their actions as 'responsible subjects' is an anathema to this particular line of thinking.

In addition to this, there is much within Foucault's work which is neglected and systematically excluded (Bristow 1997: 188). In particular, his lack of attention to categories of gender and sex. Bartky has criticised the lack of attention given by Foucault in *Discipline and Punish* to the differing experiences of female and male bodies:

"Foucault treats the body throughout as if it were one, as if the bodily experiences of men and women did not differ and as if men and women bore the same relationship to the characteristic institutions of modern life...Women, like men, are subject to many of the same disciplinary practices Foucault describes. But he is blind to those disciplines that produce a modality of embodiment that is particularly feminine. To overlook the forms of subjection that engender the feminine body is to perpetuate the silence and

powerlessness of those upon whom the disciplines have been imposed.” (Bartky 1988: 63-4).

As a methodological tool, a Foucauldian approach is not without its drawbacks. It is, in my opinion, of limited use in exploring subjective experience - the experience of ‘having’ a body, of occupying a body, of occupying a space in the world via a physical body - the ‘lived’ body. This is somewhat ironic given that ‘the body’, as a locus of power, is central to much of his work.

### **Parameters?**

I have placed a self-imposed limit upon my thesis. The limitation in question is that of the interplay between race/ethnicity and power, and the impact that might have on my discourse. This is not because I feel that race is unimportant, quite the reverse. The reasons for this are three-fold. Firstly, because my thesis is experientially based, my own position situated as it is in ‘white’ culture, will not allow me to write from an another experiential position, or indeed hope to ‘include’ issues that are unique to Black women. Given that not all women experience gender in the same way, (i.e. black women will experience the effects of gender construction in different ways to white women (Roberts

1993), I will obviously experience constructions of gender in different ways to women of different ethnic/racial origins to myself.

In this respect, I am aware of the criticisms levelled against 'western feminism' in its early failure to acknowledge the impact of race and ethnicity upon lived experience:

"It became apparent that western women's liberation movements had been based on a very specific identity, that of white, middle class, young, highly educated and often heterosexual women, and that the demands and goals of such movements had been in their interests rather than in the interests of all women." (Charles and Huges-Freeland 1996).

The second rationale, is closely linked with the first. It's not so much the question of how law interacts with race, but rather how legal discourse constructs the racial identity. In this respect, a Foucauldian<sup>8</sup> approach would suggest that knowledge is produced within the discourses that in turn, 're-iterates' or 'produces' the

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<sup>8</sup> At least, the later works of Foucault would hold to this view, especially for example, *History of Sexuality*.

‘knowing’ subject (Charles 1996: 8). In this context then, ‘knowledge’ of how law interacts with race, is produced within race discourse itself - the racial subject is only ‘defined’ by the rhetoric. The implication of this are that in terms of race discourse, it is difficult to experience a discourse which does not imbue me with the constructions of ‘the racial other’. Although being defined as white means that I experience the effects of power as part of the ‘dominant’ culture, I do not experience the effects of power and the imposition of dominant ideological racial discourse in the same way as if I were part of a racial minority culture.

Thirdly, the discourse on issues of race and womanhood is vast (Kennedy 1992); (Smart 1989), and there are more authoritative works dedicated to the issues of race, sexuality and gender, and I feel that it is not my place to comment upon the subjectively lived experience of race and ethnicity within my thesis. Rather, I feel that the question of whether my thesis has any value for issues surrounding race and ethnicity, would be best answered by someone who could speak from the ‘authoritative’ position of subjectively lived experience. It would not occur to me to claim that I speak for the experience of all women, I can only tell a small part of what I would suggest is a much larger story.



## **Conclusion to Chapter One**

Given the considerations I have outlined above, my methodological approach is not a question of seeking absolute truth as to the 'right' perspective on identity, but rather an unfolding or exposing of what I perceive to be previously silenced, non-recognised and marginalised areas of the interplay between 'law', 'the family' and 'sexuality'. Indeed, it the very usage of these words that will form the first part of my critique. I will be attempting to demonstrate that these concepts are restrictive of critical thought. A good example of this, is the furore surrounding the passing of the Family Law Act 1996.

During the latter stages of the Act's passing, the Parliamentary debates spent a significant amount of time discussing whether married couples should be able to divorce after one year or eighteen months. Whilst this issue is important to couples who are spouses, it is by no means relevant to all couples. In other words, in this particular instance, the discourse is very limited in its application. My point being that in many instances, 'law' only applies to a limited number of 'privileged' individuals. The rest are excluded one way or another. If the purpose of law is to have relevance and significance to the individuals under its influence and power, it cannot do that by continuing to restricting itself to narrow thinking, whilst 'promising' to do the opposite.

In this context, I would argue that it is important to engage in a mode of analytical discourse which attempts to uncover and expose to critical examination, the restrictions imposed by such narrow thinking; it is we who should be thinking of law in a wider context.

In the light of the above, I would suggest that Foucault's theory of power is right, perhaps it is a question of power. However, it seems to be more than just 'a' question of power, for there are many questions to be asked in terms of the operation of power. To what extent, for example, can the individual resist the unwanted intrusion of power, and exercise the power they 'live' in order to self-determine and express identity? It is not necessarily a question of 'to what extent can individuals exert power to change other people, the course of events?', but more a question of individuals resisting the intrusions of 'power normalisation' from outside sources. It is about having the 'power' to 'self-define' identity; to name oneself, and, to determine the conditions under which that name is used. However, as Butler points out in *Bodies That Matter*, although it is necessary to assert political demands through recourse to identity categories, it is impossible to sustain the kind of control over how these categories are treated and constructed in the future. This is not to argue that identity categories should never

be used, but along with the struggle to self-define, there must go with it, the awareness that an identity category will not remain static:

“The expectation of self-determination that self-naming arouses is paradoxically contested by the historicity of the name itself: by the history of the useage’s that now emblemizes autonomy; by the future efforts to deploy the term against the grain of the current ones, and that will exceed the control of those who seek to set the course of the terms in the present”. (Butler, 1993: 228).

Butler examines the effects of discursive power on the pejorative use of the word ‘queer’. She argues that the term ‘queer’ is the site for a convergence of ‘historical reflections and futural imaginings’. As such, it can never be fully owned, and can only be ‘redeployed’ and ‘twisted’; that self-naming is not ‘free will’ and does not involve ‘choice’. Rather, that identity, is as a result of complex and constitutive history of discourse and power. In this respect, ‘queer’ cannot fully describe those it purports to represent. Notwithstanding this, Butler argues that it remains politically necessary to lay claim to “women”, “queer”, “gay”,

and “lesbian”, precisely because of the way these terms lay their claim on us prior to our full knowing:

“The political deconstruction of “queer” ought not to paralyse the use of such terms, but, ideally, to extend its range, to make us consider at what expense and or what purposes the terms are used, and through what relations of power such categories have been wrought.” (Butler 1993: 229).

I have applied a similar approach to the subject constituted as “mother” and “lesbian”. Although the definitional category of the subject may change, they are still subject to the operation of power and its normalising effects.

Because families are constituted by individual subjects, similar questions apply. For this reason, ‘the family’, both in social and legal thought, can be said to be in similar state of flux. Debates, for example, on the public versus private nature of the family, can be read as family resisting the power intrusions of the State and Law. Such debates illustrate a struggle for ‘self-definition’, or self determination. The rising divorce rates, the fall in the number of marriages, children being born to older parents, and so

forth, can also be read in this way, as possible sites of resistance to the constructed 'traditional' family. Previously glorified and revered as the 'foundation of society', the props which held it there; the discourse of knowledge and the machinations of power, fail to stand up to scrutiny and critique. Yet in terms of an ideological concept, 'the family in family law' still proves to be remarkably resistant to such intrusions of critique.

Whelehan suggests that one of the main reasons for this, is the rise of the 'New Right' in the mid 1980's (Whelehan 1995). In *Modern Feminist Thought; From the Second Wave to 'Post-Feminism'*, Whelehan argues that ideology of the New Right posits the family as 'natural' and 'morally desirable', and therefore any feminist critiques of current familial arrangements, are characterised as antipathetic to the desires of 'human nature' (Whelehan 1995: 240). Whelehan argues that the New Right undermines feminist ideology indirectly by the adoption of more subtle and complex strategies to maintain patriarchal relations. And that this has been achieved by a reclamation of 'the natural':

"The New Right has done much to reaffirm contemporary gendered assumptions about women's place in society...It is not a new tactic to make reference to the natural to substantiate a

preferred form of social order, but the New Right has worked hard to give the category of the natural a more urgent contemporary meaning.” (Whelehan, 1995: 240).

Whelehan identifies the issue as being one of redefining the category of natural to give it a meaning which is acceptable to the ideology of the New Right. In other words the category of natural is constantly open to (re)interpretation. In this instance, the New Right has given different meaning to the natural, and it has been achieved through discourse. It is therefore, a claim to meaning. During this process, they have claimed human nature as ‘their own’ to define, and through definition comes inclusion and exclusion. Claiming the meaning of human being is, I would suggest, achieved through the operation of power. This is not to suggest that there is a centralisation of power in the New Right, but, rather that any discourse is an operation of power in itself. If discourse can equate with power, then does the meaning given to the natural in legal discourse, allow for the operation of power to present the natural as the basis for ‘truth’ and thus Law? If identity is produced through legal discourse, to what extent then, is the identity of family and the identity of the legal subject produced on the basis of what is ‘natural’? These questions lead into the issues addressed in the next chapter.

## CHAPTER TWO

### **Identity by Marriage, Blood, Symbolism and Rights**

#### **Introduction**

“Where does family law come from? The classic answer is to refer the reader to general sources of law such as custom, history, common law, legislation and cases. But this answer may hide as much as it reveals.” (O’Donovan, 1993: 10).

O’Donovan’s reference to the ‘classic answer’ as being capable of hiding much more than it may reveal, has much resonance. The manner and method by which ‘law’ and ‘family’ are ‘traditionally’ constituted, means that mere reference to a particular ‘legal’ source *per se*, can ‘hide’ possible answers. Could it be that it is not just the legal citation which needs critical examination, but the context in which the citation is delivered? Perhaps then, it is in the manner in which a particular source is engaged, that answers may be found, rather than ‘mere’ reference(s) to citation. During the course of this chapter, I will address the question of whether that which is hidden can be revealed though looking at family and family law through three main areas; blood; symbolism and rights.

The 'blood' tie, and its importance in familial definition, finds its roots in the influence of biological determinism/constructionism - the appeal to the 'natural'. As I hope to demonstrate, the appeal to what is 'natural', holds great attraction, it requires no further justification, and thus it has been successful in 'hiding' answers.

How then, does an examination of 'blood', 'symbolism' and 'rights' help to unravel the control law exercises over the formation of identity? Firstly, many of these underlying assumptions have a bearing on the 'practical' chances of a mother gaining custody of her children or securing her 'share' in the house. Judicial pronouncements and legal culture still make decisions largely based on what is 'natural', what is 'normal' - these concepts are, I argue, directly influenced by biological determinism. 'Rights' can, I would argue, be seen as an extension of 'biology'. The 'right' to inherit a parents' property (for example), can only be a 'right' if one is the (legally defined) child of that parent (or parents). Whilst the child's right to inherit is not absolute, the testator can, for example, disinherit the child, there still remains a legal presumption that a child will inherit from the parent. Secondly, an examination of the techniques, language and methods underlying law's discourse on 'blood', 'symbolism' and 'rights', can expose the influence this has on the 'bigger picture'. These influences on judicial thinking and pronouncements send out a message to society about what is approved of (legitimate, visible, suitable etc.) and what is not approved of (illegitimate,



unsuitable, the 'other' etc.). Perhaps more importantly, they are often 'hidden' within the judicial rhetoric.

On a general level, socio-legal culture presents an image of a particular familial arrangement. The West, toward the end of the 20th Century, is well used to being presented with the image of a nuclear family. It is also used to hearing calls for a 'return to the golden age' of the family. I suspect however, that these kinds of calls have always been made by each generation. As not only each generation will experience 'family' in different ways, but each individual as well, historical accounts of 'family' cannot in themselves per se, convey an 'accurate' or 'objective' description of 'family'.

Foucault's approach to historical analysis led him to reject the idea that historical analysis is a matter of uncovering that which has been forgotten and overlooked in order to provide a 'total' history. For Foucault, history is not about the unfolding of a continuous narrative, neither did he believe that this process could provide a complete and comprehensive view of the past. Instead he argued that what should be examined was:

“... the traditional devices for constructing a comprehensive view of history and for retracing the past as a patient and continuous development must be systematically dismantled.” (Foucault 1977:153).

In other words, Foucault was interested in the complex relations between discourses, the interaction between them; the dissonance

and difference between discourses. If, as Foucault argues, historical analysis is identifying discourses, it becomes possible to explore history avoiding preconceptions. What is studied instead is preconceptions as discourse.

An historical examination of collected accounts and experiences is riddled with potential difficulties. I am aware of the potential dangers in subconsciously imposing modern conceptions on historical forms of 'family' in a manner in which they were never intended to be. For example, it appears to be a 'modern' day assumption that the nuclear family is a recent phenomenon, superseding the 'extended' family. However some commentators have argued that:

“...the large, joint or extended family seems never to have existed as a common form of the domestic group at any point in time covered by known numerical records.” (Laslett, 1972:126).

To try to understand the term 'family' in any historical context produces difficulties of interpretation. Constructing an image of the family at any given moment in time, would necessitate the artificial construction of a history in which 'modern' assumptions (e.g. the 'roles' each family member is expected to occupy), are not made. Any definition of family, and this may include discussion on such things as norms, household membership, forms of domestic organisation and cultural symbols, can never be

superimposed upon one another to produce a picture of what the family was like at any given time. In other words, what is assumed and what is consciously, or perhaps subconsciously accepted as 'norms' or 'truisms' for families today may not have even been hypothesised or even practised in times prior to the present day.

In the light of this, I would argue that it is in fact impossible to conceive of historical times or events in the manner in which they were viewed at the time. Views of history must remain as just views - they are relative to the underlying presumptions of fact, culture and interpretation. For example, the contemporary perspective of the First World War was that it was a 'war to end all wars'. It only later came to be perceived as the First World War after subsequent events; i.e. the Second World War, which altered the interpretation of history. Thus any historical examination of the family must be 'tainted' with our modern day views. The idea of understanding the history of the family in terms of the past itself is affected by how we in the present selectively interpret the significance of that history, and it is these selective interpretations which are problematic.

For example, some writers start their examination of family law with a purely contemporary analysis of definitions vis a vis marriage, since to many, marriage is the logical starting point for a family.<sup>1</sup>

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<sup>1</sup> See for example, Bromley and Lowe, 1992.

This is a particularly good example of modern day interpretations and perspectives imposing themselves upon history. Marriage was not always seen as the natural starting point for the formation of a family. As pointed out in by Nietzsche:

“Being married in the era of the ancien regime is not sufficient to qualify a unit of cohabitation as a family.” (Nietzsche 1969: 58).

In the time of the ancien regime, the term ‘family’ referred to an inter-generational entity, an estate. The Encyclopedie of 1765 defines family as:

“... those citizens who, clearly distinguished from the dregs of the populace, perpetuate themselves in an estate, and transmit their line from father to son in honourable occupations ... in well matched alliances, a proper upbringing and agreeable ... manners.”<sup>2</sup>

However, Donzelot traces the advent of the modern family to an array of Eighteenth and Nineteenth Century discourses surrounding children. Such issues included swaddling, corseting

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<sup>2</sup> Encyclopedie of 1765. Cited in Flandarin, pp 6-7.

and unhygienic infant care, wet nursing and babyfarming, infanticide, child abandonement, the evils of servants rearing children, the moral dangers of lodgers and communal sleeping arrangements. The concentration on children illustrates the importance with which they were viewed. In this respect, the presence of children appeared to be a pre-requisite for the formulation of a family.<sup>3</sup>

Any study of the historical understanding of family, necessitates a starting point. Piecemeal reforms litter the historical textbooks and statutes. It is difficult to find a starting point and say with certainty, 'that was the origin of the modern day 'family'. Nevertheless, a starting point of some sort must be found, even whilst at the same time recognising that there can be no analysis of assumptions that derive from an historically definitive perspective. Recognising the difficulties of tracing a linear history poses, it makes more sense to chose a starting point which is not linear. In this context, it might be logical to examine the institution of marriage itself. However, as mentioned above, care must be taken here for marriage was not always seen as an essential pre-requisite to the existence of a family, (indeed a marriage ceremony was often the last on the list of priorities). Many modern family law definitions necessitate some form of marriage ceremony, civil and/or religious before it can be accepted that a (legally

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<sup>3</sup> Indeed Dewar has suggested that in the Twentieth Century, marriage should be viewed as superseded by parenthood as the control determinant of the legal rights and responsibilities of family members (Dewar, 1992).

recognisable) family indeed exists.<sup>4</sup> Again, are we imposing our contemporary understanding on history? Even when talking about 'modern marriages', care must be taken to understand precisely the context in which the word 'marriage' is being discussed. For example, it is used to describe the procedural ceremony that two people go through: 'the marriage of John and Mary happened yesterday'; it is also used to describe their ongoing union; 'John and Mary have a good marriage'. The differing contextual usages of the word 'marriage' illustrate the word's ambiguity.

In the light of this, my concern is to try to unravel some of the assumptions made surrounding the questions of how a family is defined or constituted. I want to question the presumptions regarding whether 'marriage' is to be accepted as a pre-requisite of family? Why is it that 'socially acceptable', and legally recognised families only achieve this 'status' by virtue of a ceremony of marriage? How and why then, did 'family' and 'marriage' become synonymous?

Whether families are defined through blood, marriage, rights and so forth, one commonality between these definitions, is that 'family', has been and still is, implicitly identified with procreation. Thus, procreativity created families are generally identified as 'biological' families. It is these families which are favoured in the legal hierarchy and illustrates the importance of biology and blood to socio-legal discourse.

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<sup>4</sup> I deliberately omit to mention such statutes as Housing law statutes where one parent families and unmarried (heterosexual) couples may be treated as a family for the purposes of the particular legislation.

## **The Family As Defined By Patriarchal Blood**

The insistence, by law, of the existence of a 'blood tie' in order to 'define' family could be argued to be largely historical. The word 'family':

“Often related to a set of kinfolk who do not live together, while it is also designated as assemblage of co-residents who were not necessarily linked by ties of blood or marriage.” (cited in *Genealogies of Morals* 1969:183).

Indeed, it was only in the Eighteenth Century that the concept of the family began to be restricted to those members of the household who were related by blood.

The appeal to the 'blood' can also be read as an appeal to the 'natural', and 'natural' can be read as 'biology' and thus 'science'. For example,

“... that by the Laws of Nature a Man has Right to inherit the Property of another, because he is of Kin to him, and is known to be of his Blood”. (Locke, ed. Laslett, P 1960).

The reference here to the 'laws' of 'nature' is used to justify the conclusion that the right to hold property was a right of *nature*, not a mere privilege from positive law (Freeman, 1994:98). In other words, Locke maintained the right of private property was implied by natural law, and that the justification of private ownership lay in labour, and was therefore 'natural'.

Although Locke is not talking directly in terms of the family, it can be clearly seen that he bases the laws of inheritance upon the blood relationship. According to Locke, this happens because the Laws of Nature dictate that this will be the case. 'Nature' and 'blood' are almost effortlessly and inextricably linked.

Thus from prior to the Enlightenment, there is an appeal to the 'natural', an appeal which served to justify a particular case, decision or statute. This reliance on 'nature' to justify all manner of things found its way into the 'scientific' research done by the 'sexologists' in the late Nineteenth Century.<sup>5</sup> Sexology involves cataloguing and interpreting all forms of sexual practice which are then hierarchised as more or less 'deviant' (Whelehan 1995: 150).

This criteria of 'natural', found expression in *Studies in the Psychologies of Sex* by the 'sexologist', Havelock Ellis. He based his analysis of sexual relations between women and men on animal courtship. His basic theory was that in animal courtship, the male pursues and conquers the female. Because this

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<sup>5</sup> See also Weeks (1985: Ch.4), which contains an comprehensive analysis of the work and influence of the sexology tradition.



'biological fact' happened in the animal kingdom, it was therefore 'natural'. This line of argument led him to the conclusion that because it was 'natural' for women to be sexually submissive, they therefore enjoyed rape, beatings, and physical and sexual humiliation, regardless of any contrary protestations by the woman herself. By presenting his arguments as being based on 'nature', there is the assumption that the origins of human sexuality is a 'natural' response, 'inverted' by cultural or biological means. By presenting itself as a 'science', sexology is thus able to impose notions of what 'normal' sexuality should be, in addition, 'it arguably possesses a hidden agenda that is rooted in a biologicistic model of sexuality' (Whelehan 1995: 151).

The 'attractiveness' of 'nature'; that which is 'natural', has been the basis of much socio-legal discourse. Naturalism in this sense, is closely linked to biological determinism and necessarily, essentialism. In this line of argument, essentialism adheres to the theory that a woman's characteristics are shared in common with all other women, running through all time and across all cultures. It locates the major source of sex and gender differences in nature, and that these differences are largely innate. This necessarily means that there are limits (possibly an absolute limit) on the ways in which a woman can act contrary to her 'natural' manner. This conveniently ties women to 'biological' and thus to the role of reproduction and child rearing:

"Biologism is a particular form of essentialism in

which women's essence is defined in terms of

biological capabilities. Biologism is usually based on some form of reductionism: social and cultural factors are the effects of biological causes...Biologism is thus an attempt to limit women's social and psychological capacities according to biologically established limits. It asserts, for example, that women are weaker in physical strength than men; that women are, in their biological natures, more emotional than men. Insofar as biology is assumed to constitute an unalterable bedrock of identity, the attribution of biologicistic characteristics amounts to a permanent form of social containment for women." (Grosz, 1995: 48).

Legal discourse positions itself as merely 'reflecting' that a woman's 'role' within society is defined by her 'essential nature'. Her role is portrayed as 'inevitable' and pre-ordained by nature. In this respect, the legal discourse determines the limits of identity by reference to roles which are incapable of alteration or critique, and without further justification. This approach conveniently ignores other discourses on sex and gender difference, by treating 'man' as the standard, and women as 'the other'.

When the previous Conservative Government working paper on the reform of the adoption laws was launched in late 1992, a letter

to *The Times* newspaper stated that the industrialisation of the family was "a departure from nature" as it denied "the child's right to a mother as prime carer."<sup>6</sup>

One can only wonder at the writer's understanding of the word "nature", but it would appear to illustrate the widespread feeling that 'nature' and what is 'natural', is *the* criteria for definition of the family. But exactly what is meant by these terms; in what ways are they to be understood?

Within legal discourse, the appeal to nature is almost universal, and whilst some areas of legal discourse have acknowledged the limiting effects of this approach, they are heavily outweighed. For example, The Report of the Committee on Homosexual Offences and Prostitution, criticised usage of the terms 'natural' and 'unnatural' on the grounds that:

"they depend for their force upon certain explicit theological or philosophical interpretations and without these interpretations their use imports an approving or condemnatory note into a discussion where dispassionate thought and statement should not be hindered by adherence to a particular preconceptions."<sup>7</sup>

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<sup>6</sup> The Times. 20th October 1992.  
<sup>7</sup> Cmnd. 247, para.35, p.17.

Unfortunately, this approach is highly unusual, the appeal of nature has a strong rhetorical effect and is used frequently to give credence to some blatant prejudice. For example, during the course of Parliamentary debates surrounding homosexual marriage and the *Corbett* case, one MP suggested that legal recognition of a homosexual relationship:

“would be contrary to any understanding of the Churches about what is the *nature* of marriage. It would certainly counter what I regard as the *proper* basis of English marriage.”<sup>8</sup> (emphasis added)

Again, it is ‘nature’ that dictates criteria for legitimacy; what is ‘natural’ is again the predetermined reference point. Naturalism allows for the determination of legitimacy; the inside/outside division.

A similar approach can be found in legislation. In the Human Embryology and Fertilisation Act 1990, where an unmarried woman is provided with treatment services, regard is to be had to not only the welfare of the child, but also the need of the child to have a father are criteria for eligibility to receive the services. Within this context, what does the term ‘father’ mean? It could refer either to the man who provided the sperm, or the man who is involved to a greater or lesser extent in the child’s upbringing.

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<sup>8</sup> Alexander Lyon MP., Hansard, n.11. 1829. Regarding the *Corbett v Corbett* case.

This requirement for “the need of that child for a father” is meaningless as every child has a ‘genetic’ father, regardless of whether the father is present during the child’s development or not, and regardless of how the child was conceived.

Thus what is being talked about here is ‘the need of that child for a father *figure*. Whether intentional or not, the underlying effects of this legislation is to discourage the provision of treatment services for those people who live outside what is regarded as the ‘traditional nuclear family’, which, is of course defined primarily in terms of blood (a wife and husband become ‘one flesh’). By and large such people will be single women and/or lesbians. Again, we see that the family is not ‘really a family’ unless there is a man or father figure presence.

Chodorow suggests that exclusive female parenting leads to the suppression of important personality traits in both girls and boys. Thus, according to Chodorow, the healthy development of children requires the active participation of both parents. However, she also suggests that women’s heterosexual relationships lack emotional richness, and that women ‘have learned to deny the limitations of masculine lovers for both psychological and practical reasons’ (Chodorow 1978: 200).

This raises the matter of compulsory heterosexuality. The biological fact is that it takes one sperm and one egg to produce a child. This is inescapable. Yet, once this has happened, we are in a position to choose whether to attach any social significance to this biological happenstance. Attaching social significance

involves insisting that it takes one man and one woman to *raise* the child. If we choose to attach social significance, this is then stating that the sex of the child raiser(s) is important. If we choose *not* to attach social significance to the fact that it takes sperm and an egg to produce a child, then the sex of the child raiser(s) ceases to be relevant. Yet we have seen that legislative activity places paramount importance on heterosexual sex. Indeed, this means that attaching social significance to the conception of a child is to reinforce compulsory heterosexuality. Attaching no social significance would mean that 'parents' can consist of one or more persons, in any combination, regardless of sex.

Thus the extensive use of what is 'natural' within the context of familial relationships is frequent, and is used in order to legitimate and give credibility to what are socially constructed, preconceived ideas of how the family should or should not be defined. Further, the word 'nature', and its derivatives, for example, 'natural', have been and still are inextricably linked with consanguinity. Familial forms and relationships have been based on the saying that 'blood is thicker than water'. In the context of a court room, this approach is re-inforced by the exclusion of the 'social' father.

A good illustration of this is *Re J*<sup>9</sup>, concerned a property transfer application by a woman who wanted the court to transfer the interest of a property which was held in the joint names of both her and the man with whom she'd been living with for the past ten years. The parties had not undergone a ceremony of marriage and

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<sup>9</sup> *Re J* (Unreported) The Times, 12 November 1992.

he was not the natural father of her child. The court admitted that he had undoubtedly been a 'social' father to the child and that the three individuals concerned had lived together and considered themselves to a family. Nevertheless, the property transfer was denied for two reasons; firstly, he was not married to the mother and secondly, there was no consanguine link between him and the child. Are these two reasons sufficient to exclude the man from the understanding or definition of a family?

The familial image presented by the judgement is an extremely limited one. Limiting definitions of the family to the construct outlined above is a backward step. In this particular instance the man should have been considered to have been 'a member of the family'. The lack of a valid marriage certificate and of a consanguine link to the child should not be a bar to the recognition of a familial relationship. Ironically enough, a legal familial link to the child could have been made by an application for a residence order.

In this instance, the only two methods of 'integrating' himself into the judicial concept of family was either to marry the woman or apply for a residence order. Whilst there may not be anything intrinsically wrong with these two particular methods, the method and criteria for their application leave something to be desired. The so called 'failure' of this man to undergo these procedures should not be an automatic bar to considering him a member of that particular family.

However, it is not just blood which determines a family, it is *patriarchal* blood. That the family is a patriarchal invention is by no means a new concept. But if we examine the family through the defining metaphorical criteria of blood, flesh, nature, it becomes harder to unravel.

In Western ideological culture, a person's wealth consists of property (both real and personal), titles, (sur)names and money. It is these things which are considered to be part of the individual's and the community's heritage. To ensure that the son inherited his father's wealth, it was essential for the father to be assured that his son was indeed, *his* son; that there be a 'blood' link between them:

“In a patriarchal society where power is in the hands of the fathers, a society where blood ties and property are privileged, it is important that fathers be sure of their paternity before they pass their names and property onto their sons.” (Spensky 1992:65).

This was not necessary to the same extent for women since (in the absence of modern scientific tests), maternity is more easily established than paternity. In addition to this, women had no wealth of their own to pass on in any case. The easiest way achieve this with a reasonable amount of certainty is to establish the presumption that the child a married woman gives birth to is



the child of her husband.<sup>10</sup> Thus, all that was important in the world was passed directly from father to son, by-passing the woman altogether. Apart from ensuring the 'safe' transition of property and wealth, this arrangement also had the additional 'benefit' of rendering the woman invisible.

Thus, the perception of a marriage between a man and a woman in order to produce legitimate children (especially boys who could inherit landed wealth and private property) produced the basis of a concept much used today. Children were not considered 'legitimate unless they were born within 'wedlock'. Could it be the case that this legitimation was based upon conformity to perceived notions of 'nature'? Was this approach largely responsible for the notions of 'nature' or 'naturalness' of a union which determined paternity/parenthood?

### **The Family As Defined By Marriage**

The above examinations of family do not have as their starting point a ceremony of marriage, and thus texts such as *Bromley's Family Law* take their own starting points when formulating an examination of family, and are perhaps therefore culpable of over simplifying the whole issue.

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<sup>10</sup> See Banbury Peerage Case. (1811) 1 Sim & St 153.

Historical and present day assumptions on concepts of the validity (or otherwise) of a union of two people are still wrapped up in a doctrine which is approximately two thousand years old:

- “1. But from the beginning of the creation God made them male and female.
2. For this cause shall a man leave his father and mother, and cleave to his wife.
3. And they twain shall be one flesh; so then they are no more twain, but one flesh”.<sup>11</sup>

Thus one of the oldest definitions therefore merely required sexual consummation for a valid marriage to come into existence. Perhaps more accurately, sexual intercourse of a particular and specified kind. As Collier has pointed out, sexual intercourse within a marriage is of a pre-determined kind, and means penetrative heterosexual sexual intercourse (Collier, 1995: 148).

A ‘ceremony’ of any kind is not mentioned. Consent to marriage was not necessary until the advent of the influence of Roman law. By the time the Norman conquest occurred, casual polygamy was very common and there were many differing methods and reasons for entering into a marriage. Marriage was seen as a means of uniting those people of property: Kingdoms and Dynasties. A

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<sup>11</sup> Gospel according to St. Mark Chapter 10.

church ceremony was not considered relevant or necessary. By Tudor times, it was generally accepted that a marriage was a prerequisite for the formulation of a family. However, things were still far from simple, as Stone points out:

“Marriage was an engagement which could be undertaken in a variety of ways and the mere definition of it is fraught with difficulties.”<sup>12</sup>

Lord Hardwicke’s Marriage Act 1753 dictated that informal and often clandestine marriages should no longer be considered valid. Prior to this Act, all that had been necessary for a valid marriage was sexual consummation and consent. From this date onwards, it became necessary for a church ceremony to be undertaken for the recognition of the marriage. Civil marriages were not recognised in England again until the Marriage Act of 1836. However, only the power of jurisdiction changed, the criterion for validity established by the Church survived.

It was only really the question of property division upon death which necessitated Hardwicke’s Act. Wealthy and propertied families needed to have legal certainty in order to know who would inherit and what would be inherited, and in this context, marriages had far reaching and important financial consequences. In so far as children could marry without parental consent, if the minor was a girl with a large fortune the old common law rule that

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<sup>12</sup> Stone, O., (1977) *Family Law*. 1st. Ed.

a wife's property became vested in her husband on marriage made her a particularly attractive match. Hardwicke's Act thus invoked considerable parental control over their offspring's marriage.

The first line of *Bromley's Family Law*, states that:

"The word 'family' is one which is difficult, if not impossible to define."

However, this is not necessarily the case, especially if there is a specific goal to be achieved through the definition. For example, in relation to (public) housing law:

"A person is a member of a another's family....if

(a) he is the spouse of that person, or he and that person live together as husband and wife, or

(b) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or

niece." <sup>13</sup>

In other words, for the purposes of this statute, a family is heterosexual. Two women who live together in a 'committed, monogamous, homosexual relationship' are not 'members of the tenant's family' within the meaning of s.113(1).<sup>14</sup>

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<sup>13</sup> Housing Act 1985, s.113(1).

<sup>14</sup> See for example *Harrogate Borough Council v Simpson* [1986] 2 FLR 91

This is in contrast to the definition of 'dependants' contained within the Inheritance (Provision for Family and Dependant's) Act 1975. Here, the relationship to the deceased is defined in terms of financial dependence and thus extends to those people who may otherwise be regarded as being outside traditionally constructed familial norms.

What can be difficult and perhaps impossible is providing a definition which is suitable for every occasion. It is little surprise therefore that there is much difficulty in providing a definition of universal applicability. On the other hand, it is surprising that he does not provide an understanding of the term family, since the apparently 'normal' family is commonly understood to be nuclear and heterosexual (Boyd 1992).

However, it is not merely the marriage ceremony which is under consideration here; it is the marriage contract itself. The 'traditional' marriage vows are prescribed by the State and religion. Because these vows are prescribed, no negotiation is allowed with respect to the terms of the marriage contract (Pateman 1988).

### **The Family as a Symbol**

The codification of family is not just restricted to the codification of individuals within that particular family, to imagine that family regulation and family law was restricted to this would be to vastly over-simplify. The family is much more than this. The institution

of the family exerts influence over society, as in turn, does society exert influence over and through the family:

“The concepts of ‘marriage’ and ‘family’ describe complex social institutions in Western Society in which individuals seek to satisfy a variety of individual...and social interests. As social institutions ‘marriage’ and ‘family’ are flexible, versatile concepts accommodating a wide range of divergent patterns of behaviour and attitude.”

(Dewar, 1992:33).

Perhaps the confusion arises because of confusion over the context of the word ‘family’. Is it a ‘mere’ word capable of precise and concise definition in the way in which a lawyer would understand it? Or is it perhaps a concept, or a symbol with a plurality of possible and actual connotations? Maybe even an ideology - a way of life? Some people appear to have used the word almost as a way of giving a structure to a particular way of life. The use by political parties of all types of ‘family values’ in legislation, is a good example of this. The ‘return to family values’ is more than just a phrase, it is a call for a return to a past age that never was. The fact that the phrase is used by politicians of all persuasions demonstrates its ‘flexibility’ to assume any given social or political meaning.

Stone presents a slightly different view of family, who argues that:

“A family is a more varied complex of different relationships, and exists in fact in so far as those individuals who form it consider themselves to be continuously related to each other biologically or socially or (more usually) both.” (Stone 1977:78).

Thus ‘family’ is here defined in terms of the individual and subjective opinion of its members - i.e., those who ‘consider themselves’ to belong to the family. As valid as this may be, it would appear that purely subjective definitions are not acceptable either socially or legally. It would follow then, that many of the definitions have been based upon the need to address a particular and individual problem or issue (such as preventing too many immigrants), rather than to provide a de facto definition. It would seem that the law will not allow individual members to define themselves as family, unless of course they have performed certain pre-defined actions/rituals, such as a recognised ceremony of marriage. It seems almost preposterous that the law would give individuals a ‘free’ hand to define themselves and their relationships with others. It would not be legally valid for a group of individuals to state publicly ‘we are a family’. Why should this be so?

One logical inference is that legal culture requires and demands certainty if it is to regulate the institution of the family. And it does need to regulate it. As with any other complex social

institution, the family is required to submit to regulation. John Dewar suggests that 'family law' is an immense subject covering education, housing, health services, the fiscal system and the labour markets (Dewar, 1992). This appears to be an accurate picture, but what he quite rightly goes on to say is that 'family' focuses primarily on the traditional question of 'status':

“and is primarily concerned with the means by which status is conferred, such as marriage parenthood and cohabitation, and on the means by which status may alter, such as divorced, or state action to remove children.” (Dewar 1992: 43).

Indeed, it is not just the family which places focus on 'status', but the whole system of family law itself 'traditionally family law has been concerned with questions of status: child, wife, parent, husband, legitimacy, father, cohabitant, and how these are created, altered and terminated'. (O'Donovan 1993: 11).

To leave such considerations to the individual members of the family group would not provide legal culture with the certainty which it strives for.

Both the previous Conservative and the incoming Labour Government have emphasised the importance of 'the family' both to society generally, and to their policies. However, it would appear that despite many years of emphasis on 'family values',



little has been achieved in terms of arresting the increasing divorce rate. It is doubtful therefore whether the law can be deployed as an effective instrument of social engineering.

By the Eighteenth Century a valid family was seen as a group of people united by blood ties headed by the male. Women and wives were seen as part of this property division. Interestingly, this perception was only cultivated in the Nineteenth Century with the onset of industrialisation. People moved from the rural areas where there had been a division of labour, with men and women seen as being equal but different, into crowded industrialised areas, where only a limited amount of paid work was available. As this work was physically demanding, and women were (obviously) the child bearers, the men got the jobs and thus the economic wealth. Women, as economic 'burdens' on their husbands, were then perceived as property. The Victorian family was headed by the man who possessed all the rights enjoyed by a legal person. Thus conforming to the religious belief discussed earlier that a man and a woman are 'one flesh'.

There are two points to be made here. Firstly, it is the man who represents this 'one flesh'. Secondly, and this brings me back to my earlier topic, that the (emotive) use of a particular word, in this immediate instance, the word 'flesh', is again representative of the 'body' and the 'biological', and thus what is 'natural'. Is this constant magnetic pull back to the reference points of blood and nature inevitable? Are these really the only reference points available to us in our constant drive to define the family, and if so why?

Women were not defined as legal persons in their own right - all their actions were deemed to be the responsibility of the husband. This is put quite clearly by Glendon:

“organised around a hierarchical model, with a clear division between the sexes, traditional family law placed primary responsibility for support of the family on the male partner and vested authority in him to determine the place and mode of family life and to deal with all the family property, including that of the wife.” (Glendon, 1977: 55).

Indeed it has been suggested that the industrialisation process is in itself a cause of the breakdown or weakening of the family (Goode, 1980: 34). As it calls for individuals within that family unit to go out from the family to work for individually earned wages, and therefore derive less benefit from their communal, shared contributions to the household unit. Since this industrialisation process:

“[C]ommentators and social philosophers have been prophesising the disintegration of the family, or arguing that it has lost its functions, and have pointed to continually increasing divorce rates, rising rates of illegitimacy, the breakdown of parental control, sexual perversions, communes,

cohabitation without marriage and even the Women's Liberation Movement as proof of that dissolution." (Goode, 1980:35).

As graphically stated by Blackstone:

"...the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything." (Blackstone 1857:468).

This is quite clearly a definition of family which does not just stop at "the suspension of the legal existence", but which is intrinsically based on the issue of "rights", i.e. 'who owns what rights and against whom'. What is perhaps more significant, is that it clearly illustrates the very visible and positive rights of the husband in sharp contrast to the non-existent rights of the wife. It would appear then, that 'rights' can play a large part in the construction of families, but to what extent?

### **The Family as Defined by 'Rights'?**

"The husband hath, by law, power and dominion over his wife, and may keep her by force within the

bounds of duty, and may beat her, but not in a violent or cruel manner: for, in such case, or if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace by suing a writ of supplicavit out of chancery.”<sup>15</sup>

The notion that individuals may hold rights within the context of a familial relationship is not new. However, the enforcement of one family member’s rights against another family member, can lead to the family unit being defined by rights. The ‘right’ of a parent to consent/refuse medical treatment for their child; the ‘right’ of spouses to expect sexual intercourse, and so forth, have been used to provide an understanding or a method of examining what constitutes a family. Is there anything ‘wrong’ or limiting in defining the family in terms of rights, or is a rights discourse a valid methodology for defining, grouping or excluding those individuals in a family unit?

Until recently, defining the family in terms of rights appears to have been acceptable to those who had ownership of those rights. Smart argues that whilst a rights discourse may have been entirely appropriate during the nineteenth century when women faced a very different set of circumstances; ‘the law was quite overt in its distribution of privileges and power to men’ (Smart 1989: 139). However, she strongly disapproves of using a similar rights

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<sup>15</sup> Bacon’s *New Abridgement of the Law*, published in 1736. Quoted in Doggett 1992: 10.

discourse today, 'the continuation of the same demand for legal rights is now problematic...the rhetoric of rights has become exhausted, and may even be detrimental' (Smart 1989: 139). She argues that this is especially so where women are demanding rights which are not intended to create equal rights with men, but where the demand is for a 'special' right (e.g. women's 'right' to choose) (Smart 1989). Whilst I am in general agreement with Smart regarding the argument that rights discourse may be detrimental, my concerns centre around the underlying rights notions that 'rights' equal 'property'.

To talk in terms of rights, can be to adopt the phraseology of property law and concepts of ownership, as if rights can be owned, inherited, sold, given away and enforced against third parties. In other words, the owner of a piece of property or a tangible object usually has and always sought to have control over its use and disposition. This suggests that an 'essential' feature of rights is to give the right holder some sort of actual or normative control over that to which s/he has a right. If this is so, then the issue of 'rights' being used to define the family could be a dangerous one. Within any given family, one person can exercise actual or normative control over another, for example, a parent exercising 'lawful chastisement' over a child, or a husband exercising his 'conjugal rights'<sup>16</sup>. Merely granting the child the 'right' not to be chastised by her parent, or granting the wife the right not to be

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<sup>16</sup> The marital rape exemption was removed by the House of Lords in *R v R* [1991] 4 All ER 481.

raped by her husband, does not necessarily mean that the power imbalance has been removed - it merely gives that impression.

Is it acceptable that a person can own rights to, or over another? I suggest that rights of some form or another have to exist in order to protect the unit of the family, and/or the individuals within it. At the very least, an individual must surely have rights to themselves. The issue of rights being 'owned' by a person, is tackled by both Locke and Nozick, in their common assertion that every individual, by virtue of the fact that she is a human being, has sole right to the 'ownership' of her body. This means that she has the right to control her body without the coercive influence of others, as long of course as s/he does not infringe other people's ownership of their bodies.<sup>17</sup>

However, in Blackstone's definition above, it is clear that a woman's rights within marriage were 'suspended', the family being headed (legally) by one person, the husband. Blackstone's definition of marriage represented a thinly disguised arrangement which totally subsumed the woman's identity into that of her husband. This view would appear to be supported by Foucault who called the family a system of alliances, in which the family is implicated in a system of legal, political and economic exchange; once exchanged in marriage, the woman was hence part of her husband's estate, and therefore legally, her husband's property.

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<sup>17</sup> See Phillips, D (1992)., *Equality Justice and Rectification; An Exploration in Normative Sociology*.

Again, this is somewhat at odds with Locke's view. He writes of the 'person' that:

“...the Labour of his body, and the Work of his hands, we may say, are properly his.”<sup>18</sup>

In other words, a person has property in her person because her person (including any action which proceeds from it), is properly hers, and is so because she has an exclusive right to it. Thus, while it may be inescapable that an individual has rights, to what extent those individuals have exercisable rights over *others* within the family group is a difficult question.

Until well into the Seventeenth Century, there were several steps to go through before parties could consider themselves married. Stone listed them as follows:

“For persons of property, it involved a series of distinct steps. The first was a written legal contract between the parents concerning the financial arrangements. The second was the spousals (also called a contract), the formal exchange, usually before witnesses, of oral promises. The third step was the proclamation of banns in Church, three times, the purpose of which was to allow claims of

pre-contract to be heard (by the Seventeenth Century, nearly all the well to do evaded this step by obtaining a license). The fourth step was the wedding in Church, in which mutual consent was publicly verified, and the union received the formal blessing of the Church. The fifth and final step was the sexual consummation.”<sup>19</sup>

This may be put side by side with the present day definition, that is contained within the Marriage Act 1949, as amended by the Marriage Act 1983, and the by now familiar definition (at least to lawyers) contained within *Hyde v Hyde*:

“the voluntary union for life of one man to one woman to the exclusion of all others.”<sup>20</sup>

What appears to have remained constant is the heavy dependence upon monogamy, and the fact that the parties must be male and female respectively (or man and woman dependent on what source is being used). Other fundamental aspects of the definition are not addressed. The conflict(s) between the state and the established church then, would appear to be concerned more with who is empowered to bestow validity than what a marriage should or

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<sup>18</sup> Locke, J., *Two Treatises of Government*, ed. Peter Laslett. New York: Cambridge University Press, 1960.

<sup>19</sup> Stone, O., (1977) *Family Law*. 1st Ed.

<sup>20</sup> 1866. L.R.I.P & D. 130, per Penzance LJ at page 133.



shouldn't be. The fundamental concepts of a valid marriage have remained relatively constant. Respective bodies have therefore addressed and consequently adopted the issue of validity as it applies to and affects them, and not as it applies/affects to the individuals who participate in a marriage (ceremony). Adapting the validity rules of marriage (to suit particular needs) is an activity which seems to be enjoyed by more people than just the State and the established Church.

The issue of monogamy has at least been acknowledged with the recognition that a polygamous marriage is:

“Now recognised in this country unless there is some strong reason to the contrary.”<sup>21</sup>

The policy behind the recognition of polygamous marriages is that, if parties settle in the UK having entered into a marital union outside it, that union should be protected by English law. Usually this protection takes the form of the exercise of the adjutive jurisdiction on divorce.

Further, while various interested and learned bodies may have argued over the extent and degree of a valid marriage within prohibited degrees, the fact that they considered the matter worthy of discussion, is an improvement on the position vis a vis 'male' and 'female'.

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<sup>21</sup> Per Lord Parker. *Mohammed v Knott* (1969). 1 QB 13-14

These assumptions as to sexuality were (and indeed still are) so entrenched that the issue is never even raised let alone challenged. Indeed Cretney and Masson state that changes in the law:

“Have rendered the traditional definition of marriage in English law....inaccurate: Marriage is indeed still a voluntary union but it is no longer indissoluble save by death.” (Cretney and Masson 1987: 4).

The implication contained within this statement is that originally, death was chosen as the means by which a marriage was terminated or dissolved. Do we see here the inescapable conclusion that ‘marriage is for life’, and therefore that marriage will only come to a ‘natural’ end by the operation of ‘nature’ i.e. the death of the parties? This brings full circle the argument that ‘nature’ (with all its symbolic and semantic connotations) is supposed to provide a legal basis for determining the validity for both marriage and family.

## **Conclusion to chapter two**

In this chapter I have explored how law constructed and maintained the appeal of ‘the natural’ in order to provide a basis for defining ‘family’, and how ‘family’ in turn, was constructed by reference to ‘the natural’. My concerns revolved around exposing

law's construction and control over identity formulation and expression through the judicial appeal to the 'blood tie' 'rights' and symbolism. The connection between these concepts and judicial notions of the 'family', had (and still continues to have), the effect of restricting non-judicially constructed/approved familial forms.

If 'the family' as a unit, is 'defined' in this way, what implications does this have for the formation of the individual identity of a family member? If law's divisive operational nature vis-a-vis 'the family', is something that is 'hidden' behind blood, rights and symbolism, how might its divisive nature affect (effect?) identity formulation when that process is not so well 'hidden'?

Identity is not just restrained by the meaning associated with the terms blood, rights and symbolism, it is additionally constrained by the creation of categories and hierarchies and the operation of 'distinct' areas of legal practice.

To what extent may there be similar restraints placed on identity because of, or due to, the separation of 'distinct' epistemological areas of legal practice? Is there a further process of hierarchical categorisation within 'distinctive' areas of legal practice? To what extent is individual identity constructed by, and within the

‘domain of authorised legal knowledge’ - the epistemological field of ‘property law’?

In the following chapter, I will examine those elements of case law applicable to property disputes between co-habitees. I hope to show that law’s failure to recognise the claims from women who are either married or living in heterosexual co-habitation for legal and/or beneficial interests in property disputes, is due to two, interlinking, main factors.

Firstly, the maintenance of the rigid distinctions between two epistemological fields of ‘knowledge’; property law and family law. There appears to be firm judicial resistance to a relaxing of these boundaries. Why is there such a reluctance to recognise the concept of property being owned other than by the person who paid for it? The nexus of the problem as I see it, is the fear that such an approach would ‘weaken’ the institution of marriage. Allowing ‘family law’ concepts into considerations regarding property ownership would upset the ‘traditions’ of property law. There is, an additional problem here. I would argue that there is no such thing as ‘family law’; whilst we may have text books that say ‘family law’ on the front of them, or even a ‘Family’ Division in the Court of Appeal, we don’t have a ‘tradition’ of family law in the sense that we have a ‘tradition’ of property law. What we

have instead, is the application of 'imported parts' of other 'areas' of law, (immigration, housing, social security, trusts and so forth), which combine to produce the epistemological field of 'family law'.

The second reason for law's failure to recognise women's claims for legal and/or beneficial interests, is due to the little, if non-existent recognition of the diversity of identity; a diversity which does not fit neatly into the simple binary classification of sexual and gender identity pre-supposed by law. Instead, the sexual stereotyping, formulation and expression of the woman's identity is determined by law's adherence to notions of 'appropriate' identity expression within a marriage or heterosexual co-habitation.

Within this context, how has the 'family' has been defined and categorised by dominant ideological discourse? Is it possible to expose a dominance which is often 'hidden' within 'layers' of 'legitimacy' and 'truth'? As I have shown above, 'rights'; 'blood ties' and biological determinism/constructionism continue to play a central defining role in socio-legal familial construction. The 'truth' about families (sic), is that they are biologically constructed and determined; they are 'natural'. The appeal of 'the natural' to

legal discourse, allows for the operation of power inherent within these layers of 'established truth' to be largely disguised.

Grosz, for example, argues that this approach limits women's social and psychological capacities according to biologically established limits. Thus, 'it asserts that women are weaker in physical strength than men, that women are, in their biological natures, more emotional than men.' (Grosz, 1995: 48).

This 'desire' to keep separate, make categories, set apart and so forth, is not only utilised to ensure for example, that 'male' identity is kept separate from 'female' identity, but also to exclude in other ways; 'heterosexuality' from 'homosexuality', or 'mother' from 'lesbian'.

What follows is an exploration of the extent to which law excludes and defines identity in other ways. Only this time it is not the divide between what is 'natural' and what is not, but a divide over 'distinct' areas of legal practice. With this in mind, in addition to problematising that relationship between law, identity and ownership, it is also my concern to problematise the 'ownership' of language by, and within, law. This latter analysis will explore the artificial and thin divisions created by law in respect to its own internal workings. I hope to explore the

question of whether the continuation of the artificial divide between 'property' law and 'family' law, is not due to a perceived necessity to prevent one 'discipline' overlapping another, (a common cry amongst some lawyers), but is rather, part of a larger pattern of exclusion and ostricision (Bottomley 1993).

## **CHAPTER THREE**

### **Identity Construction by Sexual Stereotypes and the Artificial Divisions Between Property and Family Law**

“...We’re supposed to believe it’s natural to want to mince along on stilted shoes, face masked with stinking, lurid chemicals, nails bloody talons, dieted-jazzercized-depilated-plastic surgeries bodies encased in exposing dresses, voices unnaturally high, gestures ‘cute’ and aggressively flirtatious, and minds focused on pleasing men at all costs”.<sup>1</sup>

#### **Introduction**

In the previous chapter, I explored how law constructed and maintained the appeal of ‘the natural’ in order to define the ‘family’, and how the ‘family’ in turn, was constructed by reference to ‘the natural’. My concerns revolved around exposing law’s construction and control over identity formulation and

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<sup>1</sup> Jo, bev, Strega, Linda and Ruston (1990) *Dykes-Loving-Dykes*. California: Battleaxe, quoted in “*The Lesbian Heresy: A Feminist Perspective on the Lesbian Sexual Revolution*”, p. 77.



expression through the judicial appeal to the 'natural', the 'blood tie' and biological determinism. The connection between these and judicial notions of the 'family', has the effect of restricting non-judicially constructed/approved familial forms.

If 'the family' as a unit, is 'defined' in this way, what implications does this have for the individual within that familial group? If law's divisive operational nature vis-à-vis 'the family', is something that is 'hidden' behind biological determinism, how might its divisive nature affect (effect?) identity formulation when that process is not so 'hidden'?

To what extent is identity constructed by, and within, the 'domain of authorised legal knowledge'; i.e., the epistemological field of 'property law'? Is there a similar pattern of ostracism and separation? Is there a further process of separation that extends to 'distinctive' areas of legal practice?

To try and address some of these concerns, I examine some of the case law concerning property disputes between co-habitees. I hope to show that law's failure to recognise the claims from women who are either married or living in heterosexual co-habitation for legal and/or beneficial interests in property disputes, is due to two, interlinking, main factors.

Firstly, the maintenance of the rigid distinctions between two epistemological fields of 'knowledge'; property law and family law. There appears to be firm judicial resistance to any relaxation of these boundaries. Why is there such a reluctance to recognise the concept of property being owned other than by the person who paid for it? The nexus of the problem as I see it, is the fear that such an approach would 'weaken' the institution of marriage. There is, an additional problem. Allowing 'family law' concepts into considerations regarding property ownership would disrupt and contradict the 'traditions' of property law. I would argue that there is no such thing as 'family law'; whilst text books may exist which proclaim 'family law' on the front of them, and there also exists a 'Family' Division in the Court of Appeal, there is no similar sense of 'tradition' in family law as there is in property law. What exists instead, is the application of 'imported parts' of other 'areas' of law, (immigration, housing, social security, trusts and so forth), which combine to produce the epistemological field of 'family law'.

In addition, granting co-habitees the same property interests and rights as spouses may lead to a recognition (albeit implicit), that property is capable of being owned by the 'family', rather than by the individual - a recognition of 'family property'. A recognition which is not forthcoming:

“I would ... refuse to consider whether property belonging to either spouse ought to be regarded as family property, for that would be introducing a new conception into English law and not merely developing existing principles.”<sup>2</sup>

The second law’s reason for law’s failure to recognise women’s claims for legal and/or beneficial interests, is due to the little, if non-existent recognition of identity diversities. Diversities which do not fit neatly into the simple binary classification of sexual and gender identity pre-supposed by law, i.e. female/male, feminine/masculine. Instead, the sexual stereotyping, formulation and expression of the woman’s identity is determined by law’s adherence to notions of ‘appropriate’ identity expression within a marriage or heterosexual co-habitation.

Throughout this chapter, I will refer to the party seeking a declaration of beneficial ownership as a woman. This is not merely out of an acknowledgement that the vast majority of these applications do come from women, but also because I am primarily interested in exploring how female sexual identity is constructed through and by, property law.

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<sup>2</sup> *Pettitt v Pettitt* [1970] AC 777, per Reid LJ at page 795.

Whilst there may be a socio-judicial perception that the property in question is the 'family' or 'matrimonial' home, this is a misleading perception. Under the 'rules' of property law, when 'property' is bought, the legal title to that property remains with the purchaser.

Thus, the attitude of the courts has been that the property bought by the parties before entering into a marriage, stays their property, it doesn't somehow materialise into the communal property of the whole family.

As between *spouses*, where there has been a divorce, it is now seldom necessary to decide the exact property rights of husband and wife, since they have been governed by statute for some considerable time. The courts have a wide discretion to make orders concerning property as between spouses following divorce under s.24 of the Matrimonial Homes Act 1973, as amended by the Family Law Act 1996.<sup>3</sup> Where these statutory provisions do not apply, the general law of property does.<sup>4</sup> I will therefore

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<sup>3</sup> In addition, s.2(1) of the Law Reform (Miscellaneous Provisions) Act 1970, states that the statutory provisions relating to property disputes between spouses, will apply to parties who have broken off their engagement to marry. See also *Mossop v Mossop* [1989] Fam 77.

<sup>4</sup> The Family Homes and Domestic Violence Bill 1995 made provision to extend the rights of unmarried co-habitants in relation to property by amending s.17 of the Married Women's Property Act 1882 in order to allow unmarried couples to make application under it in order to resolve property disputes. This was a purely procedural amendment to make an application to the court easier. It would not have strengthened the property rights of unmarried partners.

concentrate upon how the courts have approached the question of division of property and property rights between cohabitees in order to illustrate the inconsistencies in applying sexual stereotypes.

Most of the 'modern' cases relating to family property concern unmarried, co-habiting couples. It is ironic that the rules developed under the law of property, now used for cohabitees, were originally used for married persons.

There appears to be, throughout these cases, either an express or implied regret that there may be no marriage between the parties; if a couple cohabit without any intention to marry, there should be little or no intervention by the court in the relationship, even if one of the parties should subsequently request it:

“There are many reasons why a man and a woman may decide to live together without marrying, and one of them is that each values his independence and does not wish to make the commitment of marriage; in such a case it will be misleading to make assumptions and to draw the same inferences from their behaviour as in the case of a married

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Although the whole Bill itself was dropped due to significant opposition to this 'extension of rights', the original provision allowing for transfer of tenancy (only in relation to tenancies and statutory security of tenure), it was nevertheless retained in Part III of the Family Law Act 1996.

couple. The judge must look carefully at the nature of the relationship, and only if satisfied that it was intended to involve the same degree of commitment as marriage will it be legitimate to regard them as no different from a married couple.”<sup>5</sup>

In this context, the parties tend to be viewed as having voluntarily opted for a relationship unhindered by the social and legal regulation of a marriage. It may very well be more difficult for the court to infer an agreement because there is ‘less evidence’ of a long term joint commitment.

Yet the tendency in the modern application of family law takes the opposite approach. Increasingly, the so called ‘protective and support’ functions of the courts are being applied to ‘de facto’ families:

“The family is a social as well as legal unit and the need for protection and assistance in adjustments exists whatever the formal legality of the relationships.” (Eekelaar 1978: 34).

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<sup>5</sup> *Bernard v Josephs* [1982] 3 All ER 162, per Griffiths LJ at page 169.

However, it would appear that the courts will only supply these 'protective and supportive' functions where the de facto family conforms closely to the idealised familial nuclear family.

How, and why, does law set about maintaining these rigid distinctions between authorised epistemological domains of legal knowledge?

### **'Property' and 'Family'.**

"Much of land law - the field of law above all others claimed by English lawyers to be the epitome of rational achievement - occupies a prison of reason and as long as it does so, it cannot escape its prejudice against those who do not fit Reason's stereotyped human being." (Green 1995: 129).

The divisive nature of law is not necessarily something that is hidden and kept secret. The judicial approach appears to be to 'apply' the law to the set of 'facts' before them. However, 'family law' is a nebulous, undefinable area of law, there are no 'family law' rules as such to apply. What is 'applied' is other 'areas' of law - primarily, property law. The constant striving to keep separate, make categories, set apart and so forth, is not only

utilised to ensure for example, that 'male' identity is kept separate from 'female' identity, but also to exclude on the basis of rigidly defined epistemologically distinct areas of law. The examination of case law in 'co-habitation property dispute situations, will, I hope, 'uncover' a similar pattern of exclusion, separation and categorisation, presented as a desirable and necessary divide over 'distinct' areas of legal practice.

As mentioned above, property adjustment orders are not available to unmarried cohabitants; in general, disputes must be resolved by reference to the ordinary legal rules applicable to strangers.<sup>6</sup> Cohabitees must, therefore, base their claim upon the Law of Property Act 1925 which states that when land is transferred, that transfer must be in writing.<sup>7</sup> The exception to this is if the trust arises by way of a resulting or constructive trust.<sup>8</sup>

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<sup>6</sup> The situation may be different if there is a child involved.

<sup>7</sup> S.53(1)(b) Law of Property Act 1925. Additionally, under s.2(1) and (3) Law of Property (Miscellaneous Provisions) Act 1989, such an interest can only be created by a contract in writing incorporating all the terms which the parties have expressly agreed to and such a contract must be signed by or on behalf of each party. However, where a person cannot establish her interest in the conveyance, or by written and signed contract, she can still ask the court to declare her interest under a resulting, implied or constructive trust.

<sup>8</sup> The first and easiest way to establish a trust, is if there was an express declaration of trust. Where the legal estate is vested in both parties, and the conveyance contains an express declaration of the beneficial interests of the parties, then that this proof of their interests and intentions, and the express declaration is given effect to, in the absence of fraud, mistake, undue influence or evidence to the contrary.



The '1925' legislation was drafted to simplify the processes by which property was acquired and disposed of.<sup>9</sup> It took no account of 'familial' situations. The judicial approach has seemingly been loathe to abandon epistemological boundaries of 'property law'.

In *Pettitt v Pettitt*<sup>10</sup> and *Gissing v Gissing*<sup>11</sup>, the House of Lords stated that the interests of husband and wife in property must be determined in accordance with the ordinary rules of property law. In *Pettitt*, it was very clearly stated that in dealing with property disputes between partners, the function of the court is to *ascertain* their rights and not to *alter* those rights:

“the court [cannot] disregard any existing property right, but merely confer a power to regulate possession or the exerts of property rights, or, more narrowly, merely confer a power to exercise in proceedings ... any discretion with regard to the property in dispute which has already been conferred.”<sup>12</sup>

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<sup>9</sup> The body of legislation referred to as the '1925' legislation includes; The Settled Land Act; Trustee Act; Law of Property Act; Land Registration Act; Administration of Estates Act and the Land Charges Act, all of which were passed in 1925, becoming law on January 1st 1926.

<sup>10</sup> *Supra*.

<sup>11</sup> *Gissing v Gissing* [1970] 2 All ER 780.

<sup>12</sup> *Pettitt v Pettitt*, *Supra*., Per Reid LJ at page 793. As a direct result of *Pettitt*, s.37 of the Matrimonial Proceedings and Property Act 1970 was passed; “where a husband and wife contributes in money or money’s worth to the improvement of real or personal property in which the proceeds of sale of which either or

In the words of Morris LJ in *Pettitt*, the question is ‘whose is this?’ and not, ‘to whom shall this be given?’<sup>13</sup>

“A spouse who contributes to the cost of acquiring or improving a home which is legally owned by the other, will be entitled to a beneficial interest, but the circumstances in which a trust (resulting, implied or constructive) will arise are notoriously difficult to predict.” (Hoggett and Pearl 1991:142).

In addition, it is clear from *Gissing* that if either party seeks to establish a beneficial interest in property, the legal title to which is vested in the other, s/he can do so only by establishing that the legal owner holds the property on trust for the claimant. This has to be done in the absence of any express agreement outlining how the property is to be held.

Denning attempted to do justice as he saw it to the ‘deserted wife’.<sup>14</sup> His basic premise was that it may only have been a pure matter of convenience as to which partner paid the mortgage and

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both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such an agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises”.

<sup>13</sup> *Pettitt v Pettitt*, *Supra.*, Per Morris LJ at page 798.

<sup>14</sup> See for example *Eves v Eves*, *supra*; *Hussey v Palmer* [1972] 3 All ER 744; *Heseltine v Heseltine* [1971] 1 All ER 952.

which paid the bills. Additionally, most spouses would not have thought that such arrangements may mean that they would not be entitled to the property; any part of it, or any right to occupy it, upon the breakdown of that relationship. Denning used the devices of constructive and resulting trusts,<sup>15</sup> almost interchangeably in order to achieve what he saw as justice. Denning was willing to find a beneficial share for the co-habitant who has contributed either to the improvements of the house or who had contributed in money's worth to the household by being a housekeeper, mother and so forth.

Denning's approach was strongly disapproved of by the House of Lords in the *Pettitt* and *Gissing* cases. They re-asserted the principle that if one party wished to establish a beneficial interest in property, they had to do so using the ordinary rules of land law by establishing the existence of a trust.

The way to do this was by re-iterating (as they saw it), that there must be a *common intention* demonstrated in a particular way, if a trust is to exist. However, it would appear that these two words 'common intention', are the two words to which the judiciary clings to in this area. However, as we shall see later on in this chapter, 'common intention' is very difficult to define, and is more

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<sup>15</sup> sometimes known as 'new model trusts'. See for example *Eves v Eves*, *Supra*.

often than not interpreted by the judges as being a 'financial intention'.

In the light of *Lloyd's Bank v Rosset*<sup>16</sup>, it is now financial intention that the courts are most interested in ascertaining.

The first case reported after the House of Lords decision in *Rosset* was *Hammond v Mitchell*<sup>17</sup>. Here, the two parties lived together in a bungalow purchased by way of a mortgage, by the man and put into his sole name. The mortgage was eventually replaced by a series of bank loans which were also used to pay for several improvements and extensions to the property. The woman agreed to the bungalow being mortgaged by the man to fund various business ventures which she supported and took part in. The man also had a business and house in Spain in which they lived in for a short time. The relationship broke down and the man brought an injunction for possession of the bungalow. It was held that:

“their financial rights have to be worked out according to their strict entitlements in equity”.<sup>18</sup>

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<sup>16</sup> [1991] 1 AC 107.

<sup>17</sup> *Hammond v Mitchell* [1991] 1 WLR 1127. Interestingly, “not only is Hammond a case of first instance, it is also a case not heard in Chancery but, extremely unusually given both the facts and the major element in the litigation, in the Family Division. Waite then is not a Chancery judge but a Family judge”. (Bottomley 1994: 87/89).

<sup>18</sup> *Supra*, per Waite J at page 112.

The court was asked to consider whether there had been any agreement or understanding reached by the parties expressly and relied upon in later conduct by the woman to her detriment. If there was not, then the court would consider whether or not an intention to share beneficial ownership could be imputed, and on what basis.

It was held that the support given by the woman to her partner's business ventures, together with her agreement to subordinate any claim she might have to an interest in their home to that of the bank, sufficed to give her a beneficial interest. Open to question however, is how a finding that such 'support' can amount to conduct upon which detrimental reliance is based:

“Waite is actually trying to deal with the problem of matching abstract jurisprudence to a complex of facts; in other words, this is not a judgement designed to deal with a point of law but rather the reality of a very messy factual situation arising from a very messy break-up of (ex)cohabitees. Waite says of making a decision ‘this process is detailed, time consuming and laborious’<sup>19</sup> and he is referring not so much to the jurisprudence as to dealing with the evidence of the jurisprudence demands that he looks for”. (Bottomley 1994: 88).

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<sup>19</sup> Per Waite J at page 112.

In other words, the judge recognises that there is more to this case than the application of the rules of property law. However, whilst there is recognition in *Hammond* that relationship breakdown is a ‘messy’ business, what appears to set it slightly apart from other cases, is the additional recognition that the relationship itself is legally *relevant*.

This additional recognition, is not, apparently forthcoming in the other leading cases.

“The question is what in fact the common intention was, and not what the court considers it might or ought to have been.”(Megarry 1993: 293).

Whilst this appears to be straightforward and relatively simple, however, that is exactly what the courts do. In other words, the court *does* consider what it thinks the common intention “*might or ought to have been*”. The main criticism of the orthodox line of reasoning, is that while this kind of requirement may be suitable for the commercial sector, it is not appropriate for claimants in the family context.

It is often the case that two people who set up home together and enjoy a loving and what they believe will be a permanent relationship, do not often think that it really matters whether their home is owned by one or other of them, or by both jointly, since they do not envisage the ending of their relationship. What

appears to be missed by legal culture here, is that people do not embark upon an intimate relationship in the same way they would embark upon a business venture. It is rare for couples to draw up agreements, contracts, and so forth. Yet it seems that this is what the courts are implicitly looking for. Bottomley argues that Dennings's judgement in *Eves v Eves*<sup>20</sup> blurs three elements contained within the 'orthodox' approach to the law of trusts, the first of which she says is:

“[T]he need to focus on the acquisition of the property rather than a more general consideration of the way in which the couple ran their lives”.

(Bottomley 1993:60).<sup>21</sup>

Even the 'orthodox' line of reasoning acknowledged this. In *Pettitt*, it was stated:

“The conception of a normal couple spending the long winter evenings hammering out agreements about their possessions appears grotesque, and I certainly cannot take the further step of working out

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<sup>20</sup> *supra*.

<sup>21</sup> “The second is the traditional concern to find evidence of an agreement about the ownership of the property. The third element is the preference for monetary contributions, or contributions in kind, to the acquisition or (substantial) improvements of the property.” (Bottomley 1993:60).

what they would have agreed if they had thought about it”.<sup>22</sup>

In other words, what the orthodox reasoning expects the parties to do, is to make their rights dependent on their common intention about a matter they will rarely have thought it necessary to consider. There was a recognition in *Hammond* of this ‘problem’;

“The primary emphasis accorded by the law in cases of this kind to express discussions between the parties ... means that the tenderest exchanges of a common law courtship may assume an unforeseen significance many years later”.<sup>23</sup>

It is the rules of property law which demand that the parties consider these questions, and property law which imposes these considerations upon situations where they may not be considered necessary, nor desirable.

In *Hammond*, Waite J appeared to acknowledge this. One significant factor was that the original application included a claim for financial provision for the child under s.12 of The Family Law Reform Act 1987. Bottomley argues that we can consider Waite’s judgement as the first attempt to fit the jurisprudence to the reality of litigation, and that Waite knows there is a hidden agenda - that

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<sup>22</sup> *Pettitt v Pettitt*, supra, per Hodson LJ at page 987.

<sup>23</sup> *Hammond v Mitchell*, supra, per Waite J at page 40.



of financial provision for herself and the child (Bottomley 1994: 88).

Similarly, in *Barclays Bank v O'Brien*,<sup>24</sup> it was stated that:

“Even today, many wives repose confidence and trust in their husbands in relation to their financial affairs”.<sup>25</sup>

Unfortunately, of course, most parties when they set up home together don't draw up a legal document stating what the beneficial interests (if any) are. Thus in situations (such as these), where there *is* no express declaration of trust, the party must rely on the existence of an implied or constructive trust and prove common intention. And this is done by looking at the effect of the parties conduct and words. Anything which is said or done *during* the marriage or cohabitation can only ever be considered as evidence towards intention at the time of the marriage. It is at this juncture that we can see how the second of the rigid distinctions is maintained by law; the sexual stereotyping of female identity(ies). In the following section, I question the seemingly lack of recognition given to diversity of identity. Is a woman's identity determined by law's adherence to notions of 'appropriate' identity

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<sup>24</sup> *Barclays Bank v O'Brien* [1994] 1 AC 180.

expression? To what extent (if at all), does law reflect a diversity of identities which do not conform to the pre-supposed binary classification of sexual and gender identity?

“The duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question”.<sup>26</sup>

In order to acquire a beneficial interest, a woman has to;

1. produce a written declaration or agreement;
2. or establish *direct* contributions to the purchase price;
3. or in the absence of a direct contribution, she must establish a common intention to share, *and*, detrimental reliance upon it.

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<sup>25</sup> *Barclays Bank v O'Brien*, supra per Browne-Wilkinson LJ at page 187.

<sup>26</sup> *Midland Bank plc v Cooke* [1995] 4 All ER 562 per Waite LJ at page 574.

It was clear from *Gissing* that financial contributions which are not *referable* to the costs of acquisition will *not* give rise to a share on the basis of presumed common intention. Such is the case where, for example, the payment of household expenses by one party enables the other to discharge the couple's mortgage payments, or where one party contributes physical labour on the property or does unpaid work in the family business which enables the other to put the money saved towards the acquisition of property. In itself, this may sound like an unbiased test, (and within the strict doctrinal limits of property law it may be), but there are additional important underlying judicial biases and assumptions at play relating to perceived sex and gender roles in determining 'common intention'.

For example, it is assumed that upon marriage breakdown;

“The husband will have to go out to work and must get some woman to look after the house - either a wife, if he remarries, or a housekeeper, if he does not. ... The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself perhaps with some

help. Or she may remarry, in which case her husband will provide for her”.<sup>27</sup>

Some of the underlying assumptions in the above passage become immediately apparent. The first of course is that the man will have work. The second is that it will be ‘some woman’ who ‘looks after the house’, a turn of phrase which appears to sound like ‘any woman would do’. It also equates ‘wife’ with ‘housekeeper’ - here, the two terms appear to be synonymous with each other. It is additionally clear that as men do not ‘look after the house’, the woman does not ‘qualify’ for financial assistance for housework. It appears to be assumed that housework is what women ‘do’. Within the last sentence, it is further assumed that if the woman remarries she will be financially supported by her husband. The assumptions contained within this short passage impact upon a woman’s ability to self-define and express identity. She is only able to define her identity within the confines dictated by the judgement.

She can for example, choose whether to do all of the housework herself, or employ ‘some help’. She cannot choose to state that housework is not part of her identity. Despite the imposition of this obligation, fulfilling it is not enough to support the inference of common intention:

“If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted

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<sup>27</sup> *Watchel v Watchel* [1973] Fam. 72, per Denning at page 78.

wardrobe in the bedroom while the wife does the shopping, cooks the family dinner and bathes the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home”.<sup>28</sup>

In *Burns v Burns*<sup>29</sup> the woman was not entitled to any share in the property, due to the judicial construction of ‘common intention’. Only if the courts can impute from the conduct of both parties before separation, a common intention that they were both to have a beneficial interest in the property, will such an interest will arise. She failed to establish a ‘common intention’ because her contribution was not a financial one. Although she remained at home to raise their two children until the breakdown of their relationship seventeen years later, her ‘contribution’ was, in the court’s view not relevant:

“Can the fact that the plaintiff performed domestic duties in the house and looked after the children be taken into account? I think it is necessary to keep in mind the nature of the right which is being asserted. The court has no jurisdiction to make

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<sup>28</sup> *Pettitt v Pettitt*, Supra, per Diplock LJ at page 826.

<sup>29</sup> *Burns v Burns* [1984] 1 All ER 244.

such order as it might think fair; the powers conferred by the Matrimonial Causes Act 1973 in relation to the property of married persons do not apply to unmarried couples. ... The mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them”.<sup>30</sup>

This overly narrow view of what constitutes indirect contributions can of course lead to unfairness, whereas taking a wider view could be more in line with how the parties regard the home and its contents; that is ‘their assets’. This does *not* mean that the house will be taken away from what doctrinal traditionalists would regard as its true owner, because up until now, ‘true owner’ is defined in terms of property rights established by traditional property law. If the court declares the property rights/interests to be whatever the parties originally intended (regardless or howsoever those intentions were expressed) how are the strict rules of property law affronted?

If the parties always regarded the home as ‘their home’, then surely all the courts would be doing is to formally state those interests not, as cases such as *Rosset* would have us to believe, *reassigning* those assets. Why do other courts ignore what is surely an injustice, what Denning termed as the ‘deserted wife’?

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<sup>30</sup> *Burns v Burns*, supra, per Fox LJ at page 254.

Is it that they do not recognise that Denning's 'deserted wife' has suffered injustice? Indeed, it was stated in one case that:

"The wife does not get a share in the home simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering title to, or interests in, the property".<sup>31</sup>

This point is emphasised by Moffat:

"...so long as a married or cohabiting couple adopt conventional roles within the traditional sexual division of labour, nothing they do is regarded as 'evidence' of anything" (Moffat and Chesterman 1988: 132).

The assumptions made regarding 'men's' roles and 'women's' conduct become easier to see. The judicial interpretation(s) of 'property law' become determined by judicial commitment to the parties' performance of 'traditional' gender roles; only certain 'performances' become judicially equated with fulfilling the requirement of 'common intention'.

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<sup>31</sup> *Button v Button* [1968] 1 WLR 457, per Denning MR at page 462.

In *Gissing v Gissing*<sup>32</sup>, the house was bought in the husband's name and paid for by a mortgage which he alone repaid. The wife spent money on furniture, laying a lawn and paying for her own and the parties' son's clothes. Her 'conduct' was not considered enough to entitle her to an interest in the home.

*Gissing v Gissing* left the law in an uncertain state.<sup>33</sup> Reid LJ could see no reason for the distinction between direct and indirect contributions and thought that in many cases it would be unworkable. Diplock LJ pointed out that, if the wife had made an initial contribution to the deposit or legal charges which indicated that she was to take some interest in the property, the court should also take account of her contribution to the mortgage instalments, even though these were indirect, because this would be consistent with a common intention that her payment of other household expenses would release the husband's money to pay off the mortgage and would thus be her contribution to the purchase of the home.

If the wife did not make an initial contribution to the purchase price; no direct contribution to the repayment of the mortgage, then there could be no:

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<sup>32</sup> *supra*.

<sup>33</sup> Browne-Wilkinson VC has stated extrajudicially that in his opinion, the law took a wrong turn in *Gissing*. In his opinion, these sorts of cases should be decided on the basis of proprietary or promissory estoppel. Cited in Pettit 1997:178.



“adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house”.<sup>34</sup>

She was, therefore, unable to succeed in her claim for an interest in it:

“merely because she continued to contribute out of her own earnings or private income to other expenses of the household”.<sup>35</sup>

While in theory the courts have a large amount of discretion in this area, this does not mean to say that they will apply justice. And it would appear that more recent decisions have turned away from the use of the constructive trust, especially the ‘new model’ kind used by Denning to the more strict resulting trust principles contained in *Grant v Edwards*.<sup>36</sup> This is demonstrated by the later cases such as *Lloyds Bank v Rosset*.<sup>37</sup>

However, it is at the same time difficult to determine exactly what or rather whose conscience is being used. In later cases revolving around the use of constructive trusts, the courts have obviously abandoned Denning’s ‘new model trusts’, in favour of return to the strict doctrinal approach. Cases such as *Rosset*<sup>38</sup> and *Hammond v*

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<sup>34</sup> *Gissing v Gissing*, supra, per Diplock LJ at page 793.

<sup>35</sup> *Gissing v Gissing*, supra, per Diplock LJ at page 793.

<sup>36</sup> supra.

<sup>37</sup> [1990] 1 All ER 1111.

<sup>38</sup> Supra.

*Mitchell*,<sup>39</sup> illustrate that what passes for the achievement of a fair and just result, is a rejection of the underlying philosophy of the constructive trust.

In *Rosset*, the husband bought a semi derelict house as a matrimonial home for both himself and his wife; the husband providing the purchase money. The wife made no financial contribution to the purchase price. She claimed that she held a beneficial interest in the home as a result of a common intention that the property should be jointly owned, a common intention on reliance of which the wife had acted to her detriment by carrying out restoration work on the property prior to the date of completion. The House of Lords held that the wife had no interest in the property. It was considered essential by the House of Lords that, in the absence of any express discussion establishing an agreement, a common intention was only likely to be inferred from a direct contribution to the purchase price. The wife's restoration work was not sufficient to raise an inference of a common intention that the property should be jointly held.<sup>40</sup>

By examining some of the older cases involving suggestions of dishonesty, it is possible to see that the courts appeared more willing to allow the party to claim a beneficial interest in the property. However, this may have had more to do with the fact that the court was more concerned that an errant husband should

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<sup>39</sup> [1991] WLR 1127 (Fam Div). See also Bottomley, A., [1994] *Feminist Legal Studies* Vol.II no.1.

<sup>40</sup> *Rosset* was not covered by Matrimonial law as the issue under consideration was whether Mrs Rosset had any proprietary claim prior to that of the bank. Thus the case fell to be decided under the ordinary rules of property law.

not be allowed to benefit from dishonest representation, than it was with ensuring fair treatment for the wife.

In *Eves v Eves*<sup>41</sup> for example, the two parties (Janet and Stuart) had lived together for four years during which time a house had been paid for by and conveyed into Stuart Eves' sole name. Janet Eves had been explicitly led by Stuart Eves to believe that when they set up home together, the property would belong to them jointly. She had been told by him that the legal title in the home was vested in his sole name only because she was then under 21 and that he intended to put the home into their joint names.

What appeared to weigh heavily on the court here, was Stuart Eves' dishonest conduct:

“In view of his conduct, it would, I think, be most inequitable for him to deny her any share in the house”.<sup>42</sup>

However, apart from the fact that the court did not want to let Stuart Eves 'get away' with dishonesty, there is also another aspect of this case which is of interest. The court paid attention to the work she had undertaken in and around the home.

A female claimant appears less likely to succeed if her actions and conduct substantially conform to the conventional expectations

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<sup>41</sup> *Eves v Eves* [1975] 1 WLR 1338.

<sup>42</sup> *Ibid*, per Denning at page 1340.

regarding 'appropriate' roles vis a vis femininity and masculinity. Janet Eves had redecorated the entire house, demolished a garden shed, wielded a 14 pound sledgehammer to break up an area of concrete at the front of the house. To the court, this was much more than a woman would normally be expected to do to the extent that it was described in detail:

“She did a great deal of work to the house and garden. She did much more than many wives would do. She stripped the wallpaper in the hall. She painted woodwork in the lounge and kitchen. She painted the kitchen cabinets. She painted the brickwork in the front of the house. She broke up concrete in the front garden. She carried the pieces to a skip. She, with him, demolished a shed and put up a new shed. She prepared the front garden for turfing”.<sup>43</sup>

Thus 'ordinary' household labour and child rearing, when performed by women, is evidence of nothing at all. It is only when they deviate in some way from this traditional view that their activity begins to acquire some probative and evidential force.

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<sup>43</sup> Ibid. per Denning at page 1342.

What the courts have not paid as much attention to as they ought, is that most people view their relationship as a *partnership*. Despite the fact that there are not many couples who earn exactly the same as each other, and make exactly the same contributions to the running of the family and home, they would still regard the home as belonging to 'them', as 'theirs'. The orthodox approach also ignores the imbalance of power in relationships which is often the case, between the parties:

“It is said that equality of power, which separation of property achieves, does not of itself lead to equal opportunity to exercise that power; it ignores the fact that a married woman, especially if she has young children, does not in practice have the same opportunity as her husband or as an unmarried woman to acquire property; it takes no account of the fact that marriage is a form of partnership to which both spouses contribute, each in a different way, and that the contribution of each is equally important to the family welfare and to society”.<sup>44</sup>

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<sup>44</sup> Law Commission (1971) *Family Property Law*, Working Paper No. 42, London: HMSO.

One of the advantages of the constructive trust approach, is that it removes the requirement to find evidence of intention, or strictly speaking it should do. The absence of intention can lead to the dismissal of such a claim.

However, I think that there may be a further explanation for the current judicial disapproval of the constructive trust. This lies in the answer to the question of why financial contributions are given priority over other contributions? One argument often advanced in favour of attributing shares in the house on the basis of money contributions is that the alternative of reorganising non-financial contribution would amount in effect to the introduction of a 'family property' concept so distrusted by law.

As has already been mentioned, there may be little difficulty in quantifying the parties' share if the conveyance spells out the beneficial interests or one of them acquires an interest by virtue of a resulting trust.

In the former case, the court must give effect to the conveyance. If the circumstances in which the property was bought raise a resulting trust, the beneficial interests will be proportionate to the parties' contributions. Problems arise, however, in the case of constructive trusts. As far as the courts see it, once the existence of a constructive trust has been established, the court's task is to:

“do its best to discover from the conduct of the  
[parties] whether any inference can reasonably be  
drawn as to the probable common understanding

about the amount of the share [to be taken by the claimant]’”.<sup>45</sup>

In principle, the parties interests must reflect their common intention when the property was acquired; in practice as we have seen, an express agreement is rare and the court will have to infer their intention from their actions. All the ‘available evidence’ must be considered. As was demonstrated by *Grant v Edwards*, the ‘available evidence’ led the court to award each party a half share in the house. Usually the best guide will be the parties’ contributions, both direct and indirect. In *Gissing* Lord Diplock saw:

“nothing inherently improbable in [the spouses’] acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date.”<sup>46</sup>

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<sup>45</sup> *Gissing v Gissing*, supra per Diplock LJ at page 792.

<sup>46</sup> *Gissing v Gissing*, supra, per Diplock LJ at page 789.

In practice, it may very well be impossible to determine what proportions each party's contribution bore to the whole.

Lord Denning's earlier attempts to solve this problem were based on the premise that the courts had a general power to do what was just and equitable in the circumstances and this frequently led to an equal division between the parties, especially if they were married. I earlier highlighted Denning's attempts to see the law develop in a certain direction, were severely checked in *Gissing v Gissing*, where it was held that the maxim 'equality is equity' had been applied too many times in these types of situation.

However, if both parties have made a substantial contribution but it is difficult to fix the exact proportions, the court may have no choice but to fall back on this principle.

As in the case of spouses, if both cohabitants have a legal or equitable interest in their home, each will have a right to occupy it. Unlike spouses however, neither of them has a right to occupy the other's property.

A good illustration of how this works is the case of *William and Glyn's Bank v Boland*.<sup>47</sup> A matrimonial home was bought by contributions from both husband and wife but the property was registered only in the husband's name. He then arranged a legal mortgage of the matrimonial home. The bank made no investigation of any possible interest in the property held by the

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<sup>47</sup> [1981] AC 487.



wife, who remained ignorant of the mortgage until her husband ceased mortgage payments. The bank sought possession. It was held that the wife had an equitable interest under a resulting trust, and that this could resist a bank's claim to possession by virtue of that resulting trust.

This limited degree of occupational protection flowing from the trust is of equal importance to both unmarried and married family members. It is, in fact, that in the case of married persons, it is regarded as more effective than existing or proposed statutory schemes for protecting spouses' occupation of the matrimonial property.

So, the courts may impose a constructive trust if they consider it to be in the interests of justice to do so, or to prevent unjust enrichment. If they do, it will create a property interest for the occupier which will bind third parties. This can be seen operating in one of the older cases, *Bannister v Bannister*<sup>48</sup> Here, a woman sold her brother-in-law two cottages on the understanding that she would be allowed to live in one of them rent free, for the rest of her life. The understanding between the parties was not recorded in any document and was merely an oral agreement.

The brother-in-law tried to obtain possession of the cottage, but the woman claimed that the oral agreement amounted to an informal declaration of trust by the brother-in-law that he would hold the property on trust for her lifetime. Now, normally, such a

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<sup>48</sup> [1948] 2 All ER 133.

declaration of trust requires writing under the Law of Property Act 1925, s.53, but because of the unconscionable conduct of the brother-in-law in seeking to rely upon the absence of writing, in these circumstances the court imposed a constructive trust to allow the woman to occupy it during her lifetime.

Similarly, in *Ungurian v Lesnoff*<sup>49</sup> the defendant had left her native Poland, abandoned her home and her promising academic career there, in reliance on the parties' common intention that the plaintiff would buy a house where she could live with her children. She also spent much time supervising repairs and alterations and doing some of the repair work herself. In these circumstances, Vinelott J was not prepared to infer a common intention that she should acquire an interest, when the arrangement had been that she would live with him in a house which he had provided. Thus, full effect would not be given to this intention by inferring an irrevocable licence to occupy the house. In the end, the plaintiff held the property on trust for her, in order that she could live there for the rest of her life.

However, it is not clear whether Mrs Lesnoff was found to have established detrimental reliance, on the basis of her work on the property alone, or whether it was the fact that she had given up her home and career in Poland.<sup>50</sup> Vinelott J, stated:

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<sup>49</sup> [1990] Ch 206.

<sup>50</sup> The case, however, is not strictly comparable with those discussed above, as the agreement was not that she should have an interest in the house, but that she should be allowed to live in it for the rest of her life. She successfully claimed a constructive trust and became a tenant for life.

“I think that in retrospect Mrs Lesnoff has probably come to exaggerate both the extent of the work she did, and in particular the skilled work. Mrs Lesnoff gave a graphic account of wielding a pickaxe. No doubt her solicitors had retailed to her the facts in *Eves v Eves*, which they drew to the attention of Mr Ungarian’s solicitors. ... I doubt whether Mrs Lesnoff used a tool as clumsy as a pickaxe at all, unless possibly she picked one up that had been left lying around by workmen and put it to some temporary, and possibly inappropriate use. ... I am not persuaded that, as she claimed, she mastered the art of plastering walls.”<sup>51</sup>

It could be argued that the judge was slightly sceptical of Mrs Lesnoff’s claim to physical work on the house, and therefore, may be it was the fact that she had given up her career and flat which appealed to the judges. Why the judge was so cynical about a woman claiming to have undertaken hard physical labour, especially ‘skilled’ work, is clear from the judgement; again the unquestioned sexual stereotyping is the answer. The assumptions regarding specific roles within a familial relationship were certainly made in the older cases. See for example *Gurasz v Gurasz*, where it was stated that:

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<sup>51</sup> *Ungarian v Lesnoff*, Supra, per Vinelott J at page 223.

“Some elements of family life are elemental in our society. One is that it is the husband’s duty to provide his wife with a roof over her head: and the children too. So long as the wife behaves herself, she is entitled to remain in the marital home.”<sup>52</sup>

This does not bode well for women who seek to rely on their physical labour to establish detrimental reliance.

Perhaps it should be the skills or characteristics possessed by the *individual* woman concerned be taken into account when deciding whether or not her conduct could reasonably have been expected of her, as opposed to a stereotyped and generalised view of what is ‘reasonably expected’ of a woman?

Although *Rosset* is still regarded as the leading case in this area, I wish to examine some of the post *Rosset* decisions.

Whilst *Rosset* made it clear that a constructive trust cannot be imposed on the basis of conduct which was not a direct money contribution, the Court of Appeal in *Midland Bank v Cooke*<sup>53</sup>, appeared to suggest that contributions such as child-care, could be taken into account, but only in relation to the *nature* of the common intention which will be applied. However, this would only be the case where the plaintiff could satisfy a threshold

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<sup>52</sup> [1970] P 11.

<sup>53</sup> [1995] 4 All ER 562.

requirement of some direct contribution to the purchase price. In other words, having made the (albeit small) direct contribution to the purchase price, (the *Rosset* requirement), the court then considered it a *duty* to take account of all the circumstances surrounding the parties' relationship:

“... the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing its burdens and advantages”.<sup>54</sup>

Even so, considerations of appropriate gender roles are still evident. The fact that she had contributed to household bills, looked after the children, consented to a second mortgage of the house to guarantee her husband's business debts and maintained the property, led Waite LJ to grant her a half share in the property because they fulfilled the appropriate gender roles:

“One could hardly have a clearer example of a couple who had agreed to share everything equally: the profits of his business while it prospered, and the risks of indebtedness suffered through its failure; the upbringing of their children; the rewards of her won career as a teacher; and most relevantly, a home into which he put his savings and to which

she was to give over the years the benefit of the maintenance and improvement contribution”.<sup>55</sup>

Despite the ‘relevant’ importance given by Waite to the savings and maintenance issue, his approval of appropriate gender roles in the above passage is clear. Waite then went on to give further approval to gender roles:

“When added to all this there is added the fact (still an important one) that this was a couple who had chosen to introduce into their relationship the additional commitments which marriage involves, the conclusion becomes inescapable that the presumed intention was to share the beneficial interest in the property in equal shares”.<sup>56</sup>

*Midland Bank v Cooke* contrasts nicely with an Australian case. In *W v G*<sup>57</sup> the NSW Supreme Court held that a contribution of \$500 towards the deposit of a house was de minimus and therefore incapable of establishing an interest by way of a constructive trust. In other words, the plaintiff was held not to be entitled to any interest in the property of her partner by way of a constructive trust, despite the fact that she had contributed to their joint living expenses, contributed financially and physically to the improvement of the property, and looked after their children. Indeed, although the NSW Supreme Court held that a lesbian

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<sup>54</sup> Per Waite LJ at page 574.

<sup>55</sup> Per Waite LJ at page 580.

<sup>56</sup> Per Waite LJ at page 580.

<sup>57</sup> (1996) 20 Fam LR 49 (NSW Supreme Court).

partner had acted to her detriment where she had agreed to have a child by way of artificial insemination on the basis of an assurance that her partner would assist in the upbringing of the child, the court did not, however, find that having a child per se was a detriment. Whereas English law uses the concept of the constructive trust, Australian law uses the concept of 'unconscionability'. Notwithstanding this, the case still failed to provide adequate recognition of domestic contributions to family life.

There is no clear guidance as to how these judicial tests vis a vis detrimental reliance, should (or could) be applied to male cohabitants. Would a man's financial contributions to mortgage instalments, improvements or extensions, amount to detrimental reliance in the same way they would as if they were made by a woman? Direct contributions to the purchase price/mortgage would present no problem.

However, the effect of a man's physical labour on the property is more uncertain. If the work done by Janet Eves had been done by Stuart Eves, would it have amounted to detrimental reliance?

If the judges do make stereotyped assumptions about so called 'women's work', then presumably the same assumptions would be made in relation to so called 'men's work'. On this basis, the answer would be no; such work could, presumably, be reasonably expected of a man acting out of love and a desire to improve the place in which he lives, in the same way that painting, wall papering and designing can be similarly expected of a woman. In

*Button v Button*<sup>58</sup> for example, stereotypical views regarding 'appropriate' behaviour for a husband were portrayed as thus:

"The husband does not get a share in the house simply because he puts up a shelf or touches up a window sill or even paints and decorates a room. ... He should not be entitled to a share in the house simply by doing the 'do-it-yourself jobs' which husbands often do. He may however, be entitled when the work is of a kind which normally a contractor is employed to do."<sup>59</sup>

If this is so, is there any limit to the amount of physical labour it is reasonable to expect of a man, and if so, what is it? Would it make any difference if the man was, say an office worker who never did any such manual labour?

Men who do not invest physical labour in the property, but who do more than is 'traditionally expected' of them in other ways, for example, by taking on the chief responsibility for looking after the children and for doing the housework, would not seem to fare very well either.

"It might be argued that the division of labour evident in cases from the 1970's has no bearing in

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<sup>58</sup> *Supra*.



the 1990's. Yet this would be to misread how the law has reconstructed the man/work relation and underestimate how culturally powerful this idea of breadwinner masculinity remains." (Collier 1995: 195).

Taking on a 'feminine' role of child-rearing takes the man out of his 'traditionally' defined role of 'breadwinner'.

It is now clear that what is now required is much more exacting proof of 'detriment' or 'sacrifice'. The ruling of the House of Lords in *Rosset* (still regarded as the leading case), underlines the intense preoccupation with money payments which dominates much of the law of trusts:

"The test of acquisition of beneficial interests by a spouse or partner (probably female) relies on a contractual (market place, male) model of human relations which is in practice...inappropriate to the circumstances." (Green 1995: 143/144).

In other words, the pre-occupation with money appears to transcend all other considerations. There is little, if no acceptance that relationships are more than just a financial contractual arrangement between two individuals. The extreme limitations

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<sup>59</sup> *Button v Button*, supra.

imposed by *Rosset* become more apparent when we look at the many forms of contributory behaviour which are now effectively excluded from the ambit of the constructive trust. Bridge LJ conceded that even substantial or arduous renovation works on property, such as in *Eves v Eves*, fell far short of the kind of conduct required. Even less likely to succeed in the context of constructive trusts, will be the many years of domestic endeavour on the part of the woman who is the wife, mother and homemaker.

Even a pattern of prolonged contribution by the claimant to the shared general expenses of a common household raises no constructive trust in respect of the family home in the absence of course, of an 'express representation' by the legal owner that the contributor was to have a beneficial interest. The effect of these recent cases, is to severely limit the ability of the woman to express an identity of her own making.

In England and Wales, many of the reform proposals over the past twenty years have been made by the Law Commission.<sup>60</sup>

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<sup>60</sup> These have been; Law Commission, Working Paper No. 42, *Family Property Law* (1971); Law Commission, *First Report on Family Property: A New Approach*, Law Com. No.52 (1973); Law Commission, *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974); Law Commission, *Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods*, Law Com. No. 86 (1978); Law Commission, *Property Law: The implications of Williams and Glyn's Bank v Boland*, Law Com. No.115 (1982); Law Commission, Working Paper No.90, *Transfer of Money Between Spouses - the Married Women's Property Act 1964* (1985); Law Commission, *Matrimonial Property: Second Consultation Paper* (1986); Law Commission, *Property Law: 3rd Report on Land Registration*, Law Com. No. 158 (1987); Law Commission, *Family Law, Matrimonial Property*, Law Com. No.175 (1988); Law Commission, *Transfer of Land: Land Registration, First Report of a Joint Working Group on the Implementation of the Law Commission's Third and Fourth Reports on Land Registration*, Law Com. No. 235 (1995).

Throughout this time, there have been two main themes running through the Commission's work. The first was the persistent observation that the present rules for determining the ownership of property during marriage were arbitrary, uncertain and unfair.

The second was that the ownership of property whilst a relationship or marriage continued, it was important that any considerations of marital property should exist during that relationship; that it was not right to consider marital property only in relation to what happens when a marriage ends. They pointed to the fact that many couples rarely stop to consider questions of property ownership at the onset of a relationship, but they considered that if these couples were to consider this, the majority of them would expect that much of their property acquired during the marriage, would be co-owned. Bottomley, for example, argues that:

“The evidence suggested by so many of the cases is that whilst there may be mutual (?) dreaming about what the couple will do together, there is rarely concrete discussion about the practicalities of economic relations, especially should the couple separate.” (Bottomley 1993: 61).

The most recent attempt to address this issue and the many deficiencies in this area, began in 1995 when the Law Commission was asked to examine the property rights of ‘homesharers’. Their

consultation paper is expected to be published in late 1999.

Although it is not known at this time what recommendations will be made by the Law Commission, it would appear reasonable to suggest that their remit will be broader than previously. The Law Commission is to examine the legal position of 'homesharers' not of cohabitants. 'Homesharer' has the potential to encompass a broader class of persons than cohabitant, and would appear to be clearly wider in application than those who share living accommodation and an intimate relationship.

### **Conclusion to chapter three**

During the course of this chapter, I have attempted to illustrate that the divisive nature of law is not necessarily something which is hidden and kept secret. The judicial approach has been a dual process of the selective interpretation of the 'facts', which are then 'applied' selectively to the 'law'. However, because 'family law' is such a nebulous, undefinable area of law, there are no 'family law' rules as such to apply. What is 'applied' is other 'areas' of law - primarily, property law. The constant striving to keep separate, make categories, set apart and so forth, ensures firstly, that 'male' identity is kept separate from 'female' identity, thereby controlling identity.

Secondly, this 'strategy' excludes on the basis of rigidly defined epistemologically distinct areas of law. This, however, may be in the process of being undermined. For example, Bottomley points out that *Hammond* was heard in the Family Division before a 'family' judge under s.30 of The Law of Property Act 1925 (Bottomley 1994). This section allows the court to 'make any order as it thinks fit' in favour of 'anyone with an interest'. Bottomley argues that if the 'trend' for using s.30 in the Family Division continues:

"it will be highly likely that women would be more advantaged; my supposition is that Family Division judges are more likely to be more flexible in the interpretation of the facts and the jurisprudence."  
(Bottomley 1994: 89).

The examination of some of the leading case law in property dispute situations, has I hope 'uncovered' a process of exclusion, separation and categorisation; a process presented as a desirable and necessary divide over 'distinct' areas of legal practice. The relationship between law, identity and ownership, is a relationship 'complicated' (by love, trust and so forth), it is a relationship too complex for judicial thinking to apparently allow for. The artificial and thin divisions created by law in respect to its own

operational workings, and the continuation of the artificial divide between 'property' law and 'family' law, is not due to a necessity to prevent different fields of legal study overlapping another, (a common cry amongst some lawyers), but is part of a larger pattern of exclusion and ostracism. A process necessary for the construction and control of 'identity'.

The 'injustice' that often results from the pattern of exclusion highlighted above, is arguably the most 'blatant' open acknowledgement of law's divisive operational nature. Yet despite this, there is an apparent pervasive inability to re-evaluate categories and concepts, even where there is a judicial admission that this leads to 'injustice' and/or unfairness. It would appear that the approach of the various Law Commissions over the years, has concentrated too much on the 'substantial' issues of reforming 'property' law or reforming 'family' law. This approach is, I think exemplified by an article which appeared in *The Conveyancer*<sup>61</sup>. A workshop had been organised by the Chancery Bar Association to discuss the reform of the law relating to home sharing. This informal workshop agreed that:

"Reform should not be limited to relationships akin to marital ones; a wide range of other relationships

may involve house sharing, for example relations of the owner of the house. ... it was generally agreed that any reform proposals should be at least potentially applicable to people in other relationships. ... It was considered to be unfair because insufficient attention is paid to what might be termed domestic labour contributed to the household; such contributions being highly unlikely, in the light of ... Rosset, to be sufficient for ... the woman, to acquire a beneficial interest in the home.” (Thompson 1996: 155).

Whilst in a limited sense I may have applauded the apparent awareness that the law in this area may be ‘unfair’, it is not the fact that law pays insufficient attention to domestic labour *per se* which gives rise to the unfairness. It is the gendered, stereotypical constructions and assumptions regarding the ‘appropriate’ roles for women and men which is the unfairness. Reform framed in accordance with the above agenda, still fails to recognise this.

The ‘blatant’ admission that these exclusionary methods may result in unfairness are ‘justified’ by reference to judicial epistemological concerns regarding the ‘proper’ boundaries of

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<sup>61</sup> Thompson, M.P. [1996] Home Sharing - Reforming the Law. Conv. 154.

property law. This is not to say however, that such divisive and exclusionary methods are abandoned when (ostensibly at least), property law is not the main focus. In the epistemological area of 'family law', these methods are still at work. They, are however, more 'subtle'. These exclusionary methods rely on repetitious reiteration of the symbolic and iconistic. In the following chapter, I explore the importance of the symbolic and iconistic in identity construction by concentrating on law's reliance upon visual rhetoric.



## CHAPTER FOUR

### **Imagery, Iconography and the Deployment of Familial Symbolism<sup>1</sup> in Family Law Texts<sup>2</sup>**

#### **Introduction**

In the previous chapter, I argued that the ‘injustice’ which often results from exclusion from law, was perhaps one of the most ‘blatant’ examples of law’s divisive operational nature. In the present chapter, I question what happens when this acknowledgement is missing?

I argued that the exclusionary strategies used are more ‘subtle’. However, whilst the strategies themselves may be more subtle, the effects on ‘the subject’ are not. In order to explore the operation and effect of these strategies, I concentrate in this chapter, upon

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<sup>1</sup> The etymology of the verb to ‘symbolise’ comes from 16th Century England. It was first used in physics to refer to substances which when combined, would cause a transmutation of elements (Pitkin 1972).

<sup>2</sup> See generally, Jackson, B. (1985); *Semiotics and Legal Theory*. Goodrich, P. (1991); *Icons of Legal Authority*. Goodrich, P. (1990); *Languages of Law, From Logics of Memory to Nomadic Masks*. Weidenfield and Nicolson. Cotterell, R. (1991); *The Sociology of Law*, Butterworths, 2nd Edn., Salter, M; *Symbols, Legitimation and Dynamics of Legal Culture*. Kevelson, R (1988) *The Law as a System of Signs*. Plenum Press. Kevelson, R. (1989) *Law and Semiotics Vols 1-3*. Plenum Press.

the importance of the symbolic and iconic aspects of law's exclusionary operational nature and continued reinforcement of its own 'legitimacy'. I argue that law's dependence upon legitimacy is achieved mainly through the re-enforcement of 'lines of succession' in the context of 'the family'. This is achieved not just through written rhetoric, but also through what I have termed 'visual' rhetoric; i.e., law's symbols and icons. Law's visual symbols and icons has been the subject of critical examination in other contexts, for example, the symbolic nature of the court room.<sup>3</sup> However, the operation of power through more 'accessible' or 'common' *visual* symbols has not been addressed to a similar extent.

Constant bombardment of a particular visual representation of the family operate upon the subject to re-inforce the dominant ideology of an inherently heterosexual and gendered family. For example, the 'nuclear' family, is often portrayed visually. This visual portrayal tends to be in a manner consistent with its written image. Part of the 'problem' of trying to uncover dominant ideological constructions, has been the 'invisibility' of alternative discourses. Even within the 'academy' itself, the problem of invisibility continues. At the level of undergraduate studies, while

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<sup>3</sup> See for example, Jackson, B. (1985) *Semiotics and legal Theory*. Goodrich, P. (1991) *Icons of Legal Authority*. Kelveson, R. (1989) *Law and Semiotics* Vols

the students may be encouraged to think critically about law, the main 'tools' used for this are, of course, text books<sup>4</sup>. These immediately present the student and lecturer with images of the family which are *prescriptive* in nature and operation. The visual images I have chosen are found on the front covers of 'commonly used' family law text books in order to further explore whether 'power' operates by the symbolic repetition of citation, and how that which is symbolic becomes invested with power.

The purpose of law is to effect particular behaviours in individuals - to compel individuals to do, or not to do, a certain thing, by acting as a form of social control:

"The purpose of all legal enactments, judicial pronouncements, contracts, and other legal acts is to influence men's (sic) behaviour and direct them in certain ways. The legal language must be viewed primarily as a means to this end. It is an instrument of social control and social intercourse."  
(Olivecrona 1962: 177).

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<sup>4</sup> In recent times perhaps even more so, given the stretching of *all* resources.

In order to achieve this, law obviously uses language to communicate and perpetuate its ideology. A semiotic analysis of written rhetoric can go a long way in attempting to uncover and explain the meaning of legal language. However, 'language' is obviously not restricted to the *written* word - the use of language can explain how the mind or individual comes to be structured in a particular way and inserted in a social order (Saussure 1966:36). Language is also concerned with signs, symbols, icons - in other words, legal language uses visual pictures to communicate its ideology. Derrida, for example, argues that 'text' in the semiological sense of extended discourses, i.e., all practices of interpretation, are not limited to language. In other words, 'meaning' is not inherent in signs, nor in what they refer to, but results from the relationship(s) between the observer and the visual image. He draws out the radical 'post structuralist' implications of this point - that structures of meaning (without which nothing exists for us) include and implicate any observers of them. To observe is to interact; the observer constitutes herself as a subject in relation to the visual image. In this respect, the 'scientific' detachment of structuralists or of any other rationalist position is to Derrida, untenable. At the same time, the subject is also the observed; the visual image is reflected back at the subject as an imperative. In this respect then, legal vision has a duality of purpose.

Each subject of law interacts with the symbols presented. The vision presented to the subject produces 'experience' through interaction with the meanings associated with signs and symbols. In other words, as legal subjects, we experience the effects of law's interaction, and the meaning given to the symbol. Law's 'vision', however, is an imperative, it masks the 'life' experience of the legal subject.

'Law's languages therefore, are not merely restricted to written rhetoric. Given these considerations, how does legal vision affect the subject's free will in identity determination (if at all)? This chapter will, therefore, seek to explore the use (or perhaps abuse), of the communication and perpetuation of ideology through the symbolism of certain familial icons.

Whilst there has been preponderance of work on the importance of symbolism and icons within legal culture, this has been restricted to studies of the symbolism and iconography of *written* rhetoric.<sup>5</sup> As yet, there appears to be little or no work on the importance of symbolism and iconography of visual rhetoric within legal culture. This is especially so within the context of the family and family law. One exception to this is Anne Bottomley who has explored

the impact of iconography on land law books. Bottomley examines the many different landscapes which can be mapped by the inclusion/exclusion of 'land law' topics. She focuses on real property texts and argues that the image on the cover of the text is relatively unimportant in constructing our perception of the boundaries to real property – it is 'simply packaging to the text' (Bottomley 1996:116). However, she goes on to argue that:

'intriguing patterns to emerge and do lend themselves to a reading of the covers themselves as a kind of text of law. Real property books are characterised by a focus on landscape. Indeed landscape in the sense in which it is most often evocatively used in the country – rural landscape. Other images could have been chosen; they are available. Instead the dominant ideology has utilised not only rural landscape but also the major English artists who have been themselves melded into a tradition of 'Englishness'. ... The uses of such imagery might not be consciously invoking narratives associated with traditional identity but is surely reproducing them". (Bottomley 1996:116).

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<sup>5</sup> However, there has been considerable amount of work outside of legal research, especially in art criticism. See for example Saint-Martin, F. (1990)

Bordo has argued that it is through media images that the subject learns how to behave and what is expected of the subject (Bordo 1993:76).

What is it about symbolism and icons generally, that makes them worthy of attention?:

“Objects are human constructs and not self existing entities with intrinsic natures - meanings do not reside within objects ... but rather emerge out of the process of interpretation by which definitions are created and used.” (Plummer 1975: 11).

In other words, the icon does not have an independent meaning; it is always symbolic of something else. It is meant to be representative of that which is ‘real’ and to take the place of the content. Stripped of any cultural, social or legal interpretations, symbols and icons have no inherent meaning. They become important only when the subjective subject superimposes meaning, according to whatever tradition we wish to promote. It has been argued that these self imposed meanings and interpretations are

being constantly re-interpreted when social-legal values change.<sup>6</sup> In other words, we need new versions and interpretations to allow for our current prejudice. As Smart points out 'It's vital to remember that the meanings of representations is not immutable or unitary, although there may be dominant forms of interpretation' (Smart 1989: 136). Therefore, symbols are interpretative constructs whose process of assembly is a theme worthy of study in its own right.

In the context of 'the family', this can be interpreted in two ways; firstly, familial symbols can be interpreted as being representative of the 'real' family; a family which is stated to exist in both reality and actuality. Secondly, to signify exactly the opposite; to symbolise that which is not 'real'. In this second context, the 'familial' icon is used to symbolically represent and promote a familial ideology.

This dual purpose serves its function well. It can be used as both as a model or prototype for an idealised conception of future families; and as a reflection of previous families. When used in these ways, the familial symbol therefore continuously reinforces its own symbolic legitimacy.

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<sup>6</sup> See generally, Pierce, C.S. 1931-35. Collected papers. 8 vols. Eds. P. Weiss, C. Hartstone, and A. Burks. Cambridge: Harvard University Press.



Pictorial images directly impose a concept on the viewer's mind graphic and vivid images, in ways that the written word cannot. Pictorial images do have a more immediate and emotive effect than text. For example, starvation in the third world, can be read about in terms of written rhetoric, but it is most likely that public opinion will only be moved to action once these images appear in pictorial form, on television. The transfer and communication of an ideology is achieved through the perception of an image on a single page. This phenomenon is particularly prevalent in the imagery and iconography used to adorn various undergraduate law text books. For the picture on a text book (more than the often complex and difficult to remember text in side), reduces the concept of the family to the imagery which is being represented. The image lends itself to family law in particular, for the reproduction of an image on a text book is analogous to 'the family' itself; it relies upon reproduction, succession, passing down, exclusivity and so forth.

In exploring these issues, I shall be concentrating upon four undergraduate family law text books; *Bromley's Family Law*<sup>7</sup>;

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<sup>7</sup> Bromley, P.M. and Lowe, N.V., (1992) *Bromley's Family Law*. Eighth Edn.

*Law and the Family*,<sup>8</sup> and *The Family, Law and Society* (third and fourth editions<sup>9</sup>).

The first of these, *Bromley's Family Law*, presents us with an image on the front cover which is of four figures who are depicted in outline only. The four figures are two adults and two children. As all the figures are shown in relief, only by looking at the outline of the figures does it become possible to determine that what is represented is a family. By the stylised nature of the height and shape of these adult outlines, it can be assumed that one is male and one is female. By using imagery in this particular way, the book serves to promote one example of familial arrangement, (i.e., that of two parents of opposite sexes with two children), as 'the' family. In other words, the imagery becomes ideological in the sense of conflating a particular conception of the family with the idea of 'the' family per se, thereby disguising its own relatively contingent status. The symbol of a nuclear family becomes the symbol for all families, due to a process of constant re-inforcement and lack of critique. Other issues are raised by the appearance of the outlined figures. For example, the shorter of the two adult figures (presumably the female), is represented by long hair, the other (presumably the male), by short hair. Therefore, not

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<sup>8</sup> Dewar, J (1992) *Law and the Family* 2nd Edn.

only does the book promote a particular familial arrangement, but it also prescribes how the individuals within that arrangement should be constructed, by both elaborating and then reinforcing the symbiotic nature of gender and sexuality within that familial relationship.

The symbols on the front cover of *Bromley's Family Law* are therefore restricted to a particularly narrow understanding of what a family is. Perhaps more importantly, it acts as a very wide exclusionary understanding of what a family is not. This notion of of what a family is, (as depicted by the cover), is re-produced and continued by the written rhetoric contained within the covers.

How then, is this depiction carried out and on what basis? How, is the cultural construction routinely carried out? What are its assumptions and value judgements?

Is the front cover of *Bromley's Family Law* stating that the length of hair is representative of perceived notions of femininity and masculinity? Presumably, it is. For in this context, the symbolism on the book cover (amongst other things), states that to be male is to have short hair, and to be female is to have long hair. But this is

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<sup>9</sup> Hoggett, B and Pearl, D., (1991) *The Family, Law and Society. Cases and Materials*, 3rd and 4th Edns.

quite plainly non sensical. We could just as easily state that the female figure here is Caroline Cossey.<sup>10</sup> The point to be made here is that in law, Cossey is still regarded as a man, but she 'conforms' to portrayal of femininity as depicted by the book's front cover. Here, the images of 'femininity' and 'masculinity' are therefore revealed to be crude stereotypes - a complete fiction. *Bromley's Family Law* therefore uses legal and cultural constructions of gender to depict yet another socio-legal construction.

Does what is on the front cover of a law text book really matter? Presumably, it does, as otherwise, all books (whether text books or not), would have plain covers thereby saving on printing costs, royalties and so forth.<sup>11</sup> It also has no bearing to ask who chose the cover, for it does not matter whether the choice was left to the author or the publisher, the resulting book cover has the same impact on the subject. The front cover of *Bromley's Family Law*, was obviously chosen for a particular purpose, i.e., the picture is presented as though it most accurately sums up a particular conceptual image of the family. The image on the front cover offers itself up as being representative of the 'essence' of the

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<sup>10</sup> Caroline Cossey is a post operative male to female transsexual.

<sup>11</sup> Although no empirical research has been undertaken, anecdotal evidence suggests that the undergraduate text books used on the continent, do not tend to have their covers adorned by signs, symbols, pictures and so forth.

family; to present something as representative of an 'essence' is firstly to assume that there is such a thing as an 'essential family'.

Secondly, if such an assumption is correct, the 'essence' is identifiable as the particular 'thing' it is, and without which, it would not be identified as that 'thing'.<sup>12</sup> In this context, any given particular familial arrangement can be said to have certain common characteristics with any other given familial arrangement (such as love, companionship, cohabitation and so forth), but it is important to stress that the socially constructed heterosexual nuclear family does not have a monopoly on the essence of the family. Yet the use of visual rhetoric on the book cover states this to be the case.

What effect and influence might this have? The rhetorically powerful and influential nature of this pictorial representation should not be underestimated. The first thing the reader sees every time the book is picked up is the visual rhetoric and iconography which invents a context for the act of reading the content. This in turn is reinforced by the title itself *Bromley's Family Law* which is stamped authoritatively on top of the cover across the pictorial images. It becomes apparent then, that the field of vision on

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<sup>12</sup> Perhaps in this context, the publishers and/or author of this particular book could legitimately be described as committed proponents of essentialism. I.e.,

*Bromley's Family Law*, is limited to one of reflection, proselytising and structuring. Thus the wording on the front cover reinforces and legitimates the pictorial representation and of course, vice versa.

Bottomley argues that the cover of the property law text book, is a 'map' to the rest of the book<sup>13</sup>:

"The cover becomes the frontier between two territories; a window into the text and a window from the text onto the world." (Bottomley 1993: 3).

The 'window' is there to be looked through. It also frames a selected 'slice' of 'reality' in a particular way and structures the frame of visibility. These 'windows' allow any perception of the law to be gazed at, but as we have seen with *Bromley's Family Law*, the (window of) opportunity is invariably not taken. The image(s) used are 'safe' and easily recognisable:

"[T]hey draw on an accepted aesthetics; and in this sense could be seen as rather safe and boring, they do not confront any of the problems of, for instance,

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that a definition describes or reveals the essence of a thing and/or of the perfect ideal form of which it is an imperfect copy.

<sup>13</sup> Feminist Perspectives on Property Law: Entering as a Stranger a Familial Landscape. Unpublished paper. Bottomley, A. (1993) presented to the W.G.

non-figurative contemporary art but rather reproductive images we can all recognise and understand. They therefore do not utilise images or techniques which could signal that there are not only contemporary issues here, but issues which may be unsettling, difficult to recognise in the landscape.” (Bottomley 1993: 7).

When this approach is applied to the cover of *Bromley's Family Law*, it becomes clear that not only does the cover act as a window on the text and vice versa, it presents a ‘safe’ and ‘cosy’ image of the family. There is nothing to suggest that there is or can be more to ‘a family’ than mother, father, children. Equally, there is nothing to suggest that there is, or can be more to ‘family law’ than that law which is designed to ‘deal’ with this particular pictorial image. *Bromley's Family Law*, in other words, does nothing to ‘rock the (family) boat’. There is nothing to suggest that a family headed, for example by a lesbian couple, would be an equally valid familial alternative to the image of a family that this particular text represents.

The operation of this system of prejudices can be self perpetuating. Given the 'imperative' demands made by the image, it is an intended outcome that the subject of law (in this instance, the law student), will subconsciously ingest and then re-produce a particular conception of the family, in very much the same way as law is re-productive of its own image. In this context the, re-production follows conception.

This prejudiced conception engenders imagery which in turn supports the cultural prejudice. Is this an example of the fact that if the same thing is repeated enough times in enough ways, it becomes accepted as the 'norm'? The answer to this question is yes as repetition produces the 'norm'. In this context, a symbol or icon can originate as the symbol of the 'reality', but continues to be the symbol or the icon after the 'reality' has disappeared - it becomes a symbol of a fiction. During this process, it is 'forgotten' that the symbol derives its legitimacy from legal and socially gendered constructs, and that these constructs are directly reliant on the postulate the 'family' is essentialist. What is also 'forgotten' is the presence of those established as 'outside' to the familial symbol - the most obvious of examples are families headed by one parent, lesbian families and so forth. What is 'remembered' is recalled through the associations contained within these representations of the image. In this context, what is



forgotten is therefore repressed. This repression must occur if the interpretative process of construction of the family is to take place: it occurs on a routine, 'taken for granted' basis. Therefore, the familial symbol attempts to 'control' what is remembered and what is forgotten. The power exercised by the symbol or icon masks those images which 'law' does not want to see. In other words, 'law' is analogous to a mirror - only the 'desired' image is reflected back at the observer:

"The art of law ... is to be understood precisely as an art, as the construction of a mirror image, a portrait or icon that will serve both to represent and reflect. It represents in a perfect form the face of power, it portrays the absent cause of law, the other time of authority, while equally reflecting back to the subject of law the image of its own otherness, the mask or persona of legal subjectivity."  
(Goodrich 1989: 110).

There are, of course, different methodologies at play when choosing the cover of a text book. The cover can be specially designed and commissioned for the book (*Bromley's Family Law* being one such example); alternatively, they can be drawn from

existing pictorial images. A common practice appears to be to utilise paintings.

The second of the four books under consideration is Dewar's *Law and the Family*.<sup>14</sup> What happens then, if we apply these theories to other 'family law' text books? In Dewar's book, we have a reproduction of Diego Valasquez's *Las Meninas*.<sup>15</sup> The picture depicts several people, one of whom is a child (the subject of the title). The people depicted are a mixture of servants and family. The Patrons and the painter himself are visible to us the viewer, but only by their reflections in a mirror which hangs on a back wall of the painting.

The chosen painting as one selective, contemporary interpretation of 'a' family. This interpretative painting, is in turn, used as the front cover of a text book to represent 'a' family. In other words, we have a reproduction of an interpretation, used as a symbol to firstly reflect the context of the book, and secondly, as a symbol for 'a' family generally. Again, why was this particular picture used? What effects (and affects) does it achieve? What strategy of ideology is it a part of? By depicting an 'extended' family, the painting clearly allows for the definitional boundaries of 'family'

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<sup>14</sup> Supra, above.

to be drawn wider than *Bromley's Family Law* (which depicts a nuclear family).

According to Foucault, the domination of visual knowledge in the Classical Age, rested on the assumption that the 'observer' existed, and was able to observe visual knowledge from an 'outside' perspective. In this respect, *Las Meninas*, was to Foucault, an exemplification of this assumption (Foucault 1970).<sup>16</sup> Thus, at the time of painting, *Las Meninas* took the place of written discourse; the visual was everything.

Again, the pictorial representation on Dewar's book act as a reflection of the text contained within it.<sup>17</sup> For example, in the index of *Bromley's Family Law* there are no listings or references to homosexuals or lesbians; whereas in Dewar's book, there are three listings for homosexuals.<sup>18</sup>

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<sup>15</sup> Meaning 'Little Princess'. Completed in 1656, the painting is conventionally thought of as baroque, rather than classical art.

<sup>16</sup> Foucault, M., *The Order of Things: An Archaeology of the Human Sciences* (New York, 1970). Translated from *Les Mots et les choses* (1966).

<sup>17</sup> One review of *Law and the Family* stated that it was a 'refreshing approach to the subject, a stimulating and invigorating read and a good introduction to law and the family today. Not many of its problems would have been known by Valasquez whose *Meninas* graces the cover - what I wonder were the publishers or the author intending to convey by reproducing this classic? Not surely that time stand still!'. Freeman, M. (1994) SPTL, Spring.

<sup>18</sup> The listings are: 'cohabitation; custody of children and marriages void. See page 537'. Incidentally, 'lesbians' do not appear in the index.

The question could be raised however, that ‘this is a book on family law, not sexuality or gender, why *should* there be any references to lesbian, homosexual or heterosexual?’ In response, I would suggest that the act of asking the question illustrates that ‘family law’ is exclusionary. To not address issues of sexuality in family law text books would be to argue that sexuality is irrelevant to the family. If only in crude biological terms, families do not exist without sexuality. So clearly therefore, sexuality has a significant role to play in the family. But as I have illustrated, only (hetero) sexuality is deemed to be relevant.

The last of the family text books I wish to briefly consider is the third and fourth editions of Hoggett and Pearl’s *The Family, Law and Society*.<sup>19</sup> On the third edition, the cover is a photograph depicting Egyptian carvings of four figures (two adults and two children). The image which is presented to the viewer leaves no doubt about the sex of the two adults; they are male and female, as are the two children. Akin to *Bromley’s Family Law* book, the picture is representative of the ‘traditional heterosexual nuclear family’, yet the book professes to cover a wider range of ‘family law’ subjects than others.<sup>20</sup> In other words, the book professes to

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<sup>19</sup> *The Family, Law and Society. Cases and Materials*. 3rd edn. Hoggett, B & Pearl, D. (1991).

<sup>20</sup> On the back cover it is stated: “...with the first edition they produced a source book of ground breaking scope and depth. With the second edition they have

cover a wide range of issues, and in comparison to other similar books, it probably does. However, its outward appearance still remains as 'conservative' as *Bromley's Family Law*; it still projects the same heterosexist agenda.

Thus if we accept the symbolism and iconography of what is presented on the front cover, as reflecting the content of the book, then perhaps the book is not as 'ground breaking' as it would have us believe. For again, we can argue that the symbol and the icon 'encapsulate' the 'essence' of that which is being symbolised, in this case, 'a' family and the text contained within the book. Yet this striving to express a static 'essence' requires a process of symbolism which can never be free of the gender politics and assumptions out of which it emerges, and which its own practices further support and sustain.

For the fourth edition the picture chosen depicts a family<sup>21</sup> this time consisting of seven individuals.<sup>22</sup> What does this cover ask us to implicitly accept?

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stuck to this task with the inclusion of an even more varied range of interesting and instructive extracts".

<sup>21</sup> All of them white.

<sup>22</sup> The picture is a reproduction of a painting by Harry More Gordon, titled *Interior with Dalmatian and Family*, dated 1994.

The family in this painting are pictured in 'domestic' setting - a lounge, there are two adults (presumably, the parents) and five children.<sup>23</sup> The mother is seated, and dressed in what are apparently casual clothes. She is also wearing a ring on the third finger of her left hand - it is possible to surmise therefore, that she is married to the father. The father, is standing behind the mother, and although he too, is apparently dressed casually, they appear more formal than those of the mother as he is wearing a jacket and tie. The five children (two boys and three girls)<sup>24</sup>, are variously seated and standing. They are either side and slightly set back from the parents. All the females in the group have long hair whilst all the males have short hair. This, is a family law which law would approve of. The 'conventionality' of the family depicted is obvious to view. The depiction and representation of heterosexuality is felt strongly, even within this heterosexual conventionality there are other 'rules' complied with; even down to the length of hair, not only of the parents but the children as well.

In the preface to the fourth edition, the authors mention that they have welcomed two new authors 'who are members of a new generation of law teachers and can take the book on towards the

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<sup>23</sup> From their surroundings, it would seem reasonable to suggest the family are 'middle income'.

next century'. They go on to state that 'As always there is no shortage of new developments to think about. It is hard to remember what life was like before the Children Act 1989; but many of the old debates have been replaced with others'.<sup>25</sup> The written rhetoric clearly acknowledges 'new developments' and 'new debates', yet this awareness is not reflected on the front cover. The written rhetoric on the back cover states that:

"Particular emphasis is given to policy issues arising out of state intervention in family life and support for families in crisis or at risk, opening the book up to students on sociology, social work, social policy and history courses as well as anyone interested in family law or family policy."

The book itself then, clearly promotes itself as appealing to an audience wider than 'just' law students. The written rhetoric suggests the book is aiming to be inclusive rather than exclusive in its reach. However, I would argue that the 'inclusiveness' implied in the written rhetoric is not reflected in the visual rhetoric. Again, the first rhetoric encountered by the student is the visual image presented to them on the front cover. In most

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<sup>24</sup> I presume.

<sup>25</sup> At page v.

undergraduate courses, it is after the introductory lecture at the start of the course that the student will buy the text book.

At this stage they have not done any substantive work on the topic. They go to the book shop, take the book off the shelf, turn to look at the front cover and it is there that they are presented with their first substantive rhetoric on 'family law'. Would it not be reasonable for them to assume (even on a sub conscious level), that this is a 'legitimate' representation of 'the' family?

#### **Conclusion to chapter four**

It has not been the purpose of this chapter to suggest that one particular form of visual rhetoric should be privileged over another. Rather, my intention has been to illustrate that legal culture privileges particular familial forms via visual rhetoric. In the light of this, I would argue that symbols appearing on text books should be the subject of continuing challenge and scrutiny. Firstly, because symbols constitute visual rhetoric, and rhetoric of any kind should be so treated. Secondly, because of the impact they have on the observer, - they construct and shape the observer's perception of familial arrangements. This 'constructing' and 'shaping', is also a repetitious process, i.e., the repetitious use of the symbol re-enforces its own legitimacy.



Legal culture thus promotes a particular familial arrangement through the repetition of the symbol. It is this repetition which is used to justify a series of legal symbols which are embedded in a 'closed and sterile symbolic field' of endless repetition (McCahery 1993: 417). In concentrating upon text book covers, I have attempted to demonstrate that because visual rhetoric creates idealised effects, it has the potential to 'obscure' or 'cloud' vision. If it is important to be aware of that which attempts to construct or obstruct perception; to uncover hidden ideology wherever it may raise its (ugly) head, symbolic visual rhetoric should not be excluded from scrutiny.

Further, if such constructs are not recognised as being 'mere' constructs, they then become treated *as* absolutes; and there is nothing absolute in symbolism and iconography. The above discussion, has, I hope, illustrated this. There are many possible images and symbols from which to chose a text book cover, but the 'impact' of that choice, is as important for visual rhetoric as it is for written rhetoric. What is chosen therefore, has the potential to become visual rhetoric which is as equally important as the written rhetoric contained within the covers. Visual rhetoric, more often than not, goes unchallenged and further shields law's cultural prejudices from critical examination and challenge, leaving the operation of 'power' and 'truth' within discourse to continue

uncritiqued and unquestioned. What implications then, do these arguments have with respect to 'identity'?

Visual rhetoric provides a symbolic imperative; a 'template' which makes certain demands on any subject, not just a legal subject. It instructs the observer as to how families should be constituted (even to the extent of proscribing hair length). Visual rhetoric demands that families be structured along prescriptive notions of identity; the individuals within that family being clearly defined and understood in gendered and sexualised terms. Familial groups which do not see themselves reflected in the visual rhetoric are placed lower down the legal hierarchy, sometimes to the point of complete exclusion. Being continually presented with a (legally approved) image of the family, may persuade some legal subjects that 'law' is not to be engaged with (unless absolutely necessary).

The next chapter will concentrate on those legal subjects who engage with law more closely than an observing subject. Partaking in a legal process such as applications for residency brings the legal subject arguably closer to the constraints of constructed identity. The legal 'subjects' under consideration are lesbian mothers in child residence and responsibility disputes. What are the 'terms' upon which a lesbian mother is 'allowed' to engage with law? To what extent (if at all), is she 'recognised' as

a self-defined legal subject? Is she even 'visible'? Does law, when engaging with lesbian identity, reinforce its own expectations of 'family' and 'mother'?

## **CHAPTER FIVE**

### **The Formation of Identity Through Judgement**

“The legal regulation of lesbianism has been and continues to be very different from the law’s treatment of male homosexuality. ... Yet when female sexuality is seen as threatening the idea of essential womanhood in law (motherhood) then the law’s treatment of lesbian mothers shows that it would be inaccurate to say that the law treats lesbianism with legal impunity.” (Collier 1995: 102).

### **Introduction**

“In custody disputes between heterosexual parents, it is generally the mother who is awarded care and control of her children. When the mother is lesbian, however, custody is commonly denied. Whereas the likelihood of a lesbian mother retaining custody may be slightly higher in the 1990’s than it was in the 1970’s, it remains the case

that many lesbian mothers who go to court are unsuccessful in their quest to keep their children. For this reason, many women do not even try.” (Tasker and Golombok 1997: 2).

In fact, between 1990 and 1997, there have only been two reported cases involving disputes between a lesbian mother and father over residence of children (Harne and R.O.W. 1997). However, mothers’ appear to be increasingly aware that the traditional judicial preference for maternal custody is less prevalent in recent years. Once a father brings a custody dispute to trial, his chances of winning are roughly equal that of his former wife. Women are at a disadvantage in custody litigation because their post-divorce employment may be seen as conflicting with their maternal obligations, because they have less to offer their children economically, or because their behaviour may be more carefully scrutinised for evidence of immorality (Lewin 1993:164). In addition to this, going to court is expensive, and women are more likely to agree to a compromise, or even to give up custody, if they cannot afford a long court battle - a likelihood that is increased given that women’s ‘earning capacity’ is less than that of men.

Lesbian mothers are particularly vulnerable to such litigation. Judges tend to view them as unsuitable custodial parents solely because of their sexual orientation, even in the absence of any 'evidence' to the contrary. Lesbian mothers, aware of their poor chances in court, will endeavour to avoid it if at all possible.

Because 'motherhood' and lesbianism are legal oxymorons, legal discourse is forced to give up any essentialist assumptions regarding motherhood. There can no longer be a presumption that there is something 'essential' about motherhood that destines a woman for custody of her children. As illustrated below, the woman's 'suitability' for 'motherhood', becomes a series of questions regarding abilities, choices, lifestyle, resources and so forth. The mother must 'prove' her suitability as a parent. Within this context, is it possible to expose the ways in which a lesbian mother must explicitly and implicitly defend her identity as a woman, lesbian and mother?

In this chapter, I will focus upon some of the case law surrounding lesbian custody cases.<sup>1</sup> I will explore some of the ways in which legal ideological discourse 'hides' its dominance behind a veil of neutrality, either disregarding and minimising the relevance or

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<sup>1</sup> See also, Columbo, Spencer and Rutter; 'Children in Lesbian and Single Parent Households, Psychosexual and Psychiatric Appraisal'. *Journal for Child*

importance of other discourses as and when convenient. It is through this exploration, that I hope to expose the constraints placed upon identity and the implicit assumptions being made regarding 'appropriate' parental roles .

I will be addressing several major questions within this chapter. Firstly, are law's 'promises' of fairness, objectivity, absence of personal morality and so forth, borne out in practice, by the case law in this area? Secondly, within this context, what implications does this have for the legal construction of the lesbian mother's identity? To what extent, can the legal subject (in this particular instance the lesbian mother), exercise 'free will' in the determination of her sexual and gender identity?

### **Law's 'Promise'**

"Law constitutes a plurality of principles, knowledges, and events, yet it claims a unity through the common usage of the term 'law' [which] operates as a claim to power in that it embodies a claim to a superior and unified field of

knowledge which concedes little to other competing discourses which by comparison fail to promote such a unified appearance.” (Smart 1995:4).

In the first chapter, I discussed the ‘nature’ of Law’s promise in general terms, where law seeks to impose its control and authority through its ‘claim to truth’. However, a close examination of the case law in this area starkly reveals a breakdown of commitment to its own ideals. It appears to me that there are several ‘promises’ that law makes within this context.

The first is that legal discourse will not allow law to be ‘ahead’ of popular social attitudes, i.e., that law must reflect current social attitudes. The second, which, although in one sense contradicts the first, also supplements it, is that law will also present itself as ‘progressive’, i.e., it must not try to ‘hold back the clock’; that law is an active, not a passive by-product of social change - it leads, rather than follows social convention. Thirdly, that the issues under consideration must be decided on the basis of existing case law and that in doing so, the judge must not let (his) own personal attitudes and beliefs influence the outcome of the case.

‘Superimposed’ upon this imperative is the ‘overriding’ principle that the court will decide upon the issues solely by reference to



‘the best interests of the child.’<sup>2</sup> However, as will be seen, although courts are often at pains to point out that they are free from any pre-conceived moral values or bias, they use language and judgements which show strong preference for particular ideas and concepts, thereby reinforcing the heterosexual imperative and its hegemony.

### **‘Reflecting social attitudes’**

Law will state on many occasions that it must decide the issues with strict adherence to social attitudes; that law is a reflection of social progress and development. However, there are times when this judicial ‘rule of thumb’ is conveniently ignored or bypassed. Case law concerned with lesbian parenting, seems to be particularly susceptible to this ‘double standard’. In some of the cases, the judges appear to acknowledge that society’s normative values and morality differ from their own, but if this difference is ‘inconvenient’, then that difference is constructed as legally irrelevant, allowing the judge to impose his own morality. In this respect, the use of ‘moral’ language is dynamic rather than

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<sup>2</sup> S. 1(1) of the Children Act 1989 states that in any contested case concerning a child’s upbringing, the welfare of the child is the paramount consideration.

descriptive; it seeks to influence others rather than inform them.

The following example illustrates the point:

“Despite the vast change over the past 30 years or so in the attitudes of our society ... to homosexual relationships, I regard it as axiomatic that the ideal environment for the upbringing of a child is the home ... of her mother and father. When the marriage between father and mother is at an end, that ideal cannot be obtained ... the court’s task is to chose the alternative which comes closet to that ideal.”<sup>3</sup>

In this example, although there is a concession that social attitudes have changed, this obviously conflicts with the judge’s own viewpoint and attitude towards homosexual relationships. Social attitudes are therefore conveniently ignored and substituted by the judge’s own personal opinion:

“Lesbian mothers applying to live with, or to have regular contact with, their children are difficult for many family judges to come to terms with. A

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<sup>3</sup> *C v C (a minor)(custody: appeal)* [1991] 1 FLR 223., Per Glidewell LJ at page 228.

possible reason for this is that there is a perceived dissonance between 'mother' and all that the word implies, and 'lesbian' which carries a different set of resonance's. Faced with this problem of dissonance, courts resort to the external environment and general social attitudes. ... so although the mother may be seen by the court as better qualified for child care than the father by reason of past experience or a 'natural bond', her femininity, which is affirmed by such a perception, is opened to question by sexual preferences." (O'Donovan 1993:84).

In *W v W*<sup>4</sup>, the mother won her case for custody of her two daughters (twins) aged 11 at the time of the hearing. The basis of the father's case had been the mother's 'attachment to the Women's Liberation Movement, and her lesbian activities'. The rhetorical use of 'activities' immediately constitutes the lesbian mother as 'the other'. Her 'activities' are then imbued with negativity, legitimising subsequent legal scrutiny. It's inclusion here, is akin to the usage of 'criminal activities'. Heterosexuality

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<sup>4</sup> [1976] Unreported. Court of Appeal 3, 4 November. Cited in Edwards, S 1996:69.

is impliedly established as the 'legal norm'; there is therefore no necessity to talk in terms of 'heterosexual activities'.

In awarding custody to the mother, the Court of Appeal were careful to state:

"The case turned on practical day to day grounds...and I hope no one will regard this judgement as containing any pronouncement for or against homosexual activities."<sup>5</sup>

In other words, custody was only awarded to the mother because the father was unable to provide a suitable home. The Court of Appeal also made clear that if the father could have made suitable accommodation proposals for the two girls, then he would have been granted care and control.

Ormrod went on to say that whilst they were considering the case "with as open minds as it is possible to have on this type of issue" the mother ought to agree that, "it is quite obvious that their lives are highly abnormal", and that it is:

"Simple common sense to say that the children ought to have a more normal life in a more normal

family, amongst less vehemently minded people. It would be difficult to dispute that proposition.”<sup>6</sup>

The appeal to ‘common sense’, releases Ormrod’s rhetoric from the inconvenience of having to provide a ‘legal’ justification. To use the word ‘normal’ twice in one sentence re-inforces the ‘accepted wisdom of common sense’. The underlying ideology presents itself as ‘practised wisdom and common sense’ - it conveniently releases the judge from critical self-examination. Ormrod’s rhetoric pathologises the lesbian mother as lacking in common sense, abnormal and vehemently minded, whilst at the same time re-enforcing law’s legitimacy and ensuring that the possibility of dissent is minimised.

Perhaps one of the most blatant example of law ‘hiding’ behind ‘social attitudes’, is the case of *M v M*.<sup>7</sup> The mother had been granted access to her child but on the condition that the child not come into contact with the mother’s partner. The condition had been imposed because the trial judge, Hollings, J, viewed the mother’s partner as “dangerous”, and had suggested that the mother’s partner had seduced the mother and was the “dominant” partner.

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<sup>5</sup> *W v W* (1976) unreported Per Ormrod LJ. Cited in Edwards, S 1996:69.

<sup>6</sup> Per Ormrod LJ.

Hollings J., considered that the children would be better off if they were to 'grow up' with the knowledge of their mother's lesbianism that if "they were overwhelmed by its discovery later". He was also concerned that the mother and her partner behaved 'cautiously' before the children, but he was satisfied that neither of them were the 'active militant' types. From this subjective and stereotypical perception of the women's life-style, he was able to conclude that "there was therefore, no real risk of them behaving because of their lesbian *and* feminist views in a way harmful to the children". (emphasis added). Using the word 'and' implies that in the trial judge's opinion, it is possible to be a lesbian but not a feminist (and vice versa). The implication being, that heterosexual women may be subject to similar exceptional legal scrutiny if they present themselves, or are perceived to be, feminists.

Cumming-Bruce and Stamp thoroughly approved of the trial judge's sentiments, but denied the father's application. The denial of the father's request was presented as a 'pragmatic' solution; the child was going to discover his mother's lesbianism anyway, so there was no point in trying to hide it from the child by keeping the mother's partner away:

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<sup>7</sup> Unreported, 12 July 1977, Court of Appeal; Stamp and Cumming-Bruce LJ.

“For myself I would share the father’s anxieties but it does not follow that I accept his solution because the fact of the matter is that it is important for both these children to develop a close and affectionate relationship with their mother, and if the mother continues to hold these perhaps excessively simple views about the position of homosexuals in a fundamentally heterosexual society, if she wants to push her views down the children’s throats she is going to have ample opportunity to do it.”<sup>8</sup>

Cumming-Bruce and Stamp were clearly ‘resigned’ to a situation perceived and presented as far from ideal. The mother was presented as not acknowledging and not conceding to, societal ‘norms’. Cumming-Bruce and Stamp positioned themselves as ‘knowing subjects’, in stark contrast to the mother whose views were described as ‘excessively simple’. As a ‘knowing subject’, the judge ‘knows’ what current societal normative values are; this ‘knowledge’ is then relied upon to produce the judgement, obscuring that what is presented as ‘society’s views’, are in fact, his own. Thus:

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<sup>8</sup> Per Cumming-Bruce LJ.

“Whatever personal views one might have about homosexual activities, because society is orientated and organised on the basis of heterosexual family relationships in spite of greater tendencies to toleration; biologically the future of the human race is linked with heterosexual relationships between a male and a female, and society at present accepts that children are much more likely to develop with personalities that are not dictated or disturbed if they grow up in a household in which there is a male parent figure and a female parent figure.”

There are several implicit assumptions within this passage worthy of attention. Firstly, there appears to be a contradiction here, between the references to ‘greater tendencies to toleration’ towards ‘homosexual activities’, and, the statement that ‘children are much more likely to develop with personalities that are not dictated or disturbed if they grow up in a household in which there is a male parent figure and a female figure’<sup>9</sup>. These statements are also offered as statements of fact, and by presenting them as such, the judge again presents himself as a knowing subject.

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<sup>9</sup> Is it just co-incidence that ‘male parent figure’ is mentioned first and ‘female parent figure’ last?



Secondly, there is a conflation between 'heterosexual family relationships' and the continuance of the human race. It is unclear in which context the word 'relationships' means, but 'biologically', the future of the human race depends only upon 'relationships' between egg and sperm.

The passage continues:

"Therefore if the mother and (her partner) reject the view commonly held in society which may be regarded as one of the basic precepts of social life, their influence is likely to be extremely dangerous to the children because the children could become imbued with some very silly ideas which could have an adverse effect on their standards and behaviour when they try to form their personalities in adolescence."

Again, female and male parent figures are held up as the 'basic precepts of social life', which the lesbian mother with her 'silly views' has 'rejected'. This of course makes her 'extremely dangerous'. As a 'knowing subject' the judge represents 'truth' and effectively endows himself with the power to not just to deny

or grant custody in any particular set of circumstances, but also with the power to define identity, to define meaning.

This can be compared to *Re D (An Infant)*,<sup>10</sup> which concerned a homosexual father refusing adoption consent. In this case, there was an almost complete rejection of social attitudes. In this case, the court quite clearly regarded itself as the guardian of children's 'rights', which were clearly presented as the 'right' to be brought up in a 'normal' household. In other words, the rejection of social attitudes was 'justified' by 'hiding behind' the 'welfare principle' - conveniently disguising the judicial prejudice, which as a result, does not need to be justified:

“Whatever new attitudes Parliament, or public tolerance, may have chosen to take as regards the behaviour of consenting adults over the age of 21 inter se, these should not entitle the court to relax, in any degree, the vigilance and severity with which they should regard the risk of children, at critical ages, being exposed or introduced to ways of life which, as this case illustrates, may lead to severance from normal society, to psychological stresses and

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<sup>10</sup> *Re D (An Infant)(Adoption: Parents consent)* [1977] AC 602.

unhappiness and possibly even to physical experiences which may scar them for life.”<sup>11</sup>

Whilst this passage reveals an acknowledgement that the attitudes of ‘Parliament or public’ to the consensual behaviour of adults over the age of 21 are important, the relevance of this to children is only implicitly given. It is implicit within this passage that the homosexual father has ‘severed’ his ‘way of life’ by not living in a ‘normal’ society which may lead him to ‘psychological stresses and unhappiness’. The ‘judicious’<sup>12</sup> choice of words allows the judge to exercise ‘the court’s’ (i.e., his) ‘severe vigilance’ over the father and constitute him as ‘the other’.

### **‘Judges’ Personal Beliefs’**

“The impression often appears to be created that a judge’s own views and value judgements are of minimal importance when taken alongside assessment of evidence and reliability of witnesses.” (Bradley 1987: 186).

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<sup>11</sup> Per Wilberforce LJ at page 629.

<sup>12</sup> I hesitate to use that word in praise.

Judges are often at pains to point out that all they ‘do’, is simply to examine a set of facts and apply the law to those facts; their personal morality has therefore no part to play in this process:

“One thing is however clear: in making a decision on welfare the judge should not be influenced by subjective considerations...he must try to ensure that his personal beliefs do not affect his judicial function in deciding where the child’s welfare lies.”<sup>13</sup>

As laudable as this may sound, it does have a hollow ring to it. In a manner similar to reflecting societies attitudes, a judge’s personal beliefs and morality play a significant role in judicial pronouncements:

“Nevertheless...he cannot abdicate responsibility merely because the issue is a sensitive one on which differing views are held. What standards then should he apply if he is not to apply his own subjective views? In my judgement, he should start on the basis that the moral standards which are

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<sup>13</sup> *C v C (a minor)(custody: appeal)* [1991] FCR 24, Per Balcombe LJ at page 231.

generally accepted in the society in which the child lives are more likely than not to promote his or her welfare.”<sup>14</sup>

It seems to me that law does not follow its own rules, or rather it only follows them when it convenient in order to maintain the heterosexual status quo. As I will explore below, many of the judges go specifically out of their way to state that they are not in the business of making (or taking), moral or philosophical decisions and then proceed to do precisely that. There are openly moral statements about their views on lesbianism, which suggest that, rather than considering the best interests of the child, they are more concerned with controlling the moral behaviour of society. Some of the judges admit to being ill-informed, but never the less still proceed to decide the case on their own prejudices.

For instance, in *Re P (A Minor)(Custody)*<sup>15</sup>, the issue was whether the child should stay with her mother or be committed into the care of the Local Authority. The mother kept her daughter on a staying access visit, after the daughter complained of apparent abuse by her father. The father did not challenge the mother’s claim that he should not have custody, but he insisted that the

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<sup>14</sup> *C v C*, Per Balcombe LJ at page 230.

<sup>15</sup> *Re P (a minor)(custody)* [1983] 4 FLR 401.

mother was ‘unfit’ for custody because of her cohabitation with her female partner. The Court of Appeal, (giving its judgement through the then President, Sir John Arnold), rejected the father’s claim that the ‘better alternative’ was for the child to go into local authority care. It appears, that this case strongly suggests that a lesbian mother is a preferred option than local authority care and that a lesbian mother who was in other ways unexceptional, could have custody. This appeared to be on the basis that the Court of Appeal was impressed by the mother’s ‘discretion’, the only ‘exceptional’ thing about the mother was her sexual orientation, referred to as her ‘sexual proclivities’. It was stated that:

“The only question I have to ask myself is whether the proclivities of the mother and the lady with whom she lives are such as to make it undesirable in V’s interests that she should be brought up in that home.”<sup>16</sup>

This has clear implications for women who for various reasons, are unable to conform to the court’s construction of discreet. Women who ‘flaunt their homosexuality’<sup>17</sup>, may not find the court as sympathetic to their claim. The Court of Appeal went onto state

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<sup>16</sup> Per Watkins LJ at page 406.

<sup>17</sup> Per Arnold P., at page 403.

that before a child could be committed to care, it must be 'impracticable' or 'undesirable' that the child should be placed with an individual. Since it was not impracticable that the child should be with its mother, it had to be shown that it was undesirable. The trial judge had stated that since he had no evidence of the effect on children of being brought up in homosexual households, he must use his 'common sense' (sic). The father's case was based upon 'corruption' (to the child), and 'reputation'. 'Corruption' was defined by the court as:

"that by force of example, or by erosion of that instinctive rejection of devious conduct, which upon the father's analysis inevitably resides in the normal mind, in one way or another the child is likely to come to harm."<sup>18</sup>

The mother was described by the trial judge as a 'sensitive, articulate, and understanding woman':

"not one of those homosexuals who flaunt their homosexuality as many do nowadays not only in the face of those who are interested to know but

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<sup>18</sup> Per Watkins LJ at page 406.

also in the face of those to whom it is of no concern  
whatsoever.”<sup>19</sup>

Despite her ‘devious conduct’ the mother was, according to the court, discreet. In this respect, the court felt that there was little or no danger that the child would be corrupted. Therefore corruption was dismissed as a reason to deny the mother custody. There is an implication here that if the mother had not been discreet, she would be corruptive. Whether the mother retained custody or not, was dependent therefore upon her fulfilling the criteria of discreet. Obviously, much depends on what is understood by ‘discreet’. Placing restrictions on the mother’s behaviour would I suggest, limit her self-determination of identity.

‘Reputation’ was defined as ‘social embarrassment’, and related to the ‘expressions of ridicule and scorn by some sections of the community and at a lesbian household, leading to teasing and embarrassment of the child’.<sup>20</sup> Although the Court of Appeal rejected the father’s argument vis-à-vis corruption, they were persuaded by the argument surrounding reputation:

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<sup>19</sup> Per Arnold P., at page 403.

<sup>20</sup> Per Arnold P at page 404.



“One does not have to be a psychiatrist to appreciate that a lesbian household would be quite likely to be the subject of embarrassing conduct and comment, particularly among the child’s friends. It may be, and I am prepared to assume, that it is a disadvantage of so a substantial a character, that it can be fairly classed as a feature of undesirability so as to let in ... the power of the court to make an order.”<sup>21</sup>

Here, the appeal to negative social attitudes is clearly illustrated. In this instance, placing reliance upon negative social attitudes, excuses the court from having to fully justify their decision. The clear implication in this passage is that having a lesbian mother is a ‘disadvantage of so a substantial a character’ that the decision has, in effect, already been made - all that is required by the court is endorsement. Arnold readily admits that this is *his* assumption, he uses the first person singular ‘I’. His personal assumption is presented as factual evidence so compelling ‘so as to let in ... the power of the *court*’. ‘His’ personal assumptions become law. Additionally, given that the social attitudes referred to were not

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<sup>21</sup> Per Arnold P at page 404.

substantiated in the judgement<sup>22</sup>, a process of ‘elimination’ would suggest that it is not social attitudes which are being used to justify the judge’s own attitude.

Since the ‘undesirability’ of the alternative had also to be weighed, it was considered that the ‘warm mother’s care’ was preferable to the care of a Local Authority, and that the mother should retain custody. It is interesting to note the phraseology ‘warm mother’s care’, again emotive of prescribed gender roles.

Although Watkins LJ concurred with Arnold P., he was clearly very uneasy about allowing the child to live with her mother which caused him ‘considerable unease’ and he concluded that ‘for the future the progress of this child in this home must be regularly, carefully and discreetly watched by one of those trained to do so’<sup>23</sup>. He was also clearly in favour of regular reviews of the custody arrangements and the possibility of adding conditions:

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<sup>22</sup> This point is made strongly by Tasker and Golombok “The decision to deny a lesbian mother custody of her children has often been made in the absence of expert evidence. When experts have been called, the witness produced on behalf of the father has generally proposed, on the basis of psychoanalytic theory, that if the children remain with their mother, they are likely to experience psychological difficulties. In contrast, the expert produced on behalf of the mother has usually argued, on the basis of empirical research, that this is unlikely to be so. In the face of these opposing opinions, the judge commonly opts for the family environment that most closely approaches the traditional nuclear family” (Tasker and Golombok 1997:10).

<sup>23</sup> Per Watkins LJ at page 406.

“This is neither the time nor the place to moralise or philosophise about sexual deviance and its consequences on those who practice it, but the possible effect on a young child living in proximity to that practice is of crucial importance to that child and to the public interest. I accept that it is not right to say that a child should, in no circumstances, live with a mother who is carrying on a lesbian relationship with a woman who is also living with her, but I venture to suggest that it can only be countenanced by the court when it is driven to the conclusion that there is in the interests of the child, no other acceptable form of custody.”<sup>24</sup>

In this passage, Watkins appears to be stating that law has nothing to do with moral or philosophical considerations. However, the categorisation of the mother’s sexuality as ‘deviant’, allows the court to establish her as ‘the other’ or ‘opposite’ to their own position. I also find Watkins’ appeal to ‘the public interest’ interesting. This emotive language places law and the public interest in the same boat, re-inforcing the lesbian mother’s isolation and ‘illegitimacy’. This semantic linking of ‘law’ and

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<sup>24</sup> Per Watkins LJ at page 405.

‘public interest’, places severe limitations on the mother’s ability to self determine sexual and gender identity.

Although the ‘corruption’ argument in *Re P (A Minor)(Custody)*, was rejected by the Court of Appeal, does not, I suggest, mean that the lesbian mother is not regarded as corruptive. Rather that she is regarded as prima facie corruptive unless she can demonstrate that she is discreet. The fact that the Court of Appeal approved of the ‘reputation’ argument clearly demonstrates a major concern: that ‘exposure’ to lesbian parenting will lead them into ‘sexually deviant ways’, and will not therefore, be in the ‘best interests of the child’.

**‘The best interests of the child’.**

When deciding whether to make an order, or what type of order to make, the ‘child’s welfare shall be the court’s paramount consideration’.<sup>25</sup> In order to help them achieve this, the courts have the power to order welfare reports prepared by a local authority officer; a further illustration of the importing of overt state scrutiny into the parties’ living arrangements, lifestyle and their relationships (Douglas and Lowe 1992:46). The use of such

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<sup>25</sup> S.1 Children Act 1989.

reports can be severely criticised on the grounds that they reinforce the view that lesbianism is a 'sickness':

"It is interesting to note that the most frequently called expert was the psychiatrist. This demonstrates yet another frequently held myth about homosexuals - that homosexuality is some kind of mental disease ... the usefulness of the expert evidence presented in some cases is doubtful. Two completely opposing views from experts of comparable experience are often presented and the widely conflicting views presented in evidence seem to reflect the current state of feeling within the community, and allow the judge to choose and rely upon a view close to his own view of the matter."<sup>26</sup>

According to Cooper and Herman<sup>27</sup>, there is a:

"Deep-rooted conservative Christianity [which] underlies many of the views expressed by conservatives. Right-wing Christians ... maintain

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<sup>26</sup> Chief Judge Elizabeth Evatt of the Family Court of Australia. *A Review of Judgements: (Relevance of and Weight attached to a Parent's Homosexuality)*. Unpublished paper, 1980.

that the heterosexual unit is 'God -ordained'; any other arrangement is both evil, and dangerous...their opposition to lesbian and gay families is rooted in this tradition of the need to fortify the Christian home and nation against its perceived enemies - within and without. In the case of homosexuality however, such a view is usually publicly tempered by a reliance on the 'best interests of the child' principle, a standard drawn from a somewhat different discursive field." (Cooper and Herman 1991:32).

The seemingly ever present judicial claim of objectivity, appears to be exemplified particularly well in care and control cases. The appeal to 'common sense' also appears to be particularly ingrained. In deciding upon care and control of children, the 'appeal' of the 'best interests of the child' maxim, is, at first glance, free of any consideration outside of that maxim. Although I would argue that decisions regarding care and control are capable of being resolved by reference to 'best interests', it is the judicial construction and interpreted meaning of this phrase that I wish to question. Smart argues that the requiring of a male presence

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<sup>27</sup> Cooper, D., and Herman, D., *Getting The Family Right'; Legislating Heterosexuality in Britain, 1986-1991*. Canadian Journal of Family Law,

during child rearing is an attempt to impose a patriarchal family model, and the 'welfare' of the child is inextricably linked with this (Smart 1989: 96). This line of argument would appear to be broadly in line with Eekelaar's suggestion that stressing biological parenthood over social parenthood is a form of social engineering (Eekelaar 1992).

It appears then, that the courts seem more concerned with the mother being a lesbian, than they are with the woman's parenting abilities and considering what the child's paramount interests are. This particular judicial concern reflects Foucault's own arguments that in the modern age, the individual was defined by rights; whereas in the post-modern age, the individual is defined not by rights, but by a process of 'normalisation'. In other words, the mother's identity is no longer defined by what rights she possesses 'over' her child, but by legal discourse which defines her in the abstract.

The courts raise the 'issue' of the mother's lesbianism, and at the same time demand that the mother herself, not highlight it. In other words, the lesbian is rendered forcibly invisible.

In all of these cases, the courts are at pains to stress that the overriding issue is 'the welfare principle'. Section 1 of the Children Act 1989 provides that:

“(1) When a court determines any question with respect to-

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.”

As Smart points out (Smart 1989), although the court's have readily accepted this as an overriding principle in child care law, they have reconceptualised the issue into one of childrens' rights, to the extent that contact is the inalienable right of the child:

“Once defined as a right the law can deploy its traditional powers to defend this right (even to the extent of obliging a child to exercise her rights against her will). This transformation of power conflicts into the language of rights enables law to exercise power.” (Smart 1989: 20).



S.1. of the 1989 Children Act contains a checklist of factors which should be considered when making decisions regarding the upbringing of the child.<sup>28</sup> The legal criteria does not sanction or require judicial prejudice, yet it does not prevent it either. As Dewar points out, there is no indication in the checklist of the relative weight of each factor, which means that:

“[T]he rule of thumb ... that ... heterosexual parents are more suitable than lesbian or homosexual ones could persist under the checklist, but now with statutory sanction.” (Dewar 1992:365)

It has been pointed out that parental behaviour is only relevant where it has a direct bearing on the child's welfare.<sup>29</sup> This view is reflected in the checklist. However, even prior to the checklist, in cases involving lesbian mothers, it has been held that being brought up in a lesbian household does not promote the child's

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<sup>28</sup> In coming to a decision as to the child's residence, the court 'shall have regard to:

“(a) the ascertainable wishes and feelings of the child concerned (considered in the light of her age and understandings;  
(b) her physical, emotional and educational needs;  
(c) the likely effect on her of any change in circumstances;  
(d) her age, sex, background and any characteristics which the court considers relevant;  
(e) any harm which she has suffered or is at risk of suffering;  
(f) how capable each of her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting her needs; the range of powers available to the court under this in the proceedings in question”.

<sup>29</sup> See for example *Re H (A Minor)*[1991] Fam Law 422.

welfare due to 'social embarrassment'. In *S v S*, for example, despite two psychiatrists stating that there was no danger of the children being lead into 'deviant' sexual ways; and the children's express desire to remain with their mother, the judge emphasised the possible social embarrassment which the children might suffer.

If this 'rule of thumb' did exist prior to the Children Act, can we now be reassured that the introduction of the new checklist will mean the magical disappearance of the above named 'rule of thumb'? Will it mean that a parent's sexual orientation will cease to be considered relevant (by anybody) in residence and contact cases?

In *C v C (A Minor)(Custody: Appeal)*<sup>30</sup>, the issue was again whether the child should reside with her father and his new wife, or the mother and her new (female) partner. At first instance, custody was awarded to the mother on the basis that:

"The lesbian relationship was not a matter to be put  
in the balancing exercise."<sup>31</sup>

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<sup>30</sup> [1991] 1 FLR 223. See also "*What is a 'Normal' Family?*" . Susan B. Boyd. MLR vol.55 page 269.

<sup>31</sup> Per Malcolm Ward J at page .

However, on appeal, it was made quite clear that the trial judge had been ‘wrong’ not to consider the mother’s lesbianism as legally relevant “In my judgement this was an error on his part”<sup>32</sup>, as it was considered:

“Axiomatic that the ideal environment for the upbringing of a child is the home of loving, caring and sensible parents, her father and mother. When the marriage between father and mother is at an end, that ideal cannot be obtained ... [the court’s] task is to chose the alternative which comes closest to that ideal.”<sup>33</sup>

Glidewell was of the firm opinion that the trial judge had been ‘plainly wrong’ in concluding that lesbianism was not a factor that should be considered when weighing up the options as to the child’s best interests. By stating that it is ‘axiomatic’ that a heterosexual family is the ‘ideal’, Glidewell makes a ‘claim to truth’; there is no need for further justification; the matter is ‘self-evident’ or ‘obvious’. Thus, the ‘best interests of the child’ are best provided for within a heterosexual family. There is no

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<sup>32</sup> Per Balcombe LJ at page 232.

<sup>33</sup> Per Glidewell LJ at page 228.

necessity for further justification because everybody is deemed to endowed with the same ‘common sense’ as the judge.

A rehearing was ordered and in the interim, custody was awarded to the father, with the mother having reasonable access. At the rehearing, the Family Division awarded custody to the mother on the basis that the mother’s lesbianism was only one of the factors to be taken into account.<sup>34</sup>:

“The fact that the mother has a lesbian relationship with Mrs A does not of itself render her unfit to have the care and control of her child. It is however, an important factor to be taken into account in deciding which of the alternative homes which the parents can offer the child is most likely to advance her welfare.”<sup>35</sup>

By stating that lesbianism was one of the factors to be taken into account, there seems to be an attempt on the judge’s part to present his justification in liberal terms. Indeed, at first glance, this judgement would appear to be more ‘generous’ to lesbian mothers than those examined above. Nevertheless, even though it

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<sup>34</sup> *C v C (Custody of Children) No.2* [1992] FCR 206.

<sup>35</sup> Per Balcombe LJ at page 231.

was only 'one' of the factors to be taken into account, it was still regarded as an 'important' factor; the judgement 'gives with one hand and takes back with the other'. There is still a demonstrable reliance upon heterosexual, normative values; the mother's sexual orientation was to be regarded as an 'important factor'; the justification for which, was not forthcoming.

In *B v B (Minors)(Custody, Care and Control)*,<sup>36</sup> the Family Division of the High Court was asked to decide whether the child should reside with the father or the mother. According to the Judge (Callam J);

"This case raises two specific issues. The first is what is best for the welfare of [the children]; and secondly, the specific issue as to the desirability of bringing up a child in a lesbian household. It is the second issue which has given rise to a considerable amount of time being spent to investigate that aspect of the case."<sup>37</sup>

The mother left the father to live with another woman. The court welfare officer had recommended that the youngest child (aged

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<sup>36</sup> [1991] 1 FLR 402.

<sup>37</sup> Per Callum J, at page 403.

two), should live with the father for three reasons: concern about the effect of the mother's lesbianism on the child; concern that if the father lost care and control he would make a fresh application when the boy was older; and as the child's two older siblings were living with the father, the siblings should remain together.

The opinion of the court welfare officer conflicted with an 'expert' witness.<sup>38</sup> The court welfare officer had argued that the mother had given insufficient thought to the future development of the child and the effect of bringing him up under a lesbian relationship. However, the expert witness argued that the mother seemed to be well informed and to have thought deeply about the issue. He was of the opinion that it was because the mother did not share the views expressed in the welfare officer's report.

The judge rejected the court welfare officer's report on the first count, relying on an expert witness who had stated that little weight should be given to the effects of the mother's lesbianism; the court should have regard to the quality of parenting in all other respects, and the quality of the parenting of the mother was excellent'.<sup>39</sup> It was held that:

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<sup>38</sup> Professor Russell-Davies.

<sup>39</sup> [1991] 1 FLR 410.

“In determining whether as a matter of principle a child should be brought up in a lesbian household, there were two factors to be considered: the effect upon the sexual identity of the child and the effect of stigmatisation. Fear of psychosexual development being distorted or that the child would be subjected unduly to taunts or ostracism were not supported by research. The sexual identity of the child in this case, particularly in view of his boyish appearance and behaviour and the fact that his father would continue to play a role in his life whoever had control was, therefore, not a matter for concern and the stigmatisation aspect, though undoubtedly a worrying factor, had to take its place in the balancing exercise in deciding what was in the best interests of the children. The situation would have been very different in terms of risk to the children had the mother and the other woman in the case been militant lesbians trying to convert others to their way of life, where there may well be risks that counterbalance other aspects of welfare and are detrimental to the long term interests of

children either in relation to their sexual identity or corruption, and lesbians in private.”<sup>40</sup>

There are many assumptions contained this passage which are deserving of attention. The first and most immediate perhaps, is the assumption that the court has authority to decide whether a child should be brought up in a lesbian household. It is doubtful whether the same assumption vis-à-vis authority would be made purely on the grounds of heterosexuality.

The judge then focuses upon what he perceives are the two most salient issues: the child’s sexual identity and ‘stigmatisation’. He appears to not be overtly concerned with the child’s sexual identity - he appears to be mollified by the child’s ‘boyish appearance and behaviour’ and by the fact that the father would continue to ‘play a role’ in the child’s life. It may be surmised therefore, that to ensure a child’s ‘normal’ sexual identity development requires the ‘correct’ physical appearance, and, not surprisingly perhaps, a father presence. The constraints placed upon the woman’s ability to express self-defined identity are perhaps more clearly demonstrated in the second half of this passage. The ‘fear’ of ‘stigmatisation’ appears to weigh heavily with the judge. It is to him a ‘worrying factor’, which never the less, ‘had to take its place

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<sup>40</sup> [1991] 1 FLR at page 410.



in the balancing exercise'. It would appear that the stigmatisation concern would have been significantly more 'worrying' had the mother and 'the other' woman been 'militant lesbians' as opposed to being 'lesbians in private'.<sup>41</sup> Given these 'parameters' (which he has defined), the judge clearly considers that the 'risks' to the child's sexual identity or his possible corruption, to be so great, that they may 'counterbalance other aspects of welfare' and be 'detrimental to [his] long term interests'. Such a position allows the judge to continue to exclude certain identities from legal recognition. This exclusion applies not just to lesbian identities per se, but certain 'types' of lesbian identity.

Concerns such as those expressed above surrounding a child's 'future development', enables a court to constitute the mother's sexual identity as 'the other'. Similar concerns to those mentioned above were apparent in *Eveson v Eveson*.<sup>42</sup> This was an appeal brought by the mother against an order awarding interim custody of her six year old boy to the father. At first instance, it was clear that custody had been awarded to the father because of the 'risks' the boy would be exposed to by living in a lesbian household. The

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<sup>41</sup> It might be argued that by being so condemnatory of 'militant lesbians' who try to 'convert others to their way of life', the judge himself is being a 'militant heterosexual' in trying to convert others to *his* way of life.

<sup>42</sup> Unreported, 27 November, 1980, Court of Appeal, Civil Division; Arnold P. and Dame Elizabeth Lane. Cited in Edwards, S 1996:70.

trial judge felt that 'The way of life would not be right or natural', and that if the child lived with his mother:

"he would learn more and more and it would fill him with dismay and would be very worrying and upsetting for him."<sup>43</sup>

The trial judge's comments quite clearly found approval with the Court of Appeal. Although Dame Elizabeth Lane attempted to present a 'liberal' analysis of the situation:

"There is no rule or principle that a lesbian mother or homosexual father cannot be granted custody of a child. Indeed, I myself sitting at first instance, have committed the custody of children to such parents more than once."<sup>44</sup>

Despite this seemingly judicial liberalism, there was no reason given (apart from the mother's lesbianism) why the mother was denied custody. It would appear that the court was primarily concerned with how the mother's lesbianism would affect the future development of the child, and concern was expressed about

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<sup>43</sup> Cited in Edwards, S 1996:70.

<sup>44</sup> Cited in Edwards, S 1996:70.

the child's 'undesirable' interest in an 'unnatural relationship'. As in other cases, there were appeals to what is selectively defined as 'natural' sexual behaviour:

"My inclination is to decide the case not on the personalities but rather that the child is getting on well where it is and not to expose it to the risks of putting it with the mother."

There was no reference or further explanation in the judgement as to what these risks were, and it appears that it was the mother's lesbianism per se which constituted the 'risks' referred to be the judge. The mother's sexual identity is constructed in such a way as to place her in a situation where her lesbianism is regarded as a legally relevant consideration. The only response she is left with is to then proceed to demonstrate why her lesbianism should be dismissed as an irrelevant consideration.

A similar line of argument was taken in *G v D*<sup>45</sup>, The appeal was again brought by the father against a mother having custody of her two daughters. The mother retained custody. The father had been awarded custody at first instance, even though the children had been living with their mother all their lives, including the three

years since she had been separated from her husband. The father's view that he should have custody of the children on his re-marriage, was based on the grounds that he could provide a more 'stable' and 'normal' home for the children. His view was supported by the welfare report. The judge at first instance had said that:

"the long term interests of the children would be better served by being brought up in an ordinary household with a father and mother (or mother-substitute) rather than in a household which consisted of two women living together in the way that the mother and (Ms C) were."<sup>46</sup>

Again, there is an unquestioned use of ideological notions of 'family'. A home consisting of father and mother is constituted as 'ordinary', it is part of the process of normalisation which reduces the lesbian mother to the category of 'other'. Even though there are no express uses of normative values re-inforcing heterosexuality, the implied normative values are still present, 'hidden' behind the veil of the best interests of the child.

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<sup>45</sup> (1983) unreported, Court of Appeal. 16th February 1983.

<sup>46</sup> Cited in Edwards, S 1996:70.

The privileging of heterosexuality through normative values continued in the Court of Appeal, where the language used was more overt:

“The children do not want to live with their father and their stepmother. That being so, the Court has to give very careful consideration indeed to whether it is wise, particularly in such an abnormal situation as this, to force the children into a way of life that they did not like.”

Ormrod LJ went onto state:

“The mere fact of this homosexual way of life on the part of the mother is not, in itself, a reason for refusing to give her the control of her children, although of course it is a factor that one has to take into account and think about very hard. Experience shows, just as in this case took place, that homosexual relationships do tend to be even more unstable than heterosexual relationships are, in these days, and the result is that there is a good deal of moving to and fro ... but there is no evidence whatever that the children have suffered at all as a

result. Mr. and Mrs. G had two other children very much older, also girls (their custody was not in question) and I think there is not much evidence that they have suffered or been caused to suffer stress by the mother's association with other women."

Within this passage, the language appears more 'liberal', than that used in previous cases. The mother's sexuality is now represented as a 'mere' fact. However, it is 'of course' a factor to be considered. The emphasis is placed upon 'stability', and in this regard the judge manages to equate 'experience' (exactly whose experience, was never quantified), of homosexual relationships into 'knowledge' about the instability of such relationships.

The use of language which appears more liberal, still hides underlying assumptions regarding 'ordinary' sexual relationships. In *Re H (A Minor)*<sup>47</sup> The couple wanted to adopt the baby of a friend who already had children and did not want any more. The local authority had opposed the couple's application on the grounds that one of the women had a history of mental illness

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<sup>47</sup> *Re H (A Minor)*(s.37 direction) [1993] 2 FLR 541. As far as the author is aware, this case is, the only reported case concerning a joint residence application by lesbian couple.

and the other, a criminal record. At the residence hearing, the judge stated that the fact that:

“they are lesbians does not, according to the evidence that I have heard, make it any less likely that the placement will succeed than if they were an ordinary heterosexual couple.”<sup>48</sup>

The focus placed on a mother's lesbianism has been found in many cases.<sup>49</sup> The dual 'risks' of the children being 'led into deviant sexual ways' and the 'children suffering social harm if the relationship became known'<sup>50</sup>, appears to be one of the underlying 'commonalties'. Based on this premise, the mother's lesbianism becomes of 'prime importance. It was what the whole case was about'.<sup>51</sup> The emphasis placed upon a mother's sexual identity is almost ironic considering that such an identity is given so little legal affirmation. The concern surrounding 'militant' lesbians (discussed above) raises other questions relevant to identity. The express judicial disapproval towards 'militant' lesbians places

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<sup>48</sup> [1993] 2 FLR 545.

<sup>49</sup> See also *Re W (A Minor)(Adoption: homosexual adopter)* [1997] 3 All ER 620.

<sup>50</sup> *S v S (Custody of Children)* [1978] 1 FLR 143.

<sup>51</sup> *Holder v Holder* 12 December 1985 Court of Appeal, Civil Division.

limits on self defined identity. Such disapproval has extended to women who have joined the women's movement, for example.<sup>52</sup>

Throughout these cases, there is, I would argue, a strong underlying assumption that sexual orientation is a 'relevant factor' to be taken into consideration in custody disputes.<sup>53</sup> Why should this be so? Are the courts operating on the basis of preconceived notions of 'ideal parents' defined in terms of being heterosexual and married? Where do these pre-judged notions come from and why are they still clung to by the vast majority of judges in custody and access disputes?

The judges base these decisions on deeply entrenched cultural prejudice(s) as to the suitability of parents on categories of legal relevance. As we have seen, once the lesbian mother is constituted as 'the other' it is 'obviously' legally relevant to be lesbian, but not to be heterosexual. Further, this legal relevance of being lesbian is further subdivided, for example, into those lesbians who

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<sup>52</sup> *Re M (Minors)* (1992).

<sup>53</sup> Research undertaken by Tasker and Golombok demonstrates that a parents sexual orientation has little or nothing to do with their child's, and that children are not at 'risk' or will not suffer 'harm' by being raised in a lesbian household. See Tasker and Golombok, "Children Raised by Lesbian Mothers; The Empirical Evidence". *Fam Law* [1991] 184, and *Growing Up in a Lesbian Family - Effects on Child Development* (1997).



are categorised as ‘good’ lesbians by being ‘private’ and ‘bad’ lesbians who are categorised as ‘militant’.<sup>54</sup>

### **Conclusion to chapter five**

“Notwithstanding the changing nature of the social family, the homosexual family exists as an anathema to be sanctioned only as a last resort and in preference to a care order.” (Edwards 1996: 72).

The judicial consideration given to lesbianism in custody cases pivots upon the perceived legal relevance of lesbianism, in other words, the women are regarded as lesbians first, and mothers second. Having a lesbian mother, it would appear, is not deemed to be in the child’s best interests. What is clear, is that decisions regarding a child’s residence and so forth necessitate a judgement about the nature and quality of parenting - is this woman ‘good enough’ to be a parent? Being a lesbian mother immediately places a question mark over her ability to parent. But the criteria used are often not explicit. Even in ‘heterosexual’ cases, it is acknowledged that it is difficult, if not impossible to arrive at a consensus as to what makes a ‘good’ parent. When a lesbian mother finds herself in a courtroom, she is not only placed in the

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<sup>54</sup> *B v B (Minors)(Custody, Care and Control)*, supra.

position of having to convince the judge that she is 'as good' as a heterosexual mother, but also that she possess the necessary 'mothering qualities'. Whilst in a great many respects motherhood is socially constructed, the English legal system largely presents 'motherhood' as being essentialist, naturalistic qualities, (selflessness; placing her child's interests above her own, and so forth), the lesbian mother appears in the court room without these 'qualities'; her lesbianism makes her 'deviant'<sup>55</sup>, 'abnormal'<sup>56</sup> and 'devious'<sup>57</sup>. As such, she is viewed as morally flawed and thus an unfit parent.

It becomes apparently clear to me that law's promises are not adhered to. The 'common sense' appeal to 'what is natural' or to what is 'normal' is an appeal to emotive essentialism. It allows for the continued dominance of a narrow, essentialist led discourse. I would suggest therefore that the promises of 'neutrality', 'objectivity', 'fairness' and so forth are somewhat compromised. In other words, the law can deliver neutrality, objectivity and fairness, but only if the heterosexual imperative is complied with, not to parents who are 'the other' to heterosexuality. The above case have illustrated that the judges are at pains to point out that their own personal value systems are of minimal importance in

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<sup>55</sup> *S v S* (Custody of Children) [1978] 1FLR 143.

<sup>56</sup> *G v D* Unreported, Court of Appeal. 16th February 1983 ??.

deciding parental responsibility issues. It can be seen from the above discussion that the dominant heterosexual approach has constituted lesbian mothers as subverting the basis on which society and civilisation are built and depend upon. This approach enables law to privilege and promote a certain morality:

“Law is not viewed by conservatives as a neutral, value free mode of regulation. On the contrary, conservatives recognise that law plays a role in shaping social relations; as dominant ideology fragments and ‘new’ practices and ideas come to the fore, law must, therefore, be seized and used as a weapon of restraint.” (Cooper and Herman 1991: 145)

The constant stressing of the preferability of a ‘heterosexual’ upbringing, subjects the lesbian mother to a process of construction she has little, if no, control over. As a lesbian mother, her nonconformity to heterosexuality threatens the dominant ideology’s view of sex as ‘innate’, ‘given’ and ‘natural’. This ideological discourse implies a circular argument; family pre-dates society, it is the basis of life itself and the primary socialising agent. Family means mother, father and children. Children of

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<sup>57</sup> *Re P (a minor)(custody)* [1983] 4 FLR 401.

homosexual parents will be harmed, their best interests impaired by socially malfunctioning parents. The harm they experience lies primarily in their gender socialisation; the presence of one parent, or two same sex parents, causes a child's 'precarious' gender identity to become confused. Children will not grow up to understand the 'appropriate' roles women and men are meant to inhabit and perform. This leads to the disintegration of the family unit upon which 'civilisation' itself is based.

A 'common sense' approach denies the possibility of dissenting discourse; it assumes that everyone 'must' be of the same mind, the same opinion. The expression of her sexual identity is tightly controlled. The judicial comments in these cases appear to say more about 'controlling' the mother's behaviour, expression, and ultimately, identity than they do about what is in the 'best interests of the child'. The lesbian mother is constructed as 'unnatural' or 'not normal', thus denying her the 'opportunity' (or should it be 'right?'), to exercise free will in the determination of her own identity. The legal discourse establishes a 'truth' about what mothers' should and should not be:

"Thus the legal position of a mother in relation to her children does not turn on the assertion of formal and unqualified rights, as the father's rights

once did at common law, but on prevailing views concerning the mother's role in child-rearing, and on considerations of the individual mother's 'moral' character and fitness." (Brophy and Smart 1991).<sup>58</sup>

The opportunity for a different discourse is consequently denied. Although a Foucauldian approach would point out that the mother experiences the effects of 'power', this approach does not address the issue that she is neither part of the discourse, nor is she able to deny the de facto 'power' of the court to take her children away from her. As a subject, she is denied the opportunity to have her parenting abilities determined in the absence of her sexuality. She is denied (self-determined) existence. The superficial 'gentleness' of the judgements outlined here disguises the underlying violence of what is actually happening. In other words, the lesbian mother is forced to concede a lack of legitimacy in her sexual identity in order to demonstrate to the court that she poses no 'risk' to her child.

In this respect, Law's ideology of lesbian mothers, allows for the continued dominance of law's version of lesbian identity and the subordination of the experientially defined identity of the woman

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<sup>58</sup> Quoted in Dewar, 1992:100

herself. The connection between discursive ideology and its material effects becomes easier to see:

“A dominant power may legitimate itself by promoting beliefs and values congenial to it; naturalising and universalising such beliefs so as to render them self-evident and apparently inevitable; denigrating ideas which might challenge it; excluding rival forms of thought, perhaps by some unspoken but systematic logic; and obscuring social reality in ways convenient to itself.”

In this respect, a Foucauldian analysis would suggest that it is the discourse which produces the ‘perceived reality’. This results in a narrow, fixed and immutable meaning of ‘motherhood’, allowing only its own discourse to predominate. The lesbian mother’s status as ‘parent’ appears to be severely curtailed and restricted. It would seem then, that the promise of ‘fairness’, ‘objectivity’ and so forth are not adhered to in the cases discussed above. To me, the cases reveal much about law’s ‘claim to truth’. In some instances, the judges appear to be at pains to stress that they ‘move with the times’; in others, there appears to be judicial pride in ignoring ‘changing social attitudes’. These conflicting, plural and often contradictory approaches are ‘hidden’ behind a claim of the

unity and truth of law - its claim to a unified field of 'knowledge' (Smart 1989).

I also find the issue of performance interesting. I would suggest that a majority of the litigants who appear in a court of law (whatever the matter under consideration), will have received advice from their lawyer(s) in regard to their apparel. Whilst in a formal sense at least, litigant are free to chose whatever apparel they wish, in practice, the more a litigant mimics or adapts to the performance of the constructed identity, the greater the legal approval. This is reminiscent of Butler's arguments surrounding performance. Giving the 'right' performance in court does not necessarily equate with giving a performance which corresponds with one's own self image. I would suggest that the issue of self defined identity is linked with the issue of performance. In other words, I have argued that the individual should be able to self define identity, in the same way, I would argue that the individual should be able to chose their own performance. The issue of adaptation to legally constructed identities is one which I suspect is not merely limited to disputed contact or residency orders.

I have argued that the discourse of law can have serious effects on the woman's ability to 'self-define' her identity. If the effect(s) of discourse and power felt by the women involved in the above

cases, was to disempower them, what further ramifications might arise? Is it possible to 'map' the extent of law's 'influence' in determining identity? What is the extent of law's control - might this control extend to a situation akin to that of 'ownership'? Do concepts of 'ownership' within 'the family' have 'links' into the possible 'ownership' of identity itself? To what extent is identity, property? In other words, does law view 'identity' as its 'property'?



**Is Identity 'Owned' by Law?**

**Introduction**

This chapter is concerned with lesbian identities in law and the lesbian mother in particular.<sup>1</sup> My analysis examines the 'gaps' between the constructions, expressions and representations of self-defined identity, and those that are imposed upon the subject by law. These matters will be considered by way of a series of legal judgements concerned with parental responsibility for the child of the family and the child's residence<sup>2</sup>. These cases suggest that the law's concept of lesbian identity cannot be easily reconciled with the diversity of women's experiences and sexual identities. Are lesbian mothers forced to inhabit a 'legal body' not of their own making and construction?.

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<sup>1</sup> The term 'lesbian mother' obviously has essentialist connotations, and whilst I am reluctant to place reliance on essentialism, this chapter concentrates upon *law's* essentialist constructions of identity. Indeed, this point illustrates the limitations placed upon us by language; there must surely be a suitable alternative terminology available which encompasses the extremely wide ranging and diverse group of women whose sexuality and sexual existence, not being heterosexual, is questioned and controlled by legal culture.

<sup>2</sup> Since the introduction of the Children Act 1989, the terms 'custody' and 'access' have been replaced by 'residence' and 'parental contact' respectively, Children Act 1989, s.8.

In this context, my understanding of 'legal body', is as a cultural and legal construct. It is composed of numerous aspects of identity, for example, gender, nationality, ethnicity, which together, combine to (re)produce an overall sense of self. This 'body' can be viewed as an outward expression of identity - an expression of a particular way of being 'one's self'. This body can also be viewed as an inner source of self identity. Within the context of these issues, the term 'body' is capable of being interpreted as generating and containing a multiplicity of meanings. In this particular context, my use of 'legal body' refers to the individual person as she appears to the court and to law - a person who is 'fully constituted' to bring matters of legal dispute before the authority of the court and the legal process. In other words, a person who is deemed capable of enjoying legal rights and duties, and responsibilities.

Through an analysis of the 'gaps' between how an individual perceives and constructs herself, and how that individual is constructed and then represented in law, I will draw attention to the continuing difficulty that women, as legal subjects, have in authenticating their identity and exercising control over it. In particular, I will consider the ways in which law impoverishes our understanding of identity by way of an extremely limited range of imposed alternatives. I will illustrate the many ways in which self

identity is excluded from law, by law, together with some of the processes that facilitate this exclusion. In other words, to what extent is a subject's attempts to 'self-define' her identity, undermined and resisted by law?

### **Female identity as 'property': the principle of marital unity**

A preliminary matter that needs to be addressed in this context is the relation between the identity of the subject in law and the 'control' and 'ownership' of that identity. This is of particular concern for women as the law has traditionally treated the woman as the property of the man. The clearest example of this is to be found in the principle of 'marital unity':

“the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband: under whose wing, protection, and cover, she performs everything.” (Blackstone, (1769), 441-2)

While 'marital unity' addresses the issue of ownership and control of female identity in *marriage*, the principle of 'ownership' and 'control' described is not limited to the woman as 'wife', but also to woman as 'daughter' and woman as 'mother'. In the context of marriage, having no independent legal existence produced various effects. It meant it was legally impossible for a husband to commit rape against his wife (Hale 1736:629). Being 'one person' in law, marital rape was taken to be an act of rape by the husband upon himself - a legal impossibility<sup>3</sup>. Further, if a wife was sexually assaulted or raped by a man other than her husband, only the husband had legal redress in the form of tortious action for interference with property rights (a trespass). Sexual violence was treated as a *property* crime. In *Family Law Matters*, O'Donovan argues that Hales' pronouncement was constructed in the absence of written sources of law and judicial authority, but were extremely influential, largely due to what O'Donovan terms as the 'legal mentality', and the reverence accorded to his text by subsequent judges (O'Donovan 1993:2). As O'Donovan points out, exceptions to the marital rape principle were gradually stated, but that the central proposition remained:

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<sup>3</sup> The erasure of women's identity within the context of 'the marital rape exemption', only came to a formal end in the case of *R v R* [1991] 4 All ER 481, and by the Criminal Justice and Public Order Act 1994, s.142. Incidentally, the exemption was overturned by the Scottish courts two years earlier in *S v H.M. Advocate* 1989 S.L.T. 469.

“Indeed it was confirmed, the male marital right was upheld, but legal derogation was permitted. The woman’s submission of her case to law – not her will – revoked her consent. She still lacked autonomy over her body and only the courts could withdraw what she was held to have conferred upon her husband” (O’Donovan 1993: 3).

As a woman’s gender and sexuality constituted property, she had little or no effective control, possession or ownership of her sexual and gender identity. Thus historically, the ‘legal body’ of a woman was considered as ‘property’. All of these examples draw attention to the legal tradition which denied women the possibility of an autonomous self presence in the law and formally subjected them to the control of men. Women still experience considerable difficulties in their attempts to control the way they are represented in the law.

### **Invisible Identities?**

“Lesbians have been subject to erasure from the record, of that there can be no doubt.” (Wilton 1995: 3).

I would suggest that lesbian identities and experiences<sup>4</sup> probably pre-date history, much of that history remains undocumented, concealed or invisible (Donoghue, 1993; Faderman 1985). In a legal context, those identities and experiences can be said to have a relatively short history, having been rendered invisible by, and displaced from, legal culture (Robson 1992). However, I would suggest that in many respects, lesbian identity is more visible towards at end of the twentieth century than it was at the beginning. This appears to reflect a social and legal re-appraisal of lesbian identity. For example, the media, in one way or another have acknowledged lesbian existence, largely on the basis of what is termed 'lesbian chic' or 'lipstick' lesbian. These have included Cindy Crawford and K.d. Lang on the front cover of *Vanity Fair*; and 'Beth Jordache' a character from the Channel Four programme *Brookside* are well known examples. However, despite some increase in acknowledgement, I would suggest that this recognition is still relatively limited. One example is where the limit of changes is to be found is in the context of lesbian motherhood.

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<sup>4</sup> I use this phrase to include the widest possible variety of female same sex relationships.

## **Constructing the body of the lesbian mother**

Press coverage given to lesbian mothers has provided the following headlines:

‘Should Lesbians Have Children?’.<sup>5</sup>

‘Court says that lesbian can be ‘father’’.<sup>6</sup>

‘Gay Culture Will Never Beat Nature’.<sup>7</sup>

These newspaper headlines illustrate the continuation of negative social constructions of lesbian mothers which are generated by attaching a particular significance to their sexuality. This is in contrast to heterosexual women (qua heterosexual) are not required to defend or justify their heterosexuality in child contact or residence cases. For heterosexual women, their heterosexuality per se, is not of judicial concern.

When it falls to law to determine and assess ‘parental suitability’ or the child’s residence, those mothers who express a sexuality other than heterosexuality, again find that their sexuality assumes an importance not deemed relevant to heterosexual mothers. It is to these matters that I now want to turn.

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<sup>5</sup> *The Daily Express*, 22nd June 1994.

<sup>6</sup> *The Daily Mail*, 30th June 1994.

## **The lesbian mother in law**

The first case I want to consider is *Re C* (1994)<sup>8</sup>. This decision was the first to grant a lesbian couple a joint residency order for their 22 month old boy under the auspices of the Children Act 1989. Despite this *Re C* did not find its way into the law reports, (the hearing was held 'in camera', and only a short statement was authorised by the judge). As such, its status as a precedent is problematic further adding to the invisibility of lesbian motherhood to academic and practitioners alike. However, the media response to the case provides some insight into some of the problems that arise in the context of establishing lesbian motherhood in law.

Whilst the actual decision was welcomed by many, there were some who were not so quite enthusiastic. Harry Greenway, a Conservative M.P. commented 'It's very unfair on he child. He should have a father as well as a mother. There should be an appeal without delay'.<sup>9</sup> The (late) Sir Nicholas Fairbairn, former Conservative Solicitor General for Scotland observed 'It's ridiculous. We don't put children in the hands of the insane. Why should we put them in the hands of the perverted? Surely the child

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<sup>7</sup> *The Daily Mail*, 23rd January 1995.



should have a normal upbringing not an abnormal one'.<sup>10</sup> These statements about the case are of interest in various ways. They set up the distinction between lesbian and heterosexual by resort to a series of polar opposites: the perverted and the normal; 'gay' versus 'straight'; 'good' versus 'bad'. The establishment of 'gay' as a polar opposite of 'heterosexual' is particularly important in the context of the term 'lesbian mother'. In this context 'lesbian mother' is an oxymoron. For the lesbian to be a 'mother' she has to 'mimic' the heterosexual construction of 'woman'. As 'motherhood' is understood in terms of heterocentric normativity, the sexuality of motherhood is rendered invisible. Lesbian mothers upset the relation between sexuality and gender, rendering motherhood sexualised and thereby problematic.

More generally within the context of that amorphous body called 'Family Law', it is the heterosexualist imperative in law that reiterates and imposes the 'norms' that construct the idea of 'parent'. There still appears to be a judicial preference for heterosexual two parent families in contested custody cases involving lesbian mothers (Boyd 1992:269). In most jurisdictions, it is the mother who is most likely to be granted custody of the children, and therefore it is the lesbian mother who is placed under

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<sup>8</sup> Unreported High Court (Manchester) decision. (1994). See also *The Guardian* July 2nd 1994 and *The Pink Paper* July 1994.

greatest scrutiny. As Edwards notes 'Lesbianism has been considered as axiomatically antithetical to the interests of the child and incongruous with the construction of motherhood' (Edwards, 1996: 69).

What appears to be a common thread throughout residence and responsibility cases, is the almost exclusive reliance on the heterocentric imperative. Accordingly, families are (in a legal sense), essentially heterosexual, and a woman's sexual identity is heterosexual. This, as O'Donovan points out, is because of the perceived 'dissonance' between 'mother' and all that the word implies, and 'lesbian' which carries a different set of resonance's (O'Donovan 1993:84). It is for this reason that a lesbian mother's application for residence or responsibility in respect of a child is difficult for family law judges to come to terms with:

"Faced with this problem of dissonance, courts resort to the external environment and general social attitudes ... So although the mother may be seen by the court as better qualified for child care than the father by reason of past experience or a 'natural bond', her femininity, which is affirmed by

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<sup>9</sup> *The Daily Mirror*, 30th June 1994.

<sup>10</sup> *The Daily Express*, 30th June 1994.

such a perception, is opened to question by sexual preferences". (O'Donovan, 1993:84).

As a mother, a woman is further constructed according to the distinction 'married' or 'unmarried', which in turn is made to signify respectively, 'good mother', 'bad mother'. Here, we have categories of mother which are defined not in terms of the relationship between the child and the mother, but by reference to the marital status of the mother, a role that has traditionally been a subordinated to that of 'husband/father'. Because many lesbian mothers are legally unmarried,<sup>11</sup> or are in the process of divorce, they are placed into the category of a 'bad' mother due to law's construction of unmarried mothers as 'bad', and married mothers as 'good' (Wallbank 1997). As such a lesbian's sexual identity threatens to disrupt the heterocentric logic of identity.

At the same time, the more a lesbian conforms to the pre-existing legal attributes conventionally associated with the construction of 'woman', the more likely she is to be successful in any parental responsibility case. The pressure to conform, can take several guises. For example, prior to the case reaching the court room, this pressure can take the form of the woman's solicitor's advising

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<sup>11</sup> In legal terms, the lesbian mother cannot adhere to the prescribed formal rules for the legal recognition of her partnership (if she has one). And whilst two 'parents' are generally considered to be 'better' than one, this refers only to a man and a woman. Consequently, it is not only in connection with the formal rules that the lesbian partnership is not recognised.

her to wear a skirt, or to apply make-up. If and when the case ends up in court, the identity of the particular woman is further constructed and restrained by enquiries into the mother's lifestyle, with invasive questioning regarding shows of physical affection in front of the child(ren); concern about the 'minutiae of who was in which bedroom, and whether or not the women slept in the same bed' (Crane 1982: 103). Questions such as 'Will you have sex in front of the children?' or 'Do you make a noise when you have sex?'<sup>12</sup> are not uncommon.

The 'catch 22' situation for the lesbian mother is that for as long as she 'refuses' to adopt the hetero-identity law has constructed for her, she faces an uphill battle in trying to convince the court that she is a 'suitable' parent. However, if she adopts the hetero-identity constructed for her, she necessarily, must deny her self identified sexual identity, but does appear to stand a greater chance of success in gaining an order for residence or parental responsibility. Her lesbian sexuality becomes 'relevant' in contrast to a heterosexual mother whose sexuality would have no such similar 'relevance'. Such lines of legal enquiry help to illustrate law's focus upon the expression of sexual identity. This focus is not only directed towards lifestyle identity, but also at the 'appearance' of lesbian identities presented before law.

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<sup>12</sup> *The Guardian* 5th December 1990.

In this context, the 'appearance' of the lesbian is all important to legal culture. Law appears more concerned with 'controlling' the so called 'butch' lesbian, than it is with the so called 'feminine' lesbian (Creed, 1995:86). The latter, presents a 'lesser' threat to the dominant male ideology than the former - due to a greater 'sameness' - the 'feminine lesbian' body physically presents herself as visibly little different from her heterosexual counterpart. The 'butch' lesbian body presents herself with a greater degree of difference. However, although physical sameness is one factor, more important perhaps, is 'lifestyle' which is understood by reference to the public/private distinction found within legal discourse.

The 'public'/'private' distinction can also be read as a distinction between that which is 'good' and that which is 'bad'. In the reported case of *B v B*<sup>13</sup> the judge drew a distinction between 'lesbians who were private persons who did not believe in advertising their lesbianism...and militant lesbians who tried to convert others to their way of life'. Here the private lesbian was praised (the good lesbian), while the militant (public) lesbian was regarded with suspicion (the bad lesbian). In contrast to the lesbian, existence of heterosexual orientation presents no such dichotomy. A distinction between 'private' heterosexuals and 'public/militant' heterosexuals makes no sense. By means of these distinctions, the lesbian identity is constituted as both other to heterosexuality and other to itself. Both work to render lesbian identities largely invisible. In turn that which is visible, is forced

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<sup>13</sup> (1991) *supra*, chapter five.

to 'conform' to the 'accepted' expectations of female gender identity expression; the 'feminine' female. The expression of sexual identity has to 'conform' with the expression of gender identity. In other words, legal culture expects and requires simultaneous conformity to its own constructs of sexual and gender identity. Thus, where an individual's expression of sexual identity does not conform, that sexual identity is perceived by legal culture as 'deviant'. The constructed legal body is the only body that legal culture is able to recognise and respond to - given the prejudicial criteria for visibility. 'Lesbian bodies', are constructed as 'outsider'.

We can make a link with this, and the previous point on appearances. There, the 'feminine' was 'good, invisible and private' as opposed to the 'butch' which was 'bad, militant and public'. The former appears to be more 'accepted' than the latter. However, the problem is slightly more subtle than this. As Creed notes, 'to function properly as ideological litmus paper, the lesbian body must be instantly recognisable' (Creed 1995: 23) As such, appearance may always be relevant to law, but relevance does not equate to re-reading or re-evaluating appearance. The 'appearance' of a lesbian body to the court, is something to be exposed. When the lesbian body is constituted as the 'other', exposure is always a possibility. In this context 'control' over identity lies with the court, not the individual.

The decision in *Re C*, appears to be at odds with previous cases where lesbianism was considered legally relevant to questions relating to a child's residence, or parental responsibility. At first glance, it might appear that the lack consideration given to sexual orientation, is similar in nature to applications by heterosexual women. In *Re C*, the women's sexual identity was not considered legally relevant to the court at that time, in this particular instance. However, although sexual identity might have been considered relevant, it wasn't considered problematic.

From reading the press release at the time, the impression gained is that the mother's sexual identity was not considered problematic because no legal representation was made regarding the issue of an 'absent father'. (The Official Solicitor who represents the child's interests was in favour of the application.) In one respect, it can be argued that this case is a step forward, for sexual identity was not considered legally problematic. However, the outcome of this case does not mean that the obsession, in legal culture, with non-heterosexual identity has magically disappeared. The omission of discourse on the relevance of lesbianism to parenting in this case can be seen as a positive omission, however, there remains that which was *not* stated. The case did not expressly state that sexual orientation is irrelevant and unproblematic to parenting. If there had been such representation to the court from a putative father as to the relevance of lesbianism to parenting, the court would most likely have considered it. Thus it is (unfortunately), still open for future cases to consider a lesbian identity as a legally relevant consideration, illustrating law's determination to continue

constructing identity and imposing that construction upon its subjects.

This particular point, is one that should, in the first instance, be analysed in terms of equality. In terms of assessing parental suitability, sexual orientation is at present, only considered relevant where that sexual orientation is not heterosexual. In this context, it is possible to view this case from another angle. If we assume that the court is preoccupied with lesbianism, then why not emphasise this in order to illustrate to the court the advantages for a child in being brought up in a lesbian household? In other words, this approach would acknowledge the court's *de facto* interest in the mother's lesbianism, and would use this to emphasise the positive aspects of lesbian parenting as opposed to heterosexual parenting.

Whilst this idea holds some attraction, I remain unconvinced that emphasising lesbian identity to the court would necessarily produce 'better results'. Because the majority of such custody cases revolve around a dispute between a lesbian mother and her estranged male heterosexual partner, there is a potentially significant danger that lesbian sexuality would be placed in a competitive arena with heterosexuality. In such a context, it would necessitate portraying lesbian sexuality as 'better' than heterosexuality - a sexual identity 'competition'. This, in my



opinion, would be an unnecessary focus. What is important is not necessarily which sexual identity is 'better' than another, but the quality of parenting.

At this juncture, a distinction needs to be made between 'sex' and 'gender'. Obviously the terms 'sex' and 'gender' will have different meanings for different people and discourse surrounding these topics are hardly scarce, but there does appear to be a relatively common understanding. In other words, that there is a division in the distinction between sex and gender. It is a widely held view that the terms 'sex' and 'gender' do not have the same meaning. And what purpose does making this distinction have? The distinction appears to serve the argument that whatever fixed characteristics sex (as a biological phenomenon)<sup>14</sup> may, or may not have, as a cultural construct gender can take as many different forms as there are possible variations on cultured ways of life. Thus, gender is neither the causal result of sex nor as seemingly fixed as sex. If we accept the argument that sex denotes physical characteristics, hormones, chromosomes and so forth, then gender still remains something else other than sex. Gender is usually said to be expressed by those personality traits and behaviour patterns associated with the cultural constructs of 'masculinity' and

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<sup>14</sup> Butler argues that 'Sex is an ideal construct which is forcibly materialised through time. It is not a simple fact or static condition of a body, but a process

'femininity'. Therefore, a biological sexed 'man' can be 'effeminate', and a biologically sexed 'woman', can be identified as 'masculine'.

Furthermore, even if the sexes appear to be unproblematically binary (which cannot be assumed<sup>15</sup>), then there is no reason to assume that gender must necessarily be unproblematically binary. The presumption of a binary gender system implicitly retains the ideological belief in gender 'mimicking', or being defined by sex. When the constructed status of gender is theorised and *lived*, as being totally independent of sex, gender is again recognised as a free floating artifice.<sup>16</sup> The paucity and narrowness of the 'binary' approach to sex and gender, leaves us little room for manoeuvre outside of the pre-determined compound. If we wish to explore the extent to which the individual can have genuine self determination with respect to sexuality and gender, thinking in terms of universal, narrow, binary opposites, does not allow for much diversity, and again leads to essentialism.

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whereby regulatory norms materialise "sex" and achieve this materialisation through forcible reiteration of those norms' (Butler, 1993:1).

<sup>15</sup> See for example *The Independent*, October 9 1994, which highlights the growing number of individuals who wish to create and become part of the third gender - neither male nor female.

<sup>16</sup> See Sharpe in *Legal Queeries* (1998:26), and Whittle *Legal Queeries* (1998:42)

From a position outside the heterosexual norm, the lesbian lives a paradox. While the lesbian sense of self may be more of a 'product' of the lesbian herself than that of her heterosexual counterpart, the more she identifies with a lesbian body, the greater the gap will be between her self defined identity and the identity which law constructs for her. Furthermore, the less likely she is to receive formal recognition of that lesbian body and the greater the regulation and control.

Viewed in this way, 'control' and 'ownership' of the sexual body and the expression of identity is therefore linked to self determination and autonomy. This helps to illustrate the falsity of law's claim to simply uncover and reflect the 'truth'. In effect, its discourse only allows for one truth; one legal body; one legal identity. The discursive rhetorical repetition needed to sustain this concealed 'creativity' relies upon the exclusion of other, different identities and senses of self.

### **Conclusion to chapter six.**

During the course of this chapter, I have tried to highlight the existence of the gaps between constructed legal identity and self-defined identity, and hopefully gone some way towards mapping them.

Lesbian identity in motherhood presents us with an interesting site of legal construction because they cross the boundaries of legal identity. In terms of 'control' or 'ownership' of identity, the experience of the lesbian mother can uncover law's pervasiveness in not just the construction of identity, but also the control over the expression of identity. The lesbian mother may have control over her appearance, and she may have the appearance of control, but she faces a severe uphill struggle to gain legal representation and recognition of her lesbian body unless she complies with a pre-determined construction of identity.

If any thing is capable of being 'owned', and subject to self-determination, then in theory, sexual and gender identity is capable of such ownership. However, as I have explored, ownership and control are not necessarily synonymous. Whilst an individual can be said to possess and to have the power to express and withhold expression of her identity, she may only do so in the narrow and extremely limited manner prescribed by law. There is no corresponding ownership, control, power and so forth regarding the construction and imposition of that identity. To say that identity belongs to an individual is, I would argue, misleading. The possession and expression of identity, is not 'owned', as with other forms of property. Rather it belongs and is owned by law, which as the builder and constructor of identity, conceals its own

creativity. The construction of identities and the gaps that separate them is an on-going process, the 'social making of meaning' whereby 'lesbian' is constructed as something which comes into being by processes of description, recognition, disavowal, internalisation, externalisation and embodiment (Wilton 1995: 83). In so doing, law projects a false belief in the self determination of the creation of individual sexual and gender identity, projects its own categories and stereotypes and then treats these as independent, as already 'there'. It thus conceals the enforced maintenance of the gaps between imposed identity and self defined identity.

It might be argued that greater visibility for lesbians and lesbian motherhood is a 'good thing'<sup>17</sup>. However, greater visibility does not necessarily mean greater subjective control over identity. Whilst the boundaries of lesbian identities may have widened or moved, (which remains to be seen), this has not necessarily been the result of a re-evaluation of the strategies employed in constructing those identities. On this basis, I would argue that this partly explains why the 'new' lesbian identity is largely as stereotypically limited as the current legal construct of 'wife', or 'mother', 'husband', 'father' and so forth.

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<sup>17</sup> By a 'good thing', I mean that lesbians are at least becoming part of the discourse, having been previously ignored in comparison to, say, gay men.

The idea that sexuality or sexual identity is a social construct is nothing new, but as with any construct, what must be remembered is that the construct cannot exist independently as a 'thing in itself'. Without its constructors it has no 'independent' existence (Caplan 1987; Frosh 1994). Without law as the constructor, the boundaries of identity cease to have importance or relevance.

If law is to continue to exercise control over the formation and expression of identity, it must enforce and preserve the exclusive parameters of identity. The gaps separating imposed identity and self-defined identity, essential to the maintenance of its own control, must be maintained and enforced by a process of exclusion, definition, and ownership.

## Conclusion

“The legal subject upheld in liberal theory is a rational, choosing person, capable of decision, an autonomous individual. This individual is without particularities of identity such as gender. Such a figure of neutrality is a deliberate legal creation to overcome differences - whether of culture, origin, race, gender or other particularities. Thus imaginary figure legitimates law’s generality and, sometimes law’s violence.” (O’Donovan 1997: 47).

This thesis has focused upon the formation of identity in law. I have examined the legal and social construction of female gender and sexual identity with particular reference to lesbian sexual identity. I have argued that discourses regarding identity involve examining debates about, what in law, it means to be ‘woman’, ‘mother’ and ‘lesbian’. I went on to identify that such discourses take place not only within the context of hetero-centric values, assumptions and norms, but also within the operational nature of ‘distinct’ epistemological fields within law. The analysis aids understanding that identity is created by legal discourse, not the individual. I focused upon the ways in which female identity is represented within the contexts of ‘the family’, child custody disputes,

property disputes, visual rhetoric, marriage and biological determinism. I argued that lesbian identity in particular, continues to be regarded and rendered 'the other' and 'the invisible', in relation to their position in the network of heterosexual legal and social power relations.

During the course of my thesis I wanted to explore the law's selective refusal to recognise identity in some cases and the promotion of identity in others. Within that context, I wanted to examine some of the discourses that allow for the constitution of identity, and the imposition of that identity on the 'subject' of law. I have sought to demonstrate the importance of reading and re-reading legal discourse along with social discourse which map out what it means to be a 'family', 'mother', 'parent' in a contemporary Western society. It has been my concern to try and dis-mantle the idea of a unified and stable notion of 'family'; 'family law' and 'identity'.

During chapter one, I explored some of the methodological approaches available to me in trying to explore these issues. I drew upon some of Foucault's work in order to explore some of the limitations within the meanings associated with, and constructed by, the language(s) that law uses. I did however, stop short of a complete adoption of Foucault's ideas regarding the 'non-existence' of 'the subject', preferring instead to regard the subject as 'something which exists' within law, but whose experientially defined subjectivity is ignored or negated. Within this



context, I went on to identify how the lesbian mother is discursively produced and located in a hierarchical system in relation to other legal subjects e.g., the heterosexual mother.

In chapter two, I examined some of these issues further by exploring the manner in which 'family' has been defined, categorised and imposed by dominant ideological discourse. I argued that this dominance is often 'hidden' within 'layers' of 'legitimacy' and 'truth', from critical examination. I argued that the analysis of legal 'rights'; the 'blood tie' and symbolism demonstrated that these concepts continue to play a central defining role in socio-legal familial construction. The 'truth' about families (sic), is that they are biologically constructed and determined; they are 'natural'. The appeal of 'the natural' to legal discourse, allows for the operation of power inherent within these layers of 'established truth' to be largely disguised. I explored the ways in which judicial attitudes and pronouncements rely on what is 'natural' in order to present and determine the 'facts' as 'truth'. 'Difference' in judicial considerations is constructed as being based on fact, not cultural meanings:

"No matter how you may dispute and argue, you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and raise children:...He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more

submissive. It is he who takes the initiative and she who responds. These diversities of function and temperament lead to differences of outlook which cannot be ignored.” (Denning 1980:194).

I argued that this ‘desire’ to keep separate, make categories and so forth, was (and still is), utilised not only to ensure that ‘male’ identity is kept separate from ‘female’ identity, but was also exclusive in other ways; ‘heterosexuality’ from ‘homosexuality’, or ‘mother’ from ‘lesbian’. Once categories are established, they can then be placed in a hierarchy of privilege - what is ‘natural’ is legally privileged above that which is not. The construction of the ‘natural’ enables law to dictate those identities which are ‘natural’ and therefore legally recognisable, and those identities which are ‘unnatural’ and therefore legally unrecognisable.

In chapter three, I examined some of the case law in ‘marital’ property dispute cases in an attempt to uncover a similar pattern of separation and hierarchy. I argued that ‘identity’ is further constrained by the many divides between ‘distinct’ areas of legal study and practice. I argued that the continuation of the artificial divide between ‘property’ law and ‘family’ law, is not due to a necessity to prevent one ‘discipline’ overlapping another, but is part of a larger pattern of exclusion and ostricision (Bottomley 1993). I explored some of the ways in which the

relationships between law and proprietorial ownership had many implications for the 'subject' of law in the 'ownership' of 'identity'.

I argued that the 'injustice' which often results from this pattern of exclusion is perhaps, one of the most 'blatant' examples of law's open acknowledgement of its divisive operational nature. I explored some of the ways in which despite this acknowledgement, there is an unwillingness to re-evaluate categories and concepts. I asked myself what would happen when even this rather unhelpful acknowledgement of such divisive and exclusionary methods was absent?

I attempted to answer this question in chapter four by suggesting that the exclusionary strategies used, become a little more 'subtle'. I argued that whilst the strategies may be more subtle, the effects on 'the subject' are not. I concentrated upon the importance of the symbolic and iconic aspects of law's exclusive operational nature and how this continued to reinforce its own 'legitimacy'. I argued that within the context of the 'family', law's dependence upon legitimacy is achieved mainly through the re-enforcement of 'lines of succession'. I argued that this is not only achieved through written discourse, but also through 'visual' rhetoric; i.e., law's symbols and icons. Although the symbolic nature of law's visual symbols and icons has been the subject of critical examination in other

contexts<sup>1</sup>, I wanted to explore the operation of power through more 'accessible' or 'common' visual symbols. I suggested that a constant bombardment of a particular visual representation of the family operates on the subject to re-inforce a dominant ideology of a heterosexual and gendered family, presented as 'inherently natural'. Part of the 'problem' of trying to uncover dominant ideological constructions, has been the 'invisibility' of alternative discourses, both written and visual.

I argued that at the level of undergraduate studies, whilst the students may be encouraged to think critically about law, the main 'tools' used for this are of course, text books. I suggested that these immediately present the student and lecturer with images of the family which are *prescriptive* in nature and operation. I argued that 'power' operates by a symbolic repetition of citation, and that it is the symbolic which becomes invested with power. In order to illustrate this point I chose to examine the front covers of 'commonly used' family law text books.

In chapter five I argued that the lesbian mother provides a 'site' on which we can uncover the wielding of power within law which renders her unable to inhabit an identity of her own making. I wanted to explore the operation of 'power' and 'truth' upon the legal subject. I explored the restrictive terms upon which a lesbian mother is 'allowed' to be recognised

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<sup>1</sup> See chapter four.

as a legal subject in her own right. I argued that not only does this operate to the detriment of the particular lesbian mother concerned, but also to the detriment of law itself. In other words, diversity and difference should be considered expressions of strength, not weakness and deviance. It is unrelenting sameness and homogeneity that provide for law's stagnation. In this respect, sameness and difference are placed in a hierarchy of privilege in relation to their opposites. For example, the legal category of 'woman' is placed on a hierarchical scale in relation to its binary oppositional category, that of 'male'. In other words, law concerns itself with the creation of categories, hierarchy and privilege - and 'power' is an integral part of that process. Thus, it is not necessarily the identification of difference per se, that is of prime interest to me, but rather the operation and nature of that difference, and the meaning and importance law ascribes to that difference.

In chapter six, I questioned whether the power/knowledge dichotomy could be viewed inherently linked with the issue of control, ownership and possession of identity. I also asked whether law claims exclusive access to the 'knowledge' and 'truth' about the construction and expression of identity.

If power/knowledge do operate within the construction of sexual and gender identity, then one of the consequences, might be the control over

legal identity. 'Power' is part and parcel of our everyday lives - we *live* it rather than *have* it:

"Foucault ... constitutes a radical break with all previous conceptions of power. ... To begin with, power is not a possession, won by one class that strives to retain it against its acquisition by another. Power is not the prerogative of the 'bourgeoisie'; the 'working class' has no historical mission in acquiring it. Power, as such, does not exist, but in challenging existing notions of how societies operate, one is forced, in the first instance, to employ the same word. Power is an effect of the operation of social relationships, between groups and between individuals. It is not unitary: it has no essence."

(Sheridan, 1980: 218).

Within the context of legal discourse, I examined how power operates upon the legal subject's ability to self-determine sexual and gender identity. I argued that the legal subject does not 'have' a self-defined sexual gender identity, rather, they 'experience' or 'live' the identity constructed for them. In order to try and illustrate this point, I concentrated upon the concepts of 'ownership' within 'the family' and explored the extent to which sexuality and gender are viewed by law as 'property'. I wanted to ask whether law views 'identity' as the 'property' of law, or to what extent, is there 'property' in identity?

I attempted to explore these issues by concentrating primarily upon the operation of law on lesbian mothers. I asked whether sexual identity and its attendant expressions, is perceived by law as something to be controlled and categorised. Were there 'gaps' between the constructions, expressions and representations of a lesbian mother's self-identity, and those that are imposed upon her by law? I argued that if such 'gaps' did exist, they may allow us to 'map' the apparent continuing difficulty that women (especially lesbians), as legal subjects, have in authenticating their identity and exercising control over it.

Within this context, I questioned whether it is possible to resist impositions of power? Is it possible to move towards a 'new' jurisprudential approach to 'the family' and 'intimacy'. Why does 'law' appear incapable of viewing the 'family' without its constructed crutches of gender, sexuality, femininity, masculinity and so forth? To use a politically fashionable phrase, 'do we need to think the unthinkable?'. To my mind, 'thinking the unthinkable is not necessarily re-thinking the actual familial structures themselves, nor necessarily the strategies and methodologies used to create and sanction those structures - I do not deny their importance. Whilst I would strongly support the argument that re-thinking meaning, language, definitions and so forth is important, I would argue that 're-thinking' offers little hope for even moderate change surrounding legal notions of identity, and could only claim limited success. Similarly,

recognising or establishing 'points of resistance' can only go so far in resisting the intrusions of power.

Since I appear to have spent the majority of my thesis attempting to point to what I see as some of law's shortcomings, its failings and so forth, do I have any suggestions which might improve matters? If 'identity' and the ability to self-define are so important, are there any ways in which I can see law changing or adapting in order to allow for 'identity' to be 'self-determined'? Is law even a desirable 'vehicle' for reform? There is a danger that 'however we theorise our claims, they will become transmogrified into legal categories which mask the nature of women's socially-based oppression' (Howe 1991: 165). It has been suggested that there is a need to engage with law and that feminists must engage with law because law is an important and unavoidable site of political struggle:

"It is not simply open to feminists to eschew law on grounds of its gendered content. The struggle must take place both within law and outside it, both through it and beyond it. Legal change is neither the starting point nor the end result of the feminist project but, as an inevitable part of that project, it must be addressed." (Conaghan 1996:408).

Smart agrees with this approach. She argues that law must continue to engaged with, notwithstanding that law both facilitates and obstructs



change resulting in 'legal disappointments' (Smart 1989). O'Donovan sees the issue as being one of 'context' - we should try and perceive female identity subjectivity within the woman's own context. In other words, it may be useful strategically to call attention to, and to validate those qualities which traditionally denoted "woman" ' (O'Donovan 1997:52). She calls upon the work of Gilligan who argues that the placing of the subject in her context, offers a 'woman's justice'. For Gilligan, women tend to reason in a 'different voice' - they are less likely than men to privilege abstract rights over concrete relationships and are more attentive to values of care, connection, and context. In other words, values traditionally associated with women be valued and that legal strategies focus on altering societal structures not just assimilating women within them (Gilligan 1982). For O'Donovan, it is the rhetorical methodology of locating law's subject is, in itself, and ambivalently, both subversive of, and expressive of, subjectivities:

"In other words, we are self-consciously aware of past sexual constitutions and their places in current identities. Simultaneously we dissent from and resist these constitutions and identities." (O'Donovan 1997: 63).

Whether I like it or not, I am a legal subject and law will continue to operate upon me. Similarly, law operates upon all legal subjects. Whether law's operations are felt directly or indirectly, it will continue to influence

and shape identity. In this respect, I would argue that law cannot be 'reformed' to allow for autonomy over legal identity. 'Family law' is, I would argue, so fundamentally 'flawed' that no amount of 'Family Law Reform Acts could remedy the defects alone. In Addition, it would not be possible to pass a reforming statute (or series of statutes) to allow for self determined identity to be recognised in family law without any concurrent effects being felt in other areas of law (for example property law). Indeed, it would seem improbable that family law could be reformed without other areas of law (such as inheritance; immigration; tax; social security; housing; criminal law etc.), necessitating similar treatment. Nor could such 'legislative' reform be restricted to statute. Smart suggests that 'law is not simply synonymous with either legislation or the body of the judiciary', and that the 'operation of law is increasingly administered or influenced by quasi- or non-legal personnel such as probation officers, social workers' (Smart 1994: 152).

Apart from complete social, political, religious and legal 'revolution', which I would argue, is unlikely, what I hope is achievable is a recognition that there is no 'mileage' in pursuing the 'truth' about identity. There is no 'truth' to identity, just experience. However, if there is a stereotypical and legally acceptable version of 'identity', those that do not 'conform' do not stand as equals before the law. The diversity of 'identity' 'experiences', is a diversity foreign to law - its language is reductionist polarised as it is by an either/or framework which does not easily embrace complexity or

nuance. It is not just 'family law' which is fundamentally flawed but, I would argue, law itself. Notwithstanding this however, it is I believe, possible and important, to continually endeavour to explore and recognise that which is silenced and rendered 'the other'. Grosz, for example suggests that in relation to feminism, it is necessary to recognise 'the situation and alignments of power within and against which it [feminism] operates' (Grosz 1990: 59). I find O'Donovan's analysis (above), persuasive. There is, she argues, no 'utopia' that can be achieved without a 'moment of definition'. For if the 'utopian moment is a moment of definition, and therefore prescriptive for others, then the very rigidities we are endeavouring to escape may be reimplied' (O'Donovan 1997: 63). It is this which leads O'Donovan to conclude that 'law is undergoing an identity crisis'.

It is therefore, not just 'law reform' which may prove 'inadequate', and it is not just the 'meaning' attached to notions of 'natural', 'family', 'marriage', 'woman', 'property', 'lesbian', which must be continually re-addressed. It is as O'Donovan argues, also important to be aware that the methodology of 'sexing the subject' is a 'witnessing and documenting of the effects of history and practice'. This is why it is important to challenge not just the notions of 'family home' within the context of property law for example, but also to challenge the notion of a distinct epistemological field of property law. These 'challenges' have to be made not just 'within' law, but also 'outside' of law and legal practice. If there

is the possibility of autonomy over identity self-definition, these 'challenge' exist whenever and wherever, we engage with law. I perceive it as necessary therefore that there be continued critique of power relations in law and society, in order to resist (as far as it is possible) identity imposition and oppression.

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